TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

Charles Keizer
ckeizer@torys.com
P. 416.865.7512

October 5, 2021

**BY EMAIL AND RESS**

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

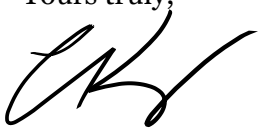
Attention: Christine E. Long, Registrar

Dear Sirs/Mesdames:

**Re: EB-2021-0110 - Hydro One Networks Inc. (Hydro One) 2023-2027 Custom Rate Application (JRAP) – Submissions on Procedural Issues**

We are counsel to Hydro One on the above application. Further to the OEB's Procedural Order No. 1 dated September 17, 2021, attached are Hydro One's submissions on three procedural issues and accompanying book of authorities.

Yours truly,



Charles Keizer

/tp

Attachments

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

**AND IN THE MATTER OF** an application by Hydro One Networks Inc. for an order or orders made pursuant to section 78 of the Act, approving or fixing just and reasonable rates for the transmission and distribution of electricity.

---

**HYDRO ONE NETWORKS INC.**

**SUBMISSION**

**OEB File No. EB-2021-0110**

**October 5, 2021**

---

# HYDRO ONE SUBMISSIONS

## 1.0 BACKGROUND

On September 17, 2021, the OEB issued Procedural Order No. 1 (PO#1) requesting submissions on three matters, as follows:

1. Blue page Update: Request for submissions on whether a blue page update is necessary. This is addressed in Section 2.0 below.
2. Confidential Treatment of the Labour Relations Strategy Appendix: Request for submissions on the confidential treatment of Hydro One's Confidential Labour Relations Strategy Appendix (Exhibit E-06-01, Attachment 5) (the Appendix). This is addressed in Section 3.0 below.
3. Reply Evidence: Request for submissions on Hydro One's entitlement to file reply evidence. This is addressed in Section 4.0 below.

## 2.0 A BLUEPAGE UPDATE

Regarding whether a blue page update should be provided, Hydro One has concluded that for the purposes of regulatory efficiency it should provide a blue page update. OEB staff proposed (a) that Hydro One could provide updates as part of its responses to interrogatories and undertakings, (b) that Hydro One could provide any material updates for 2021 in advance of the settlement conference, and (c) in the event there is no or an incomplete settlement, that the OEB could require a blue page update in advance of the hearing. Hydro One believes that it would be more efficient to provide a 2021 update once and not potentially three times as proposed by OEB staff. In addition, an update to the 2021 bridge year forecast through interrogatories and, potentially, through technical conference transcript and undertakings, may not be conducive to ensuring that parties can efficiently and effectively locate and reference the updated evidence on the record. An exhibit providing a one time update of 2021 actuals and any ancillary impacts on the 2022 forecast will provide a singular point of reference once 2021 audited financials are released. Providing a 2021 update after the release of the 2021 audited financials, and not through the interrogatory process, will also be of assistance to Hydro One in meeting its public securities reporting obligations with respect to providing updated forward

looking information. Furthermore, an updated 2021 forecast provided during the interrogatory process would be selective based on the questions asked and would be limited to reflecting actuals as at September 30, 2021. Rather than provide a further forecast, Hydro One proposes to file one update for 2021 based on actuals in mid-April.

On August 12, 2021, OEB staff hosted a stakeholder conference with intervenors and Hydro One to consider the schedule for the proceeding and how best to meet the OEB's performance standard of 355 days in the case of Hydro One's application. Hydro One indicated at the stakeholder conference that, if required, it would be able to provide a blue page update to the pre-filed evidence, reflecting 2021 audited financial information, in mid-April 2022. Hydro One confirms that if a blue page update is ordered by the OEB, Hydro One would file that update on April 18, 2022 as contemplated in the illustrative schedules included in Schedule E in PO#1 Hydro One will require direction from the OEB by mid-October 2021, as this commitment will require Hydro One to start working with the company's external auditors and various lines of business now in order to meet the April 18, 2022 deadline.

Hydro One notes that VECC, in conjunction with an order for a blue page update, expressed concern that the period prescribed by PO#1 for interrogatories was too short. However, the provision of an update either as part of interrogatories or in an April 2022 blue page update is independent of the timing set aside for interrogatories under PO#1 given the that interrogatory process is in respect of the entirety of the Application and not just an update for a single bridge year. As such, the timing for interrogatories should not be amended. VECC has also suggested a discovery process following the filing of an April 2022 blue page update. Hydro One believes that the OEB should not prejudge the nature or extent of that update at this stage and that it should reserve any consideration of the need for additional discovery until the update is filed and the OEB can effectively balance the merit of such a process against the ability of parties to clarify the record as needed as part of the subsequent steps within the proceeding.

## 3.0 CONFIDENTIAL TREATMENT OF THE LABOUR RELATIONS STRATEGY APPENDIX

At the time of filing its evidence on August 5, 2021, Hydro One requested that the Appendix be granted confidential treatment, and requested specific protocols be put in place in respect of any union representative access, to ensure its protection. In the sections below we first address the confidential nature of the Appendix, and then the protocols.

Confidential Nature of the Appendix

The Appendix – filed pursuant to the OEB's direction issued in EB-2019-0082 to provide Hydro One's go-forward plan to achieve market levels of compensation outlines the key elements of Hydro One's labour relations strategy for upcoming rounds of collective bargaining with its unions. Among other points relating to its strategy, the Appendix describes: Hydro One's objectives in upcoming rounds of bargaining; specific points on which it intends to focus in negotiations (including compensation-related changes intended to be pursued); and Hydro One's views or assumptions in respect of certain negotiating approaches, which inform its strategy. The Appendix is highly confidential, containing information that is labour sensitive. It would significantly prejudice Hydro One's position in upcoming rounds of collective bargaining if the Appendix were disclosed to anyone internal at the unions or to anyone involved in upcoming rounds of collective bargaining on the unions' behalf.

With the exception of OEB's Staff's submission about the introductory section of the Appendix (page 1 and part of page 2 of the Appendix), which we address below, none of the parties has taken issue with or objected to the confidential nature of the Appendix or the request that confidential treatment be granted:

- OEB Staff: other than the introduction section, OEB Staff has confirmed that it recognizes and accepts the highly confidential nature of the rest of the Appendix (from page 2 line 15 to the end of the Appendix);
- SEC: reviewed the Appendix and confirmed that it does not object to the requested confidential treatment;
- CCC: indicated it supports the requested confidential treatment;

- LMPA, ED, CME, AMPCO, VECC, OFA, Pollution Probe: made no submissions on, and therefore made no objection to, the requested confidential treatment;
- In respect of the union intervenors: PWU did not object to the requested confidential treatment; CUSW made no submissions and thus made no objection to the requested confidential treatment; and SUP only made submissions about the treatment of any subsequent decisions or directives that may be issued by the OEB in respect of Hydro One's labour relations strategy (which we address below).

As stated, the Appendix is confidential because it outlines key elements of Hydro One's labour relations strategy for upcoming rounds of collective bargaining during the rate period covered by this application, and considerations informing its strategy and approach to negotiations. It would be highly prejudicial to Hydro One if it were disclosed to union representatives that may be involved in these upcoming bargaining rounds. That is because the information could be used against Hydro One to influence bargaining outcomes to Hydro One's and by extension to ratepayers' detriment. The OEB has repeatedly recognized that labour sensitive information that is relevant to and could be used in labour negotiations is confidential, and has consistently granted confidential treatment to such information.[1]

The information in the Appendix (which has only been filed in response to the above specific direction of the OEB) is of even a more confidential and sensitive nature than the types of labour sensitive information the OEB has treated as confidential in past cases, since the Appendix directly sets out Hydro One's go-forward labour negotiation strategy. The case for confidential treatment here, and the need to ensure appropriate protection, is therefore even stronger than in past cases.

As noted, the only party that takes issue with the confidential nature of any portion of the Appendix is OEB Staff, and it only takes issue with the introductory section (page 1 and lines 1-14 of page 2 of the Appendix). In respect of this introductory section, Hydro One has further

[1] By way of example: EB-2013-0321; EB-2016-0152; and EB-2018-0014 (which cases are further discussed under the section of the submissions below).

reviewed it and has no issue with the first paragraph on page 1 (lines 3 to 7) being made public. That initial paragraph merely describes in a generic way (by way of preview or roadmap) what topics are addressed in the rest of the Appendix – a description that is similar to the description of the Appendix contained in the non-confidential version of it that has been filed with the application (Exhibit E-06-01, Attachment 5).

In respect of the rest of page 1 (lines 8 to 13) and lines 1-14 of page 2 of the Appendix, however, Hydro One maintains that it is confidential. Those portions of the Appendix list the key objectives of Hydro One's labour relations strategy for the rate period, including some specific elements of those objectives (page 1, down to line 11). While the main heading of each column of the figure on page 1 (i.e. the main headings in bold and all caps just after line 9) may not itself be particularly confidential, the subheadings and text below the main headings are confidential, as they describe certain items of focus and objectives that Hydro One will be seeking to achieve in upcoming rounds of bargaining.

The paragraph starting at line 12 on page 1 and carrying over to page 2 then provides further commentary, including noting some specific points of intended strategic focus in respect of the key objectives, and why certain negotiating objectives are of importance. These portions of the introduction section of the Appendix then lead into the more detailed subsequent sections of it, which further detail Hydro One' upcoming strategy and considerations informing it. Like the subsequent more detailed portions, it would similarly be prejudicial to Hydro One (and to ratepayers) for the unions to have access to these introductory portions since it would indicate to them key objectives and areas of intended focus by Hydro One – information that is relevant to, and could be used by unions during, upcoming bargaining. Also, if these introductory sections were not granted confidential treatment, this could easily add confusion and cause disputes in subsequent stages of the proceeding as to the dividing line between what is confidential and what is not, and thus make the process less efficient.

In the circumstances, including having regard to the fact that no party (with the exception of OEB Staff in respect of the limited portion of the Appendix noted above) has taken issue with

the confidentiality of the Appendix, we submit that the OEB should grant confidential treatment to the entire Appendix, with the exception of the very first paragraph of it (lines 3-7 of page 1).

In respect of SUP, we understand its submissions to be a request that any future decisions or directions issues by the OEB relating to the subject matter of the Appendix be on the public record ("along with some of the Appendix information, if appropriate"). The SUP submits they should be permitted to see any OEB decision or direction issued to Hydro One. This is not a submission regarding the requested confidential treatment of the Appendix at this stage. Hydro One assumes that the OEB's subsequent decision on this application will be public – similar to past decisions – and that any decision or direction will not contain reference to confidential information, but we submit this is not a point that needs to be considered at this stage of the process. If there is any confidentiality issue that arises in respect of any aspect of the OEB's decision, it could be addressed at the appropriate time. This does not alter the fact that the Appendix contains confidential information, and that confidential treatment should be granted (and maintained) to ensure its protection.

Appropriate Confidentiality Protocols

In respect of protocols to ensure protection of the confidentiality of the Appendix, Hydro One has requested that: (i) in respect of OEB Staff and intervenors other than the unions – individuals be required to execute and file the OEB's standard Declaration and Undertaking in order to obtain access to the Appendix; and (ii) in respect of the union intervenors – only external counsel or external consultants on this application be permitted access, and that in order to gain access they be required to execute and file both (a) the OEB's standard Declaration and Undertaking, and (b) an affidavit or sworn declaration (or other form of on the record undertaking) confirming that he/she is at arms-length from the union and is not, and will not be, involved in any way in collective bargaining activities on behalf of the union through to the end of the rate period covered by this application.

Given the highly sensitive nature of the information in the Appendix – directly setting out Hydro One's strategy and objectives in upcoming rounds of collective bargaining – the additional

protection in (b) above is warranted as a condition of the unions' external counsel or consultants obtaining access to the information. The OEB has required this type of additional protection in a number of past cases (which are addressed below), when the nature of the confidential information warranted it – and the OEB has done so in circumstances when the nature of the information was even less sensitive than in this case.

Only one intervenor, PWU, has taken issue with these requested protocols, and only in respect of the requirement that external counsel (as opposed to external consultants) be required to comply with (b) above. All of the other parties and intervenors, including the two other union intervenors (CUSW and SUP) have either supported the requested protocols or have made no objection to them:

- OEB Staff: has supported the requested protocols, including the requirement in (b) above that external counsel (as well as external consultants) to the unions provide an affidavit or other form of on the record statement confirming that it is arms length to the union and is not (and will not be) involved in any way in collective bargaining during the rate period covered by the application, in addition to executing the standard Declaration and Undertaking – OEB Staff pointed to some of the prior OEB decisions requiring this type of protection, and submitted that given the highly confidential nature of the information at issue here, this additional level of protection is appropriate;
- CCC indicated it supports the request for confidential treatment of the Appendix, and made no specific submissions on, or objection to, the requested protocols;
- SEC indicated it does not object to the confidentiality request – it also made no specific submissions on, or objection to, the requested protocols;
- it is noteworthy that neither the CUSW nor SUP unions have made any objection to the requested protocols (having chosen to make no submissions on them);
- the remaining intervenors similarly made no submissions on, or objection to, the requested protocols.

Past decisions of the OEB have recognized that there are differing degrees of confidentiality or sensitivity of confidential information that can require differing degrees or types of protections.

That is, there is a spectrum of types of confidential information, with some types of information being more labour sensitive and requiring a higher level of protection or safeguards to ensure that the information cannot be used to the prejudice of the utility in labour negotiations. We are aware of at least 3 past cases in recent years in which the OEB has required protection along the lines of (b) above, given the confidentiality of labour sensitive information.

In a 2013 case – EB-2013-0321 – this same issue arose as to whether counsel for PWU should be required to comply with protection in (b) above, and in that case PWU's counsel (the same counsel acting for PWU in this current application) did provide this additional level of protection by explicitly confirming on the record (at an oral hearing) that he (and the lawyers at his firm) did not have any involvement in collective bargaining for the union, and would not play any role in future negotiations.[2]

In a subsequent 2016 case – EB-2016-0152 – this same issue arose. In that case the utility, OPG, indicated that the documents at issue contained information relating to its collective bargaining strategies and thus their disclosure could potentially interfere with future collective bargaining negotiations with its unions.[3] Counsel for PWU objected to the request that he provide an affidavit along the lines of (b) above, submitting – like he has in this application that the Declaration and Undertaking should be sufficient and that, as a member of the Law Society, he would be subject to discipline if he were to breach the Declaration and Undertaking.[4]

After indicating that it carefully considered PWU's objection in that case, OEB ordered that PWU's counsel, as well as any external consultants to PWU on the application, be required to file an affidavit confirming that they were arms' length to the union and would not be involved in collective bargaining activities, "consistent with the principle applied to [PWU's counsel] in the last OPG proceeding (EB-2013-0321)." The OEB noted that, given the highly confidential

[2] EB-2016-0152 – OEB Decision dated January 31, 2017, pgs 3-4, quoting the hearing transcript from EB-2013-0321
[3] EB-2016-0152 -- OPG letter to the OEB dated October 27, 2016, pg 5.
[4] EB-2016-0152 – R. Stephenson (Paliare Roland) letter to OEB dated November 14, 2016, pgs 1-2.

nature of the information at issue in that case, the added requirement of the affidavit from counsel was appropriate:

> *The OEB has reviewed the information that is the subject of OPG's request and is of the view that it is not appropriate for PWU's counsel (or its representatives) who have access to this information to also be able to be involved in collective bargaining negotiations of behalf of the PWU for the period covered by the application.*
>
> *The objective of the OEB's decision on this issue is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information. It addresses what the OEB considers to be a reasonable concern of OPG in respect of this information. It is not intended to question your [i.e. PWU counsel's] integrity or to suggest that you have not complied with previous undertakings.*
>
> *While the OEB's Declaration and Undertaking does under normal circumstances offer the adequate protections you [i.e. PWU counsel] have noted, in this particular instance, the OEB believes the additional protection is warranted.*[5]

The OEB also noted at the end of that decision that "regardless of whether [PWU's counsel] choose[s] to swear the required affidavit, PWU will still have access to the information in question via the two PWU representatives [i.e. external consultants] who have confirmed that they will not engage in collective bargaining."[6] Thus, the requirement to provide the affidavit was not unfair to PWU in the circumstances.

Subsequently, in a 2018 application – EB-2018-0014 – this issue again arose as to whether external counsel to PWU or other unions should be required to provide the above affidavit. The utility in that case, Alectra, was providing information about initiatives or potential savings

[5] EB-2016-0152 – OEB's decision dated January 31, 2017, pg 5
[6] Supra, at pg 5

which could interfere with ongoing or future collective bargaining with their labour unions. PWU's counsel objected to the request that he provide the affidavit, arguing – like he has in this current application that it was unnecessary, including because as a lawyer he was capable of "compartmentalizing" information "(i.e. not using it for any purpose other than the one for which it was obtained)." After considering its submissions, the OEB again rejected PWU's position and ordered that PWU's counsel was required to provide the affidavit (in addition to the standard Declaration and Undertaking) in order to gain access to the information in that case.[7]

In concluding that an affidavit from union counsel was required to protect the confidential information in this Alectra case, the OEB again noted the objective on this issue "is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information", and that requiring the affidavit from counsel was "not intended to question [PWU counsel's] integrity or suggest that [PWU counsel] have not complied with previous undertakings." The OEB stated that: "The applicants have expressed legitimate concerns about how disclosure of the information in question to the unions might interfere with collective bargaining" and that additional protection beyond the standard Declaration and Undertaking "is warranted in light of the sensitivity of the information."[8]

In this 2018 Alectra decision, the OEB also considered and rejected PWU counsel's submissions about "compartmentalizing" information in his brain. The OEB stated that, while the OEB was not in any way questioning counsel's integrity, "ratepayers and other stakeholders might reasonably wonder whether anyone could truly compartmentalize the information; that is, whether the Declaration and Undertaking would eliminate the risk of harm." On this point, the OEB then quoted from an Ontario Divisional Court decision, where counsel's undertaking was found to be insufficient to allow access to confidential information. The Divisional Court concluded that, despite best efforts, compliance with an undertaking may prove difficult since

[7] EB-2018-0014 – OEB's Supplementary Decision on Confidentiality and Procedural Order No. 3, August 7, 2018, pgs 1-3.
[8] Supra, at pgs 2-3.

"the solicitors could not disabuse their minds of any significant information during the subsequent proceedings. They could not compartmentalize their minds so as to screen out what has been disclosed by the access and what has been acquired elsewhere" and the Divisional Court cited a Supreme Court of Canada case for that proposition. "Furthermore, there would remain the perception of a possibility of non-compliance with the undertaking", the Court noted.[9]

In this current application, PWU's counsel has essentially made the same submissions that were rejected by the OEB in the above prior proceedings. We also note that, in his submissions counsel for the PWU made no mention of the above 2018 Alectra decision. He instead just referred to and relied on the OEB decision in OPG's recent EB-2020-0290 case, and that case had referred to an earlier decision in a Toronto Hydro application, EB-2018-0165. In the particular circumstances of those two cases, the OEB did not require PWU's counsel to provide an affidavit.

What is important about these two cases to which PWU refers – which distinguishes them from this current application, and from the Alectra and other cases referred to above – is that the information at issue (which was sought to be protected) in these two cases was of a much less confidential and sensitive nature than the information here, and thus there was much less risk of prejudice and harm to the utility in the event PWU's counsel ended up being involved in collective bargaining. In particular, in respect of these two cases:

- in the Toronto Hydro case the information involved some aggregated information about the cost difference between internal and external construction projects – the OEB initially found that the information was sufficiently aggregated "such that negotiations with construction contractors or unions should not be impacted" if the information were publicly disclosed – after allowing further submissions on the confidentiality issue, the OEB concluded that it was still not satisfied the information was even confidential,

[9] Supra, at pg 3, citing and quoting from *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 531.

but it nonetheless required parties (pending the oral hearing and disposition of the application) to treat the information as confidential. PWU's counsel was required to provide the Declaration and Undertaking and the OEB did not even consider or address whether an affidavit should also be required in that case.[10]

- in the OPG case, there was also much debate amongst the parties about whether the information at issue – which included an AON expert report containing some cost estimates, and some staffing information was even confidential (various parties submitted that much of the information at issue was not confidential at all); PWU, for example, submitted that it involved information that was much broader than, and less confidential and sensitive than, documents containing collective bargaining strategy or assumptions regarding future collective bargaining outcomes. While the OEB ultimately accepted that, for the most part, the information at issue was confidential, the OEB was satisfied in the circumstances of that case (and given the nature of the particular information) that it was sufficient for PWU's counsel to provide the Declaration and Undertaking. In its decision, while the OEB noted one prior decision in which the affidavit had been required, the OEB made no mention of and did not consider the 2018 Alectra case.[11]

These two decisions on which PWU relies highlight how there is a spectrum of type and sensitivity of confidential information, with different types of information warranting different levels or types of protection. In cases involving information that may not be confidential or that is not highly confidential and labour sensitive, the standard Declaration and Undertaking from external union counsel can be sufficient. In those instances, there is a lower level of risk of harm and prejudice to the utility. However, in cases involving more highly confidential and labour sensitive information, the additional protection of requiring the affidavit (or other similar on the record statement) from counsel is required.

[10] EB-2018-0165, OEB Decision on Confidentiality, December 14, 2018, pgs 1-3.
[11] EB-2020-0290, Decision on Confidentiality – Pre-Filed Evidence, April 13, 2021, pgs 4, 6-7; Decision on Confidentiality, June 8, 2021, pgs 8-13

Here, in our case in respect the Appendix, we are dealing with information that is highly confidential and labour sensitive at the far end of the spectrum, and warranting a heightened level of protection. As stated previously, the Appendix directly sets out Hydro One's labour strategy and key objectives for upcoming rounds of collective bargaining during the rate period. It has only filed this confidential information in response to a specific direction from the OEB requiring it to provide its plan to get its compensation levels to market median. This information is even more confidential and labour sensitive, with more risk of harm if were disclosed to anyone involved in collective bargaining on behalf of the union, than any of the above past cases in which an affidavit from counsel was required (those past cases did not involve this same level of labour strategy information, as far as Hydro One is aware).

In the circumstances, the Appendix warrants the same level of protection as was required in EB-2013-0132, EB-2016-0152, and EB-2018-0014. Hydro One should be given the comfort and protection of knowing that no person counsel or otherwise who will be involved in any way in the upcoming rounds of collective bargaining for the union, will have access to its labour relations strategy and approach. If that were allowed to occur, it would significantly prejudice Hydro One in the upcoming negotiations, to it's – and ultimately to ratepayers' – detriment. This would be contrary to the important objective of ensuring protection of confidential information, especially information that the OEB has required the utility to provide. Further, PWU counsel's assertions about being able to "compartmentalize" his mind are impractical and insufficient, as found by the OEB in the 2018 Alectra case and in appellate level court decisions. Once counsel knows all the key elements of Hydro One's strategy, that type of information can't be magically forgotten or "compartmentalized" if counsel is then acting for the union in those negotiations.

Finally, we note, as did the OEB in its decision in EB-2016-0152, that even if PWU's counsel chooses not to provide the affidavit and thus does not obtain access to the Appendix, external consultants to PWU on this application will still be able to access the Appendix (PWU has confirmed that they consent to providing the affidavit). PWU has also made no submissions as to why its counsel would even be required to see the Appendix in order to consider and advocate for PWU on the proposed compensation costs of Hydro One that are actually at issue

in this application. On the other hand: if PWU's counsel chooses to provide the affidavit, there is no suggestion that PWU has had or will have any difficulty finding other representation for its labour negotiations – PWU's counsel has repeatedly indicated that the union typically uses other counsel in any event, and the OEB's paramount concern here should be to ensure the protection of confidential information (not which choice of counsel the union will have for future negotiations). For these reasons, there is no material unfairness to the PWU if the OEB orders the requested protocols.

The OEB should err on the side of ensuring the protection of the information in the Appendix and avoiding the risk of harm and prejudice, and should also avoid any perception that its processes do not provide adequate protection. The unions' external counsel should therefore be required to provide an affidavit (or sworn declaration or other equivalent form of confirmation on the record) that it is arms length from the unions and is not, and will not be, involved in any way in collective bargaining activities on behalf of the union during the rate period covered by this application.

## 4.0 HYDRO ONE'S RIGHT TO DELIVER ANY NECESSARY REPLY EVIDENCE

At the August 12, 2021 stakeholder session hosted by OEB staff and again in its correspondence to the OEB dated September 16, 2021[12], Hydro One suggested that the timetable in this matter should contemplate and set the timing for delivery of any reply evidence by Hydro One, following receipt of OEB Staff's (and any intervenors') responding evidence. In Hydro One's view it is appropriate and more efficient to raise this point and address it in the timetable at the outset of the proceeding, rather than waiting until after the receipt of responding evidence. An entitlement to deliver any necessary and proper reply evidence is an important element of the right to natural justice and procedural fairness, and is necessary to ensure that Hydro One's and OEB Staff's econometric experts are placed on equal and fair footing.

[12] Hydro One letter to the OEB dated September 16, 2021.

In their submissions on this issue, with the exception of VECC, none of the intervenors has objected to Hydro One's request to deliver reply evidence (though some intervenors have requested accompanying conditions, including an opportunity to deliver interrogatories in respect of any reply evidence):

- OFA: indicated it supports Hydro One's request for reply evidence, including because it would allow other parties to properly prepare for cross-examination at the hearing;
- SEC and CCC: indicated that they do not object to the request for reply evidence, provided that there be an opportunity to ask interrogatories on any reply evidence – and SEC also requested the following two additional points or conditions: (i) that any reply evidence be limited to proper reply, and (ii) that there be an abeyance or "clock stopping" of the timetable to accommodate this step in the process;
- VECC: does not support reply evidence, suggesting it should be sufficient for Hydro One to be permitted to ask questions about OEB staff's responding evidence and respond to it by way of argument at the end of the case; and
- the remaining intervenors made no submissions on, or objection to, Hydro One's reply evidence request.

OEB Staff, in its submissions, noted that the OEB has the power to determine its own procedure and practices and submitted that it is "not necessary" for the OEB to provide for any reply evidence. OEB Staff pointed to rule 13A.04 which provides that the OEB may require experts to confer in advance of a hearing or to testify together as a joint panel at a hearing. However, those potential processes leading up to, or at, the oral hearing are not substitutes for the right to deliver any necessary reply evidence.

Further and importantly, as a matter of law, the OEB is required to ensure that its processes comply with the rules of natural justice and procedural fairness – the OEB cannot deny an applicant procedural fairness, or any fundamental elements of it (regardless of which specific processes may or may not be expressly provided for in the OEB's own rules). OEB Staff further submitted that if reply evidence is permitted, it and intervenors should at a minimum be

permitted to ask interrogatories on any reply evidence.[13] We will further address OEB Staff's (and also VECC's) submissions below.

A fundamental element of the rules of natural justice and procedural fairness – to which the OEB is subject – is the right of a party to know an opposing party's case/evidence against it and be given a fair opportunity to respond to it. Accordingly, when an opposing party (in this context, OEB Staff or an intervenor) delivers responding evidence that raises any new points or issues (that could not reasonably have been anticipated and dealt with in the applicant's initial evidence), the applicant is entitled to deliver reply evidence responding to the new points or issues raised by the other party. This includes delivery of a reply expert report responding to new points or issues raised by the responding report of the opposing expert.[14] This is particularly important in respect of expert evidence because experts are required to set out all of their opinions on which they intend to testify in a report, so that the tribunal and other parties have advance disclosure of their intended testimony and can properly prepare for cross-examination at the hearing.

In the context of this application, Hydro One needs to be given an opportunity, as a matter of basic fairness, to deliver any necessary and proper reply report from its econometric expert, Clearspring Energy Advisors (Clearspring) in response to the report that is expected to be delivered by OEB Staff's econometric expert, Pacific Economics Group (PEG). The opportunity to deliver a reply report is required because of the staggered exchange of expert reports in this application:

- Clearspring has already delivered its Benchmarking and Productivity Research report, dated July 30, 2021, as part of Hydro One's pre-filed evidence. When it delivered its

[13] OEB Staff also submitted that, in addition to interrogatories, the OEB should also consider whether the timetable should provide for any sur-reply evidence from its expert. In our submission there is no need to do so, certainly not at this stage of the process. We further address this point below.

[14] Robert W. Macaulay and James L. H. Sprague*, Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) (loose leaf updated 2021, release 9), Appendix WP*; Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at paras. 318-320; *Tomagatick v. Ontario (Ministry of the Environment)*, 2009 O.E.R.T.D. No. 3 at paras. 37-39; *Brand v. Workers' Compensation Board of British Columbia* (1993), 32 Admin. L.R. (2d) 89 at paras. 8-10 (B.C. Sup. Ct.); *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105, pp. 1113-1114, 1116; *C.N. Railway v. R.*, 2002 BCSC 1669 at paras. 25-26.

report, Clearspring did not know (and had no way of knowing) what analyses PEG would do, or what PEG's opinions would be in this matter in respect of Hydro One's cost performance or total factor productivity, or what additional issues PEG might raise in its report. So Clearspring had no opportunity to address those points, and will not have any such opportunity until after it gets PEG's report.

- PEG, on the other hand, has now received Clearspring's report. So PEG has a full opportunity to consider Clearspring's work (including its working papers) and opinions, and to respond to them by way of a responding report. In addition, PEG can also do its own analyses and provide its own opinions regarding Hydro One's cost performance and total factor productivity, and PEG may also in its responding report raise other new issues not addressed by Clearspring. In fact, in its letter to the OEB dated September 24, 2021, OEB Staff has expressly indicated that PEG will provide "one or more reports" and in its report(s) besides responding to Clearspring's work, PEG's work:

> "may include new analyses on Hydro One's cost performance. PEG will also review Hydro One's proposed custom plan designs and parameters for both Transmission and Distribution, and include comparisons with other incentive rate-setting plan designs approved in Ontario and some other North American jurisdictions."

In other words, OEB staff has confirmed that PEG may in its report(s) raise new points or issues beyond simply responding to Clearspring's work (as PEG has also done in certain other recent rate application proceedings).[15]

- Clearspring will for the first time see PEG's analyses and opinions and working papers, and any new points and issues and comparisons raised by PEG -- including on cost benchmarking, TFP analyses and any other issues in respect of Hydro One's plan design – when PEG delivers its responding report. Therefore, the only opportunity Clearspring

[15] OEB Staff's letter to the OEB dated September 24, 2021, pgs 1-2

would have to respond to any such new points or issues raised by PEG is by way of a reply report.

Thus, in order to ensure that both sides' experts are on an equal and fair footing, meaning that they both are given an opportunity to see the other's analyses and opinions (and working papers) and respond to them, there must be an opportunity for Clearspring to deliver a reply report (if necessary) responding to any new points or issues raised by PEG. If Clearspring were not permitted to do so, the process would be unfair in PEG's and OEB Staff's favour – something the OEB should ensure is avoided.

Not only should Clearspring be permitted to deliver any necessary reply report as a matter of basic procedural fairness to which Hydro One is entitled as an element of fully presenting its case and being heard by the OEB, but also as a practical matter it is useful to the process and fair to other parties to receive any reply report. A reply report provides advance disclosure (prior to the oral hearing) of Clearspring's views in response to the new points or issues raised by PEG. This enables other parties to properly prepare to cross-examine Clearspring, and helps the oral hearing proceed most efficiently. Any reply report is available to the OEB when it is considering the evidence in this matter and deliberating.

Also, the potential delivery of a reply report by Clearspring is not something new in this application. In other recent rate applications it has similarly done so. In those cases of which Hydro One is aware – i.e. the last Toronto Hydro application (EB-2018-0165) and the last Hydro One Transmission application (EB-2019-0082) -- the reply report was admitted in evidence by the OEB, and parties had the opportunity to cross-examine on it at the oral hearing. In those cases, the reply report was available for consideration by the OEB in its deliberations and analysis of the issues.

In its submissions, OEB Staff has not specifically objected to Hydro One's request but has submitted that permitting reply evidence is "not necessary in order to effectively and completely adjudicate" the matters in this application. Hydro One disagrees. For the reasons

noted above, an opportunity to deliver reply evidence – a reply report from Clearspring (or any other proper and necessary reply evidence in the event OEB Staff or intervenors were to deliver any other new evidence) – is necessary to ensure Hydro One has a fair opportunity to fully present its case, and thus to ensure the OEB can fully and completely adjudicate the matters at issue on this application. If Hydro One and its expert Clearspring were deprived of this opportunity, the OEB would not have all relevant evidence before it. And OEB Staff and its expert should not be given an unfair advantage in this regard, nor should OEB Staff be seeking to obtain any such advantage.

OEB Staff referred in its submissions to rule 13A.04. Although the OEB has the power under that rule to require experts to confer with each other prior to a hearing, or to present their oral testimony as part of a joint panel at a hearing, these potential processes are not substitutes for the right to deliver reply evidence, and that rule cannot permit the OEB to abrogate or deny Hydro One the right to natural justice and procedural fairness (including the right to fully present its case).

Further, as a practical matter, the potential processes contemplated by that rule (conferring, or testifying as one panel), would only potentially make sense or be useful *after* Clearspring had delivered any reply report. It is only after both sides' experts have had an opportunity to view the other's work and opinions and respond to them, that it could potentially be useful for them to confer to see if they might then narrow the points of difference between them. We submit there is no need at this stage of the proceeding to decide whether it may or may not ultimately be useful to have the two experts confer or potentially testify as a joint expert panel (which is not the normal order of testimony in rate applications). Those points could be further considered and discussed later in the proceeding, leading up to the oral hearing, if the OEB or parties think it useful to do so.

In VECC's submissions, they assert that it should be sufficient for Hydro One to have an opportunity to ask questions of PEG in respect of its report and make closing argument on it at the end of the case. Respectfully, that submission by VECC's consultant misses the important

procedural fairness point here, and fails to appreciate the significance of the difference between evidence and argument. For the same reason that there is a right to deliver reply argument, there is also a right to deliver reply evidence during the evidence phase of the proceeding. VECC's submissions are an invitation to the OEB to improperly deny Hydro One natural justice and procedural fairness.

While Hydro One appreciates it will have an opportunity to ask PEG questions about its evidence and opinions, such questions would only elicit further evidence from *PEG* in response to the questions. That is, of course, very different than *Clearspring* providing its views/evidence in response to PEG. And the ability of Hydro One to make closing argument about PEG's evidence is also very different than, and is not a replacement for, having Clearspring's responding evidence. Hydro One cannot deliver any new commentary or evidence from Clearspring as part of its closing argument – in argument, Hydro One can only refer to and make submissions on the evidence that is in the record, and the OEB can only take into account evidence in the record in reaching its decision. This highlights why Hydro One needs to be given the opportunity to deliver reply evidence in order to fully make its case, and to give the OEB a full evidentiary record on which to decide the matters at issue.

VECC's consultant also suggests that Clearspring might not deliver proper reply evidence. There is no basis for that submission. If VECC ends up being of the view that any reply report does not constitute proper reply, VECC (or any other party) will of course be free to raise any objection to the report and its admissibility at the appropriate time, and the OEB can deal with any such objection at that point. That is not a reason to deprive Hydro One and Clearspring of the entitlement to deliver proper reply evidence.

In respect of the request from OEB Staff and a number of the intervenors that they be given an opportunity to deliver interrogatories on any reply evidence: Hydro One has no objection to that request, provided any such interrogatories are limited to questions on the reply evidence. In EB-2018-0165, the OEB did provide an opportunity for interrogatories on the reply report

Clearspring[16] delivered in response to the PEG report. Those interrogatories were asked shortly after delivery of the reply report and were answered in a short amount of time -- the same could be done in this case.

For all of the above reasons, including Hydro One's fundamental right to procedural fairness – and having regard to the fact that most of the parties have raised no objection to Hydro One's request – Hydro One respectfully requests that it be permitted to deliver any necessary reply evidence, and suggests it would make most sense and be efficient to provide for this step in the timetable at this stage.

In response to SEC's other requested terms or conditions relating to this issue: (i) Hydro One agrees that any reply evidence would be limited to proper reply, i.e. evidence in response to new points or issues raised in the responding evidence; (ii) we submit that the various schedules being considered by the OEB should provide sufficient time for delivery of a reply report, and there should be no need for the proceeding to be held in abeyance (or for any "clock stopping") to accommodate this step. Hydro One should not be penalized in any way for requesting and being given an opportunity to fully present its case.

In particular in respect of the schedule: assuming a blue page update will be required, the potential hearing schedules proposed by the OEB in that scenario should permit plenty of time for the delivery of reply evidence and a brief opportunity for interrogatories on it – those steps could be completed well in advance of the start of the oral hearing. Alternatively, in the event a blue page update were not required, reply evidence could still be worked into the timetable in advance of the oral hearing, and in this scenario Hydro One would request that PEG deliver its responding report by the time of the technical conference and that PEG deliver its working papers simultaneously with its report so that Clearspring can start considering and be in a position to deliver any necessary reply in a timely way. In either scenario, Clearspring's reply

[16] The Clearspring principal, Mr. Fenrick, was at that point at a different firm, PSE, and so his report was delivered by PSE.

should be delivered sometime after PEG delivers its interrogatory responses (so that Clearspring can take then into account in preparing any reply report).

Finally on this issue, while OEB Staff submitted that at a minimum parties should be given an opportunity to ask interrogatories on any reply report – to which Hydro One does not object – it also suggested that the OEB should provide for the delivery of a further sur-reply report by PEG. Hydro One disagrees with that suggestion. It is only in rare cases where sur-reply evidence can ever become necessary or appropriate. That is because sur-reply can only be required and proper in the unlikely event that the reply report itself raises new points or issues that were not previously raised and that could not have been reasonably anticipated and dealt with. That is highly unusual, especially in this context when Clearspring has already delivered its initial report and PEG has a full opportunity to consider and respond to it. In other administrative tribunal and court proceedings, timetables do not typically provide for sur-reply evidence (unlike reply evidence) – just like how they do not (and there is no need to) provide for sur-reply argument. If, and in the unlikely event, OEB Staff is subsequently of the view, after receiving any Clearspring reply report, that it actually raises new issues (as opposed to simply responding to the issues raised by PEG) and that a sur-reply report is appropriate and necessary, OEB Staff can always raise that request at that stage and Hydro One (and other parties) – and the OEB – could consider and address it at that point.

## 5.0 CONCLUSION

In summary, for all the reasons discussed above, Hydro One submits that:

- a blue page update is appropriate and should be provided;
- the Appendix meets the requirements to be granted confidential treatment, and the protocols described in Section 3.0 above are warranted; and
- it is entitled to deliver any necessary reply evidence as a matter of basic procedural fairness, and that the delivery of any such evidence should be incorporated into the timetable.

**EB-2021-0110**

**ONTARIO ENERGY BOARD**

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

**AND IN THE MATTER OF** an application by Hydro One Networks Inc. for an order or orders made pursuant to section 78 of the Act, approving or fixing just and reasonable rates for the transmission and distribution of electricity.

# BOOK OF AUTHORITIES OF HYDRO ONE NETWORKS INC.

**(Hydro One's Submission dated October 5, 2021)**

**INDEX**

# TAB1

**Ontario Energy Board**
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

**Commission de l'énergie de l'Ontario**
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273

Ontario

**BY E-MAIL**

January 31, 2017

Richard P. Stephenson
Paliare Roland Rosenberg Rothstein LLP
115 Wellington Street West, 35th Floor,
Toronto, Ontario
M5V 3H1

Dear Mr. Stephenson:

**Re: Power Workers' Union objections regarding filing of affidavit**
**File No. EB-2016-0152**

In its letter dated October 27, 2016, OPG requested confidential treatment for information related to collective bargaining strategies that was provided in response to certain interrogatories and attachments to interrogatories[1]. In regards to granting access to these documents, OPG requested the following:

> Given the participation in this proceeding of OPG's two labour unions, the Power Workers' Union ("PWU") and the Society of Energy Professionals ("Society"), OPG has a particular concern with the possibility of certain confidential information, which has the potential to interfere with collective bargaining negotiations, being disclosed to either the PWU or the Society. While OPG has ensured that any such information has been marked as confidential and would be redacted from the public record, this information would in the normal course be available to those who file a Declaration and Undertaking. OPG understands that the Board typically accepts Declarations and Undertakings from counsel, experts or consultants to a party. If Declarations

[1] Interrogatory responses containing information relating to labour relations and collective bargaining include: L-04.3-2 AMPCO 045, L-06.6-1 Staff 147, L-06.6-1 Staff 157, L-06.6-1 Staff 149, L-06.6-1 Staff 160, L-06.6-2 AMPCO 122, L-06.6-2 AMPCO 145, L-06.6-3 CME 005, L-06.6-13 PWU 016, L-06.6-15 SEC 070, L-06.6-15 SEC 072, L-06.6-15 SEC 079 and L-06.6-19 SEP 013. The attachments include: L-06.6-1 Staff 147 (2 Attachments), L-06.6-1 Staff 157 (2 Attachments) and L-06.6-15 SEC 074 (2 Attachments).

> and Undertakings are filed on behalf of PWU or Society in this proceeding, OPG asks that the Board ensure it only accepts such Declarations and Undertakings from counsel, experts or consultants that are external to and at arms-length from PWU or the Society, as applicable, and that such individuals are not and will not be involved in any collective bargaining-related activities on their behalf. If the Board is not satisfied that the counsel, expert or consultant is external to the PWU or the Society, or that they have no involvement in collective bargaining-related activities, then OPG would request that OPG's labour-related confidential information, identified below, be withheld from those individuals notwithstanding their filing of a Declaration and Undertaking in this proceeding. [Emphasis Added]

In Procedural Order No. 4, dated November 4, 2016, the OEB granted OPG's request for limited access to the noted information and stated:

> The OEB grants OPG's request for limited access to the Collective Bargaining Documentation. Accordingly, as an interim measure and while the OEB is considering OPG's request, the OEB requires that representatives for the PWU and the Society that wish to gain full access to the Collective Bargaining Documentation, must in addition to filing the OEB's Declaration and Undertaking, also file an affidavit affirming that they are external to and at arms-length from PWU or the Society, as applicable, and are not and will not be involved in any collective bargaining-related activities on their behalf.

The above requirement only applies to representatives of the PWU and the Society, and only in respect of information that OPG believes could interfere with collective bargaining negotiations.

Under cover of letter dated November 14, 2016, you submitted affidavits in the form ordered by the OEB for the two consultants representing the PWU in this proceeding, but objected to filing an affidavit in your capacity as counsel to the PWU. You state that the requirement for counsel to file such an affidavit is unnecessary and inappropriate and request that the OEB reconsider its requirement as it relates to counsel. Specifically you state:

> Although I am not typically retained by the PWU in respect of its collective bargaining activities with OPG (and I am not presently engaged to do so), I cannot preclude that I will be requested to do so in the future. If that were to occur, the provisions of the Board's Declaration and Undertaking would prohibit my use or disclosure of any confidential information obtaining in this proceeding in that engagement.
>
> The Declaration and Undertaking fully protects OPG's legitimate interests, and at the same time respects (a) the PWU's right to engage the counsel of its choice in

> future matters, and (b) the public interest that that any restriction on public access to Board proceedings be as minimal as possible. Nothing more is required.

In your letter you also submit that the OEB has not imposed similar requirements in any other context and that counsel and consultants executing the undertaking may well represent clients engaged in future commercial dealings with the utility in question. You further submit that the requirement for the filing of an affidavit amounts to an indication by the OEB that you will not abide by the terms of your undertaking.

The OEB has carefully considered your objection and for the reasons set out below has determined that it will not exempt counsel from the requirement to file an affidavit. The OEB however clarifies that the restrictions with respect to involvement in future collective bargaining negotiations only applies to negotiations concerning the years covered by this application.

The OEB observes that the requirement to file an affidavit in the form requested by the OEB is consistent with the principle applied to you as counsel to the PWU in the last OPG proceeding (EB-2013-0321). Because the issue arose in the last proceeding during the oral hearing phase of the proceeding, you spoke to the issue on the record. In this proceeding, the matter arose prior to the oral hearing phase, and therefore the OEB asked you to confirm your position by way of affidavit.

In the previous proceeding you affirmed on the record that you would not be involved in collective bargaining matters on behalf of the PWU as it relates to OPG. Specifically the transcript reads as follows:

| | |
|---|---|
| MS. LONG: | Mr. Stephenson, can I just clarify here?<br>Are you asking for relief with respect to yourself solely or the consultants as well? |
| MR. STEPHENSON: | All three. |
| MS. LONG: | All three? |
| MR. STEPHENSON: | Yes. |
| MS. LONG: | Thank you. |
| MS. HARE: | And since we've interrupted you, let me ask the one question that we think is relevant. Will you or your other two consultants have any role to play in the future negotiations of the contract with PWU and OPG? |

MR. STEPHENSON: No. No.

MS. HARE: Okay. Thank you.

MR. STEPHENSON: Needless to say, the consultants do Energy Board work. They don't have anything to do with the union. And as you know, the consultants are both from Elenchus. They're a firm that has a long history at this tribunal. They're not -- and these are people that have executed these undertakings on many occasions in the past over many years, as I have.

I personally, while I'm counsel to the PWU in a variety of capacities, I don't do -- I don't have any involvement in collective bargaining. For what it's worth, none of the lawyers have any role in collective bargaining. It's just, that's just the nature of it. [Emphasis Added]

....

MR. SMITH: I may be able to be of assistance at this point. Until Mr. Stephenson indicated in direct response to the Chair's question, we did not know that the consultants played no role in bargaining, and indeed it would have been my submission that Mr. Stephenson be permitted access to the material precisely because we don't have any concerns about his integrity at all. I've had a number of cases with Mr. Stephenson and I know him personally and professionally. I don't have any concerns and OPG doesn't.

Obviously we have a concern given the relationship and the ongoing collective bargaining, which is a distinctly adversarial one. But if my friend is indicating on the record, as he is, that the consultants similarly play no role and will play no role, then we don't have the concern that was identified. So if the material is restricted to those three individuals, that's fine....[2] [Emphasis Added]

You have advised that you are unwilling to swear the affidavit. Your position has changed since the time of the last application, since you have now stated that you may indeed engage in labour negotiations on behalf of the PWU against OPG.

[2] Motion Hearing Transcript, dated May 9, 2014, EB-2013-0321, pages 6-8.

Labour negotiations between OPG and the PWU have historically been difficult and labour costs represent a significant portion of the costs the OEB is asked to approve in this application.

The OEB has reviewed the information that is the subject of OPG's request and is of the view that it is not appropriate for PWU's counsel (or its representatives) who have access to this information to also be able to be involved in collective bargaining negotiations of behalf of the PWU for the period covered by the application.

The objective of the OEB's decision on this issue is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information. It addresses what the OEB considers to be a reasonable concern of OPG in respect of this information. It is not intended to question your integrity or to suggest that you have not complied with previous undertakings.

While the OEB's Declaration and Undertaking does under normal circumstances offer the adequate protections you have noted, in this particular instance, the OEB believes the additional protection is warranted.

The OEB notes that regardless of whether you choose to swear the required affidavit, PWU will have access to the information in question via the two PWU representatives who have confirmed that they will not engage in collective bargaining.

Yours truly,

*Original Signed By*

Kirsten Walli
Board Secretary

c. All parties in EB-2016-0152

# TAB2

ONTARIO POWER GENERATION

**Barbara Reuber**
Regulatory Affairs

700 University Avenue, Toronto, Ontario M5G 1X6

**Tel: 416-592-5419** Fax: 416-592-8519
barbara.reuber@opg.com

October 27, 2016

**VIA RESS**

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

Dear Ms. Walli:

**Re: Application by Ontario Power Generation Inc. for 2017-2021 Payment Amounts (EB-2016-0152) – Request for Confidential Treatment re Interrogatory Responses**

In accordance with Rule 10 of the Ontario Energy Board's ("**OEB**" or the "**Board**") *Rules of Practice and Procedure* and section 5.3 of the OEB's *Practice Direction on Confidential Filings* (the "**Practice Direction**"), Ontario Power Generation Inc. ("**OPG**") hereby requests confidential treatment for 18 interrogatory responses and 39 documents, or portions thereof, that are included as attachments to OPG's responses to certain interrogatories. A list of the affected interrogatory responses and documents is provided in **Appendix 'A'**.

As indicated in the cover letter to OPG's interrogatory responses, certain responses remain to be filed. These remaining responses include confidential information. OPG will file a separate request for confidential treatment of these responses when they are filed.

OPG brings to your attention that documents with or without redactions that OPG is filing publically in response to interrogatories are non-confidential. This is regardless of whether the documents themselves may be otherwise marked as "Confidential" or "OPG Confidential". Such notations would have been applicable at a prior time in the history of the document.

Below, OPG sets out the reasons for these confidentiality requests, including the potential harm that could result from public disclosure of the relevant information. While most of the requests are for redactions to portions of interrogatory responses or documents, a very small number of the requests are for the confidential treatment of entire documents, as identified below.

There is certain information, identified below, for which OPG is requesting permanent redactions. Permanently redacted information would be disclosed to the OEB, but would be redacted on the public record and would continue to be redacted in confidential documents provided to those intervenors, or their representatives, who have signed a Declaration and Undertaking in the prescribed form in this proceeding. The requested permanent redactions relate to confidential information concerning OPG's unregulated business and facilities. This

information is similar in nature to that which was the subject of permanent redactions accepted by the OEB in OPG's last payment amounts application (EB-2013-0321) and in EB-2010-0008.

Given the participation in this proceeding of OPG's two labour unions, the Power Workers' Union ("PWU") and the Society of Energy Professionals ("Society"), OPG has a particular concern with the possibility of certain confidential information, which has the potential to interfere with collective bargaining negotiations, being disclosed to either the PWU or the Society. While OPG has ensured that any such information has been marked as confidential and would be redacted from the public record, this information would in the normal course be available to those who file a Declaration and Undertaking. OPG understands that the Board typically accepts Declarations and Undertakings from counsel, experts or consultants to a party. If Declarations and Undertakings are filed on behalf of PWU or Society in this proceeding, OPG asks that the Board ensure it only accepts such Declarations and Undertakings from counsel, experts or consultants that are external to and at arms-length from PWU or the Society, as applicable, and that such individuals are not and will not be involved in any collective bargaining-related activities on their behalf. If the Board is not satisfied that the counsel, expert or consultant is external to the PWU or the Society, or that they have no involvement in collective bargaining-related activities, then OPG would request that OPG's labour-related confidential information, identified below, be withheld from those individuals notwithstanding their filing of a Declaration and Undertaking in this proceeding. This would be consistent with the OEB's ruling made on May 9, 2014 in EB-2013-0321 (pp. 5-8 of the transcript of hearing).

Based on the various categories of confidential information requests, OPG has organized the interrogatory responses and documents into the following attachments, which are included with the hard copy of this letter. For the electronic copy of this letter, filed through the RESS, only this letter and the non-confidential attachments are included. The attachments are as follows:

**Attachment A**: *Non-Confidential*, redacted versions of the documents that are the subject of this request (excluding documents that are considered to be confidential in their entirety). These documents are intended to be placed on the public record. Please note that while some of these documents may be marked "Confidential", these versions that contain redactions are no longer confidential.

**Attachment B**: *Confidential*, unredacted versions of the documents that are the subject of this request (except that permanent redactions will remain redacted), as well as interrogatory responses that are to be treated as confidential in their entirety. These interrogatory responses are intended to be treated confidentially, and should only be provided to intervenors or their representatives who sign, or have already signed, a Declaration and Undertaking in the prescribed form in this proceeding. The specific portions of these interrogatory responses that constitute the confidential information are marked with red boxes.

In this request, OPG references several prior Board decisions on the confidential treatment of OPG information, particularly as related to permanent redactions. These include a letter and a procedural order from EB-2010-0008 and a procedural order from EB-2013-0321. As copies of these referenced materials were included in OPG's May 27, 2016 request for confidential treatment of certain documents forming part of its pre-filed evidence, OPG determined that it is not necessary to file further copies of these materials with the present request.

As an interim measure for efficiency, prior to the OEB making its final determination on OPG's request for confidential treatment, OPG would be amenable to the OEB making provision for intervenors to proceed as though OPG's request has been granted. In so doing, OPG requests that the OEB provide in a procedural order that each intervenor requesting a copy of the confidential information complete and sign a Declaration and Undertaking in the prescribed form and file it with the Board in order to be given a copy of the confidential materials that are included in Attachment B. However, OPG reserves the right to submit that it may not be appropriate for any particular intervenor to review certain confidential information even though it has signed an Undertaking. This may arise, for example, if the intervenor may gain an unfair competitive advantage simply by being an intervenor who has signed the Undertaking. The OEB has made orders of this nature in prior OPG proceedings, most recently in EB-2013-0321.

On a final determination, should the OEB grant OPG's request for confidentiality, OPG proposes that the OEB order the confidential information to be disclosed, subject to any conditions the OEB may find appropriate, to only those persons that by then have signed, or that subsequently sign, a Declaration and Undertaking in the prescribed form in this proceeding.

In addition, consistent with section 6.2 of the Practice Direction, OPG requests that during oral proceedings any reference to information, which the Board has determined to be confidential, be conducted *in camera* so as to preserve its confidential nature.

In the event that the confidentiality request is refused, in whole or in part, and OPG in turn requests that some or all of the information that is the subject of this request be withdrawn in accordance with section 5.1.12 of the Practice Direction, all persons in possession of the said information will be required to promptly destroy or return the information to the OEB Secretary for destruction.

**Reasons for Requesting <u>Permanent Redactions</u>**

OPG received OEB approval in EB-2010-0008 and EB-2013-0321 with respect to certain permanent redactions in OPG's filings. In particular, redactions of confidential information relating solely to OPG's unregulated business and facilities (reflecting no aspect of the regulated business) were permitted to remain redacted in the confidential versions of such documents.

In this request, OPG seeks this treatment for similar information, which is contained in certain Business Planning Instructions that OPG is filing in L-01.2-1 Staff 003, Attachment 1. This is on the same basis as set out above. OPG has written to the OEB and provided it alone with the information for which OPG seeks permanent protection.

**Reasons for Requesting <u>Confidential Treatment</u>**

OPG is requesting confidential treatment relating to confidential information contained in a number of interrogatory responses and documents, which based on their nature can largely be categorized as (a) OPG vendor/contractor name references in third party or internal oversight reports on DRP, (b) project cost contingencies and other commercially sensitive information in business case summaries, (c) OPG vendor/contractor name references in contracting strategies for major work bundles in the DRP, and (d) collective bargaining-related documentation. OPG's reasons for requesting confidential treatment are set out below for each of these categories, as well as for a small number of other responses and documents that do not fall within these groups.

### *(a) Vendor/Contractor References in Third Party or Internal Oversight Reports on DRP*

Third party or internal oversight reports on DRP, containing confidential information, are being filed in: L-04.3-15 SEC 029 (1 document), L-04.3-15 SEC 037 (1 document), L-04.5-8 GEC 13 (1 document), and L-06.6-1 Staff 072 (13 documents). These include oversight reports from Modus/Burns & McDonnell, CALM Management Consulting and OPG Internal Audit.

OPG seeks confidential treatment for information in these reports that involves certain commentary on the performance of specific contractors in the Darlington Refurbishment Program, as well as third-party commercially sensitive information. Public disclosure of this information could potentially prejudice the competitive positions of the relevant contractors. Public disclosure of this commentary could also give rise to adverse impacts on existing contractual relationships that OPG has with the relevant contractors or on contracts those vendors have with others. In EB-2013-0321, the OEB agreed that disclosure of this type of information could lead to reputational harm to contractors. Accordingly, the OEB ordered this type of information to be treated as confidential (Hearing Transcript, Vol. 12).

This information is provided in the confidential, unredacted versions of the documents filed in Attachment B-2, with non-confidential, redacted versions provided in Attachment A.

### *(b) Commercially Sensitive Information in Business Case Summaries*

Nuclear business case summaries ("BCSs") for particular projects are being filed in: L-04.2-1 Staff 028 (1 document), L-04.2-1 Staff 040 (1 document), L-04.2-1 Staff 041 (1 document), L-04.2-1 Staff 043 (1 document), L-04.2-13 PWU 006 (1 document), L-04.4-15 SEC 048 (1 document) and L-06.1-1 Staff 093 (1 document).

The redacted portions of the BCSs should be protected as confidential because this information includes OPG commercially sensitive information such as project cost contingencies, certain costs for contracted or purchased work or materials, or aggregate information that would allow determination of commercially sensitive information. Some BCSs also include commentary on the performance of specific contractors. These aspects are of a nature that is similar to that which is described in (a), above. Disclosure of the redacted portions of the BCSs that include OPG commercially sensitive information could prejudice OPG's competitive position and disclosure of the commentary on contractor performance could significantly interfere with its negotiations and existing relationships in a variety of aspects of its business. Furthermore, similar information was treated as confidential by the OEB in OPG's previous applications, EB-2010-0008 and EB-2013-0321.

This information is provided in the confidential, unredacted versions of the documents filed in Attachment B, with non-confidential, redacted versions provided in Attachment A.

### *(c) Vendor/Contractor References in Contracting Strategies for Major Work Bundles*

Contracting strategies for various aspects of the Darlington Refurbishment Project are being filed in: L-04.3-15 SEC 031 (4 documents).

Information in these documents includes commentary about specific contractors, including their prior performance and experience. This commentary is similar in nature to that which is

described under (a), above. The public disclosure of such information could potentially prejudice the competitive positions of such contractors and affect OPG's existing and future contractual relationships with the referenced contractors.

This information is provided in the confidential, unredacted versions of the documents filed in Attachment B, with non-confidential, redacted versions provided in Attachment A.

***(d) Collective Bargaining Documentation***

Collective bargaining-related documents are being filed in: L-06.6-1 Staff 147 (2 documents), L-06.6-1 Staff 157 (2 documents) and L-06.6-15 SEC 074 (2 documents). Interrogatory responses containing information relating to labour relations and collective bargaining are being filed in L-04.3-2 AMPCO 045, L-06.6-1 Staff 147, L-06.6-1 Staff 157, L-06.6-1 Staff 149, L-06.6-1 Staff 160, L-06.6-2 AMPCO 122, L-06.6-2 AMPCO 145, L-06.6-3 CME 005, L-06.6-13 PWU 016, L-06.6-15 SEC 070, L-06.6-15 SEC 072, L-06.6-15 SEC 079 and L-06.6-19 SEP 013.

OPG is requesting that the above-referenced documents be protected as confidential *in their entirety* and that the above-referenced interrogatory responses be partially protected using redactions. The documents contain information on OPG's collective bargaining strategies and their disclosure could potentially interfere with future collective bargaining negotiations between OPG and the unions that represent its employees.

This information is provided with the confidential, unredacted versions of documents filed in Attachment B. As they are considered confidential in their entirety, there are no non-confidential, redacted versions provided in Attachment A.

(e) ***Other***

There are six documents containing confidential information that do not fit into one of the above categories. These documents are being filed in: L-01.2-1 Staff 003 (1 document), L-01.2-5 CCC 008 (1 document), L-04.2-13 PWU 006 (1 document), L-04.3-2 AMPCO 044 (1 document), L-04.5-5 CCC 022 (1 document) and L-06.1-1 Staff 184 (1 document). In addition, there are five interrogatory responses containing confidential information that do not fit into one of the above categories. These responses are being filed in: L-04.3-15 SEC 023, L-06.3-2 AMPCO 116, L-06.6-15 SEC 085, L-07.12-1 Staff 205 and L-06.7-2 AMPCO 115.

The documents filed in response to CCC 008, PWU 006 require confidential treatment for the same reasons as the business case summaries, described in (b), above. The first document is a Comprehensive Post-Implementation Review of a particular project and the second is a Project Change Request Authorization Form for a particular project. These documents contain commercially sensitive information such as project cost, contingencies or certain costs for contracted or purchased work or materials, or aggregate information that would allow determination of commercially sensitive information. These same reasons underlie OPG's requests for confidential treatment of each of the above-referenced interrogatory responses.

The document being filed in response to AMPCO 044 is a report on the contingency modeling approach undertaken in connection with one of the major DRP contracts. This document contains information for which confidential treatment is being requested due to one of OPG's DRP contract counterparties having specifically requested that the information or type of information be protected. The counterparty is a joint venture between SNC-Lavalin Nuclear Inc.

and AECON Construction Group Inc. (the "SNC/AECON JV"). The current request for confidential treatment is made pending the OEB's ruling on this issue.

The document filed in response to Board Staff 003 is also the document for which certain permanent redactions are requested. The rationale for the permanent redactions has been described above. The 'regular' redactions relate to information reflecting the combined regulated and unregulated assets and business of OPG. This information should be treated as confidential because disclosure of this aggregated information (in combination with the information regarding the regulated business already disclosed), would allow for the disclosure of information related to the unregulated business and facilities. OPG consistently treats information relating to its unregulated business as confidential financial information and confidential commercially sensitive information. Similar requests for confidential treatment of such combined information were accepted by the board in previous submissions.

The document filed in response to CCC 022 consists of a report to OPG's Board of Directors on the Darlington Refurbishment Program cost and schedule. This report contains information for which confidential treatment is being sought for a number of the reasons described above. In particular, it includes information collected from a third party on a confidential basis, information about costs under particular Darlington Refurbishment contracts, and information that could interfere with negotiations between OPG and its unions.

The document filed in response to Staff 184 consists of OPG's 2015 income tax return, which includes OPG commercially sensitive information. As indicated in the Practice Direction, tax information such as this is regularly afforded confidential treatment by the OEB.

The foregoing materials are provided in the confidential, unredacted versions of the documents filed in Attachment B-2, with non-confidential, redacted versions provided in Attachment A.

Respectfully submitted,

[Original signed by]

Barbara Reuber

cc: Carlton D. Mathias (OPG) via email
Charles Keizer (Torys) via email
Crawford Smith (Torys) via email

## APPENDIX 'A'

### List of Affected Interrogatory Responses and Documents

**1. Affected Interrogatory Responses**

| | Exhibit |
|---|---|
| 1. | L-04.3-2 AMPCO 045 |
| 2. | L-04.3-15 SEC 023 |
| 3. | L-06.3-2 AMPCO 116 |
| 4. | L-06.6-1 Staff 147 |
| 5. | L-06.6-1 Staff 157 |
| 6. | L-06.6-1 Staff 149 |
| 7. | L-06.6-1 Staff 160 |
| 8. | L-06.6-2 AMPCO 122 |
| 9. | L-06.6-2 AMPCO 145 |
| 10. | L-06.6-3 CME 005 |
| 11. | L-06.6-13 PWU 016 |
| 12. | L-06.6-15 SEC 70 |
| 13. | L-06.6-15 SEC 72 |
| 14. | L-06.6-15 SEC 79 |
| 15. | L-06.6-15 SEC 85 |
| 16. | L-06.6-19 SEP 13 |
| 17. | L-06.7-2 AMPCO 115 |
| 18. | L-07.12-1 Staff 205 |

## 2. Affected Documents Attached to Interrogatory Responses

| # | Exhibit | Attachment # |
|---|---|---|
| 1. | L-01.2-1 Staff 003 | Attachment 1 |
| 2. | L-01.2-5 CCC 008 | Attachment 2 |
| 3. | L-04.2-1 Staff 028 | Attachment 1 |
| 4. | L-04.2-1 Staff 040 | Attachment 1 |
| 5. | L-04.2-1 Staff 041 | Attachment 1 |
| 6. | L-04.2-1 Staff 043 | Attachment 1 |
| 7. | L-04.2-13 PWU 006 | Attachment 1 |
| 8. | L-04.2-13 PWU 006 | Attachment 2 |
| 9. | L-04.3-1 Staff 072 | Attachment 1 |
| 10. | L-04.3-1 Staff 072 | Attachment 2 |
| 11. | L-04.3-1 Staff 072 | Attachment 3 |
| 12. | L-04.3-1 Staff 072 | Attachment 4 |
| 13. | L-04.3-1 Staff 072 | Attachment 5 |
| 14. | L-04.3-1 Staff 072 | Attachment 6 |
| 15. | L-04.3-1 Staff 072 | Attachment 8 |
| 16. | L-04.3-1 Staff 072 | Attachment 9 |
| 17. | L-04.3-1 Staff 072 | Attachment 11 |
| 18. | L-04.3-1 Staff 072 | Attachment 22 |
| 19. | L-04.3-1 Staff 072 | Attachment 23 |
| 20. | L-04.3-1 Staff 072 | Attachment 25 |
| 21. | L-04.3-1 Staff 072 | Attachment 29 |
| 22. | L-04.3-2 AMPCO 044 | Attachment 1 |
| 23. | L-04.3-15 SEC 029 | Attachment 1 |
| 24. | L-04.3-15 SEC 031 | Attachment 3 |
| 25. | L-04.3-15 SEC 031 | Attachment 5 |
| 26. | L-04.3-15 SEC 031 | Attachment 6 |
| 27. | L-04.3-15 SEC 031 | Attachment 7 |
| 28. | L-04.3-15 SEC 37 | Attachment 2 |
| 29. | L-04.4-15 SEC 048 | Attachment 1 |
| 30. | L-04.5-5 CCC 022 | Attachment 1 |
| 31. | L-04.5-8 GEC 13 | Attachment 1 |
| 32. | L-06.1-1 Staff 093 | Attachment 1 |
| 33. | L-06.6-1 Staff 147 | Attachment 1 |
| 34. | L-06.6-1 Staff 147 | Attachment 2 |
| 35. | L-06.6-1 Staff 157 | Attachment 1 |
| 36. | L-06.6-1 Staff 157 | Attachment 2 |
| 37. | L-06.6-15 SEC 74 | Attachment 1 |
| 38. | L-06.6-15 SEC 74 | Attachment 2 |
| 39. | L-06.10-1 Staff 184 | Attachment 1 |

# TAB3

PALIARE ROLAND
BARRISTERS

**Richard P. Stephenson**
T 416.646.4325 Asst 416.646.7419
F 416.646.4301
E richard.stephenson@paliareroland.com
www.paliareroland.com

November 14, 2016

File 92805

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Ontario Power Generation**
**Payment Amounts 2017-2021**
**Ontario Energy Board File No. EB-2016-0152**

Enclosed herewith please find Affidavits executed by Messrs. Andrew Blair and Bayu Kidane which we are filing with the Board in accordance with Procedural Order No. 4.

I will not be filing an affidavit and I am hereby requesting that the Board reconsider its requirement that I do so in order to have access the confidential filings in this matter. In my submission, the requirement for an affidavit is entirely unnecessary and inappropriate. I note that the OPG did not request that an affidavit be filed.

Although I am not typically retained by the PWU in respect of its collective bargaining activities with OPG (and I am not presently engaged to do so), I cannot preclude that I will be requested to do so in the future. If that were to occur, the provisions of the Board's Declaration and Undertaking would prohibit my use or disclosure of any confidential information obtaining in this proceeding in that engagement.

The Declaration and Undertaking fully protects OPG's legitimate interests, and at the same time respects (a) the PWU's right to engage the counsel of its choice in future matters, and (b) the public interest that that any restriction on public access to Board proceedings be as minimal as possible. Nothing more is required.

The terms of the Declaration and Undertaking are stringent and provide complete protection to all stakeholders. Moreover, the Board has made it clear that it

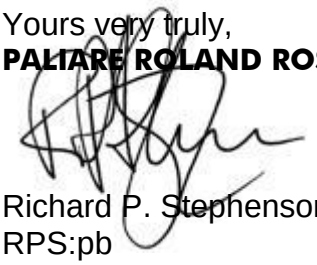
considers any breach of the Declaration and Undertaking to be an extremely serious.

I note that, to my knowledge, the Board has not required any additional assurance other than an executed Declaration and Undertaking in any other context, notwithstanding the fact that the information being disclosed pursuant to the Declaration and Undertaking is, by definition, of a very sensitive nature, and that counsel or consultants executing the Undertaking may well represent clients engaged in future commercial dealing with the utility in question.

Ultimately, the requirement for an affidavit simply amounts to an indication by the Board that I will not abide by the terms of my undertaking. That is distressing to me. It has been my privilege to appear before this Board for more than 22 years. During that time I have executed the Board's Declaration and Undertaking on many occasions. There has never been any suggestion that I have not complied with it in every respect. Moreover, you will know that as a member of the Bar of Ontario, a breach of an undertaking constitutes professional misconduct punishable by the Law Society of Upper Canada.

I would hope this is sufficient for the Board to reconsider its requirement regarding the filing of an affidavit by me in this matter. In the event the Board wishes further submissions on the matter, I am available at its convenience.

Yours very truly,
**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**



Richard P. Stephenson
RPS:pb

Encls.

Doc 1991436 v1

# TAB4

**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2018-0014**

**Alectra Utilities Corporation**
**Guelph Hydro Electric Systems Inc.**

**Application for approvals to amalgamate Alectra Utilities Corporation and Guelph Hydro Electric Systems Inc. and continue operations as Alectra Utilities Corporation**

# SUPPLEMENTARY DECISION ON CONFIDENTIALITY AND PROCEDURAL ORDER NO. 3

**August 7, 2018**

Alectra Utilities Corporation (Alectra Utilities) and Guelph Hydro Electric Systems Inc. (Guelph Hydro) filed an application with the Ontario Energy Board (OEB) on March 8, 2018 under sections 18, 74 and 86 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Schedule B for approval to amalgamate and continue operations as Alectra Utilities.

The applicants requested confidential treatment for parts of the responses to certain interrogatories.[1] They argued that the redacted information shows the specific functional areas or initiatives from which potential synergy savings may be achieved, which information has not been communicated to all staff that may be impacted by the changes. They further argued that disclosure of the redacted information could interfere with ongoing and future collective bargaining with their labour unions, the Power Workers' Union (PWU) and International Brotherhood of Electrical Workers, Local 636 (IBEW), both of which are intervenors in this proceeding. They asked that PWU and IBEW not have access to the redacted information even if the unions sign a Declaration and Undertaking pursuant to the OEB's *Practice Direction on Confidential Filings*.

In its Decision on Confidentiality and Procedural Order No. 2, the OEB accepted that the information in question is confidential, and invited submissions on the applicants' request that the information be withheld from the unions even if they signed the

[1] B-Staff-7(b), B-Staff-10(a), and B-Staff-12.

Declaration and Undertaking. The unions both objected to the request. PWU argued that the information would need to be disclosed to the unions during collective bargaining in any event, pursuant to provincial labour relations legislation. PWU added that, even if the OEB accepted that the information were truly confidential, it would be sufficient to treat the unions the same as other intervenors and allow them to view the information as long as they signed the Declaration and Undertaking. PWU submitted that for the OEB to deny access to the information despite the Declaration and Undertaking would suggest that the OEB considered there to be a real risk that PWU's counsel would breach the Declaration and Undertaking. That assumption is unwarranted, PWU argued, and it ignores that lawyers are capable of "compartmentalizing" information (i.e., not using it for any purpose other than the one for which it was obtained). IBEW raised similar concerns, and added that without access to the redacted information its ability to make submissions on the impacts of the proposed amalgamation would be impaired.

The applicants responded that the question of whether the information would need to be divulged in the collective bargaining process should be determined in that process, in accordance with the applicable labour relations regime, rather than by the OEB. Nevertheless, "as a good faith effort to resolve the issue while protecting the Applicants' legitimate interests", the applicants proposed a compromise solution whereby the unions' counsel would be given access to the confidential portions of the interrogatory responses, "provided such individuals (i) are external to and at arms-length from PWU or IBEW, as applicable, and (ii) are not and will not be involved in any collective bargaining-related activities on their behalf, whether current or future." The applicants noted that this proposed compromise is similar to what the OEB accepted in the most recent Ontario Power Generation Inc. (OPG) payment amounts case (EB-2016-0152).

Although the OEB had not provided an opportunity for any further submissions from the unions, IBEW wrote to the OEB to advise that it does not consent to the compromise, arguing that "counsel would be placed in a position where they would not be able to provide full information to their client or seek instructions."

In the OEB's view, the compromise proposed by the applicants is reasonable. It is consistent with the solution adopted by the OEB in the OPG case, where the OEB explained:

> The objective of the OEB's decision on this issue is to give ratepayers the highest degree of confidence in the OEB's processes and treatment of highly sensitive information. It addresses what the OEB considers to be a reasonable concern of OPG in respect of this information. It is

> not intended to question [PWU counsel's] integrity or to suggest that [PWU counsel] have not complied with previous undertakings.

The same reasons apply here. The applicants have expressed legitimate concerns about how disclosure of the information in question to the unions might interfere with collective bargaining. While the unions may be right that the information will need to be shared with them in the context of collective bargaining, that is a determination best left for the collective bargaining process, by the appropriate authority under the governing labour relations legislation, not one for the OEB to make in this amalgamation case. Moreover, while the Declaration and Undertaking would, on its face, prevent the use of the information in the course of collective bargaining (or in any other matter other than this proceeding), additional protection is warranted in light of the sensitivity of the information. The OEB reiterates what was said in the OPG case: by endorsing the proposed compromise, the OEB does not mean to question anyone's integrity. Nevertheless, ratepayers and other stakeholders might reasonably wonder whether anyone could truly compartmentalize the information; that is, whether the Declaration and Undertaking would eliminate the risk of harm. As the Divisional Court said in *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner),* (1993), 13 O.R. (3d) 531, where counsel's undertaking was found to be insufficient to allow access to confidential information:

> The solicitors say they would honour their undertaking and I have no doubt that they would make their very best efforts to do so. The difficulty is that circumstances might render compliance impossible. The solicitors could not disabuse their minds of any significant information during the subsequent proceedings. They could not compartmentalize their minds so as to screen out what has been disclosed by the access and what has been acquired elsewhere: see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at p. 1261, 77 D.L.R. (4th) 249. Furthermore, there would remain the perception of a possibility of non-compliance with the undertaking.

For these reasons, the OEB finds that the information in question will only be disclosed to counsel to the unions if they provide an affidavit similar to the one required in the OPG case, in addition to the Declaration and Undertaking.

## THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Representatives for the PWU and IBEW who wish to gain access to the confidential information provided in response to interrogatories B-Staff-7(b), B-Staff-10(a), and B-Staff-12 shall, in addition to filing the OEB's Declaration and Undertaking, also file an affidavit affirming that they are external to and at arms-

length from PWU or the IBEW, as applicable, and are not and will not be involved in any collective bargaining related activities on their behalf.

All filings to the OEB must quote the file number, **EB-2018-0014** and be made electronically in searchable/unrestricted PDF format through the OEB's web portal at https://pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed at the OEB'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.oeb.ca/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, Saleh Lavaee at Saleh.Lavaee@oeb.ca and OEB Counsel, Ian Richler at Ian.Richler@oeb.ca.

## ADDRESS

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

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

**DATED** at Toronto, **August 7, 2018**

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

# TAB5

1993 CarswellOnt 1047
Ontario Court of Justice (General Division) [Divisional Court]

Gravenhurst (Town) v. Ontario (Information & Privacy Commissioner)

1993 CarswellOnt 1047, [1993] O.J. No. 1227, 13 O.R. (3d) 531,
41 A.C.W.S. (3d) 195, 49 C.P.R. (3d) 550, 4 W.D.C.P. (2d) 352

# The Corporation of the Town of Gravenhurst, (Applicant) v. Information and Privacy Commissioner/Ontario and Weir & Foulds, (Respondents)

Saunders J.

Judgment: June 1, 1993
Docket: Doc. 479/92

Counsel: *Shemin N. Manji*, for the moving party and respondent, Information & Privacy Commissioner/Ontario.
*Guy W. Giorno*, for the applicant (respondent to motion, Town of Gravenhurst).
*Barnet H. Kussner*, for the respondent, Weir & Foulds.

Subject: Intellectual Property; Property; Public; Civil Practice and Procedure; Municipal

**Headnote**

Municipal Law --- Actions involving municipal corporations — Practice and procedure — Judicial review

Discovery — Documents — Privacy legislation -- Requirement to obtain new solicitors for judicial review proceedings.

Plaintiff brought an action against town. There were both judicial review proceedings and an action for wrongful dismissal. Plaintiff's lawyer obtained a disclosure order from Information and Privacy Commissioner in order to obtain certain information. Town sought judicial review of the disclosure order. On an interim application, the issue was raised as to the extent of disclosure. Held, access would be granted only to new solicitors engaged for the judicial review proceedings. Although the lawyers undertook not to disclose information to the client which would be of assistance in other proceedings, they might not be able to comply with that undertaking because they could not disabuse their minds of significant information during the subsequent proceedings. To balance the need to preserve the integrity of the privacy legislation with the needs of plaintiff, independent counsel was required for the judicial review application. Inconvenience to plaintiff was outweighed by the need to maintain confidentiality until disposition of the main application.

**Per Curiam:**

**ENDORSEMENT**

1 Order to go:

(1) in terms of paragraph 1 of draft order filed;

(2) in terms of paragraph 2 of such draft order, after deleting the words "and the Respondent, Weir & Foulds";

(3) providing that the Record of the Commissioner shall also be provided to counsel for the Respondent, Weir & Foulds, who shall not be a member or associate of such firm, upon the filing by such counsel of an undertaking in the form of Schedule "B"; and

(4) providing that the costs of this motion shall be reserved to the court hearing the application.

**REASONS:**

2 The issue on this interim application is the extent of access to a sealed record that should be granted to counsel for the purpose of preparing for the main application.

3 The main application is brought by the Corporation of the Town of Gravenhurst (the "Municipality") for judicial review of an order for disclosure made by the Information and Privacy Commissioner (the "Commissioner"). The respondent solicitors, Weir & Foulds (the "Solicitors") support the disclosure order.

4 The Solicitors requested information from the Municipality which it refused to disclose. This resulted in the order under review. The Solicitors represent an individual client (the "Client") who has been engaged in various proceedings with the Municipality arising out of his loss of office. Currently, the Client is applying for judicial review of a decision by the Municipality and has also brought a civil action in the nature of a wrongful dismissal claim. In all these proceedings, he has been, and continues to be, represented by the Solicitors.

5 Pursuant to s.137(2) of the *Courts of Justice Act*, R.S.O. 1990, c.C-43, the record of the Commission is to be sealed and not form part of the public record. This is because public disclosure would predetermine the judicial review and render it nugatory.

6 A problem arises because the Solicitors need access to the sealed portions of the record to prepare for the argument on the judicial review application. The Municipality is familiar with most of the record but the Solicitors are not. In several previous cases, this problem has been solved by permitting access to counsel on the undertaking that confidentiality will be maintained even with respect to the client. I pause to remark that such an undertaking has the potential of placing counsel in a difficult, if not intolerable, position.

7 The Solicitors say that they need access for only this application and to only a limited part of the record (one document). They do not intend to use the information for any other purpose, including in any of the other proceedings in which the Client is involved with the Municipality. They are aware that they might unexpectedly come across something that might be useful to the Client. They have discussed this with the Client. They say he is prepared for such an eventuality but has nevertheless instructed them not to disclose any of the information and to give the required undertaking.

8 The contents of the document are unknown. It is uncertain whether they would be otherwise available to the Solicitors through the operation of s.51 of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M-56. I was not invited to inspect the documents. I doubt it would have been helpful if I had done so. With my limited knowledge of the dispute, it is not for me to pass on the significance of the documents without the assistance of counsel. The Municipality is not prepared to consent to access. I must assume the possibility that the documents would contain information that would be of assistance to the Client in the other proceedings. If use were made of that information, the whole purpose of the judicial review application would be frustrated.

9 The Solicitors say they would honour their undertaking and I have no doubt that they would make their very best efforts to do so. The difficulty is that circumstances might render compliance impossible. The Solicitors could not disabuse their minds of any significant information during the subsequent proceedings. They could not compartmentalize their minds so as to screen out what has been disclosed by the access and what has been acquired elsewhere (see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 1261). Furthermore, there would remain the perception of a possibility of non-compliance with the undertaking.

10 I, reluctantly, conclude that if the Solicitors want access they must retain independent counsel who must provide the undertaking in the form proposed. Such counsel, or another independent counsel, must thereafter represent the Solicitors on this judicial review application. A balance must be struck between the need to preserve the integrity of the privacy legislation and the interests of the Client. The Client is deprived of counsel of his choice and will be put to some additional expense. However, in the context of the dispute between the parties, the additional costs ought not to be great. I am of the opinion that the inconvenience to the client is outweighed by the need to preserve the confidentiality of the material until a decision is made by this court.

11 My reluctance is based not only on the inconvenience to the Client but also on the opportunity it gives to a party in the position of the Municipality to force a change of counsel in almost every case. It is not possible to assess whether the opposition

is well founded. That will only occur when the main application is determined. If the engagement of a new counsel turns out to have been unnecessary, a client may be compensated in costs.

**End of Document**

# TAB6

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

**EB-2018-0165**

**Toronto Hydro-Electric System Limited**

**Application for electricity distribution rates beginning January 1, 2020 until December 31, 2024**

# DECISION ON CONFIDENTIALITY
**December 14, 2018**

Toronto Hydro-Electric System Limited (Toronto Hydro) filed a 5-year Custom Incentive Rate-setting (IR) application with the Ontario Energy Board (OEB) on August 15, 2018 (updated September 14, 2018) under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its distribution rates, to be effective January 1, 2020 to December 31, 2024.

Procedural Order No. 1, dated October 25, 2018, accepted a number of parties as intervenors in the proceeding and granted cost award eligibility to all parties that requested it. Procedural Order No. 1 also established deadlines for the filing of submissions on Toronto Hydro's confidentiality requests and for Toronto Hydro to reply to the submissions of parties.

In its Decision on Confidentiality and Procedural Order No. 2, the OEB approved confidential status for four of the six categories of information requested by Toronto Hydro.[1] For the cost difference between internal and external construction projects[2], the OEB considered the redacted information sufficiently aggregated such that negotiations with construction contractors or unions should not be impacted. The OEB also noted that public disclosure of this information could make it less complicated to test Toronto Hydro's application.

[1] In its reply submission on confidentiality, dated November 13, 2018, Toronto Hydro withdrew its confidentiality request related to commercially sensitive and proprietary information in its corporate tax returns. An un-redacted copy of this information is filed on the public record for this proceeding.
[2] Exhibit 1B, Tab 2, Schedule 2, p. 22.

The OEB previously treated this information as confidential.[3] The OEB provided Toronto Hydro with the opportunity to augment its submission before the OEB made a final determination.

Toronto Hydro's supplemental submission largely reiterated the same point previously made; that disclosure of the information would affect both its contracting and collective bargaining, and therefore would result in increased costs for its customers. Toronto Hydro submitted that the fact that the data is aggregated does not remedy this concern as long as it reveals any difference between contractor and internal labour costs, which the external contractors or the labour unions could use to benefit their position in future bargaining with the utility.

Toronto Hydro also argued that it would not be more complex to test its application if the information is confidential, and that complexity is not one of the OEB's criteria for determining whether information will be kept confidential.

The OEB did not say that complexity was a criteria it considered for determining whether information should be granted confidential status. The OEB's *Practice Direction on Confidential Filings* (Practice Direction) states that "[t]he Board and parties to a proceeding are required to devote additional resources to the administration, management and adjudication of confidentiality requests and confidential filings."[4] This is reiterated in the OEB's Chapter 1 Filing Requirements for Distribution Rate Applications.[5] The Practice Direction also states that "[t]he 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."[6] The onus is on Toronto Hydro to demonstrate that confidential treatment is warranted.

The OEB is not satisfied that Toronto Hydro has provided sufficient rationale for granting confidential treatment for the cost difference between internal and external construction projects. However, the OEB has further questions for Toronto Hydro on this matter. Rather than continue this process through written questions and submissions, the OEB will reserve its judgement at this time.

The OEB intends to hold an oral hearing for this Toronto Hydro proceeding. This will afford an opportunity for the OEB to ensure it has all of the relevant information on this

[3] EB-2014-0116, Decision on Confidentiality and Procedural Order No. 4, January 7, 2015.
[4] Ontario Energy Board, *Practice Direction on Confidential Filings,* p. 2.
[5] Ontario Energy Board, Filing Requirements for Electricity Distribution Rate Applications, Chapter 1, p. 3.
[6] Ontario Energy Board, *Practice Direction on Confidential Filings,* p. 2.

matter. All parties shall continue to treat this information confidential until the OEB makes a final determination.

Toronto Hydro submitted that the PWU should not have access to the un-redacted version of its evidence on the cost difference between internal and external construction projects.

Counsel for the PWU argued that the OEB's mandated Confidentiality Declaration and Undertaking (Undertaking) requires a person to commit that the confidential information will be used exclusively for duties performed in respect of this proceeding, and that the confidential information not be disclosed except to a person granted access to such confidential information, or to the OEB.

The OEB will permit the disclosure specifically to Richard Stevenson, counsel for PWU. No staff or other representatives from PWU are granted access. As all parties are aware, there are significant consequences for breaches of the OEB's Undertaking. In addition to sanctions that the OEB can take, Mr. Stevenson as a lawyer has additional obligations to the Law Society of Ontario (LSO), and in particular to the LSO's *Rules of Professional Conduct*, to which he is bound. The OEB is satisfied that the significant consequences of a breach of the Undertaking are such that the risk of disclosure is minimized.

**DATED** at Toronto, December 14, 2018
**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

# TAB7

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

**EB-2020-0290**

**Ontario Power Generation Inc.**

**Application for payment amounts for the period from January 1, 2022 to December 31, 2026**

# DECISION ON CONFIDENTIALITY – PRE-FILED EVIDENCE
**April 13, 2021**

Ontario Power Generation Inc. (OPG) filed an application dated December 31, 2020, with the Ontario Energy Board (OEB) under section 78.1 of the *Ontario Energy Board Act, 1998* seeking approval for changes in payment amounts for the output of its nuclear generating facilities in each of the five years beginning January 1, 2022 and ending on December 31, 2026. OPG also requested approval to maintain, with no change, the base payment amount it charges for the output of its regulated hydroelectric generating facilities at the payment amount in effect December 31, 2021 for the period from January 1, 2022 to December 31, 2026.

As part of its pre-filed evidence, OPG requested confidential treatment of the following documents, or certain portions thereof, itemized as follows:

1. The Amended 2020-2026 Business Plan located at Exh. A2-2-1, Attachment 1 (Business Plan)

2. The Amended 2020-2026 Business Planning Instructions located at Exh. A2-2-1, Attachment 2 (Business Planning Instructions)

3. The revenue comparison tables located at Exh. G2-1-1, Table 1 and G2-1-2, Table 1 (Revenue Comparison Tables)

4. The engagement letters with third party advisors located at Exh. C1-1-1, Attachment 2, Exh. D2-2-11, Attachment 2, and Exh. D2-2-11, Attachment 4 (collectively, Expert Engagement Letters)

5. The nuclear business case summaries found at Exh. D2-1-3, Attachment 1 and Exh. F2-3-3, Attachment 1 (collectively, Nuclear BCSs)

6. The Darlington Water Treatment Plant business case justification memorandum located at Exh. D2-1-3, Attachment 2 (WTP Memorandum)

7. The Darlington Refurbishment Program attachments (collectively, DRP Attachments), comprised of:

    a. Contract summaries at Exh. D2-2-4, Attachments 3, 14, 18, and 20 (Updated DRP Contract Summaries):
        i. Summary of Retube and Feeder Replacement (RFR) Engineering, Procurement and Construction (EPC) Contract
        ii. Summary of Turbine Generators (TG) EPC
        iii. Summary of Steam Generators (SG) EPC
        iv. Summary of Extended Service (ES) Master Services Agreement (MSA)

    b. Major DRP contract amendments at Exh. D2-2-4, Attachments 4, 7, 8, 9, 13, 15, 16, 17, 19, and 21 (DRP Contract Amendments):
        i. RFR EPC Amendment 7
        ii. RFR EPC Amendment 10
        iii. RFR EPC Amendment 11
        iv. RFR EPC Amendment 12
        v. TG Engineering Services, Equipment Supply and Field Services Agreement (ESESFSA) Amendment 5
        vi. TG EPC Amendment 3
        vii. TG EPC Amendment 4
        viii. TG EPC Amendment 5
        ix. SG Amendment 3
        x. ES MSA, SNC-Lavalin Nuclear Inc. and Aecon Construction Group Inc. (SNC / Aecon JV), Amended and Restated

    c. The Burns & McDonnell Canada and Modus Strategic Solutions Canada Company (McD / Modus) Report on Unit 3 Execution Estimate at Exh. D2-2-7, Attachment 3 (DRP Report)

    d. The business case summary for the Heavy Water Storage and Drum Handling Facility at Exh. D2-2-10, Attachment 2(k) (D2O BCS)

    e. The Black & McDonald Ltd. (B&M) Purchase Order located at Exh. D2-2-10, Attachment 2(f)

f. The B&M ES MSA located at Exh. D2-2-10, Attachment 2(d)

g. The original ES MSA, SNC / Aecon JV and Amending Agreement #2 located at Exh. D2-2-10, Attachments 2(g)&(i) (Original JV ES MSA Documents)

8. OPG's 2019 income tax returns and tax information located at Exh. F4-2-1, Attachment 1 and Exh. F4-2-2-1, Table 4 (2019 Income Tax Returns and Tax Information)

9. The Planning Phase Clarington Corporate Campus business case summary located at Exh. D3-1-2, Attachment 2 (Planning Phase BCS) and certain related information contained in the following tables (collectively, Clarington Corporate Campus Information):

   a. Capital Projects – Support Services located at Exh. D3-1-2

   b. Capital Projects Tables located at D3-1-1 Table 1, D3-1-1 Tables 2a and 2b, D3-1-2 Tables 1a and 1b, D3-1-2 Table 4, and D3-1-2 Tables 5a and 5b

10. The Willis Towers Watson Report located at Exh. F4-3-1, Attachment 3 (Willis Towers Watson Report)

11. The Report on the Estimated Accounting Cost for Post-Employment Benefit Plans for Fiscal Years 2021 to 2026 located at Exh. F4-3-2, Attachment 1 (Aon Report)

In Procedural Order No. 1, issued February 17, 2021, the OEB granted confidential treatment of redacted information in the 2019 Income Tax Returns and Tax Information (item #8). By letter dated February 26, 2021, OPG notified the OEB that confidential treatment of the Willis Towers Watson Report was no longer required (item #10).

Procedural Order No. 1 also made provision for intervenors and OEB staff to file submissions on OPG's confidentiality request, and for OPG to reply. OEB staff, the Power Workers' Union (PWU) and the School Energy Coalition (SEC) filed submissions. The only objections or concerns that were raised were specific to the Aon Report (item #11) and the Clarington Corporate Campus Information (item #9). OPG filed a reply submission.

## Confidential Treatment of the Aon Report (item #11)

OPG stated that it sought confidential treatment of certain information in the Aon Report as it contains assumptions that underpin cost estimates that are labour-relations sensitive.[1] OPG argued that disclosure of the information could prejudice its position in upcoming rounds of collective bargaining with the PWU and Society of United Professionals (Society).

OEB staff noted that a report similar to the Aon Report was filed in OPG's previous payment amounts proceeding (2017-2021 Payment Amounts Proceeding),[2] however, confidential treatment of that report was neither requested nor granted. OEB staff submitted that it was unclear as to what had changed since the 2017-2021 Payment Amounts Proceeding that warranted information in the Aon Report being treated as confidential in this proceeding. Further, OEB staff highlighted that it was also unclear as to how such information being unredacted could impact collective bargaining with the PWU and Society.

On March 5, 2021, OPG filed a letter with the OEB elaborating on its request for confidential treatment of portions of the Aon Report. OPG explained that the report "includes cost estimates and underpinning assumptions that are labour-sensitive because they consider pension, other post-employment benefits and associated headcount projections related to certain Pickering downsizing processes expected to take place during the period. The assumptions and estimates depend on, and/or may influence, collective bargaining outcomes related to the anticipated Pickering downsizing exercise."[3]

OPG further requested that, in order to have access to the confidential portions of the Aon Report, representatives of the two union intervenors, the PWU and Society, be required to file an affidavit with the OEB. The affidavit would affirm that the representatives are external to, and at an arms-length from, the PWU and Society, and that they are not, and will not, be involved in any OPG collective bargaining-related activities on behalf of the PWU or Society. OPG argued that this measure was needed, in addition to the usual Declaration and Undertaking contemplated in the OEB Rules of Practice and Procedure, to avoid prejudice to its position in the collective bargaining process.

[1] Exhibit F4 / Tab 3 / Schedule 2 / Attachment 1.
[2] EB-2016-0152.
[3] OPG Request to Limit Access to Labour-Sensitive Information / March 5, 2021 / p. 1.

The PWU filed a response to OPG's March 5, 2021 letter on March 10, 2021. The PWU argued that the Aon Report should not be granted confidential treatment as it is not apparent that it includes information that has not already been put on the public record of this proceeding. The PWU claimed that it would be inappropriate to require the PWU representatives to sign an affidavit in addition to the Declaration and Undertaking. The PWU asserted that singling out the PWU to sign an affidavit "is punitive to the PWU, undermines its right to the counsel of choice, and undermines the effectiveness of its representation in this matter."[4]

While acknowledging that the OEB had required union representatives to sign an affidavit in the 2017-2021 Payment Amounts Proceeding, the PWU argued that the OEB is not bound by that decision. It pointed to a more recent case where a similar issue had arisen: the Toronto Hydro-Electric System Limited (Toronto Hydro) rate proceeding.[5] In that case, the PWU argued that the execution of a Declaration and Undertaking should suffice as it is common for solicitors to be required to "compartmentalize" information. The PWU also noted that, in the case of lawyers, the breach of a Declaration and Undertaking is an act of professional misconduct. The OEB agreed with the PWU that its external counsel should have access to the information in question upon executing the Declaration and Undertaking, and that an additional affidavit was not necessary.

The PWU stated in its March 10, 2021 submission that its analysts from Econalysis were prepared to execute the affidavit, even though in the PWU's view it should not be required, but the PWU's counsel, Richard P. Stephenson, was not.

In its reply, OPG asserted that PWU was incorrect to suggest that the Aon Report included information that is already on the public record. OPG explained that "the Aon Report includes material assumptions and corresponding amounts of which may be recorded in the Pickering Closure Costs Deferral Account"[6] that does not appear elsewhere in the evidence.

OPG further maintained that the redacted information in the Aon Report could prejudice its position in upcoming rounds of collective bargaining with the PWU and Society, if such information were disclosed. OPG highlighted that the Aon Report includes assumptions that are labour-sensitive as they consider pension, other post-employment benefits and associated headcount projections related to certain Pickering Nuclear Generating Station downsizing processes.

[4] PWU Submission / March 10, 2021 / p. 2.
[5] EB-2018-0165 / Decision on Confidentiality / December 14, 2018.
[6] OPG Reply Submission / March 15, 2021 / p. 2.

OPG relied on the OEB's decision in the 2017-2021 Payment Amounts Proceeding to require the PWU representatives to sign an affidavit in addition to the Declaration and Undertaking. In that case, according to OPG, "the arguments made by PWU … were made and rejected by the OEB."[7] OPG quoted at length from that decision, where the OEB observed that "Labour negotiations between OPG and the PWU have historically been difficult and labour costs represent a significant portion of the costs the OEB is asked to approve in this application" before concluding that "While the OEB's Declaration and Undertaking does under normal circumstances offer the adequate protections you have noted, in this particular instance, the OEB believes the additional protection is warranted."

### *Findings*

The OEB approves OPG's request for confidential treatment of certain information, redacted from the public record in the Aon Report (item #11). The OEB considered the submissions of OEB staff regarding the proposed redactions to the Aon Report. The OEB accepts the explanation provided by OPG in its reply submission. In particular, the redactions to the Aon Report include cost estimates and underpinning assumptions that are labour-sensitive as they relate to the Pickering downsizing processes expected to take place during the 2022-2026 period and that this information is not already on the public record.

The OEB has reviewed the letters filed by OPG and the PWU. OPG requested that the OEB limit access to the redacted Aon Report as it contains estimates for expenditures associated with post-employment benefit plans for the fiscal years 2020-2026. OPG proposed that access be provided to those intervenor representatives who have filed a Declaration and Undertaking. However, OPG submitted that the counsel and consultants representing the PWU and the Society also be required to file an affidavit with the OEB affirming that they are not and will not be involved in any collective bargaining-related activities on their behalf to gain such access. Mr. Stephenson, a legal counsel for PWU, objected to the requirement of the additional affidavit.

The OEB has reviewed its Rules of Practice and Procedure, Practice Direction on Confidential Filings and form of Declaration and Undertaking. The Declaration and Undertaking is signed by an individual with corresponding personal liability for its breach; it is not signed on behalf of the approved intervenor. The OEB finds the Declaration and Undertaking is sufficient for Mr. Stephenson and any other external counsel to the PWU or the Society, without an additional affidavit, as undertaking #1 states:

[7] OPG Reply Submission / March 15, 2021 / p. 2.

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

In so deciding, the OEB finds that the words “exclusively for duties performed in respect of this proceeding” are a sufficient protection against the disclosure or use of this information by the unions’ legal counsel in future labour negotiations. In particular, Mr. Stephenson will be giving his undertaking as a member of the Law Society of Ontario and may be subject to the discipline of that body for any breach of the same. Any subsequent legal assistance that he may render to PWU with respect to labour negotiations involving OPG or in this or any other proceeding will be governed by the terms of the undertaking.[8] The OEB relies on the provisions of the required undertaking, as well as the potential personal liability that might result from its breach to ensure compliance.

Consultants do not have the same professional obligations as lawyers. Therefore, the OEB finds it appropriate to require any external consultants to the PWU or the Society who wish to have access to the Aon Report for the purposes of this proceeding to sign the affidavit requested by OPG in addition to the Declaration and Undertaking. As noted above, the PWU has said its consultants are prepared to do so.

The OEB acknowledges, but is not persuaded, by the decision made by the panel in OPG’s 2017-2021 Payment Amounts Proceeding to require Mr. Stephenson to sign an affidavit, and by OPG’s submissions on that issue in this proceeding. The OEB agrees with the reasoning provided in the more recent Toronto Hydro case, which emphasized a lawyer’s professional obligations concerning undertakings which are in addition to the “sanctions that the OEB can take” for breach of the Declaration and Undertaking. The OEB is aware of the necessity to ensure confidentiality of information that, if disclosed, might place OPG at a disadvantage in subsequent labour negotiations.

In summary, OPG must provide access to the confidential version of the Aon Report to any external counsel for the PWU or the Society who signs the Declaration and Undertaking, but any external consultant for either union who wishes to view the confidential version must also sign an affidavit of the type requested by OPG in addition to the Declaration and Undertaking.

[8] EB-2018-0165 / Decision on Confidentiality / December 14, 2018 / p. 3.

## Confidential Treatment of the Clarington Corporate Campus Information (item #9)

In its confidentiality request, OPG noted that the Clarington Corporate Campus Information contained details relating to contingencies, as well as aggregate information, that would allow the determination of commercially sensitive information. As the tendering process for the Clarington Corporate Campus project has not commenced, OPG stated that disclosure of the redacted information could prejudice its competitive position and significantly interfere with its negotiations with prospective contractors / third parties.

SEC expressed concern with OPG's request for the confidential treatment of the forecast total cost for the Clarington Corporate Campus project[9] as it was unclear if the entire project, and thus total cost, would go out for a single tender or not. SEC submitted that if the project is to be tendered in portions, the forecast total cost could be made public, while the cost of each portion could be treated as confidential.

In response to the concern raised by SEC, OPG clarified that it expects the Clarington Corporate Campus project to go out as a single tender and, therefore, it is essential that the total project cost be treated as confidential.

### *Findings*

The OEB approves OPG's request for confidential treatment of the proposed redactions within the Clarington Corporate Campus Information (item #9). The OEB considered SEC's question on the proposed redactions regarding the total project costs. The OEB accepts the explanation provided by OPG in reply submission. The redactions regarding the Clarington Corporate Campus project are necessary as OPG expects the project to go out for a single tender.

## Permanent Redactions to the Business Plan (item #1), the Business Planning Instructions (item #2) and the DRP Attachments (item #7)

As part of its confidentiality request, OPG sought permanent redactions, without disclosure except to the OEB, of certain information in the Business Plan, Business Planning Instructions, and personal information under the *Freedom of Information and Protection of Privacy Act*.

[9] Exhibit D3 / Tab 1 / Schedule 2 / p. 3, Exhibit D3 / Tab 1 / Schedule 2 / Attachment 2, and Exhibit D3 / Tab 1 / Schedule 2 / Table 1a.

OPG stated that redactions in the Business Plan and Business Planning Instructions related solely to OPG's unregulated business and information that, pursuant to applicable securities law, OPG is not permitted to disclose. The redactions of personal information included banking information, tax registration numbers, Workplace Safety and Insurance Board registration numbers, and names of individuals in the DRP Attachments.

### *Findings*

The OEB is deferring its decision with respect to the permanent redactions in the Business Plan, the Business Planning Instructions and the DRP Attachments as proposed by OPG. The OEB will render a decision regarding the proposed permanent redactions request at a later date.

To clarify, the unredacted documents have been made available only to the panel in this proceeding and not "the OEB" in general as implied in correspondence from OPG.

### Confidential Treatment of Items #1 to #7

No one objected to OPG's request in respect for confidential treatment of items #1 to #7.

### *Findings*

The OEB has reviewed the remaining documents for which OPG requests confidential treatment (item #1 to #7 inclusive). The OEB approves OPG's request for confidential treatment of these documents, or certain portions thereof, as they contain commercially-sensitive information, third-party information and information that public disclosure could reasonably be expected to prejudice the economic interest and competitive position of the third parties. While the OEB did not receive any objections from parties regarding these confidentiality requests, the OEB has assured itself that these documents have been appropriately redacted.

## THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OPG's request for confidential treatment is granted in respect of the documents identified as items #1 to 7, 9 and 11 in the list above. OPG shall provide the non-redacted, confidential versions of those documents to the individuals that have signed and filed a Declaration and Undertaking (except in order to have access

to #11, individuals acting as external consultants to the PWU or the Society must also sign and file an affidavit of the type described above). For clarity, OPG is not required to provide anyone with those portions of items #1, 2 and 7 for which it has requested permanent redactions; that request will be dealt with in a separate decision.

**DATED** at Toronto, April 13, 2021

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long
Registrar

# TAB8

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

BY EMAIL

September 24, 2021

Ms. Christine Long
Registrar
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Long:

Re: **EB-2021-0110 Hydro One Networks Inc. 2023-2027 Custom Rate Application – Intention to File Expert Evidence**

In accordance with Procedural Order No. 1 issued on September 17, 2021, please find below a summary of the expert evidence that OEB staff plans to file in the proceeding to consider the application referenced above.

Pacific Economics Group Research LLC (PEG) will provide one or more reports presenting PEG's review of the evidence prepared by Clearspring Energy Advisors LLC (Clearspring), for Hydro One Networks Inc.'s (Hydro One's) 2023-2027 Custom Rate Application with respect to Clearspring's evidence on total cost benchmarking and Total Factor Productivity (TFP) for Hydro One's Transmission Custom Plan and total cost benchmarking of Hydro One's Distribution Custom Plan. Clearspring's analyses compare Hydro One's historical performance (and in the case of total cost benchmarking, forecasted performance during the 2023-2027 plan term) against that of a sample of U.S. utilities with electricity transmission and distribution operations. It is Clearspring's evidence on which Hydro One is basing the proposed base productivity and stretch factors for the Transmission and Distribution plans.

PEG's analyses will include a detailed review of Clearspring's report and working papers,[1] and may include new analyses on Hydro One's cost performance. PEG will

[1] The working papers consist of data base files, spreadsheets, program code and other documentation with the data and summary analyses that would allow for replication of Clearspring's analyses. Consistent with past practice, the Ontario Energy Board has granted confidentiality to Clearspring's working papers in Procedural Order No. 1 and Decision on Confidentiality.

also review Hydro One's proposed custom plan designs and parameters for both Transmission and Distribution, and include comparisons with other incentive rate-setting plan designs approved in Ontario and in some other North American jurisdictions. In addition, PEG staff will prepare interrogatory responses and will attend any technical conference or oral hearing, as necessary.

While there is a team of staff at PEG on this engagement, the principal whom OEB staff intends to offer as an expert witness is Dr. Mark Lowry, president of PEG. Dr. Lowry is an economist who has testified on matters of economic analysis, total and partial factor productivity analysis, cost benchmarking, and incentive regulation, in Ontario, Alberta, Québec, in U.S. jurisdictions and internationally. Dr. Lowry and PEG have been involved in policy consultative processes and applications in Ontario for over 15 years. Of particular relevance are Dr. Lowry's evidence and testimonies before the OEB on total factor productivity and cost benchmarking analyses in recent applications for electricity and natural gas distribution and for Ontario Power Generation Inc.'s prescribed hydroelectric generation assets:

- EB-2016-0152: Ontario Power Generation's 2017-2021 rate setting plan for prescribed nuclear and hydroelectric generation payment amounts
- EB-2017-0049: Hydro One Inc.'s 2018-2022 Custom IR plan for distribution operations
- EB-2017-0306/EB-2017-0307: Merger of Enbridge Gas Distribution Inc. and Union Gas Limited and Rate-Setting Mechanism
- EB-2018-0165: Toronto Hydro-Electric System Limited's 2020-2024 Custom IR plan
- EB-2019-0082: Hydro One Networks Inc.'s 2020-2022 Custom IR plan for electricity transmission revenue requirement
- EB-2019-0261: Hydro Ottawa Limited's 2021-2025 Custom IR plan.

The estimated budget for PEG's work in preparing its evidence in this proceeding is approximately $500,000, including costs for matters such as interrogatory responses, technical conference and hearing attendance.

Any questions relating to this letter should be directed to keith.ritchie@oeb.ca or at 416-440-8124. The Ontario Energy Board's toll-free number is 1-888-632-6273.

Yours truly,

*Tracy Garner*

Tracy Garner
Project Advisor – Generation and Transmission Application

cc: All registered parties to EB-2021-0110

# TAB9

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

**EB-2020-0290**

**Ontario Power Generation Inc.**

**Application for payment amounts for the period from January 1, 2022 to December 31, 2026**

# DECISION ON CONFIDENTIALITY
**June 8, 2021**

Ontario Power Generation Inc. (OPG) filed an application dated December 31, 2020, with the Ontario Energy Board (OEB) under section 78.1 of the *Ontario Energy Board Act, 1998*. OPG's application seeks approval for changes in payment amounts for the output of its nuclear generating facilities in each of the five years beginning January 1, 2022 and ending on December 31, 2026. OPG also requested approval to maintain, with no change, the base payment amount it charges for the output of its regulated hydroelectric generating facilities at the payment amount in effect December 31, 2021 for the period from January 1, 2022 to December 31, 2026.

## Permanent Redactions

As part of its pre-filed evidence, OPG requested confidential treatment of documents, or certain portions thereof. In its request, OPG sought, among other things, permanent redactions, without disclosure except to the OEB ("OEB Review Only"), of certain information in the Amended 2020-2026 Business Plan[1] (Business Plan) and the Amended 2020-2026 Business Planning Instructions[2] (Business Planning Instructions).

In its Decision on Confidentiality – Permanent Redactions, dated April 15, 2021, the OEB did not approve the proposed permanent redactions to the Business Plan and Business Planning Instructions. Instead, the OEB requested OPG to re-submit the two documents with additional supporting rationale for such permanent redactions.

On April 30, 2021, in response to the April 15, 2021 Decision, OPG significantly narrowed the number of permanent redactions being sought in respect of the Business Plan and Business Planning Instructions, and provided additional supporting rationale for the remaining permanent redactions, in a letter for "OEB Review Only". A redacted version of the letter for "OEB Review Only" was filed on the public record on May 3,

[1] Exhibit A2 / Tab 1 / Schedule 2 / Attachment 1.
[2] Exhibit A2 / Tab 1 / Schedule 2 / Attachment 2.

2021. In the letter, OPG also proposed to permanently redact certain information in a board memo, dated October 19, 2020, prepared in relation to the Business Plan (Board Memo). This board memo was attached to the response provided to interrogatory CCC-015.

OPG also proposed to permanently redact personal information, within the meaning of the *Freedom of Information and Protection of Privacy Act*, in certain interrogatory responses and documents as indicated in the following table:

**TABLE 1**

| Exhibit | Attachment No. | Page(s) |
|---|---|---|
| L-D2-02-AMPCO-079 | 2 | 1 & 2 |
| L-D2-02-AMPCO-079 | 40 | 2 |
| L-D2-02-AMPCO-080 | 1 | 1 |
| L-D2-02-AMPCO-080 | 2 | 1 |
| L-D2-02-AMPCO-080 | 3 | 2 |
| L-D2-02-AMPCO-080 | 4 | 2 |
| L-D2-02-AMPCO-080 | 5 | 2 |
| L-D2-02-AMPCO-115 | 1 | 15 and 32 |
| L-D2-02-SEC-084 | 17 | 23, 28, 30, 40, 45, 49, 51, 52, 53, 54, 58, 61 and 62 |
| L-D2-02-SEC-084 | 18 | 34 |
| L-D2-02-SEC-084 | 22 | 25 |
| L-D2-02-SEC-084 | 23 | 52 |

## Findings

The OEB approves OPG's revised proposal for permanent redactions to the Business Plan and the Business Planning Instructions, as well as the proposed permanent redactions to the Board Memo. The OEB finds that this information relates to specific unregulated businesses and is not publicly available. As a reporting issuer under Canadian provincial securities law, OPG indicated that it may be subject to liability (and securities regulatory proceedings) in relation to forward-looking disclosures of financial information. The OEB is of the opinion that sufficient information is available elsewhere

on the record, without this forward-looking financial information, to consider issues in this proceeding.

The OEB also approves the permanent redactions to certain interrogatory responses that contain personal information within the meaning of the *Freedom of Information and Protection of Privacy Act.*

## Confidential Filings to Interrogatory Responses

Pursuant to Procedural Order No. 1, OPG provided responses to interrogatories filed by intervenors and OEB staff. In letters dated April 30, 2021 and May 11, 2021 (Confidentiality Request Letters), OPG requested confidential treatment of a number of interrogatory responses, or certain portions thereof.

Procedural Order No. 3, dated May 13, 2021, made provision for intervenors and OEB staff to file objections on OPG's confidentiality request, and for OPG to reply. The Power Workers' Union (PWU), School Energy Coalition (SEC), and Vulnerable Energy Consumers Coalition (VECC) filed letters indicating objections. OEB staff filed a letter stating it did not object to OPG's confidentiality request. OPG filed a reply submission in response to these objections.

The interrogatory responses, or certain portions thereof, and / or documents provided as attachments to interrogatory responses for which confidential treatment was sought, are categorized based on their nature. The objections of parties are referred to, where required, below.

1. *References to Vendor / Contractor Performance*

OPG requested confidential treatment of information related to vendor / contractor performance in the following interrogatories:

## TABLE 2

| Exhibit | Attachment No. |
|---|---|
| L-A1-02-SEC-011 | Attachment 2 |
| L-D2-02-AMPCO-137 | Attachment 132 |
| | Attachment 133 |
| | Attachment 134 |
| | Attachment 135 |
| | Attachment 136 |
| | Attachment 137 |
| | Attachment 138 |
| L-D2-02-SEC-073 | Attachment 1 |
| L-D2-02-SEC-084 | Attachment 1 |
| | Attachment 2 |
| | Attachment 3 |
| | Attachment 4 |
| | Attachment 5 |
| | Attachment 6 |
| | Attachment 7 |
| | Attachment 8 |
| | Attachment 9 |
| | Attachment 10 |
| | Attachment 12 |
| | Attachment 13 |
| | Attachment 14 |
| L-D2-02-Staff-105 | Attachment 2 |
| L-D2-02-SEC-095 | Attachment 1 |
| L-D2-02-AMPCO-079 | Attachment 2 |
| | Attachment 4 |
| | Attachment 34 |
| | Attachment 40 |
| | Attachment 41 |
| | Attachment 42 |
| L-D2-02-AMPCO-115 | Attachment 1 |

Disclosure of such information, as stated by OPG, could prejudice the competitive positions of the parties involved, damage contractual relationships, and cause reputational harm to vendors / contractors. OPG submitted that the confidential nature of such information had been accepted by the OEB in OPG's previous payment amounts application (2017-2021 Payment Amounts Proceeding)[3] and in this proceeding.

No objection to the confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information related to vendor / contractor performance in Table 2 as the information is commercially sensitive, with the two exceptions of AMPCO-079, Attachment 41 and AMPCO-115, Attachment 1.

With the exception of AMPCO-079, Attachment 41 and AMPCO-115, Attachment 1, the OEB agrees with OPG that disclosure of such information could prejudice the competitive position of the parties involved, damage contractual relationships, and cause reputational harm to vendors / contractors.

The OEB finds that the redacted information is not commercially sensitive to the specific contractor in AMPCO-079, Attachment 41 entitled "Evaluating Organizational Effectiveness Review Detail Report – Quality Review Completed". The OEB finds that some of the redacted information is commercially sensitive to the contractor in AMPCO-115, Attachment 1 entitled "Incident Investigation Report: Delay in D2O Storage Project", while other information is not commercially sensitive.

Regarding AMPCO-079, Attachment 41 and AMPCO-115, Attachment 1, the OEB finds that the information that is not commercially sensitive relates to OPG and OPG's interactions with this contractor. Given OPG's implied involvement and interactions with this contractor, the OEB is not convinced the information will prejudice the competitive position, damage contractual relationships, and cause reputational harm to this contractor. Further, as these documents were issued in 2015 and 2014 respectively, the OEB questions OPG's claim of commercial sensitivity in 2021.

The OEB distinguishes information in AMPCO-079, Attachment 41 and AMPCO-115, Attachment 1 as unique from other documents previously approved for confidential treatment in this proceeding. The OEB must balance the need for transparency with the risk of potentially exposing commercially sensitive information on the public record. As

[3] EB-2016-0152.

the D2O Storage Project is a major capital project with total actual costs of $510 million (including $509.3 million of capital costs), the OEB finds it appropriate for intervenors who do not sign the Declaration and Undertaking to have access to this information to fully participate in this proceeding.

Specific to OPG's request for redactions to AMPCO-115, Attachment 1, the OEB approves the confidential treatment of the proposed redactions on pages 9, 10, 14, 16, 18, 28, 31, 33, 38, and 41 of the 76-page document as commercially sensitive, specific to a third party.

OPG is directed to revise and refile the publicly available versions of documents AMPCO-079, Attachment 41 and AMPCO-115, Attachment 1.

2. *Commercially Sensitive Information in Nuclear Business Case Summaries*

OPG sought confidential treatment of commercially sensitive information in nuclear business case summaries provided in the following interrogatories:

**TABLE 3**

| Exhibit | Attachment No. |
|---|---|
| L-D2-01-Staff-116 | |
| L-D2-01-AMPCO-027 | Attachment 1 |
| L-D2-01-AMPCO-059 | Attachment 1 |
| L-D2-01-AMPCO-044 | Attachment 1 |
| L-F2-03-AMPCO-151 | Attachment 1 |
| L-D2-01-AMPCO-059 | Excel file titled "OPG Excel Requested Tables (Confidential)" |

OPG submitted that the redacted portions include commercially sensitive information, such as project cost contingencies, certain costs for contracted or purchased work / materials, or aggregate information that would allow for the determination of commercially sensitive information. OPG stated that disclosure of such information could prejudice its competitive position. OPG also noted that some of the nuclear business case summaries include commentary on the performance of specific contractors. Disclosure of such information, as stated by OPG, could significantly interfere with its negotiations and existing relationships in a variety of aspects of its business.

In its submission, OPG noted that similar information was treated as confidential by the OEB in this proceeding, the 2017-2021 Payment Amounts Proceeding, its application for payment amounts in 2014 and 2015 (2014-2015 Payment Amounts Proceeding)[4], and its application for payment amounts in 2011 and 2012 (2011-2012 Payment Amounts Proceeding).[5]

No objection to the confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information related to the nuclear business case summaries in Table 3 as the information is commercially sensitive.

3. *Pricing Information and Labour Rates in Darlington Refurbishment Program Documents*

OPG requested confidential treatment of pricing information and labour rates for various aspects of the Darlington Refurbishment Program in the following interrogatories:

**TABLE 4**

| Exhibit | Attachment No. |
|---|---|
| L-D2-01-AMPCO-072 | Attachment 1 |
| L-D2-02-SEC-084 | Attachment 18 |
| L-D2-02-SEC-085 | Attachment 1 |
| L-D2-02-SEC-096 | Attachment 3 |
| L-D2-02-SEC-084 | Attachment 22 |
| L-D2-02-SEC-084 | Attachment 23 |
| L-D2-02-SEC-105 | Attachment 1 |

OPG submitted that the document filed in response to SEC-085 contained information relating to the budget of an external advisor and retainer amounts. OPG stated that such information should be treated as confidential as the external advisor budget is commercially sensitive to OPG. In addition, OPG submitted that the information is not relevant to the Darlington Refurbishment Program amounts requested in this proceeding while the retainer amounts are commercially sensitive to a third party.

[4] EB-2013-0321.
[5] EB-2010-0008.

For the documents provided in response to the remaining interrogatories, OPG submitted that the redacted portions relate to labour rates and pricing information. OPG stated that disclosure of such information could be detrimental to its commercial interests as well as the commercial interests of its counterparties. OPG noted that information, similar in nature to its request, was already the subject of confidential treatment in this proceeding.[6]

No objection to the confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information related to pricing information and labour rates in the Darlington Refurbishment Program documents in Table 4 as the information is commercially sensitive.

*4. Collective Bargaining Documentation*

OPG sought confidential treatment of collective bargaining-related information contained in the following interrogatories:

**TABLE 5**

| Exhibit | Attachment No. |
|---|---|
| L-D3-01-Society-005 | |
| L-D3-01-Society-006 | |
| L-D3-01-Society-007 | |
| L-D3-01-Society-008 | |
| L-D3-01-Society-012 | |
| L-F3-02-Energy Probe-059 (page 2) | |
| L-F4-01-PWU-029 | |
| L-F4-03-AMPCO-174 | |
| L-F4-03-AMPCO-175 | |
| L-F4-03-Energy Probe-063 | |
| L-F4-03-Energy Probe-064 | |
| L-F4-03-PWU-018 | |
| L-F4-03-PWU-024 | |

[6] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.

| | |
|---|---|
| L-F4-03-PWU-026 | |
| L-F4-03-PWU-031 | |
| L-F4-03-SEC-145 | |
| L-F4-03-SEC-149 | |
| L-F4-03-SEC-152 | |
| L-F4-03-Staff-276 | |
| L-F4-03-Staff-282 | |
| L-F4-03-Staff-300 | |
| L-F4-03-Staff-304 | |
| L-F4-03-Staff-306 | |
| L-F4-03-Staff-307 | |
| L-F4-03-Staff-309 | |
| L-F4-03-Staff-311 | |
| L-A1-02-SEC-011 | Attachment 1 |

OPG stated that it sought confidential treatment as the document and interrogatory responses contain labour-sensitive information regarding the anticipated Pickering Nuclear Generating Station downsizing exercise and OPG's relocation to the Clarington Corporate Campus. OPG also noted that the information includes details indicative of:

- OPG's collective bargaining strategies
- Estimates of cost savings from pension and benefits reforms
- Planned declines in total regular employee headcount
- Planned share performance plan participation (which may be indicative of forecasted attrition)
- Sick leave targets
- Retirement eligibility forecasts
- Estimated staff demand levels
- Relocation plans and costs related to Clarington Corporate Campus (including plans for vacating certain office leases)

OPG submitted that the information includes estimates and underpinning assumptions that are labour-sensitive because they depend on, and / or may influence, collective bargaining outcomes. Disclosure of such information, as argued by OPG, could potentially interfere with future collective bargaining negotiations it has with unions that represent its employees. OPG noted that the OEB granted confidential treatment for

similar types of labour-sensitive information in this proceeding[7] and the 2017-2021 Payment Amounts Proceeding. SEC and PWU filed objections to OPG's confidentiality request.

OPG further requested that, consistent with the OEB's April 13, 2021 Decision on Confidentiality – Pre-Filed Evidence, this information "be withheld from such experts or consultants who have not also filed an affidavit with the OEB affirming that they are external to and at arms-length from the PWU and Society, as applicable, and that they are not and will not be involved in any collective bargaining-related activities on behalf of PWU or Society."

*SEC Objection:*

SEC objected to the confidential treatment of Tables 1 and 2 provided in response to SEC-149, submitting that the information is of the same nature as that placed on the public record in the 2017-2021 Payment Amounts Proceeding and 2014-2015 Payment Amounts Proceeding. No similar request for confidential treatment was made by OPG in those proceedings. SEC submitted that OPG did not provide any reason for why the situation in this proceeding is different, and how it will negatively impact labour negotiations. SEC also noted the importance of the information by highlighting the decisions in both the 2017-2021 Payment Amounts Proceeding[8] and 2014-2015 Payment Amounts Proceeding[9] referring to this type of information in determining the appropriate level of compensation costs to be recovered in payment amounts.

OPG disagreed with SEC about the information, with respect to Table 1, being the same as that provided in the 2017-2021 Payment Amounts Proceeding and 2014-2015 Payment Amounts Proceeding. OPG noted that in this proceeding, Table 1 contains forward looking information (i.e., 2022 to 2026) inclusive of the unregulated business whereas in the 2017-2021 Payment Amounts Proceeding, JT3.2 did not contain any total OPG forward looking information. It only contained total OPG historical information. OPG also stated that information contained in J9.11 was limited to OPG regulated business only.

OPG clarified that certain redacted information in SEC-149 should have been referenced in its Confidentiality Request Letters. OPG stated that SEC-149 should have also been referenced in the section relating to the combined regulated and unregulated assets and business of OPG. OPG reiterated its request for confidential treatment of

[7] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.
[8] EB-2016-0152 / Decision and Order / December 28, 2017 / p. 82 / citing JT3.2 in footnote 106.
[9] EB-2013-0321 / Decision with Reasons / November 20, 2014 / p. 74 / citing J9.11 in footnote 71.

SEC-149, as outlined in its Confidentiality Request Letters, subject to two revisions. OPG clarified that the 2019 OPG historical information in Table 1 was redacted in error, and that the proposed redactions in Table 2, which contains information solely related to the nuclear business, was being withdrawn.

*PWU Objection:*

PWU objected to OPG's confidentiality request by submitting that OPG's claims were overbroad and do not reflect any genuine "sensitivity", and that the underlying premise of the request is flawed and should be rejected.

PWU acknowledged that documents containing OPG's collective bargaining strategy, or assumptions regarding future collective bargaining outcomes are appropriately confidential, subject only to information which is mathematically derivable from information which is otherwise on the public record. However, PWU argued that the documents to which OPG was seeking confidentiality were much broader, and that information that does not meet this narrow exception is not properly considered to be confidential. PWU submitted that certain interrogatories fall into either or both of two categories: (1) the forecast future financial impact of past decisions and actions; and / or (2) forecast future operational actions or circumstances, and the financial impacts arising therefrom.

For the first category, PWU submitted that the focus of such questions is about the consequences of past actions, not issues of current or future labour relations sensitivity, whereas the second category pertains to operational actions or circumstances existing independently of future collective bargaining. PWU also argued that forecast future inflation rates and / or labour shortages / surpluses may have an impact on future collective bargaining, but is not confidential information.

PWU stated that the underlying premise of OPG's confidentiality request was that disclosure would cause prejudice to OPG. Specifically, that public disclosure would defeat OPG's ability to maintain the confidentiality over the information and use this information to its advantage in future collective bargaining. PWU submitted that the OEB's task is to determine whether there is a legitimate interest of sufficient importance to override the presumption of public transparency. If the alleged prejudice is the potential use of the "confidential" information in collective bargaining, the question for the OEB is whether the employer has a legitimate entitlement to refuse to disclose such information to its union in collective bargaining. If the answer to the question is "no", the employer has no interest worthy of protection, and no legally cognizable prejudice.

PWU argued that the difficulty with OPG's position is that OPG has no legal right, in the context of collective bargaining, to maintain the confidentiality of the information from its union counterparties. Any attempt to do so, when requested from the union, would be bad faith bargaining, contrary to the provisions on the *Ontario Labour Relations Act*.

PWU submitted that as an employer, OPG has the legal obligation to provide this type of information to its unions and the onus is on OPG to demonstrate the prejudice to its legitimate interests that disclosure would cause. The OEB's task in this regard is essentially identical to when it is faced with refusal to provide otherwise relevant information based on a privilege claim. A valid assertion of privilege is a well-recognized socially protected interest, which overrides disclosure obligations. However, that treatment is dependent upon the privilege claim being a valid one – of which it falls to the OEB to determine that validity.

OPG disagreed with PWU's objection. In response, OPG argued that its confidentiality request was not overbroad as the information is consistent with the type of information the OEB previously determined to be labour sensitive and confidential in this proceeding. OPG also noted that PWU's counsel can access the information, by way of Declaration and Undertaking and, as such, there is no prejudice to PWU in treating such information as confidential. OPG also submitted that the OEB has recognized the labour sensitivity associated with information that contains cost estimates underpinning assumptions that depend on or may influence collective bargaining outcomes – to which OPG stated the redacted information pertained.

OPG further disagreed with PWU's submission about how OPG should be required to publicly disclose the information, even if it is labour sensitive. OPG cited the Ontario Labour Relations Board recognizing an employer's right to withhold information where the facts support a determination that such information is appropriately labour relations sensitive and / or commercially sensitive. OPG further submitted that PWU's right to request production from OPG for collective bargaining only applies in the narrow context of collective bargaining where PWU is negotiating terms and conditions of employment on behalf of its members, and only so far as such information pertains to PWU and its members.

OPG also addressed specific interrogatories that PWU claimed were not confidential. OPG noted that certain responses not only contain collective bargaining information, but also commercially sensitive information, including information that discloses aggregated information for OPG's regulated and unregulated assets. OPG also highlighted that some responses contain information related to future employee attrition, a type of

information for which confidential treatment was provided in the 2017-2021 Payment Amounts Proceeding.

## Findings

The OEB approves confidential treatment of the redacted collective bargaining documentation in Table 5, with the exception of SEC-149.

The OEB does not approve the request for confidential treatment of SEC-149 as proposed. The OEB finds that within Table 1, the last three columns with totals shall be made public. The OEB approves confidential treatment of the rest of Table 1 as it provides union-specific information which potentially could be utilized during collective bargaining. The OEB reinforces its April 13, 2021 Decision on Confidentiality that this information be "withheld from such experts or consultants who have not also filed an affidavit with the OEB affirming that they are external to and at arms-length from the PWU and Society, as applicable, and that they are not and will not be involved in any collective bargaining-related activities on behalf of PWU or Society".

For the remaining interrogatory responses in Table 5 related to collective bargaining, the OEB finds that the information could be utilized during collective bargaining. Further, the OEB notes that OPG has filed extensive evidence on its staff resource plans associated with the Pickering shutdown and with its ongoing Darlington Refurbishment Program. The OEB agrees with OPG that the current Custom IR period is a transition period which OPG will need to effectively manage on many fronts, including the impact on human resources, and the release of public information is labour sensitive.

Regarding Society-007, the OEB has also considered the sensitivity of dates associated with end-of-office leases and the potential impact on staff should such information be made public, particularly when OPG's optimization plans are anticipated to result in headcount reductions. As noted above, this information shall be treated as confidential.

*5. Tax Information*

OPG requested confidential treatment of tax information provided in the following interrogatories:

**TABLE 6**

| Exhibit | Attachment No. |
|---|---|
| L-F4-02-Staff-272 | |
| L-F4-02-Staff-272 | Attachment 1 |

OPG stated that the information should be treated as confidential as it relates to Income Tax Returns for 2014, 2015 and 2019 as well as OPG's unregulated businesses. OPG submitted that tax information is regularly afforded confidential treatment by the OEB, as outlined in the *Practice Direction on Confidential Filings*, and referenced the OEB granting confidential treatment, for information of such nature, in this proceeding.[10]

No objection to OPG's confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information related to tax information in Table 6, consistent with the OEB's *Practice Direction on Confidential Filings*, Appendix B.

*6. Combined Regulated and Unregulated Assets and Business of OPG*

OPG requested confidential treatment of information related to the combined regulated and unregulated assets and business of OPG in the following interrogatories:

**TABLE 7**

| Exhibit | Attachment No. |
|---|---|
| L-C1-01-VECC-015 | |
| L-A2-02-CCC-012 | |
| L-F4-03-Staff-276 (page 1) | |
| L-F4-03-AMPCO-176 | Attachment 6 |

OPG submitted that the information should be granted confidential treatment as disclosure of the aggregated information – combined with information regarding the regulated business already disclosed on the record – would allow for information about OPG's unregulated business and facilities to be known.

OPG provided further reasoning for the confidential treatment of the document filed in response to AMPCO-176. OPG submitted that the document contains aggregated information that could disclose amounts relating to the Earnings, OM&A Expenses, Production and Total In-service Capital for OPG's unregulated business. OPG noted that the response to VECC-015 contains the proportion of total revenues generated from regulated assets which, if disclosed, could enable the calculation and disclosure of unregulated revenue amounts. OPG also further submitted that the response to CCC-

[10] Procedural Order No. 1 / February 17, 2021.

012 requires confidential treatment as it contains information which may disclose annual budgets for Enterprise Operations, Enterprise Strategy and Enterprise Projects for OPG's unregulated business while the response to Staff-276 (page 1) contains information which may disclose a forecast of retirements for the unregulated business.

OPG noted that similar requests for confidential treatment of such combined information were accepted by the OEB in this proceeding, the 2017-2021 Payment Amounts Proceeding,[11] and 2014-2015 Payment Amounts Proceeding.[12]

VECC objected to OPG's confidentiality request for the table provided in response to VECC-015 and submitted that OPG be ordered to provide a response on the public record.

VECC clarified that VECC-015 intended to discover whether there has been, or will be, any material change in the proportion of regulated to unregulated business. As OPG seeks a change to its approved capital structure in this proceeding, VECC argued that changes to the proportion of OPG's regulated and unregulated revenues are germane to the issue of the proposed change in capital structure. VECC further submitted that OPG has provided no evidence for how a forecast of the proportion of revenue from regulated and unregulated services could harm either business and noted that the table in VECC-015 is a generalization and does not distinguish between the type of generation.

In response, OPG submitted that the information in VECC-015 discloses the percentage of the total revenue relating to unregulated assets of OPG and that similar information has previously been granted confidential treatment by the OEB – such as the 2017-2021 Payment Amounts Proceeding. OPG also noted that disclosure of its forward-looking unregulated revenues may provide indicative information on the extent of unregulated business plans in a competitive environment, beyond the recently completed investment.

## Findings

The OEB has reviewed the need for confidential treatment of evidence in Table 7 related to the combined regulated and unregulated businesses, within the context of the entire application. The OEB is reserving judgement on the need for confidential treatment of the unregulated business information within these interrogatory responses.

[11] EB-2016-0152 / Decision on Confidential Filings and Procedural Order No. 3 / November 1, 2016.
[12] EB-2013-0321 / Decision and Order on Confidential Filings and Procedural Order No. 4 / March 21, 2014.

The OEB will maintain confidential treatment of this information at this time; however, if any of this information is referenced in a decision, the OEB will consider whether to make this information public to fulfill its transparency obligation but will not do so without providing notice to OPG. In the interim, access to the information is available, in a restricted manner to those that sign the form of Declaration and Undertaking.

7. *Heavy Water Sales Information*

OPG requested confidential treatment of evidence related to heavy water sales information in the following interrogatories:

**TABLE 8**

| Exhibit | Attachment No. |
|---|---|
| L-G2-01-CCC-053 | |
| L-H1-01-AMPCO-178 | Attachment 1 |
| L-I1-01-SEC-159 | Attachment 1 |
| L-A1-02-Staff-002 | Attachment 1 |
| L-G2-01-SEC-153 | Attachment 1 |

OPG submitted that the information be treated as confidential as it relates to OPG's heavy water sales and processing – an unregulated business activity. OPG noted that the document in response to Staff-002 relates to OPG's sales and proceeds from its heavy water sales and processing, and its isotope sales business or aggregate information, that would allow determination of such information. OPG also highlighted that the documents in response to AMPCO-178 and SEC-159 pertain to margins on surplus heavy water sales as part of Nuclear revenues. Information contained in response to CCC-053 details the forecast and actual amounts, with respect to heavy water sales, for the 2017 to 2021 period on sales of surplus heavy water, as part of Nuclear revenues.

Disclosure of such information, as submitted by OPG, would prejudice its competitive position, and interfere with any future negotiations it carries out. OPG also referenced that the confidential nature of this information was previously approved in this proceeding, the 2017-2021 Payment Amounts Proceeding, and 2014-2015 Payment Amounts Proceeding.

No objection to the confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information regarding heavy water sales information in Table 8 as it is specific to one of OPG's unregulated businesses and may be prejudicial to the competitive position of OPG in the business of heavy water sales.

*8. Third Party Rates and Information*

OPG sought confidential treatment of evidence related to third party rates and information in the following interrogatories:

**TABLE 9**

| Exhibit | Attachment No. |
|---|---|
| L-A1-02-CCC-001 | |
| L-A1-02-CCC-001 | Attachment 1 |
| | Attachment 2 |
| | Attachment 6 |
| | Attachment 8 |
| | Attachment 9 |
| L-F4-03-Staff-287 | Attachment 1 |

OPG submitted that the redacted portions contained commercially sensitive third-party information that, if disclosed, could prejudice the economic interest and competitive position of the third parties. OPG also noted that similar information was treated as confidential by the OEB in this proceeding,[13] the 2017-2021 Payment Amounts Proceeding,[14] and 2014-2015 Payment Amounts Proceeding.[15]

No objection to the confidentiality request was filed.

## Findings

The OEB approves the confidential treatment of the redacted information related to third party rates and information in Table 9 as the information is commercially sensitive.

[13] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.
[14] EB-2016-0152 / Decision on Confidential Filings and Procedural Order No. 3 / November 1, 2016.
[15] EB-2013-0321 / Decision and Order on Confidential Filings and Procedural Order No. 4 / March 21, 2014.

*9. Clarington Corporate Campus Information*

OPG requested confidential treatment of information related to the Clarington Corporate Campus in the following interrogatories:

**TABLE 10**

| Exhibit | Attachment No. |
|---|---|
| L-D3-01-SEC-111 (pages 1 and 2) | |
| L-D3-01-Society-009 | |
| L-D3-01-Staff-176 | |
| L-D3-01-Staff-177 | |
| L-A1-02-Staff-002 | Attachment 1 |

OPG submitted that the redacted information is commercially sensitive as it pertains to the total capital costs of the Clarington Corporate Campus Project, as well as the composition of total project costs and project scope for the Clarington Corporate Campus. As the Clarington Corporate Campus Project is yet to be tendered, OPG stated that disclosure of such information could prejudice its competitive position and interfere with negotiations with prospective contractors / other third parties.

OPG highlighted that the information is the same as, or similar, to the information set out in the Planning Phase Clarington Corporate Campus business case summary[16] – which was granted confidential treatment by the OEB in this proceeding.[17]

No objection to the confidentiality request was filed.

**Findings**

The OEB approves confidential treatment of the redacted information related to the Clarington Corporate Campus in Table 10 as the information is commercially sensitive.

*10. Other Responses and Documents that Do Not Fall Within Previous Categories*

OPG requested confidential treatment for information contained in the following interrogatories:

[16] Exhibit D3 / Tab 1 / Schedule 2 / Attachment 2.
[17] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.

**TABLE 11**

| Exhibit | Attachment No. |
|---|---|
| L-D2-01-Staff-120 | |
| L-F2-05-Staff-244 | |
| L-D3-01-SEC-111 | |
| L-D3-01-Society-007 | |
| L-D3-01-Society-012 | |
| L-F3-02-Energy Probe-059 (page 1) | |
| L-A1-02-SEC-011 | Attachment 2 |
| L-A2-02-CCC-015 | Attachment 1 |
| L-D2-02-AMPCO-106 | Attachment 1 |
| L-F4-04-Staff-317 | Attachment 2 |
| L-F4-04-Staff-315 | Attachment 1 |
| L-F4-04-VECC-035 | Attachment 1 |

*i. Staff-315, Attachment 1 and Staff-317, Attachment 2:*

OPG requested that the documents provided as attachments to Staff-315 and Staff-317 be redacted in their entirety as they provide breakdowns of "Other" centrally held costs for Nuclear and OPG. OPG submitted that similar information was granted confidential treatment in its 2014-2015 Payment Amounts Proceeding.[18] No objection to the confidentiality request was filed.

*ii. AMPCO-106, Attachment 1:*

The document filed as an attachment to AMPCO-106 is a conceptual design that contains operating experience relating to a heavy water storage project by Bruce Power. OPG submitted that the information is commercially sensitive to Bruce Power and, thereby, requires confidential treatment. No objection to the confidentiality request was filed.

*iii. Energy Probe-059 (page 1):*

OPG requested page one of Energy Probe-059 be partially redacted as it contains information regarding the annual capital costs from 2020 to 2026 for the Clarington

[18] EB-2013-0321 / Procedural Order No. 6 / April 10, 2014.

Campus. OPG noted that the annual capital costs were included in the Planning Phase Clarington Corporate Campus business case summary which was granted confidential treatment in this proceeding.[19] No objection to the confidentiality request was filed.

*iv. Staff-244:*

Information provided in Staff-244 summarizes the annual value of adjustment for cost (or benefit) sharing between 2012 to 2021. As this information impacts the pricing of OPG's uranium conversion services, OPG submitted that its disclosure would prejudice its competitive position and interfere with any future negotiations. OPG noted that similar pricing information was treated as confidential by the OEB in this proceeding, the 2017-2021 Payment Amounts Proceeding, the 2014-2015 Payment Amounts Proceeding, and the 2011-2012 Payment Amounts Proceeding. No objection to the confidentiality request was filed.

*v. Staff-120:*

Information contained in Staff-120, as submitted by OPG, is commercially sensitive as it relates to an open procurement process. OPG argued that disclosure of such information will prejudice its competitive position and interfere with future negotiations with prospective vendors / other third parties. OPG noted that the confidential nature of this information was approved in this proceeding.[20] No objection to the confidentiality request was filed.

*vi. Society-007:*

OPG submitted that the response contains commercially sensitive information related to the potential sale of an asset of OPG's unregulated business, including the planned timing of such potential sale. As the asset has yet to be offered for sale, OPG stated that disclosure of such information may prejudice its competitive position and interfere with future negotiations with prospective purchasers / other third parties.

SEC objected to OPG's confidentiality request for Society-007 parts (h) and (n), submitting that the date of a potential sale will not harm any future negotiations, and that OPG provided no basis for such claim. OPG disagreed with SEC's objection. OPG argued that public disclosure of the timing for any such potential sale may adversely affect OPG's commercial interests – such as signaling to potential buyers that OPG is a willing seller seeking to enter into a transaction within a discrete timeframe. OPG further

[19] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.
[20] Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021.

submitted that such information may give potential buyers leverage in their negotiations with OPG.

*vii. Society-012 and SEC-111 (page 3):*

OPG stated that the interrogatory responses contain commercially sensitive information related to the expected date of termination for certain office leases as well as OPG's forecasts of annual savings for leases expiring prior to 2026. Disclosure of such information, as stated by OPG, may interfere with any future landlord-tenant lease negotiations.

SEC objected to OPG's confidentiality request for Society-012 part (a), Chart 1. SEC noted that it did not understand OPG's concern as the various landlords would be aware of when OPG could terminate the leases based on the wording of the specific lease agreements. It was therefore unclear to SEC as to how the information could be commercially sensitive. In response, OPG clarified that it may engage certain landlords to negotiate new lease termination dates, which may be different from the termination dates set out in the existing lease agreements – making the information commercially sensitive. OPG noted that as it has yet to commence such negotiations, disclosure of the desired termination dates may prejudice its commercial position in the negotiations.

*viii. VECC-035, Attachment 1:*

The document provided in response to VECC-035 was redacted in its entirety as OPG stated it contains commercially sensitive information regarding its insurance policies, including expected increases in insurance costs. OPG submitted that disclosure of such information would interfere with negotiations related to its upcoming policy renewal(s). No objection to the confidentiality request was filed.

*ix. CCC-015, Attachment 1:*

Information in the document filed in response to CCC-015 contains details reflecting the combined regulated and unregulated assets and business of OPG. OPG submitted that disclosure of the aggregated information – combined with information regarding the regulated business already disclosed – would allow for disclosure of information related to the unregulated business and facilities. OPG noted that similar requests for confidential treatment of combined information were accepted by the OEB in this proceeding, the 2017-2021 Payment Amounts Proceeding, and 2014-2015 Payment Amounts Proceeding. No objection to the confidentiality request was filed.

*x. SEC-011, Attachment 2:*

OPG requested confidential treatment of information contained in the document as it pertains to internal audit findings regarding OPG's cybersecurity systems and the security of OPG's certain facilities. OPG submitted that disclosure of such information could pose a potential threat to OPG's cybersecurity systems and the security of OPG's facilities. No objection to the confidentiality request was filed.

## Findings

The OEB approves confidential treatment of the redacted information in Table 11 as the information is consistent with the *Practice Direction on Confidential Filings*, Appendix A and Appendix B.

Regarding Society-007, the OEB has addressed the scope of this matter as it relates to OPG's application and amended the issues list accordingly.

## THE ONTARIO ENERGY BOARD THEREFORE ORDERS THAT:

1. Subject to the exceptions and limitations described in the findings above, OPG's request for confidential treatment is granted. OPG shall provide individuals that have signed and filed a Declaration and Undertaking with the non-redacted, confidential versions of the documents described above for which confidential treatment has been granted, in accordance with the findings above (except in order to have access to the collective bargaining documentation, individuals acting as external consultants to the PWU or the Society of United Professionals must also sign and file an affidavit of the type described herein).

2. OPG shall refile a revised public version of the following documents: (a) SEC-149; (b) AMPCO-079, Attachment 41; and (c) AMPCO-115, Attachment 1.

3. OPG's request for permanent redactions, as described in the findings above, is granted.

**DATED** at Toronto, **June 8, 2021**

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long
Registrar

# TAB10

## Practice and Procedure Before Administrative Tribunals Appendix WP § WP:303



---

# § WP:303. NATURAL JUSTICE

*See also* AUDI ALTERAM PARTEM

DUTY TO ACT FAIRLY

FAIR HEARING

FAIRNESS

FUNDAMENTAL JUSTICE

NATURAL JUSTICE

NEMO JUDEX IN CAUSA SUA DEBE ESSE

PRINCIPLES OF FUNDAMENTAL JUSTICE

RULES OF NATURAL JUSTICE

**(Can.)** The two “fundamentally universally recognized principles” of natural justice are: “first, that no man be condemned under *(audi alteram partem)*, and second, that no man be judged in his own cause *(nemo judex in sua causa).”* (Dussault and Borgeat, *Administrative Law: Atrius* (2nd ed.) (1990), vol. 4 at pp. 244-45; quoted per L'Hereux-Dube, J. at p. 838 of instant case.)

*C.U.P.E. v. Montreal (Ville)*, [1997] 1 S.C.R. 793.

**(Can.)** “The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In *Blackstone's Criminal Practice*, revised ed. by Peter Murphy (London: Blackstone Press, 1993), the author's remark at p. 1529: ‘Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles—no man may be a judge in his own cause, and the tribunal must hear both sides of the case.’” (Per L'Heureux-Dubé J. at pp. 436-7.)

*R. v. Behariell* (1995), 130 D.L.R. (4th) 422 (S.C.C.).

**(Can.)** “One of the best explanations of natural justice as set out in s. 80(a) [of the Unemployment Insurance Act] is contained in CUB-8345 *(Re David Dyck)*.... (A)t p. 4, [Smith, J.] wrote as follows: ‘The principle of natural justice in the context of this paragraph is related to the jurisdiction of the Board in the conduct of this case. It signifies the great principles of justice that are designed to ensure that the person whose conduct is being inquired into will be dealt with fairly. [They afford to] such a person the right to know what is alleged against him, the right to have reasonable notice of the date and place of the meeting at which the matter will be heard, the right to attend the meeting and be represented by someone of his choice, the right of a full opportunity to present his side of the case, including the right to

answer any allegations against him, and the right to have the matter determined by an impartial tribunal that is not prejudiced against him and has no bias against him'" (at pp. 4-5 of instant case).

*Re Draho* (1994), CUB-23946 (Can. Unemployment Insurance Comm.); *Dundas, Re* (1987), CUB-12316 (Can. Unemployment Insurance Comm.).

**(Can.)** Per Pratte, J.A.: "The expression 'principles of natural justice' means the fundamental rules of procedure which all who are required to make quasi-judicial, and in many cases administrative decisions, must observe" (at pp. 6-7).

*Re Granger* (1992), CUB-10909 (Can. Unemployment Insurance Comm.).

**(Can.)** "De Smiths's *Judicial Review of Administrative Actions*, 4th ed., gives the following succinct definition of natural justice at p. 248: 'Natural justice is said to demand not only that those whose interests may be directly affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial'" (at p. 4).

*Re Kaasgard* (1988), CUB-14677 (Can. Unemployment Insurance Comm.).

**(Can.)** ... the board could not properly decide the impact of the smoke upon the health of the applicant by relying simply on the description he gave of his reaction to tobacco smoke. That evidence might not have told the full story. The physician and the allergist, with their special skills and knowledge, might have added a dimension of critical importance. By refusing to hear their evidence the board denied the applicant natural justice. The fact that such evidence might not have assisted the applicant was not a valid reason for refusing to hear it.

*Timpauer v. Air Canada* (1986), 27 D.L.R. (4th) 75, 65 N.R. 352, 18 Admin. L.R. 192, 11 C.C.E.L. 81, [1986] 1 F.C. 453, 1986 CarswellNat 201, 1986 CarswellNat 668, [1985] F.C.J. No. 184 (Fed. C.A.).

**(Can.)** There is nothing before me that suggests that the Chairman of either Board did not act properly and in accordance with the provisions of section 95 and section 96 [of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48]. I therefore assume that neither Chairman formed an opinion that the case before him involved an important principle or other special circumstances by reason of which leave to appeal ought to be granted. In these circumstances I find it difficult to conceive that the rules of natural justice concerning a fair hearing require that a person who has had a fair hearing at one appeal (where his appeal was unanimously dismissed) should have an inherent right to a further appeal.

*Marchak v. Canada (Attorney General)* (1979), 102 D.L.R. (3d) 745, [1980] 1 F.C. 3, 1979 CarswellNat 82, 1979 CarswellNat 82F (Fed. T.D.).

**(Alta.)** "All that is required [for compliance with the rules of natural justice] is that the parties must know the case being made by the opposing side and be given an opportunity to reply; they must be given a fair opportunity to correct or controvert any relevant and prejudicial statement." (At p. 317 [Alta. L.R. (3d)].) A refusal to permit cross-examination is not a violation of natural justice if equally effective methods of response are available.

*Emery v. Alberta (Workers' Compensation Board Appeals Commission)*, 91 Alta. L.R. (3d) 311, 2000 ABQB 704, 274 A.R. 331, 2000 CarswellAlta 1119 (Alta. Q.B.).

**(B.C.)** Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. It does not mean that the Director [of Employment Standards]'s delegate must arrive at a conclusion the appellant considers just and fair.

*Nosheen Asad (Re)* (2018), 2018 BCEST 76, 2018 CarswellBC 2174 (B.C. Empl. Stnds. Trib.) at para. 22 Roberts (Member))

**(B.C.)** Natural justice does not equate with what one party feels is a "fair

resolution" to the complaint. Rather, it is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

*0896022 B.C. Ltd., Re* (2016), 2016 CarswellBC 2711 (B.C. Empl. Stnds. Trib.).

**(B.C.)** Natural justice does not mean that the delegate accepts one party's notion of "fairness". Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

*Khan, Re* (2016), 2016 CarswellBC 1224 (B.C. Empl. Stnds. Trib.).

**(B.C.)** Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

*Nath Investment Group Ltd., Re* (2016), 2016 CarswellBC 566 (B.C. Empl. Stnds. Trib.).

**(B.C.)** Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

*Onison (Canada) Corp., Re* (2016), 2016 CarswellBC 199 (B.C. Empl. Stnds. Trib.).

**(B.C.)** The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker who provides a cogent explanation or reasons, for the Determination. Natural justice does not mean that the

delegate accepts one party's notion of “fairness”.

*Efilcon Consulting Tech Ltd., Re* (2016), 2016 CarswellBC 3754 (B.C. Empl. Stnds. Trib.).

**(N.B.)** “The old concept of ‘natural justice’ and its two main components, the right to be heard and the right to a hearing from an unbiased tribunal, is giving way to a doctrine of procedural fairness which incorporates and extends the former boundaries of natural justice. In the course of any such transition there are bound to be divergences and false starts.... [T]he cases now say that procedural fairness must apply to the exercise of power by statutory and non-statutory tribunals alike, the extent of the court's review depending on the consequences which result from the tribunal's exercise of power.” (Per Hoyt, J.A. at p. 84).

*Wark v. Green* (1985), 66 N.B.R. (2d) 77 (C.A.).

**(N.B.)** Natural justice requires that “fair play” be afforded all parties. It can hardly be said that fair play has been afforded a party who has not been given an opportunity to be heard by the body that issues the order affecting his rights.

*Buggie v. Moncton (City)* (1984), [1984] A.N.B. No. 285, [1984] N.B.J. No. 285, 14 D.L.R. (4th) 100, 6 C.H.R.R. D/2469, 148 A.P.R. 211, 57 N.B.R. (2d) 211, 84 C.L.L.C. 17,023, 1984 CarswellNB 257 (N.B. Q.B.).

**(Nfld.)** “... (T)here are two principles at work in affording natural justice to participants in a tribunal process: the right to be adjudged by an adjudicator who is disinterested and unbiased *(nemo judex in sua causa)* and the right to be given adequate notice and the opportunity to be heard *(audi alteram partem).”* Per Handrigan, J. at p. 134 [Admin. L.R. (3d)]

*Royal Newfoundland Constabulary Chief of Police v. Royal Newfoundland Constabulary Public Complaints Commissioner* (2001), 35 Admin. L.R. (3d) 122, 2001 CarswellNfld 161, 202 Nfld. & P.E.I.R. 1, 608 A.P.R. 1 (Nfld. T.D.).

**(N.W.T.)** “There is no comprehensive list of what constitutes the principles of natural justice. Generally speaking, they can be placed under the general rubric of fairness. The Supreme Court of Canada has said in recent times that all tribunals have a duty of fairness but the extent of that duty will depend on the nature and function of the particular tribunal. Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case and not on some classification such as quasi-judicial … so the mere reference to principles of natural justice does not either predetermine all that must be done nor whether what is done is subject to judicial review.” (Per Vertes, J. at p. 317 [Admin. L.R. (3d)].)

*Morin v. Crawford* (1999), 14 Admin. L.R. (3d) 287, 29 C.P.C. (4th) 362 (N.W.T. S.C.).

**(N.W.T.)** “Traditionally there are two broad ‘principles of natural justice’. First, an adjudicator must be disinterested and unbiased *(nemo judex in causa sua);* second, the parties must be given an opportunity to be heard *(audi alteram partem).* These broad principles have been delineated further into specific aspects of procedural fairness: the right to notice, to disclosure of all information in the possession of the adjudicator that has a bearing on the decision, to particulars of the allegations, to present evidence, to cross-examine witnesses, to open and public proceedings, to know the reasons for the decision, to have a disinterested and unbiased adjudicator, and the right to be represented by counsel.” (Per Vertes, J. at pp. 324-5.)

*Groenewegen v. Northwest Territories (Speaker of Legislative Assembly)* (1998), 23 C.P.C. (4th) 314 (N.W.T. S.C.).

**(N.S.)** “Natural justice is not a difficult or complicated concept. In *Reid and David, Administrative Law and Practice*, 2nd ed., the authors state at p. 213, ‘Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more’” (Per Clarke, C.J.N.S. at p. 334).

*Municipal Contracting Ltd. v. I.U.O.E. Local 721* (1989), 60 D.L.R. (4th) 323 (N.S. C.A.); *White v. Nova Scotia (Registrar of Motor Vehicles)* (1996), 20 M.V.R. (3d) 192 (N.S. S.C.) at p. 211.

**(N.S.)** ... "natural justice" means simply "fair play" or "fair play in action". The reference here is to the decision of Cooper J.A. in *Re R.D.R. Construction Ltd. and Rent Review Comm.* (1982), 55 N.S.R. (2d) 71 at 81 ... (N.S. C.A.) and to a decision of Morrison J.A. in *W.C.B. (N.S.) v. Cape Breton Dev. Corp.* (1984), 62 N.S.R. (2d) 127 ... (N.S. C.A.) at 135.

*Nova Scotia Michelin Tire Employees' Union, Local 1699 v. Nova Scotia (Labour Relations Board)* (1985), 20 Admin. L.R. 229, 86 C.L.L.C. 14,009, 163 A.P.R. 316, 69 N.S.R. (2d) 316, 1985 CarswellNS 137 (N.S. T.D.).

**(Ont.)** "The content of the concept of natural justice varies with the tribunal and the circumstances. Most importantly, a refusal to allow cross-examination is not necessarily a denial of natural justice ... it is where the refusal of cross-examination interferes with the ability of a party to address key issues or essential elements of its case that the courts have found a denial of fairness or natural justice by an administrative tribunal." (Per Swinton, J. at p. 240.)

*National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230 (Ont. S.C.J.).

**(Ont.)** "The jurisprudence of this Court has made it clear that the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with and the statutory provisions under which the tribunal is acting ...". (Per Sopinka, J. dissenting at p. 787.)

*Telecommunications Workers Union v. Canada (Radio-Television & Telecommunications Commission)*, [1995] 2 S.C.R. 781.

**(Ont.)** ... "natural justice" requires that, in determining matters of procedure which lie within the exclusive jurisdiction of the arbitrator, all

necessary steps must be taken to allow the parties the opportunity to present their case and to be given a full and fair hearing.

*Stelco Inc., Hilton Works v. U.S.W.A., Local 1005* (1988), 2 L.A.C. (4th) 219 at 223 (Ont. Arb. Bd.).

**(Ont.)** The rules of natural justice require that a person in the position of a solicitor be assured: (a) the right to adequate notice and a fair hearing; (b) that the tribunal be free of bias or reasonable apprehension of bias.

*Emerson v. Law Society of Upper Canada* (1984), 1984 CarswellOnt 337, 44 O.R. (2d) 729, 5 D.L.R. (4th) 294, 41 C.P.C. 7 (Ont. H.C.).

**(Ont.)** The concept of natural justice is an elastic one, that can and should defy precise definition. The application of the principle must vary with the circumstances. How much or how little is encompassed by the term will depend on many factors; to name a few, the nature of the hearing, the nature of the tribunal presiding, the scope and effect of the ruling made.

In some instances the denial of a right to cross-examine may well, in itself, constitute a denial of natural justice. In other situations a restricting or limiting of cross-examination on some aspect or topic could never offend the innate considerations of fairness which comprise the “natural justice” concept.

*U.S.W.A. v. Radio Shack* (1979), 1979 CarswellOnt 909, 79 C.L.L.C. 14,216, 102 D.L.R. (3d) 126, 26 O.R. (2d) 68 (Ont. Div. Ct.).

**(Sask.)** “Natural justice” connotes the requirement that administrative tribunals, like courts, when reaching a decision, must do so with procedural fairness. Procedural fairness relates to fairness between the parties and before the Board. Natural justice is “the basic requirement of procedure that one who judges is neither interested nor biased” and “that the parties have enough notice and the chance to be heard” [in S.A. DeSmith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens 1980) at 77

and 156].

> Natural justice is comprised of two fundamental principles: audi alteram partem — that a person must know the case being made against him/her and be given an opportunity to answer it … and nemo judez in sua causa debet esse — the rule against bias … (p. 204 *Principles of Administrative Law*, Jones De Villars).
>
> The principle audi alteram partem is an imperative, which translated means “hear to other side”. More generally, it refers to the requirement in administrative law that a person must know the case being made against him/her and be able to answer it before the tribunal or agency will make a decision. “Fair hearing” is defined as “the opportunity to fully answer and defend, adequately to state one's case” in the *Dictionary of Canadian Law.* The concept of “fair hearing” connotes fairness between the parties or litigants.
>
> Generally, fair hearing refers to a process of fairness, openness and impartiality. Fair hearing requires notice of the hearing, knowing the case to be met, disclosure, the opportunity to present the other side, the right of reply and the right to cross-examine. (Per Dawson J. at para. 51, 52, 53, 54.)
>
> *Blass v. U.R.F.A.* (2007), 2007 CarswellSask 811, 76 Admin. L.R. (4th) 262, 2007 SKQB 470, [2007] S.J. No. 649 (Sask. Q.B.).

**(Sask.)** [Martland C.J.C. quoted from a previous judgment of Lord Morris of Borth-y-Gest in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*[1979] 1 S.C.R. 311 at 355*Furnell v. Whangarei High Schools Board*[1973] A.C. 660 (N.Z. P.C.) as follows]:

… the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules … Natural justice is but fairness writ large and juridically. It has been described as “fair play in action” … the requirements of natural justice must depend on the circumstance of each

particular case and the subject matter under consideration.

*Barrett v. Northern Lights School Division No. 113* (1988), 20 C.C.E.L. 69, 1988 CarswellSask 265, [1988] 3 W.W.R. 500, 64 Sask. R. 81, 49 D.L.R. (4th) 536 (Sask. C.A.).

**(Sask.)** According to the well known passage from *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 (P.C.) at p. 679: "Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'", (quoted by Dickson, J. in *Martineau v. Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353, [1980] 1 S.C.R. 602. The basic tenet of "natural justice" is that if one's rights are affected by the action of an administrative tribunal, one is entitled to a fair hearing. The concept of "natural justice" is broad enough to encompass principles that, in other contexts, have been termed abuse of discretion or abuse of process because of delay or related matters.

*Misra v. College of Physicians & Surgeons (Saskatchewan)* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.).



**End of Document**

# TAB11

Federal Court of Appeal | Cour d'appel fédérale

**Date: 20180830**

**Dockets: A-78-17 (lead file); A-217-16; A-218-16;
A-223-16; A-224-16; A-225-16; A-232-16;
A-68-17; A-74-17; A-75-17;
A-76-17; A-77-17; A-84-17; A-86-17**

**Citation: 2018 FCA 153**



**CORAM:** **DAWSON J.A.**
**DE MONTIGNY J.A.**
**WOODS J.A.**

**BETWEEN:**

**TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and
TRANS MOUNTAIN PIPELINE ULC**

**Respondents**

**and**

**ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA**

**Interveners**



Heard at Vancouver, British Columbia, on October 2-5, 10, 12-13, 2017.

Judgment delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

Project "is in the present and future public convenience and necessity, and in the Canadian public interest". In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.



(vii) Trans Mountain's reply evidence

[316] At paragraph 71 of its memorandum of fact and law, Tsleil-Waututh makes the bare assertion that the Board "permitted [Trans Mountain] to file improper reply evidence". While Tsleil-Waututh referenced in a footnote its motion record filed in response to Trans Mountain's reply evidence, it did not make any submissions on how the Board erred or how the reply evidence was improper. Nor did Tsleil-Waututh reference the Board's reasons issued in response to its motion.

[317] Tsleil-Waututh argued before the Board that, rather than testing Tsleil-Waututh's evidence through Information Requests, Trans Mountain filed extensive new or supplementary evidence in reply. Tsleil-Waututh alleged that the reply evidence was substantially improper in nature. Tsleil-Waututh sought an order striking portions of Trans Mountain's reply evidence. In the alternative Tsleil-Waututh sought, among other relief, an order allowing it to issue Information Requests to Trans Mountain about its reply evidence and allowing it to file sur-reply evidence.

[318] The Board, in Ruling No. 96, found that Trans Mountain's reply evidence was not improper. In response to the objections raised before it, the Board found that:

- Trans Mountain's reply evidence was not evidence that Trans Mountain ought to have brought forward as evidence-in-chief in order to meet its onus.
- Trans Mountain's reply evidence was filed in response to new evidence adduced by the interveners.
- Given the large volume of evidence filed by the interveners, the length of Trans Mountain's reply evidence was not a sufficient basis on which to find it to be improper.
- To the extent that portions of the reply evidence repeated evidence already presented, this caused no prejudice to the interveners who had already had an opportunity to test the evidence and respond to it.

[319] The Board allowed Tsleil-Waututh to test the reply evidence through one round of Information Requests. The Board noted that the final argument stage was the appropriate stage for interveners and Trans Mountain to make submissions to the Board about the weight to be given to the evidence.

[320] Tsleil-Waututh has not demonstrated any procedural unfairness arising from the Board's dismissal of its motion to strike portions of Trans Mountain's reply evidence.

(viii) Conclusion on procedural fairness

[321] For all the above reasons the applicants have not demonstrated that the Board breached any duty of procedural fairness.

# TAB12

# *Tomagatick v. Ontario (Ministry of the Environment), [2009] O.E.R.T.D. No. 3*

Ontario Environmental Review Tribunal Decisions

Ontario Environmental Review Tribunal

Marcia A. Valiante, Member

Heard: By written submissions.

Decision: January 15, 2009.

Case Nos. 08-095, 08-097, 08-098, 08-099, 08-100 and

08-101

**[2009] O.E.R.T.D. No. 3**

IN THE MATTER OF an application for Leave to Appeal by Emelda, Clara, John and Francious Tomagatick, and Theresa Okitigo pursuant to section 38 of the Environmental Bill of Rights, 1993, S.O. 1993, c. 28, as amended, with respect to a decision of the Director, Ministry of the Environment, under section 34 of the Ontario Water Resources Act, to issue Permit to Take Water No. 8718-7JZGMJ, dated October 3, 2008, to De Beers Canada Inc. for water taking from Victor Open Pit Well Field located 90 km West of Attawapiskat, in the unsurveyed Territory (Timmins District Office), in the District of Kenora, Ontario; and IN THE MATTER OF a written Hearing

(57 paras.)

## Case Summary

For a list of parties and presenter in this matter, please see the Appendix.

## Appearances

Ramani Nadarajah and Joseph F. Castrilli - Counsel for the Applicants, Emelda and Clara Tomagatick.

Isabelle M. O'Connor - Counsel for the Director, Ministry of the Environment.

Robert Mansell - Counsel for the Instrument Holder, De Beers Canada Inc.

Michael J. McDonald - Counsel for the Attawapiskat First Nation.

---

**Reasons for Decision**

**Background:**

**1** This application is brought by Emelda and Clara Tomagatick (the "Applicants") for Leave to Appeal under section 38 of the *Environmental Bill of Rights* ("*EBR*") the issuance of Amended Permit to Take

Water (Groundwater), No. 8718-7JZGMJ (the "PTTW"), to De Beers Canada Inc. ("De Beers") on October 3, 2008 by Patrick Morash, Director, Ministry of the Environment ("MOE"), under section 34 of the *Ontario Water Resources Act* ("*OWRA*"). The PTTW authorizes the taking of water from the Victor Open Pit Well Field 90 km west of Attawapiskat, in Unsurveyed Territory (Timmins District Office), in the District of Kenora.

**2** The PTTW is necessary for the operation of De Beers' Victor Diamond Mine (the "Mine"). Exploration activities at the site began in 1999 and commissioning of operations commenced in December of 2007. The Mine was formally opened on July 26, 2008 and achieved commercial production as of August 1, 2008.

**3** The Mine project was subject to an environmental assessment under the *Canadian Environmental Assessment Act*. A Comprehensive Study Environmental Assessment Report was submitted by De Beers in March of 2004. A Comprehensive Study Report was completed in 2005 and on August 19, 2005, the federal Minister of the Environment announced that further assessment of the project was not required, referring the project back to the responsible authorities for appropriate action.

**4** De Beers also required numerous provincial approvals for construction and operation of the Mine. Several PTTWs and Certificates of Approval were applied for, reviewed and issued during the construction phase. In June of 2007, De Beers applied to the MOE for a PTTW and a Certificate of Approval under section 53 of the *OWRA* to allow full-scale well field dewatering and discharge of the water, respectively. PTTW 5607-78CL4V was issued to De Beers on November 26, 2007 and authorized the dewatering of the mine site at the rate of 60,000 m3/day until June 30, 2008. Conditions required De Beers to conduct further monitoring, modelling, assessment and reporting. Certificate of Approval 8700-783LPK was issued to De Beers on December 11, 2007, authorizing the discharge of this water to the Attawapiskat River.

**5** On April 8, 2008, De Beers applied for amendments to the PTTW and the Certificate of Approval. De Beers sought approval for an increase in the amount of water being taken, up to the rate of 150,000 m3/day, for a period of 10 years, and a Certificate of Approval to allow the discharge of this water to the Attawapiskat River. In May 2008, the MOE posted a notice on the *EBR* Registry regarding the applications, allowing a 45-day comment period. Three comments were received by the MOE during this period, but no comments were received from the Applicants.

**6** On October 3, 2008, the Director issued the amended PTTW authorizing De Beers to pump up to 150,000 m3/day for five years, subject to a number of conditions. At the same time, an amended Certificate of Approval was issued authorizing the discharge of the pumped water to the Attiwapiskat River, also subject to numerous conditions.

**7** On October 15, 2008, the Tribunal received a letter from the Tomagatick Family indicating their wish to appeal the amended PTTW. Because of the complexity of the process and their need to secure assistance with the application, the Family requested and was provided an extension to allow them to submit documents in support of their application for Leave to Appeal. The Family secured legal representation and their documents were submitted on November 17, 2008. Counsel for the MOE and De Beers sought and were provided with extensions, to December 9, 2008. Their documents were received on that date.

**8** The application for Leave to Appeal was originally brought on behalf of the Tomagatick Family, however, it has been clarified that the Applicants are Emelda ("Emily") Tomagatick, and her daughter,

Clara Tomagatick. As a result of this clarification, the Tribunal is closing its files relating to the other members of the Tomagatick family (Case Nos. 08-098 to 08-101).

**9** Emily Tomagatick is an Elder of the Attawapiskat First Nation (the "First Nation") who lives on the First Nation's reserve with her extended family. The family has a trap line and camp on lands adjacent to the Nayshkootayaow River, near the Mine site, and regularly fishes in the Nayshkootayaow River.

**10** On December 8, 2008, the Tribunal received a letter from the Chief of the First Nation in support of the Director and De Beers' position opposing Leave to Appeal. The Tribunal wrote back to the Chief on December 11, 2008 saying that it was not able to consider the letter unless the First Nation had status in the Hearing. On December 15, 2008, the First Nation formally requested Presenter status in the Hearing of the application for Leave to Appeal. On December 17, 2008 submissions in support of this request were received from De Beers and the Director and in opposition to this request from the Applicants. A further submission responding to the Applicants' submissions was received from Counsel for the First Nation on December 18, 2008. In the meantime, the Applicants filed Reply and supporting documentation on December 12, 2008. On December 16, 2008, the Tribunal received a letter from Counsel for the Director asking that certain paragraphs of the Applicants' Reply be expunged. The Tribunal responded on December 17, 2008 asking that this request be put in motion form and that submissions be made by all Parties with respect to the issue. The Director's submissions were received on December 19, 2008, De Beer's submissions on December 23, 2008 and the Applicants' submissions on December 29, 2008. Reply submissions were filed by the Director on January 2, 2009.

**Issues:**

**11**

1. Whether the Attawapiskat First Nation should be granted Presenter status in the Hearing of the application for Leave to Appeal.
2. Whether paragraphs 11-22, 27-34, 44-50 and 62-66 and corresponding supporting documents in the Applicants' Reply should be expunged.

**Discussion and Analysis:**

**Issue #1: Whether the Attawapiskat First Nation should be granted Presenter status in the Hearing of the application for Leave to Appeal.**

**Relevant Rule:**

**12** Rules of Practice of the Environmental Review Tribunal:

> 60. The Tribunal may name persons to be Presenters in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Presenter to a proceeding is not a Party to the proceeding and may not raise grounds not already raised by a Party. In deciding whether to name a person as a Presenter, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

**13** The Attawapiskat First Nation requests Presenter status in order to have the Tribunal consider the information provided in its letter of December 8, 2008. The elected Chief and Council of the First Nation submit that they are the official representatives of the First Nation and as such are stewards of its territories and holders of Aboriginal Rights in those territories. The Mine is located on Attawapiskat territories, and some 119 members of the First Nation are employed at the Mine. Thus, the First Nation argues it is directly affected by the operation of the Mine and will experience direct economic, social and environmental impacts if operation of the Mine ceases in the event the application for Leave to Appeal is successful. The First Nation submits that it has been involved in all aspects of the review of the Mine project. In November 2005, it completed negotiation of a comprehensive Impact and Benefits Agreement with De Beers, agreeing to detailed terms regarding the development, construction, operation and closure of the Mine. It is submitted that funding provided by De Beers allowed the First Nation to hire legal, financial and environmental consultants to provide expert advice on the Mine and its proposed operations. In summary, the First Nation asserts that it has a unique and important perspective on the Mine and its development, it is directly affected by the outcome, and it can make a relevant contribution to the Tribunal's understanding of the issues.

**14** De Beers supports the First Nation's request for Presenter status, asserting that it meets, and even exceeds the criteria. De Beers asserts that the First Nation and its members are directly affected by the Mine and by how, and whether, it operates. The First Nation can provide evidence to the Tribunal with respect to relevant issues, including the issues of consultation and compensation raised by the Applicants in their October 15, 2008 letter applying for Leave to Appeal. In addition, the First Nation can provide evidence regarding community support for the Mine, an issue raised by the Applicants.

**15** The Director supports the First Nation's request for Presenter status, asserting that the First Nation would meet the criteria for Party status under Rule 54 because it is directly affected by the outcome of the hearing, it has a genuine interest in the subject matter, and, because of its extensive prior involvement, it is likely to make a relevant contribution to the Tribunal's understanding of the issues.

**16** The Applicants oppose the First Nation's request for Presenter status, on several grounds. The Applicants argue that granting Presenter status is not appropriate at this stage of the proceedings. They argue that Presenter status would more appropriately be granted at the hearing of the appeal, should leave be granted, because at the leave stage the Applicants are not able to directly question or challenge the accuracy of statements made in the December 8, 2008 letter. Further it would provide an opportunity for other members of the First Nation to make presentations on the PTTW. In addition, the Applicants argue that the December 8, 2008 letter does not address the "central issue" that the Tribunal must decide. In other words, the Applicants submit that the First Nation's letter does not address itself to the question of whether the statutory test for granting leave is met, but deals with issues beyond the Tribunal's jurisdiction at this stage. The Applicants further submit that if the Tribunal grants Presenter status to the First Nation, the Tribunal should be aware of the concerns of some members of the First Nation, supported by other First Nations in the region, about the adequacy of the Impact and Benefits Agreement.

**17** In response, the First Nation submits that the language of Rule 60 of the Tribunal's Rules of Practice and the practice of the Tribunal supports the granting of Presenter status at the Leave to Appeal stage of a proceeding. In addition, the First Nation asserts that it has a direct and genuine interest in the outcome and the December 8, 2008 letter addresses issues relevant to issues to be decided by the Tribunal at this stage of proceedings.

**Findings on Issue #1:**

**18** The Tribunal has held in previous cases that it has the authority to grant Party, Participant or Presenter status in Leave to Appeal application hearings, although requests are rare. (*Haldimand Against Landfill Transfers v. Ontario (MOE),* [2005] O.E.R.T.D. No. 29; *Marshall v. Ontario (MOE)*, (2008), 38 C.E.L.R. (3d) 291 (Ont. Env. Rev. Trib.)). Rule 60 specifically provides that the Tribunal may name persons as Presenters "in all or part of a proceeding ...," and a proceeding includes a hearing on a Leave to Appeal application. Allowing a person to participate as a Presenter in a Leave to Appeal hearing, in appropriate circumstances, is also consistent with several of the purposes of the Rules, in particular providing a fair process and assisting the Tribunal in fulfilling its statutory mandate.

**19** The matters to be considered in deciding whether to grant Presenter status include those relevant to the granting of Party status, found in Rule 54, that is, whether:

(a) a person's interests may be directly and substantially affected by the Hearing or its result;

(b) a person has a genuine interest, whether public or private, in the subject matter of the proceeding; and

(c) a person is likely to make a relevant contribution to he Tribunal's understanding of the issues in the proceeding.

**20** A person seeking Party status need not satisfy all three criteria, and even though a person does satisfy one or more of these criteria, the Tribunal retains discretion over whether to add a person as a Party. (*Stericycle Inc. v. Ontario (Ministry of the Environment),* [2006] O.E.R.T.D. No. 21.).

**21** Similar considerations apply to the granting of Participant or Presenter status. A Presenter, however, may not raise grounds not already raised by a Party. Matters raised by a Presenter must be relevant to the decision of the Tribunal on a leave application. This would include the "central questions" of the statutory test set out in section 41 of the *EBR*. In addition, if leave is granted, because there is an automatic stay of the decision being appealed, the implications of a stay are also relevant considerations at this stage of the proceedings (*Marshall, supra*).

**22** There is no requirement that a Presenter explicitly address the statutory criteria for Leave to Appeal. Rather, so long as evidence is provided that is relevant to those criteria, and does not merely repeat the evidence already before the Tribunal, that is sufficient for a Presenter to be of assistance to the Tribunal in understanding and evaluating those criteria in light of the specific facts. A Presenter can assist the Tribunal by providing a fuller understanding of the background facts and correcting statements of the Parties.

**23** The Tribunal finds that the First Nation has interests that may be "directly and substantially affected by the Hearing or its result" and it has a "genuine interest ... in the subject matter of the proceeding." The First Nation's interest in the proceedings was neither disputed nor conceded by the Applicants, who instead focused their primary objection on whether the evidence provided by the First Nation was relevant to the issues requiring decision in a Leave to Appeal application.

**24** The key issue then is whether the First Nation's submissions are likely to make a relevant contribution to the Tribunal's understanding of the issues, whether they raise new grounds not already raised by one of the Parties, or whether they merely repeat submissions made by others. The December

8, 2008 letter from the First Nation raises several issues that directly respond to evidence submitted by the Applicants, including reference to studies undertaken and collaborative efforts designed to address the environmental issues raised by the Applicants. In addition, the letter addresses the potential impacts on the community if leave is granted and a stay of the PTTW thereby comes into effect. Even though the First Nation's letter does not explicitly address the statutory criteria for Leave to Appeal, it does address matters relevant to the very issues that must be decided, in particular the reasonableness of the Director's decision and the resulting harm to the environment. The Tribunal does not find that all issues raised in the December 8, 2008 letter are necessarily relevant to the decision the Tribunal must make on Leave to Appeal, however, relevant issues are raised therein.

**25** The Applicants argue that Presenter status should not be granted to the First Nation because there is no opportunity to challenge the accuracy of some of the statements made in its December 8, 2008 letter. The Tribunal finds that this is not a sufficient ground for denying Presenter status to the First Nation. All of the Parties are in the same position with respect to the difficulty of challenging statements made by other Parties because a leave to appeal hearing is conducted entirely in writing. However, there has been opportunity for each of the Parties to challenge the evidence and arguments of the other Parties through their written submissions. In fact, the Applicants' Counsel filed a letter with the Tribunal on December 10, 2008 setting out what they considered to be the specific errors and misunderstandings in the December 8, 2008 letter from the First Nation.

**26** The Applicants' wish to allow an equal opportunity for other, unnamed, members of the First Nation to make their own presentations to the Tribunal is not a sufficient ground for denying Presenter status at this stage to the First Nation. There is no unfairness that would result. The Applicants themselves are members of the First Nation who are raising concerns about the adequacy of the Director's decision to issue the PTTW. If leave is granted, and other members of the First Nation or other First Nations have relevant contributions to make to the determination of the appeal, they are free to seek status at that stage.

**27** For these reasons, the Tribunal finds that the First Nation should be granted Presenter status in the Hearing of the application for Leave to Appeal.

**Issue #2: Whether paragraphs 11-22, 27-34, 44-50 and 62-66 and corresponding supporting documents in the Applicants' Reply should be expunged.**

**Relevant Rule:**

**28**

> 47. An Applicant may file a reply to the response of the Director or Instrument-holder no later than three days from the date the response is filed.

**(a) The general nature of reply**

**29** The Director argues that portions of the Reply filed by the Applicants are not in accordance with Rule 47 and the common law understanding of the nature of reply evidence. In particular, the Director asserts that certain paragraphs in the Reply raise new issues and provide evidence that ought to have been provided in the Applicants' original submissions, thus "splitting its case". The Director argues that reply should have the same meaning it has before the courts. In the past, the Tribunal's Rules did not include a right to reply in Leave to Appeal applications, but instead specified that the Tribunal would provide an

applicant with an opportunity to reply when satisfied that a response "includes new evidence or raises new issues that the applicant could not be expected to have anticipated and addressed when filing the application for leave ..." (Rules of Practice for the Environmental Review Tribunal, May 31, 2002, Rule 9) The Director argues further that when the Tribunal's Rules were changed to their current form there was no intention to change previous practice or the meaning of reply.

**30** De Beers supports the arguments of the Director and adopts his position on these matters. Both argue that to allow the matters in the specified paragraphs to be considered by the Tribunal would be unfair.

**31** The Applicants agree with the Director on the meaning and purpose of reply in civil and criminal proceedings but argue that an administrative tribunal is entitled to be more flexible in its proceedings. The Applicants argue that Leave to Appeal applications in particular should not be conducted in accordance with the rigid rules that bind court proceedings because of significant differences in their purpose and conduct. Instead, the Tribunal can and should admit any evidence that assists it in understanding the issues before it. The *EBR*, which establishes the right to seek Leave to Appeal, contemplates an approach to procedural rules that is flexible so as to facilitate public participation. The Applicants submit that flexibility is necessary due to the tight deadlines to provide supporting documentation, the lack of prior disclosure of evidence, and often the complexity of the matters. They argue that these factors and the late date at which Counsel was hired by the Applicants meant that it was difficult for them to gather all the relevant evidence by the deadline. The Applicants argue that the change in the Tribunal's rules does signify a change in meaning to a broader scope for reply, unfettered by common law restrictions.

**32** The Director responds that the Tribunal has flexibility regarding the admission of evidence but that it must always ensure fairness to all parties, not just to applicants for Leave to Appeal. The Director points out that the deadline for the Applicants to submit supporting documentation was extended by 31 days in this case.

**33** The Tribunal agrees that it is not bound by the strict rules that bind courts with respect to the admission of evidence. This is clear from section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. However, this alone does not resolve the issue.

**34** The Tribunal has established Rules to guide its proceedings. There are several purposes of those Rules that are relevant to the question of the treatment of reply: "to provide a fair, open, accessible and understandable process ...; to facilitate and enhance access and public participation; ... to assure the efficiency and timeliness of proceedings; and to assist the Tribunal in fulfilling its statutory mandate." (Rule 1)

**35** The Tribunal's prior practice with respect to reply in Leave to Appeal applications was to require applicants to request it. The Tribunal would then review the material and determine whether the requirements of the Rule were met, that is, whether a response included new evidence or raised new issues that could not have been anticipated and addressed earlier, and whether the desired reply itself was within these limits. In some cases, such as those cited by the Director, reply was not allowed. However, not all applicants requested an opportunity to reply. The Rules were changed to ensure that every applicant had an opportunity to reply without having to ask the Tribunal, and to allow the time for reply to be routinely built into the Tribunal's scheduling of submissions.

**36** In changing its rule regarding reply, the Tribunal did not intend to change its understanding of the

meaning of reply and the limits on it. The wording of Rule 47 makes this clear. The Rule no longer refers explicitly to "new evidence" or "new issues," but it states that an applicant may file "a reply to the response" of the Director or Instrument Holder. This signals that the substance of an applicant's reply must relate directly to the response filed by the Director or Instrument Holder. This is consistent with the Tribunal's previous practice and shows no indication of an intention to broaden the scope of reply in the manner suggested by the Applicants.

**37** It is thus necessary to clarify the meaning of reply, and what limits apply to it. The Tribunal must ensure a balance between providing fairness to all parties, enhancing participation, assuring efficiency and assisting the Tribunal.

**38** It is expected that an applicant for Leave to Appeal will put forward its entire case, that is, raise all issues that could reasonably be anticipated and provide all relevant supporting documentation of which it is aware, at the first stage. The Director and the Instrument Holder then file their responses. Those responses may raise new issues and in reply an applicant may make submissions and adduce evidence that address those new issues. However, an applicant in reply may not raise issues it could have raised earlier or address issues that do not flow directly from a response. Otherwise, this would allow an applicant to split its case. If the Director and the Instrument Holder are not then given an opportunity to respond to these new issues and evidence, it could be unfair to them. While it is open to the Tribunal to allow such an opportunity to respond, to do so regularly would unduly prolong what is meant to be an expeditious process and possibly cause confusion. If an applicant, because of the tight deadlines, finds that it does not have sufficient opportunity to amass the documentation and make its best case, it can approach the Tribunal for an extension of time within which to provide its submissions. This in fact occurred in this case. It is not appropriate to use reply to try to solve this problem.

**39** In addition, reply is not an opportunity to merely repeat submissions that have been previously made. However, it may be appropriate to use reply to clarify or amplify an earlier submission. This is particularly so when a response misconstrues an applicant's position or where what was initially thought to be a relatively insignificant issue takes on greater importance because of the response.

**40** The Director also argued that the rule in *Brown v. Dunn* (1893), 6R. 67 (H.L.) should apply to a leave to appeal hearing. The effect of applying this rule would be that the Applicants cannot lead evidence that questions the credibility of a witness without first putting that evidence to the official while under oath. Under its Rules, the Tribunal has the discretion to direct cross-examination of a witness "where the written evidence reveals factual disputes or raises questions about the credibility of a witness." (Rule 44) This is not usually necessary because the Tribunal is well able to assess the relative weight of the different pieces of evidence, and reach its conclusions on how to interpret the facts before it. Opposing parties are entitled to lead evidence that challenges evidence adduced by the others and there is no requirement that that evidence be under oath, affirmation or declaration. The Rules do not contemplate that every attempt to challenge a witness' statement should require cross-examination of that witness, although it may be appropriate in certain circumstances to do so. The Tribunal finds that the rule in *Brown v. Dunn* is not applicable in this case.

### (b) Application of the rule to the specific paragraphs

#### i. Paragraphs 11-22:

**41** The Director argues that paragraphs 11-22 of Applicants' Reply should be expunged. These paragraphs relate to the Applicants' allegations of deficiencies in the former and present *Water Taking*

*Regulation*, now *O. Reg. 387/04*, made under the *OWRA*, and the MOE's PTTW Manual, most recently dated 2005. The corresponding evidence includes excerpts from reports of the Environmental Commissioner of Ontario in 2001, 2005 and 2006 regarding deficiencies in the design and administration of the MOE's PTTW program. The Director argues that these submissions raise a new issue, the evidence is out of date and is irrelevant.

**42** The Applicants do not respond directly to this argument, but argue that these paragraphs together with paragraphs 62-66 respond to the Director's position set out in its Response that he considered and applied the MOE's Statement of Environmental Values ("SEV"). The Applicants submit that this was unexpected because the policy of the MOE in the past has been that Directors are not required to consider and apply the SEV in making decisions on instruments such as PTTWs.

**43** Paragraphs 62-66 will be addressed below. With respect to paragraphs 11-22, the issue of whether and how the Director applied the Regulation and the Manual is certainly relevant to the decision the Tribunal must make and has been raised by the MOE's Response. Thus, the Applicants could submit evidence that sheds light on those concerns. However, the evidence presented by the Applicants in these paragraphs of their Reply does not address those concerns, but rather addresses the adequacy of the design of the Regulation and the Manual. The Tribunal, in reaching its decision on a leave application, does not have the jurisdiction "to question the adequacy of the content of the relevant laws and policies" but only whether "the Directors' decisions took into account those laws and policies." *(LaFarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, *(2008), 36 C.E.L.R. (3d) 189* at para. 49) (Ont. Div. Ct.) As a result, these paragraphs and the corresponding evidence should be expunged.

**ii. Paragraphs 27-34:**

**44** The Director argues that paragraphs 27-34 of Applicants' Reply should be expunged. These paragraphs address "environmental justice" concerns, in particular the disproportionate impact of pollution on Aboriginal peoples in Canada generally, the vulnerability of the Applicants to mercury pollution, arguments about the applicability of the Great Lakes Water Quality Agreement to the Director's decision on the PTTW, and the unequal protection of residents of northern Ontario. The Director argues that the Applicants misstate the Director's position on mercury discharges, that environmental justice is a new issue that does not respond to material in the Director's or De Beers' Responses so that they do not have an opportunity to counter these submissions, that evidence about the impacts of mercury only reconfirm evidence previously adduced, and that the issue of the applicability of the Great Lakes Water Quality Agreement ought reasonably to have been anticipated, so should have been addressed in their initial submissions.

**45** De Beers argues that the environmental justice submissions are particularly unfair because they seek to imply that the Mine is exploitative of the Attawapiskat First Nation and impugn the relationship between the company and the First Nation.

**46** The Applicants argue that environmental justice concerns are appropriate because the effect of the Director's decision would be differential treatment for a community in the north as opposed to how a community would be treated in southern Ontario. They argue further that the Director's position on the applicability of the policies in the Great Lakes Water Quality Agreement was unanticipated and was raised in the Director's response.

**47** The issue of the differential impact on a community resulting from a Director's decision might be relevant to the Tribunal's determination of whether the Director's decision meets the statutory test for

Leave to Appeal. However, the general issue of environmental justice and how other Aboriginal communities have been affected by pollution adds nothing relevant to that determination. Therefore, paragraphs 28-31 and corresponding evidence should be expunged. The material in paragraph 32 is less remote to the issue of whether the Director's decision meets the statutory test, and is linked directly to the Applicants. The impacts of mercury were extensively discussed in the Applicants' Supplemental Application for Leave to Appeal. This paragraph adds little to that discussion, but seeks only to take the discussion beyond the general impacts and clarify the potential route of exposure to, and factors affecting the impacts of, any increased mercury on the Applicants themselves. This paragraph should not be expunged.

**48** Paragraphs 33 and 34 regarding the differential application of mercury reduction strategies following from the Great Lakes Water Quality Agreement deal with matters that were first raised in the Applicants' Supplemental Application for Leave to Appeal (paragraphs 61-64). The Director's Response directly addresses the issues raised by the Applicants. These paragraphs in the Applicants' Reply respond to the Director's position and seek to clarify their arguments. These paragraphs should not be expunged.

**iii. Paragraphs 44-50:**

**49** The Director argues that paragraphs 44-50 of the Applicants' Reply should be expunged. These paragraphs deal with the degree to which the Director relied on the Canadian Water Quality Guidelines for the Protection of Aquatic Life for Mercury (the "CCME Guidelines") for any aspect of his decision, and whether the Director otherwise considered the bioaccumulation of mercury in reaching his decision. The Director and De Beers submit that these paragraphs misstate the Director's position on use of the CCME Guidelines and the evidence on the Director's consideration of mercury bioaccumulation, raises a new issue that ought reasonably to have been introduced in their original submissions and was not raised by the Responses, and is an attempt to confirm evidence previously adduced.

**50** The Applicants take the position that the CCME guidelines are referred to in several affidavits and documents submitted by the Director so their Reply is appropriate.

**51** The issue of what documents and standards were considered by the MOE and the Director in reaching his decision on the PTTW is relevant to the Tribunal's ultimate determination. While the conditions on the PTTW do reference a report on "trigger values" that in turn refers to the CCME Guidelines, the significance of the issue of the Guidelines and the consideration of bioaccumulation became clearer as a result of the affidavits filed by the Director. For this reason, it is appropriate for the Applicants to address the issue in their Reply. The Director's position is clearly stated in his Response but it is open to the Applicants to attempt to adduce evidence that puts that position in context and amplifies their own position. Paragraphs 44-50 should not be expunged.

**iv. Paragraphs 62-66:**

**52** The Director argues that paragraphs 62-66 should be expunged. These paragraphs address the MOE's past policy with respect to the relevance of its SEV in decision-making by Directors and challenge the Director's statement in his affidavit that he considered and applied the SEV in reaching his decision on this PTTW. The Director argues that these submissions call into question the Director's credibility without his having an opportunity to be cross-examined.

**53** The Applicants take the position that they could not have anticipated that the Director would take that

position because of the MOE's past policy, so it is appropriate to challenge it through its Reply, and that cross-examination was not a viable option in the circumstances.

**54** The question of whether the Director considered and applied the SEV is directly relevant to the Tribunal's ultimate determination of the Application here. The Director's statement in his affidavit is key evidence on this issue, and it is open to the Applicants to attempt to challenge it. As noted above, they need not do this through cross-examination. The Applicants' submissions do not amount to direct evidence contradicting the Director's statement but are only evidence of MOE's policy and practice prior to the Divisional Court's decision in *LaFarge v. Ontario*, which criticised that approach. Prior to that decision, this evidence of MOE's general policy would likely have shed light on how the Director approached decision-making on this specific PTTW. The Director asserts that this policy has changed as a result of the *LaFarge* decision and that the Director's decision-making process here is consistent with that policy change. Without evidence of general current practice or evidence relating to this particular case with which to challenge the Director's evidence, these submissions are not relevant to how the Director reached his decision in this case. As a result, paragraphs 62-66 should be expunged.

## Order

**55**

1. The Tribunal orders that the Attawapiskat First Nation be added as a Presenter in the Hearing of the Leave to Appeal application.
2. The Tribunal further orders that paragraphs 11-22, 28-31, and 62-66 in the Applicants' Reply, and accompanying Reply Documents, be expunged.

**56** *Presenter Status Granted*.

**57** *Portions of Reply Expunged*.

* * * * *

**Appendix A**

## List of Parties and Presenter

| | |
|---|---|
| Applicants: | Emelda and Clara Tomagatick |
| Counsel for the Applicants: | Ramani Nadarajah and Joseph F. Castrilli |

| | |
|---|---|
| | Canadian Environmental Law<br>Association<br>130 Spadina Avenue<br>Suite 301<br>Toronto, ON M5V 2L4 |
| Director: | Patrick Morash<br>Director, Section 34<br>*Ontario Water Resources Act* |
| Counsel for the Director: | Isabelle M. O'Connor<br>Legal Services Branch<br>Ministry of the Environment<br>135 St. Clair Avenue West, 10th Floor<br>Toronto, ON M4V 1P5 |
| Instrument Holder: | De Beers Canada Inc. |
| Counsel for the Instrument Holder: | Robert Mansell<br>Barrister & Solicitor<br>88 Hogarth Avenue<br>Toronto, ON M4K 1K4 |
| Presenter: | Attawapiskat First Nation |
| Counsel for the Presenter: | Michael J. McDonald<br>McDonald & Company<br>400-999 West Broadway<br>Vancouver, BC V5Z 1K5 |

End of Document

# TAB13

1993 CarswellBC 3068
British Columbia Supreme Court

Brand v. British Columbia (Workers' Compensation Board)

1993 CarswellBC 3068, [1993] B.C.J. No. 2330, [1995] B.C.W.L.D. 681, 32 Admin. L.R. (2d) 89, 43 A.C.W.S. (3d) 1046

# Re THE JUDICIAL REVIEW PROCEDURE ACT R.S.B.C. 1979, CHAPTER 209, THE PRIVACY ACT R.S.B.C. 1979, CHAPTER 336 and THE WORKERS' COMPENSATION ACT R.S.B.C. 1979, CHAPTER 437

DAVID BRAND, LLOYD LOMSDALEN, KEN JUPE, PULP, PAPER and WOODWORKERS OF CANADA, LOCAL 8 v. WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

Newbury J.

Heard: October 13 and 15, 1993
Judgment: November 15, 1993
Docket: Doc. Vancouver A932031

Counsel: *J.C. Lee*, for petitioners.
*S. Nielsen*, for respondent.
*A. Winter*, for intervenor.

Subject: Public

**Headnote**

Administrative Law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Miscellaneous procedural requirements

Requirements of natural justice — Right to hearing — Procedural rights at hearing — Disclosure — Workers' Compensation Board providing information from workers' files — Workers bringing petition for judicial review — Case involving balancing of competing interests of natural justice and privacy or confidentiality — Policy considerations in favour of privilege giving way to those in favour of natural justice — Petition dismissed.

Two employees suffered work-related injuries in 1983 and 1990, and claimed workers' compensation benefits. One of the workers received both wage loss benefits and a disability pension, which was increased. He understood that s. 39(1)(*e*) of the *Workers' Compensation Act* (B.C.) was applied to his claim, and that the employer was given relief for one-quarter of his increased pension. The other received wage loss benefits for about 13 months.

Both employees received letters in 1993 from the Workers' Compensation Board informing them that copies of documents on the file had been sent to consultants retained by the company that was the employer at the time of the injury. The two employees and their union objected to the disclosure of the contents of their files, in particular their medical records.

The employees, their union and the union safety representative petitioned for judicial review. The board argued that it was bound to provide full disclosure to employers of the case against them, and that the obligation overrode the privacy rights of claimant workers.

**Held:**

The petition was dismissed.

This case involved a balancing of the competing interests of natural justice and privacy or confidentiality.

With respect to the question of whether a privilege or right of privacy existed, the application of Wigmore's four criteria for determining whether communications should be privileged was considered. The first criterion was that the communications must originate in a confidence that they will not be disclosed.

The second criterion states that the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. With respect to the relationship between the injured worker and the board, it was desirable that the confidentiality of rewards be maintained as far as possible. At the same time, it had to be considered that disclosure was essential to the full and satisfactory maintenance of the relationship between employers and the board.
There were also competing policies with respect to the third criterion, that the relation must be one which, in the opinion of the community, ought to be fostered.
With respect to the fourth criterion or "balancing" question, of whether the injury that would inure to the relation by the disclosure of the communications would be greater than the benefit thereby gained, the public interest in the proper administration of justice outweighed in importance any public interests that might be protected by upholding the petitioners' claims.
The policy considerations in favour of privilege had to give way to those in favour of natural justice. The disclosure to the consultants of the full files, for the purposes of a s. 39 appeal by an employer, had to be upheld.
The board did not go too far in providing disclosure. Its guidelines were a rational approach to the balancing of the interests involved.

Petition for judicial review, for declaration and order prohibiting Workers' Compensation Board from making certain disclosures without written and informed consent of workers involved.

***Newbury J.*:**

1 At issue in this case is a conflict that is arising with increasing frequency — the conflict of an individual's interest in privacy and the confidentiality of his personal information, with the law's requirement for full disclosure of the case against a person in any judicial or quasi-judicial hearing affecting him. In this instance, the conflict arises thus: the petitioners Brand and Lomsdalen, were employees of MacMillan Bloedel Ltd. at the time they suffered injuries in the course of their employment — Mr. Brand in August, 1990 and Mr. Lomsdalen in May, 1983. Mr. Brand claimed wage loss benefits and received them for a period of about 13 months ending in September of 1991; Mr. Lomsdalen claimed and received wage loss benefits for about a year and a half, after which it was found that his injuries amounted to a permanent disability. He received a pension award which initially amounted to six per cent of that of a totally disabled person, appealed in February, 1986, and eventually had his pension increased to eleven per cent of total disability effective November 1, 1986. He understands that s. 39(1)(*e*) of the *Worker's Compensation Act* R.S.B.C. 1979, c. 437, (the "Act") was applied on his claim to the extent of one quarter of the increased pension — i.e. that his employer was given relief for one-quarter of its costs.

2 At the time of making their claims, both workers executed the Board's Form 6, entitled "Application for Compensation". That form includes a declaration on the worker's part that:

> ... all the information I have given on this form is true and correct and I elect to claim compensation for the above mentioned injuries or disease. This will authorize the Board and review board to obtain or view from any source whatsoever, including records of physicians, qualified practitioners or hospitals, a copy of records pertaining to examination, treatment, history and employment of the undersigned.

Nothing of further significance occurred as between the Board and Messrs. Brand and Lomsdalen until at some point in the last few months, they received form letters from the Board advising that:

> Pursuant to the requirements set out in Workers' Compensation Reporter Decision 338, 370 and 410, copies of documents on the above-numbered file(s) have been sent to the following requestor: Angus Qually Consultants Ltd.
>
> The copies with which the requestor has been provided are to be used solely for the purpose of appeals under the Workers' Compensation Act.

In Mr. Brand's case, the "requestor" named was Angus Qually Howard Consultants Ltd. It is common ground that both it and Angus Qually Consultants Ltd. (whom I shall refer to collectively as "AQH") were consultants retained by MacMillan Bloedel Ltd. to carry out a review of workers' compensation claims and related costs in some 400 files for that employer. However, this

was unknown to the two workers, who complained to Mr. Jupe, their union's safety representative. Mr. Jupe and Local 8 of the union, the Paper and Woodworkers of Canada, are also petitioners herein.

3 Mr. Jupe's affidavit notes that at least two other union members, Messrs. Belinski and Potvin, have received letters similar to those received by Brand and Lomsdalen. When he complained to the Board on behalf of the union members, the Board assured Mr. Jupe that the disclosure had been authorized under s. 39(2)(*e*) of the Act, which deals with the assessment of employers, and that the workers' claims and pensions would not be affected by the procedure initiated by AQH.

4 Messrs. Brand and Lomsdalen and their union nevertheless object to the disclosure of their files, and in particular the disclosure of their medical records, to AQH. They say that a right of privacy in respect of such records exists at common law and is recognized and protected both by s. 95 of the *Workers' Compensation Act* and s. 1 of the *Privacy Act* [1] , and that the Board's action amounts to an error of jurisdiction that is reviewable by this Court. They seek a declaration that the Board had no legal authority to make the disclosures without the "written and informed consent" of the workers involved, and an order prohibiting the Board from doing so in future. The Board and the intervenor, on the other hand, argue that disclosure of the records is required to ensure that an employer such as MacMillan Bloedel who is pursuing an appeal under s. 39 of the Act is fully aware of the case it must meet — in short, that the rules of natural justice are observed, and are seen to be observed, by the Board in adjudicating upon such appeals.

**Privative Clause**

5 The Board's disclosure to AQH of the contents of its records regarding Messrs. Brand and Lomsdalen was in fact an administrative action taken in accordance with a policy directive entitled "Decision No. 410" issued by the Board in October 1987 [unreported]. That directive in turn amended two earlier directives, Nos. 370 [unreported] and 338 [5 W.C.R. 110], which set forth the Board's guidelines for disclosure of files to claimants and employers. I will review those directives and the development of the policy embodied in Decision 410 below. I note here, however, that the "decision" challenged by the petitioners is not one of the usual types of determination made with respect to a particular worker or a particular claim, for which appeal procedures are provided in the Act. It is not, for example, one of the types of decision described in the list (which is stated not to be exhaustive) in s-s. 96(1). Nevertheless, the Board claims the protection of the privative clause in s. 96, which gives to the Board "exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part" [I] and provides that "the action or decision of the Board on them is final and conclusive and is not open to question or review in any court". Part I includes s. 95, headed "Secrecy":

> (1) Officers of the board and persons authorized to make examinations or inquiries under this Part shall not divulge or allow to be divulged, *except in the performance of their duties or under the authority of the board*, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part ...
>
> (3) The workers' advisers, the employers' advisers and their staff shall have access at any reasonable time to the complete claims files of the board and any other material pertaining to the claim of an injured or disabled worker; but the information contained in those files shall be treated as confidential to the same extent as it is so treated by the Board. [Emphasis added]

(I note parenthetically that in my view, s. 95 is not a substantive provision in the sense that the question of whether the "authority of the board" and the performance by Board officials of their duties, legitimately require or permit disclosure, must be answered with reference to the general law.)

6 Counsel for both sides cited a number of cases that leave no doubt that where an "exclusive jurisdiction" provision such as s. 96 applies, the courts may not interfere unless "the board has made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function": per La Forest J. in *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.* (1989), (sub nom. *C.A.I.M.A.W. v. Paccar of Can. Ltd.*) (1989) 40 B.C.L.R. (2d) 1 (S.C.C.); see also *Electrolux Corp. of Canada Inc. v. British Columbia (Workers' Compensation Board)* (1993), 76 B.C.L.R. (2d) 239 (C.A.) at pp. 243-4; *IPX International Ltd. v. British Columbia (Workers' Compensation Board)* (1988), 49 D.L.R. (4th) 86 (B.C. C.A.); *National Corn Growers' Assn. v. Canada (Canadian Import Tribunal)* (1990), (sub nom. *Grain*

*Corn, Re)* 74 D.L.R. (4th) 449 (S.C.C.) and *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.). As I understand it, the petitioners did not argue that the privative clause is inapplicable to the Board's decision to make workers' complete files available to employers; rather they say the decision — and the policy behind it — are patently unreasonable and that the privative clause is thereby surmounted.

7 But because the Board's decision is defended on the grounds of compliance with natural justice, one must also consider the effect of the privative clause from that viewpoint. Could a breach of the rules of natural justice be seen as a "mere error of law" that is not "patently unreasonable"? None of the cases cited above addresses that question, but administrative law texts and case law authority indicate that the answer to this question is 'no'. For example, in Jones and de Villars, *Principles of Administrative Law* (1985), the authors note at p. 194 that a delegate who has been given a quasi-judicial function by Parliament and who is acting substantively within the subject-matter so granted to him, will nevertheless be found to be acting ultra vires if he breaches the principles of natural justice or the duty to be procedurally fair, considers irrelevant evidence, ignores relevant evidence, or acts for an improper purpose. In their words [at pp. 195-96]:

> The concept of jurisdiction thus underlies these four grounds for judicial review every bit as much as it underlies review of other substantive *ultra vires* actions by a delegate of the legislature. The unstated premise, of course, is that Parliament never intended its delegate to act contrary to natural justice, or to consider irrelevant evidence, or to ignore relevant evidence, or to act maliciously or in bad faith, or unreasonably. Of course Parliaments' sovereignty means that it would theoretically permit its delegates to act in any of these ways, and the courts would have to give effect to such specific legislative commandment. But the legislature rarely does this and the courts continue to construe legislation and other powers on the assumption that these four requirements must be complied with in order for the delegate's action to be valid. In short, these requirements go to the substantive jurisdiction of the delegation, and must do so to authorize the courts to interfere with any such defective administrative action ....
>
> ... For more than a century the assumption has been that Parliament intends the procedural requirements of natural justice to be observed by certain delegates, as part and parcel of the power granted to them; any default renders the decision void. ... Nor is it difficult to find that such cases involving breaches of natural justice, improper consideration of the evidence, or malice. None of these cases could have avoided the clear words of a privative clause if the decisions involved were merely voidable instead of being void, because then there would have been a "decision" protected by the privative clause. It must be concluded, therefore, that the rule that a breach of natural justice renders the decision *void* is of high constitutional importance, and must not be permitted to be eroded by loose *dicta* in cases where there is no privative clause.

For case authority on the point, reference may be made to the judgment of Dickson J. (as he then was) in *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1974), [1975] 1 S.C.R. 382 at pp. 388-9 and the many cases that have followed it.

8 The assumption that a breach of the rules of natural justice is reviewable notwithstanding an "exclusive jurisdiction" clause was implicit in *Napoli v. British Columbia (Workers' Compensation Board)* (1981), (sub nom. *Bourdin v. British Columbia (Workers' Compensation Board)*, 29 B.C.L.R. 371 (C.A.), the case cited by counsel which is most relevant to the case at bar. In *Napoli*, the Board had awarded a worker a disability pension calculated as five per cent of total disability. He appealed the decision to a board of review. Prior to that board's hearing, his lawyer was given a four-page summary of the information in his file. When the matter came on for hearing, the board of review refused to disclose the medical reports on file and recommended that the appeal be denied. The worker then applied for leave to appeal to the Commissioners on the grounds inter alia that the requirements of natural justice had not been met because he had been refused access to the contents of his file, including medical reports.

9 Eventually, the question reached the Supreme Court (see (1981), 27 B.C.L.R. 306), where Bouck J. reviewed the history of the Act, including in particular legislative amendments made in the 1960s confirming and extending the Board's quasi-judicial functions. He also analyzed the privative clause in s. 96 (the terms of which were identical to s. 96 as it now stands) in the context of the structure of Commissioners, boards of review, and appeal boards established in the 1968 legislation. His Lordship stated [at p. 325]:

(13) The protection of the privative section (s. 96) applies to the W.C.B. in the following instances:

(a) when it is making its initial inquiry through its officers or a commissioner as to whether or not compensation should be granted (s. 88);

(b) when it is reconsidering the findings of the board of review under s. 90(3); and

(c) when it is reviewing the decision of the commissioners after they have concluded their hearing under s. 91.

(14) In the final result, whether or not compensation will be paid, and in what amount, is a decision of the W.C.B. itself (s. 85(2)). It may or may not choose to follow the ruling of the board of review or of the commissioners who sat on the appeal (s. 96).

(Presumably, the list of items in paragraph 13 was not meant to be exhaustive, given the wording of s. 96.) The Court then turned to the "natural justice argument" — i.e., the fundamental principle that "an adjudicating body reach its decision only on the basis of evidence presented where the parties have an opportunity of cross-examination and reply. When evidence is taken in secret, the right to challenge it by cross-examination and rebuttal is lost. Justice is denied. These ideas are as old as the law itself ..." Bouck J. did not comment directly on the relationship between this argument and the privative clause in s. 96, but in dealing with an argument based on the Board's "usual practice", he said [at p. 330]:

The W.C.B. has no legislative authority to establish a practice of non-disclosure at a quasi-judicial inquiry, such as a hearing before a board of review. While the W.C.B. may establish an administrative practice of secrecy, it acts *beyond its mandate* if it attempts to extend this to an inquiry before a board of review. [emphasis added]

At p. 332, he also noted that "Failing to comply with the rules of natural justice is an act in excess of jurisdiction." Thus the privative clause in s. 96 was ineffective to shield the Board from judicial review based on a claim of breach of the rules of natural justice.

10 The Court of Appeal upheld the trial decision, saying that "a high standard of justice is required, particularly since Napoli's future will be largely shaped by the decision of the final domestic tribunal." Nemetz C.J.B.C. for the Court relied largely on the judgment of Dickson J. in *Kane v. University of British Columbia* (1980), 18 B.C.L.R. 124 (S.C.C.), where the following principles had been affirmed by Dickson J. (as he then was) [at *Napoli* p. 375]:

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which ... is only 'fair play in action'. In any particular case, the requirements of natural justice will depend on 'the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth' ....

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake .... A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity 'for correcting or contradicting any relevant statement prejudicial to their views' ....

5. It is a cardinal principle of our law that, unless expressly or by necessary implication empowered to act ex parte, an appellate authority must not hold private interviews with witnesses ... or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must ... 'know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ... whoever is to adjudicate must not hear evidence or receive representation from one side behind the back of the other'.

Again, it was implicit that s. 96 did not insulate the Board from judicial review based on a breach of the rules of natural justice.

11 In the case at bar, of course, the Board seeks to *rely* on the rules of natural justice to *defend* its policy. In these circumstances, the questions are more subtle and complex than those posed in *Napoli*. If the disclosures were necessary to ensure the Board's compliance with the rules of natural justice, does that end the inquiry? Or could the Board's conduct still be challenged as constituting an "error of law", unreasonable or otherwise?

12 Without the benefit of any case law or other commentary on this point, I suggest that the key to this question lies in the word "necessary". If the disclosures were *necessary* to comply with the rules of natural justice, I know of no authority that would suggest that the decision to make available the files of Messrs. Brand and Lomsdalen to their employer's agent could be attacked as constituting an error of law of any kind. On the other hand, if the Board, though motivated by its duty to comply with the rules of natural justice, went further than *necessary*, or if disclosure was made in a manner that *needlessly* jeopardized the petitioners' legitimate expectations of confidentiality, an error of law could be inferred. In that event, it seems to me that the privative clause would become relevant and that the Court could interfere only if the Board's error was a patently unreasonable one.

13 From both these perspectives, it will be useful to review the development of the Board's present policy concerning disclosure of files since the *Napoli* decision.

**The Board's Disclosure Policy**

14 In August 1981, the Board announced (in directive No. 338) that it would extend to "claimants and employers involved in other cases" the right to require disclosure of its claims files. Eighteen conditions governing disclosure were laid out in the directive, including the following [at pp. 110-11]:

> 1. The file is to be disclosed solely for the purpose of pursuing or opposing an appeal made under the *Workers' Compensation Act* and the information gained is not to be used for any other purpose.
>
> 2. Disclosure will be provided to the employer or the claimant or any representative of either authorized in writing.
>
> . . . . .
>
> 4. There must have been a decision adverse to the claimant or employer which he is appealing ....
>
> . . . . .
>
> 8. Where the request for disclosure is received from the employer or his representative, copies will only be provided of documents relevant to the issue under appeal.
>
> . . . . .
>
> 11. If the recipient of copies [of documents relevant to the issue under appeal] is not satisfied with them, he may make an appointment to inspect the file in person. A claimant or his representative may inspect the file in person prior to receiving the copies if he specifically requests it. However, an employer or his representative may only inspect the file in person after he has been provided with copies and his right of inspection is limited to the original documents of which he has received copies.

The directive also noted that the new rule regarding disclosure to employers was consistent with recommendations made by the Honourable Mr. Justice Krever for the government of Ontario in his report of the Commission of the Inquiry into the Confidentiality of Health Information. Further, it said [at p. 112]:

> In essence, our position represents a compromise between the right of a worker to have the information on his file kept confidential and the right of an employer to disclosure under the rules of natural justice. While the recent court decisions deal specifically only with the claimant's right to see his file, we feel that the principles which led the Court to order disclosure must also apply to employers. Employers are given status under the *Workers' Compensation Act* to pursue and oppose appeals regarding claims and have interests which can be adversely affected by a decision in favour of a worker. Therefore they must also be entitled to see the claim file under the rules of natural justice. On the other hand, the right of the claimant to privacy means that the employer's right should be not extended beyond what the rules strictly require. Therefore, the employer's right is limited to seeing the documents which are relevant to the issue under appeal.

In directive No. 370 made in April, 1983, the Board modified No. 338 to remove the requirement that the decision be made on a claim by a claims adjudicator before disclosure would be granted.

15 Decision No. 410, issued in October, 1987, went even further, both on the issue of when disclosure could be required, and on the issue of what would be disclosed. On the former question, the Board stated:

> The Board is satisfied that its reasons for not granting disclosure before initial claims adjudication decisions are still valid. It no longer considers, however, that restricting disclosure to situations where an appeal has been initiated is the only viable alternative. Based upon its experience since Decision No. 338 was issued, the Board is of the opinion that allowing disclosure where there is an appealable claims adjudication decision would be a suitable compromise. On the one hand, disclosure at this point would assist both claimants and employers in deciding whether they should appeal. On the other hand, delays and complexities in the initial decision-making process would be avoided.

On the latter subject, the Board said that its experience had shown that it is "often virtually impossible for any person to determine, in advance of the consideration of an appeal, which information the actual decision-maker will consider relevant to its disposition". Evidently cases had arisen in which employers who had been denied access to the complete claim file became aware of relevant information only "through comments at oral hearings or references in letters, communicating findings or decisions." In the Board's words:

> The credibility of the system becomes greatly reduced when this occurs. Even, however, without such occurrences, employers cannot be sure that all the information considered by the decision-maker was disclosed to them, since they do not have access to the claim file to verify this.
>
> It is the Board's view that the problems associated with employer disclosure will only be resolved by granting them the same access to claim files as that enjoyed by claimants ....

16 Further details of the way in which this policy is administered were provided in the Claims Manual published by the Board under the heading "Disclosure of Claim Files" in June 1991. It stated that disclosure of a file would be granted to a claimant or employer "where an appealable decision has been communicated in writing on that claim file, even though there is no valid appeal in process"; that where an employer is empowered to receive disclosure, "disclosure will consist of the same disclosure which would be granted to the claimant"; and (as before) that "the file is to be disclosed solely for the purpose of pursuing or to determine whether to pursue or oppose an appeal made under the Workers' Compensation Act and the information gained is not to be used for any other purpose". The Manual also dealt with the right of a "recipient of copies" to inspect the file in person and if he objected to anything in the file, to insert a statement to that effect.

17 For purposes of this narrative, one further policy directive of the Board (in this case the Appeal Division) must be noted. This was a decision issued in August 1991 with respect to employers' appeals for relief of costs under s-s. 39. To remove any uncertainty as to whether the 30-day time limit commences for the initiation of such appeals, it was stipulated that for purposes of s. 96(6), the "notice" would take the form of a "decision letter" to the employer. In the cases of the petitioners before me, this fact accounts for the considerable lapse of time between the handling of the original claims of the employees and the release of the employees' files to AQH: such "decision letters" were not sent to MacMillan Bloedel Ltd. until they were formally requested by it at AQH's suggestion, in some cases several years after the determination of the worker's claim.

18 The August, 1991, directive also dealt with the role of the worker in an appeal or re-hearing of a decision under s. 39 and in particular the Governors' stated policy that "s. 39(1)(*e*) is concerned only with the class to which the costs of the claim are to be charged and cannot affect the entitlement of the claimant". It noted that under the wording of s. 90, the Review Board may consider an appeal only from a decision "with respect to a worker" — i.e., a decision of a "kind or class that affects workers financially". Yet, where an employer appealing under s. 39 takes the position that a worker had a pre-existing disability, it might also appeal to the Review Board concerning the application of s-s. 5(5). In such event, the Appeal Division was directed to suspend its consideration of the s. 39 matter pending the disposition of the disability issue, and was prohibited from identifying

the basis on which any appeal is allowed under that provision, on the basis that disclosure might "pre-empt a decision by the Board's officer or a right of appeal to the Review Board on an issue affecting the worker."

19 The directive also dealt with the question of notification to workers:

> The participation of the worker may assist the appeal division in its inquiry into the merits of the issues raised on an appeal under Sections 96(6)(a) concerning Section 39. The question as to whether the worker suffered from a 'pre-existing disease, condition or disability' is one on which the worker's evidence as to their [sic] prior medical and employment history may well be relevant.
>
> The Appeal Division will not, however, automatically notify the worker in each in every case that an appeal or re-hearing has been commenced in relation to a decision under Section 39. The worker's comments are not essential to the Appeal Division's consideration of the matter, nor does natural justice require the worker's participation as the worker will not be affected by the proceeding.
>
> ... The current practice of the Board is to notify a worker if the employer receives disclosure of the claim file. Under the existing policy, the worker is advised of the nature of the appeal or appealable decision in connection with the employer who has been granted disclosure. In this notice, the worker will now be advised that he/she may on application be provided with copies of the documentation submitted by the employer in connection with the appeal or rehearing.

**Privacy Rights and Natural Justice**

20 Ms. Lee's argument attacking the Board's policy was original and wide-ranging, bringing together a number of cases, reports and policy discussions concerning rights of privacy. Some of these — notably the *Guidelines on the Protection of Privacy and Trans-Border Flows of Personal Data*, published by the Organization for Economic Co-operation and Development, and a report made in 1988 by the British Columbia Ombudsman — are documents aimed at legislative changes. Such changes, of course, are in the province of the Legislature and not the courts.

21 The gist of Ms. Lee's legal argument was that the principles of natural justice, in particular audi alteram partem, should not be permitted to override (or in Ms. Lee's word, "obliterate") the Board's duty to protect the privacy and confidentiality of the personal information in a worker's claim file. The Board's position that *Napoli* must apply to employers as well as to workers, amounts in her submission to a patently unreasonable interpretation of s. 95 of the Act and the general law relating to privacy and confidentiality. She relied in particular on two decisions of the Supreme Court of Canada, *Halls v. Mitchell*, [1928] 2 D.L.R. 97 (S.C.C.), and a more recent one, *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. *Halls* was a libel action arising out of mis-statements made to a compensation board concerning a worker's medical history by a medical officer of his employer. The issue was whether such statements were privileged. The Court held that there was no duty resting on the medical officer that supported a privilege in the "general interests of society". In the course of his judgment, Duff J. made the following comments concerning obligations of secrecy imposed upon medical practitioners [at p. 105]:

> It is not necessary, for the purposes of this appeal, to attempt to state with any sort of precision the limits of the obligation of secrecy which rests upon the medical practitioner in relation to professional secrets acquired by him in the course of his practice. Nobody would dispute that a secret so acquired is the secret of the patient and, normally, is under his control, and not under that of the doctor. *Prima facie, the patient has the right to require that the secret shall not be divulged; and that right is absolute, unless there is some paramount reason which overrides it. Such reasons may arise, no doubt, from the existence of facts which bring into play overpowering considerations connected with public justice*; and there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations *prima facie* imposed by the confidential relation. [emphasis added].

In *McInerney*, the Court affirmed the right of a patient to examine and copy all information contained in her medical records maintained by her physician, including records prepared by other doctors and forwarded to the physician. La Forest J. for the Court reasoned as follows [at pp. 150-1]:

> The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue.

22 I do not agree with Ms. Lee that these decisions are largely determinative of this case. They confirm the principle that as between a doctor and patient, the patient is entitled to control of his or her medical information — a principle I would think is undisputable. Certainly the respondents do not dispute the principle. They contend, however, that since the Board is bound by the rules of natural justice, as established inter alia by *Napoli*, and since employers have statutory rights of appeal under s. 39(1)(*e*), the Board is bound to provide full disclosure to employers of the case against them and that this obligation *overrides* the privacy rights and expectations of claimant workers. They cite the decision of this Court in *F. v. Psychiatrist* (1984), 53 B.C.L.R. 216, in which the plaintiff was seeking damages against her psychiatrist for allegedly negligent treatment and for assault and battery consisting of many acts of sexual intercourse over a period of years. She sought the production of documents from the College of Physicians and Surgeons relating to similar complaints made by other patients against the defendant. The College objected to producing such documents on the basis that the public interest required the continued confidentiality of all documents in its possession. Arguably, the interest of the other patients in continued confidentiality was stronger than in this case; yet, after balancing "the interest of the public in having all cases properly tried and the sometimes competing public interest in protecting communications which arise in circumstances of confidentiality", McEachern C.J.S.C. (as he then was) ordered the College to produce the requested documentation.

23 A similar "balancing" occurred in *MacMillan Bloedel Ltd. v. West Vancouver Assessment Areas Assessors* (1981), 34 B.C.L.R. 111 (S.C.), where the Court was asked to rule on whether cross- examination must be limited on confidential communications made by an expert forestry witness to his clients, who were not parties to the case. The Chief Justice reviewed the four "conditions of confidence" advanced by Wigmore (3rd ed., 1961), for determining whether communications should be privileged [at p. 115]:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

His Lordship ruled that the four criteria did not establish any *new* "umbrella of privilege under which a forester can obtain shelter" unless the conditions were met, and noted that most relationships of confidentiality do not qualify because they do not "override the public interest in the proper disposition of litigation between other parties" (at 115-6). He continued [at p. 117]:

> Returning to this case, it is my view that there is no privilege attaching to Mr. Malcolm's previous work. Professor Wigmore's four tests are not met because, in a proper cause, the injury that would inure to the relation between Mr. Malcolm and his other client by disclosure of the communication would not be greater than the benefit thereby gained for the correct disposal of litigation. If it were otherwise then it could hardly be contended that physician and patient, and priest and penitent communications were not also privileged. In this connection, see also the comments of Taggart J.A. in *Bergwitz v. Fast* ... as follows:
>
> > ... the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege ...

24 I agree that in undertaking to balance the two competing interests, it is useful to consider the application of Wigmore's four criteria in this case. The first is that "the communications must originate in a confidence that they will not be disclosed". The respondents say that in commencing an application for compensation to the Board, the worker is or ought to be aware that the Act recognizes his or her employer as a party and that therefore it is unreasonable for the worker to assert that information provided in support of his claim will be kept in confidence and not disclosed to that other party. Section 90 of the Act, for example, provides that where an officer of the Board makes a decision "with respect to a worker" the worker, his dependents if he is deceased, or the employer may appeal the decision within 90 days. Similarly, under s. 91, the worker or the employer may appeal a decision of the Review Board to the Appeal Division. In both instances, the present policy of the Board would require full disclosure of the worker's file to the appealing party upon request. Thus as soon as a decision is made "with respect to a worker", the worker's file is liable to be disclosed. The only difference between these situations and the case at bar is the fact that in an appeal under s. 39(1)(*e*), the lis is between the Board and the employer, so that the worker does not stand to be affected financially. For that reason a requirement that he give a "written and informed consent" could very well hamstring an employer wishing to mount an appeal. Ms. Lee offered no satisfactory solution to this problem.

25 The second criterion is that "the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" — i.e., the injured worker and the Board. There can be no doubt that it is desirable, from the point of view of the relationship between the Board and the workers who came within its purview, that the confidentiality of records be maintained as far as possible. But there is a competing and equally compelling principle that must be considered — the fact that disclosure is essential to the "full and satisfactory maintenance" of the relationship between employers and the Board. Furthermore, the "element of confidentiality" is very arguably bargained away by a worker mounting a claim under the Act. When he does so his medical records, theretofore held in confidence by his own physician, enter the Board's purview, just as the medical records of any other plaintiff who mounts a claim in a court of law become subject to public scrutiny. At that point, the interest of the public in seeing that the rules of natural justice are observed by a body clearly serving a quasi-judicial function, and the interest of the parties to the litigation or to the particular claim or appeal in question, overcome the privacy interest and expectation of the claimant.

26 The third criterion is that "the relation must be one which in the opinion of the community ought to be fostered". Ms. Lee contends, quite rightly, that it is in the interests of the Board and the community to foster trust and confidence in the relationship. Here again, however, there is a competing policy — the desirability of the Board's compliance with the rules of natural justice, and in being seen to be acting fairly. There can surely be no doubt that as a body which adjudicates in the stead of courts of law, all claims arising in respect of work-related injuries in many industries in this province, the Board must act fairly towards both sides in all matters that come before it. I cannot think that having been told by the Court of Appeal of British Columbia that it must make full disclosure of its files to workers in connection with *their* appeals, it could refuse to extend that right to employers. It is true that in the context of a s. 39 appeal, the employer's right is "merely financial" and that the Court in *Kane*, supra, emphasized that where one's profession or employment is at stake, a high standard of justice applies. However, no case was cited that would support the argument that for a body exercising a quasi-judicial role, some lesser standard of natural justice should be applied to some cases as distinct from others.

27 Fourth, there is the "balancing" question — whether the injury that would enure to the relationship by virtue of the disclosure is greater than the benefit thereby obtained. In fact, this is a restatement of the larger issue that lies at the heart of this case — whether a worker's interest in the confidentiality of his own medical information is outweighed by the employer's interest in having full disclosure, albeit in connection with an appeal that is "merely financial", and in the public interest in ensuring that the Board operates in accordance with the rules of natural justice. Ms. Lee has not cited one case in which an individual's interest in the privacy of his medical records has been held to outweigh the dictates of natural justice when a direct conflict has occurred. In my view, that is because as stated in *Bergwitz v. Fast* (1980), 18 B.C.L.R. 368 (C.A.), "the public interest in the proper administration of justice outweighs in importance any public interests that might be protected" by upholding the petitioners' claims. This is not to say they do not have a legitimate interest in or expectation of privacy, but that that interest and expectation must in these circumstances give way to the larger public interest. It follows in my view that the

policy considerations in favour of privilege must give way to those in favour of natural justice and that the disclosure to AQH of the Petitioner's full files for purposes of a s. 39 appeal must be upheld.

**Secondary Question**

28 As suggested earlier in these reasons, another question remains did the Board go too far in complying with the rules of natural justice? In particular, did it fail to enact adequate safeguards in its policy directives with respect to disclosure, and thereby commit an error of law? Having again reviewed the various conditions of disclosure that have been imposed by the Board, particularly in Decision No. 338, I must answer this question in the negative. In my view, the Board's guidelines constitute a rational approach to the balancing of the inter ests involved and do not sacrifice the interests of workers unnecessarily. Although I might have wished that any employer or employer's agent to whom disclosure is made be required to undertake in writing not to use the information for any purpose other than "pursuing or opposing an appeal" made under the Act (see Decision No. 338, paragraph 1), that is a policy decision that lies within the Board's purview and not that of this Court. The policy has not been shown to be patently unreasonable or otherwise erroneous in law.

**Other Arguments**

29 Finally, I wish to deal with two other concerns expressed on behalf of the petitioners. First, Ms. Lee contended that the disclosures have caused and have the potential to cause significant personal harm in the form of embarrassment and risk to the employment status of the workers. In the case of one of the workers (*not* a party to these proceedings) whose files were disclosed, it has been alleged that the employer did in fact use information in this way. Since that particular question was not before me, and the employer has specifically denied using the Board's claim files in this way, the question of actual harm will await another forum on another day. The question of potential harm, however, surely exists not only in the context of an employer's cost appeal under s. 39 but also in the context of an appeal under s. 90 or 91. Indeed, the question of potential misuse of information by an employer is a pervasive feature of the Act if Ms. Lee's argument is correct. Yet there is no evidence adduced before me of any serious problem of this kind with respect to the Workers' Compensation Board. Returning again to the analogy of court proceedings, I suppose that any employer who decides to look into the litigation file, kept in the court registry, of a plaintiff who is his employee, might misuse that information, as indeed might any other outside party. As far as I am aware, that fact has never been successfully mounted as an argument for keeping court files or court proceedings secret.

30 The second concern voiced by Ms. Lee was that workers' files may contain *misinformation* which could operate to the prejudice of a worker. But as the respondents pointed out, this too is a double-edged sword: many workers' files may contain misinformation about employers as well. As already noted, the Board has attempted to meet this problem by providing that any party who, in reviewing his file, finds material which he believes to be incorrect or objectionable, may make a note to that effect on the file. In my view, this is a reasonable response, and indeed the best solution, short of the Board's holding a hearing on the issue every time an "objectionable" statement is recorded in a file — a wholly unrealistic alternative.

31 Last, I should note for the record that although the *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61 was referred to in oral argument, that statute was not in force at the time of the disclosures to AQH or at the time of the filing of the petition herein. I do not think it appropriate to comment on its applicability in this situation or to suggest how the Commissioner appointed thereunder should approach questions such as those in the case at bar.

**Costs**

32 In view of the public nature of the questions raised in this Petitioner, there will be an order that all parties will bear their own costs.

33 I thank all counsel for their thoughtful submissions.

*Petition dismissed.*

Footnotes

1 In argument, the *Privacy Act* was not relied upon, presumably because the Board comes within the definition of "court" for purposes of the exception in s-s. 2(1)(*c*) thereof.

**End of Document**

# TAB14

**Julius Kane** *Appellant*;

and

**Board of Governors of the University of British Columbia** *Respondent*.

1979: October 25, 26; 1980: March 3.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Colleges and universities — University president ordering suspension of faculty member — Appeal to Board of Governors — Appellant's withdrawal following conclusion of hearing by Board — Further facts given to Board by president in absence of appellant — Breach of natural justice — Failure to observe rule expressed in maxim audi alteram partem.*

Two deans of faculties at the University of British Columbia recommended that the appointment of the appellant (K), a professor at the University, be terminated for cause, the chief complaint being that he had made improper use of the university computer facilities for personal purposes. Following a meeting called by the President of the University, at which K and his counsel were present, the deans recommended that, instead of terminating K's appointment, he should be suspended without salary for three months, and be required to make financial restitution to the University. The deans were influenced by the argument that the irregular procedures followed by K were the result of a misunderstanding rather than a deliberate attempt to deceive, and that administrative officers of the University may have been lax in discharging their duties to such a degree as to mislead K as to the proper procedures to be followed.

The President of the University acted according to the deans' recommendation. He suspended K for three months, without salary, pursuant to s. 58(1) of the *Universities Act*, 1974 (B.C.), c. 100, and directed him to provide a full accounting and restitution of all sums due the University.

K appealed to the Board of Governors of the University, pursuant to s. 58(3). K did not question the fact that he had used the university computer for his own purposes, but felt that he should not be suspended for doing so. The President attended the meeting as a member of the Board. Section 61 of the *Universities Act* provides

**Julius Kane** *Appelant*;

et

**Le conseil d'administration de l'Université de la Colombie-Britannique** *Intimé*.

1979: 25, 26 octobre; 1980: 3 mars.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et McIntyre.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Collèges et universités — Président de l'université ordonnant la suspension d'un professeur — Appel au conseil d'administration — Départ de l'appelant après la conclusion de l'audition du conseil — Faits additionnels fournis au conseil par le président en l'absence de l'appelant — Violation de la justice naturelle — Inobservation de la règle exprimée dans la maxime audi alteram partem.*

Deux doyens de faculté de l'Université de la Colombie-Britannique ont recommandé qu'il soit mis fin à l'emploi de l'appelant (K), un professeur à l'Université, avec motifs à l'appui savoir, principalement, qu'il avait irrégulièrement utilisé les services d'informatique de l'Université à des fins personnelles. Suite à une réunion convoquée par le président de l'Université, à laquelle assistaient K et son avocat, les doyens ont recommandé qu'il ne soit pas mis fin à l'emploi de K, mais que ce dernier soit plutôt suspendu sans traitement pendant trois mois et qu'il soit tenu de rembourser l'Université. Les doyens ont été influencés par l'argument que les méthodes irrégulières suivies par K découlaient d'un malentendu plutôt que d'une tentative délibérée de frauder et que des agents d'administration de l'Université ont pu faire preuve de négligence dans l'exécution de leurs fonctions au point d'induire K en erreur quant aux méthodes à suivre.

Le président de l'Université a suivi la recommandation des doyens. Il a suspendu K pour trois mois, sans traitement, conformément au par. 58(1) de la *Universities Act*, 1974 (C.-B.), chap. 100 et lui a ordonné de rendre compte de toutes les sommes dues à l'Université et de les rembourser.

K a interjeté appel devant le conseil d'administration de l'Université conformément au par. 58(3). K n'a pas contesté le fait qu'il avait utilisé l'ordinateur de l'Université à des fins personnelles, mais selon lui, cela ne justifierait pas sa suspension. Le président assistait à l'assemblée à titre de membre du conseil. L'article 61 de

that the President is a member of the Board "and shall attend its regular meetings."

K and his counsel were heard by the Board. K answered questions directed to him by members of the Board. During the hearing, the President of the University responded to questions directed to him by Board members, but did not ask questions of K or his counsel.

At the conclusion of the hearing, the chairman requested K and his counsel to leave so that the Board might deliberate. Following an adjournment for dinner, the Board deliberated, the University President being present throughout. The President did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by Board members. The Board approved the three-month suspension of K, without salary, and the order for a full accounting and restitution of all sums due to the University for the use of the computer for private and commercial affairs.

K petitioned the Supreme Court of British Columbia for an order that the Board resolution be quashed, pursuant to the *Judicial Review Procedure Act*, 1976 (B.C.), c. 25. The petition was dismissed. A majority of the British Columbia Court of Appeal dismissed an appeal from the trial judgment. K appealed from the judgment of the Court of Appeal to this Court.

*Held* (Ritchie J. dissenting): The appeal should be allowed.

*Per* Martland, Pigeon, Dickson, Beetz, Estey and McIntyre JJ.: The submission which was based upon the fact that the President testified or gave evidence during the postprandial session in the absence of K and that this amounted to a breach of the principles of natural justice and a failure to observe the rule expressed in the maxim *audi alteram partem* was accepted. Applying the following principles, the appeal must be allowed.

1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake. A disciplinary suspension can have grave and permanent consequences upon a professional career.

la *Universities Act* prévoit que le président est membre du conseil «et assiste aux réunions ordinaires».

Le conseil a entendu K et son avocat. K a répondu aux questions que lui ont posées les membres du conseil. Au cours de l'audience, le président de l'Université a répondu aux questions que lui ont posées les membres du conseil mais n'a interrogé ni K ni son avocat.

A la fin de l'audience, le président du conseil a demandé à K et à son avocat de se retirer afin que le conseil puisse délibérer. Après avoir ajourné pour le dîner, le conseil s'est de nouveau réuni, toujours en présence du président de l'Université. Ce dernier n'a pas participé aux discussions ni pris part au vote de la résolution. Il a toutefois répondu aux questions que lui ont posées les membres du conseil. Le conseil a entériné la suspension de trois mois sans traitement et l'ordre de rendre compte et de rembourser toutes les sommes dues à l'Université pour avoir utilisé l'ordinateur à des fins personnelles et commerciales.

K a présenté une requête en annulation de la résolution du conseil devant la Cour suprême de la Colombie-Britannique, conformément à la *Judicial Review Procedure Act*, 1976 (C.-B.), chap. 25. La requête a été rejetée. La Cour d'appel de la Colombie-Britannique à la majorité a rejeté l'appel interjeté du jugement de première instance. K se pourvoit devant cette Cour du jugement de la Cour d'appel.

*Arrêt* (le juge Ritchie est dissident): Le pourvoi est accueilli.

*Les* juges Martland, Pigeon, Dickson, Beetz, Estey et McIntyre: Est acceptée l'allégation fondée sur le fait que le président aurait témoigné au cours de la séance tenue après le repas en l'absence de K et que cela équivaut à une violation des principes de justice naturelle et à l'inobservation de la règle exprimée dans la maxime *audi alteram partem*. Appliquant les principes suivants, le pourvoi doit être accueilli.

1. Il incombe aux cours de justice d'attribuer à un tribunal, tel le conseil d'administration d'une université auquel la loi donne mandat de siéger en appel, une large mesure d'autonomie de décision.

2. En tant qu'élément constitutif de l'autonomie dont il jouit, le tribunal doit respecter la justice naturelle. Les règles de justice naturelle ne peuvent être abrogées que par un texte de loi exprès ou nettement implicite en ce sens.

3. Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

4. The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views.

5. Unless expressly or by necessary implication empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny.

6. The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so.

The Board was under an obligation to postpone further consideration of the matter until such time as K might be present and hear the additional facts adduced; at the very least the Board should have made K aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made. In the event, the Board followed neither course. The Board heard the further facts, deliberated, and ruled against K. In doing so, it made a fundamental error. The danger against which the Courts must be on guard is the possibility that further information could have been put before the Board for its consideration which affected the disposition of the appeal.

*Per* Ritchie J., *dissenting*: K knew from the outset exactly what it was that he was charged with, and he had an opportunity to present his case and to examine the witnesses against him. It could not be suggested that the President decided to wait until K was absent before providing the members of the Board with facts prejudicial to K, what the allegations really were and the reasons why the penalty was reduced from termination to suspension. If this had been the case there would indeed have been a grave breach of good faith on the part of the President and other Board members and a denial to the appellant of the fundamental right to be heard in his own defence in breach of the elementary principles of natural justice.

The statement contained in a letter from a member of the Board to the counsel for the University to the effect that the President provided the Board with necessary facts without in any way discussing the merits of the appeal, was too slender a thread upon which to support an accusation of such gravity against men of presumed integrity acting under a statutory authority.

[*Local Government Board v. Arlidge*, [1915] A.C. 120; *Ridge v. Baldwin*, [1962] 1 All E.R. 834; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Abbott v. Sullivan*, [1952] 1 K.B. 189; *Board of Education v. Rice*, [1911] A.C. 179; *Kanda v. Government of the*

4. Le tribunal doit entendre équitablement les deux parties au litige afin de leur donner la possibilité de rectifier ou de contredire toute déclaration pertinente préjudiciable à leurs points de vue.

5. A moins d'être autorisée à agir *ex parte* de façon expresse ou nettement implicite, une juridiction d'appel ne doit pas avoir d'entretiens privés avec les témoins ou, a fortiori, entendre des témoignages en l'absence de la partie dont la conduite contestée fait l'objet de l'examen.

6. La Cour ne cherchera pas à savoir si la preuve a de fait joué au détriment de l'une des parties; il suffit que cette possibilité existe.

Le conseil était tenu d'ajourner l'examen ultérieur de la question jusqu'à ce que K puisse être présent afin d'entendre les faits additionnels; le conseil aurait dû, à tout le moins, lui faire part de ces faits et lui donner une possibilité réelle et valable de rectifier ou de réfuter toute déclaration défavorable. En l'espèce, le conseil n'a fait ni l'un ni l'autre. Le conseil a entendu les faits additionnels, il a délibéré et tranché la question à l'encontre de K. Ce faisant, il a commis une erreur fondamentale. Le danger dont les cours doivent se méfier est la possibilité que le conseil ait pu être saisi d'autres renseignements à même d'influer sur l'issue de l'appel.

*Le* juge Ritchie, *dissident*: Dès le début, K connaissait exactement l'accusation portée contre lui et il a eu la possibilité de se défendre et d'interroger les témoins à charge. On ne peut laisser entendre que le président a décidé d'attendre que K soit absent pour fournir aux membres du conseil des faits préjudiciables à ce dernier, la nature véritable des allégations et les motifs à l'origine de la décision de réduire la sanction de renvoi à suspension. S'il en avait été ainsi, le président et les autres membres du conseil auraient effectivement gravement fait fi de la bonne foi et du droit fondamental de l'appelant d'être entendu pour faire valoir sa défense, le tout contrairement aux principes élémentaires de justice naturelle.

La déclaration dans la lettre d'un membre du conseil de l'Université selon laquelle le président a fourni au conseil les faits nécessaires sans discuter de quelque façon du bien-fondé de l'appel est un moyen beaucoup trop ténu pour étayer une accusation aussi sérieuse contre des hommes dont on présume l'intégrité et qui agissent en vertu d'un pouvoir conféré par la loi.

[Jurisprudence: *Local Government Board v. Arlidge*, [1915] A.C. 120; *Ridge v. Baldwin*, [1962] 1 All E.R. 834; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Abbott v. Sullivan*, [1952] 1 K.B. 189; *Board of Education v. Rice*, [1911] A.C. 179; *Kanda v. Government of*

*Federation of Malaya*, [1962] A.C. 322; *Errington v. Ministry of Health*, [1935] 1 K.B. 249; *Re Brook and Delcomyn* (1864), 16 C.B.R. (N.S.) 403; *Re an Arbitration between Gregson and Armstrong* (1894), 70 L.T. 106; *R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones*, [1962] 2 Q.B. 677; *Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, [1977] 1 S.C.R. 456; *Jeffs v. New Zealand Dairy Production and Marketing Bd.*, [1967] 1 A.C. 551; *R. v. Architects' Registration Tribunal, Ex p. Jaggar* (1945), 61 T.L.R. 445, referred to.]

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from the dismissal of a petition under the *Judicial Review Procedure Act*, 1976 (B.C.), c. 25. Appeal allowed, Ritchie J. dissenting.

*David Roberts*, for the appellant.

*G. S. Cumming, Q.C.*, and *M. A. Cummings*, for the respondent.

The judgment of Martland, Pigeon, Dickson, Beetz, Estey and McIntyre JJ. was delivered by

DICKSON J.—Julius Kane holds tenured appointment as a professor at the University of British Columbia. On February 21, 1977, the Dean of the Faculty of Graduate Studies and the Dean of the Faculty of Science recommended that Dr. Kane's appointment be terminated for cause. It was alleged he had made improper use of University computer facilities for personal purposes. It was further alleged that he had improperly used his National Research Council grant to support private work and to purchase hardware items not related to the purposes of the grant.

Following a meeting called by the President of the University, Dr. Douglas T. Kenny, at which Dr. Kane and his counsel were present, the Deans recommended that, instead of terminating Dr. Kane's appointment, he should be suspended without salary for three months, and be required to make financial restitution to the University. The Deans were influenced by the argument that the irregular procedures followed by Dr. Kane were

[1] (1979), 11 B.C.L.R. 318.

*the Federation of Malaya*, [1962] A.C. 322; *Errington v. Ministry of Health*, [1935] 1 K.B. 249; *Re Brook and Delcomyn* (1864), 16 C.B.R. (N.S.) 403; *Re an Arbitration between Gregson and Armstrong* (1894), 70 L.T. 106; *R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones*, [1962] 2 Q.B. 677; *Pfizer Co. Ltd. c. Sous-ministre du Revenu national pour les douanes et l'accise*, [1977] 1 R.C.S. 456; *Jeffs v. New Zealand Dairy Production and Marketing Bd.*, [1967] 1 A.C. 551; *R. v. Architects' Registration Tribunal, Ex p. Jaggar* (1945), 61 T.L.R. 445.]

POURVOI à l'encontre d'un arrêt de la Cour d'appel de la Colombie-Britannique[1], qui a rejeté un appel interjeté du rejet d'une requête en vertu de la *Judicial Review Procedure Act*, 1976 (B.C.), chap. 25. Pourvoi accueilli, le juge Ritchie étant dissident.

*David Roberts*, pour l'appelant.

*G. S. Cumming, c.r.*, et *M. A. Cummings*, pour l'intimé.

Version française du jugement des juges Martland, Pigeon, Dickson, Beetz, Estey et McIntyre rendu par

LE JUGE DICKSON—Julius Kane est professeur permanent à l'Université de la Colombie-Britannique. Le 21 février 1977, le doyen de la Faculté des Études supérieures et le doyen de la Faculté des Sciences recommandaient avec motifs à l'appui qu'il soit mis fin à l'emploi de M. Kane. Ce dernier aurait d'une part irrégulièrement utilisé les services d'informatique de l'Université à des fins personnelles. Il aurait d'autre part fait un usage irrégulier de la subvention que lui avait accordée le Conseil national de recherches en l'affectant à des travaux personnels et en achetant du matériel, le tout contrairement aux fins de la subvention.

Suite à une réunion convoquée par le président de l'Université, M. Douglas T. Kenny, à laquelle assistaient M. Kane et son avocat, les doyens ont recommandé qu'il ne soit pas mis fin à l'emploi de M. Kane, mais que ce dernier soit plutôt suspendu sans traitement pendant trois mois et qu'il soit tenu de rembourser l'Université. Les doyens ont été influencés par l'argument que les méthodes irrégulières suivies par M. Kane découlaient d'un

[1] (1979), 11 B.C.L.R. 318.

the result of a misunderstanding rather than a deliberate attempt to deceive, and that administrative officers of the University may have been lax in discharging their duties to such a degree as to mislead Dr. Kane as to the proper procedures to be followed.

The President of the University acted according to the Deans' recommendation. He suspended Dr. Kane for three months, without salary, pursuant to s. 58(1) of the *Universities Act*, 1974 (B.C.), c. 100, and directed him to provide a full accounting and restitution of all sums due the University. Section 58 of the Act reads:

> 58. (1) The president has power to suspend any member of the teaching and administrative staffs and any officer or employee of the university.
>
> (2) Upon the exercise of the power, he shall forthwith report his action to the board with a statement of his reasons.
>
> (3) A person who is suspended under this section has a right of appeal to the board.

Dr. Kane appealed to the Board of Governors of the University, pursuant to s. 58(3). The appeal came before a regular meeting of the Board of Governors. Dr. Kane did not question the fact that he had used the university computer for his own purposes, but felt that he should not be suspended for doing so. The President attended the meeting as a member of the Board. Section 61 of the *Universities Act* provides that the President is a member of the Board "and shall attend its regular meetings."

Dr. Kane and his counsel were heard by the Board. Dr. Kane answered questions directed to him by members of the Board. During the hearing, the President of the University responded to questions directed to him by Board members, but did not ask questions of Dr. Kane or his counsel.

At the conclusion of the hearing, the Chairman requested Dr. Kane and his counsel to leave so that the Board might deliberate. Following an adjournment for dinner, the Board deliberated, the University President being present throughout. According to the findings of the Chambers judge,

malentendu plutôt que d'une tentative délibérée de frauder et que des agents d'administration de l'Université ont pu faire preuve de négligence dans l'exécution de leurs fonctions au point d'induire M. Kane en erreur quant aux méthodes à suivre.

Le président de l'Université a suivi la recommandation des doyens. Il a suspendu M. Kane pour trois mois, sans traitement, conformément au par. 58(1) de la *Universities Act*, 1974 (C.-B.), chap. 100, et lui a ordonné de rendre compte de toutes les sommes dues à l'Université et de les rembourser. L'article 58 de la Loi précitée se lit comme suit:

> [TRADUCTION] 58. (1) Le président a le pouvoir de suspendre tout membre du personnel enseignant et administratif et tout cadre ou employé de l'université.
>
> (2) Lorsqu'il exerce ce pouvoir, il doit sans délai communiquer sa décision au conseil avec motifs à l'appui.
>
> (3) La personne suspendue en vertu du présent article a un droit d'appel devant le conseil.

M. Kane a interjeté appel devant le conseil d'administration de l'Université conformément au par. 58(3). L'appel a été entendu au cours d'une réunion ordinaire du conseil d'administration. M. Kane n'a pas contesté le fait qu'il avait utilisé l'ordinateur de l'Université à des fins personnelles, mais selon lui, cela ne justifierait pas sa suspension. Le président assistait à l'assemblée à titre de membre du conseil. L'article 61 de la *Universities Act* prévoit que le président est membre du conseil [TRADUCTION] «et assiste aux réunions ordinaires».

Le conseil a entendu M. Kane et son avocat. M. Kane a répondu aux questions que lui ont posées les membres du conseil. Au cours de l'audience, le président de l'Université a répondu aux questions que lui ont posées les membres du conseil mais n'a interrogé ni M. Kane ni son avocat.

A la fin de l'audience, le président du conseil a demandé à M. Kane et à son avocat de se retirer afin que le conseil puisse délibérer. Après avoir ajourné pour le dîner, le conseil s'est de nouveau réuni, toujours en présence du président de l'Université. Selon les conclusions du juge en chambre,

"Dr. Kenny did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by Board members." The Board approved the three-month suspension of Dr. Kane, without salary, and the order for a full accounting and restitution of all sums due to the University for the use of the computer for private and commercial affairs.

Dr. Kane petitioned the Supreme Court of British Columbia for an order that the Board resolution be quashed, pursuant to the *Judicial Review Procedure Act*, 1976 (B.C.), c. 25.

The main thrust of the case advanced on behalf of Dr. Kane was that no man could be a judge in his own cause, and although no actual bias on the part of the President was alleged, his presence during the deliberations of the Board violated the principles of natural justice. The judge rejected this submission, being of opinion that the judgment of this Court in *Law Society of Upper Canada v. French*[2], determined the application. The judge considered that the President was in no sense an accuser or prosecutor, and the Legislature, in directing the President to attend regular Board meetings, had implicitly accepted the duplication which followed through the President making the decision to suspend and then sitting on the Board of Governors on appeal from that decision. Reference was also made by the judge to *King v. University of Saskatchewan*[3], and to *Ringrose v. College of Physicians and Surgeons of Alberta*[4].

A majority (McFarlane and Aikins, JJ.A., Lambert J.A. dissenting) of the British Columbia Court of Appeal agreed with the Chambers judge and dismissed an appeal brought to that Court by Dr. Kane. The Court rejected the argument based upon the dual position of the University President as originator of the suspension and member of the tribunal sitting in appeal. Rejected also was a second submission, apparently not advanced expressly in the Court of first instance, impugning the presence and conduct of the University Presi-

[2] [1975] 2 S.C.R. 767.
[3] [1969] S.C.R. 678.
[4] [1977] 1 S.C.R. 814.

[TRADUCTION] «M. Kenny n'a pas participé aux discussions ni pris part au vote de la résolution. Il a toutefois répondu aux questions que lui ont posées les membres du conseil.» Le conseil a entériné la suspension de trois mois sans traitement et l'ordre de rendre compte et de rembourser toutes les sommes dues à l'Université pour avoir utilisé l'ordinateur à des fins personnelles et commerciales.

M. Kane a présenté une requête en annulation de la résolution du conseil, devant la Cour suprême de la Colombie-Britannique, conformément à la *Judicial Review Procedure Act*, 1976 (C.-B.), chap. 25.

Le principal argument invoqué au nom de M. Kane est que nul ne peut être juge dans sa propre cause et que, même si l'on n'allègue aucune partialité réelle de la part du président, sa présence pendant les délibérations du conseil contrevient aux principes de justice naturelle. Le juge a rejeté cet argument étant d'avis que l'arrêt de cette Cour, *Law Society of Upper Canada c. French*[2], règle la question. Selon lui, le président n'est en aucune façon un accusateur ou un poursuivant et le législateur, en obligeant le président à assister aux réunions ordinaires du conseil, a implicitement accepté le chevauchement qui découle de ce que le président prend la décision de suspendre et entend ensuite l'appel interjeté de cette décision à titre de membre du conseil d'administration. Le juge a également renvoyé aux arrêts *King c. Université de la Saskatchewan*[3], et *Ringrose c. College of Physicians and Surgeons of Alberta*[4].

La Cour d'appel de la Colombie-Britannique à la majorité (les juges McFarlane et Aikins, le juge Lambert était dissident) a souscrit aux conclusions du juge en chambre et a rejeté l'appel interjeté par M. Kane. Elle a rejeté l'argument fondé sur le chevauchement des fonctions du président de l'Université en tant qu'auteur de la suspension et membre du tribunal siégeant en appel. Elle a également rejeté une seconde allégation qui n'a apparemment pas été expressément soutenue devant le tribunal de première instance, et qui

[2] [1975] 2 R.C.S. 767.
[3] [1969] R.C.S. 678.
[4] [1977] 1 R.C.S. 814.

dent during the deliberations of the Board, after Dr. Kane and his counsel had withdrawn. This argument rested upon the fact that the President testified or gave evidence during the postprandial session in the absence of Dr. Kane. It is contended that this amounted to a breach of the principles of natural justice and a failure to observe the rule expressed in the maxim *audi alteram partem*. It is to that argument that I now turn because, in my view, it is one to which the University can give no compelling answer. If this ground of appeal succeeds, as I think it must, it is unnecessary to address the argument resting upon the dual role of the President, the maxim *nemo judex in causa sua*, and the ramifications of the *King, French* and *Ringrose* decisions.

The evidence as to what occurred following the dinner adjournment is scant. Paragraph 7 of Dr. Kane's petition reads:

7. During the consideration by the Board of Governors of the said appeal leading to the said Resolution, the President, Douglas T. Kenny, was present and took part in the consideration and the discussion of the merits of the said appeal.

Dr. Kane's affidavit in support of his petition reads in part:

6. I am informed by the said Roberts [David Roberts, counsel for Doctor Kane] and verily believe that he was informed by a member of the Board of Governors, Mr. George Morfitt, that following the hearing of my appeal pursuant to Section 58 of the Universities Act and when the Board of Governors was considering my appeal following the hearing, the President of the University of British Columbia, Douglas T. Kenny, from whose decision the said appeal was brought, was present and took part in the discussion leading to the said Resolution.

An affidavit was filed in which Mr. Morfitt, a member of the Board of Governors, swore that during the meeting after dinner President Kenny did not participate in the discussions with regard to the petitioner. In clarification of Mr. Morfitt's affidavit, Mr. George S. Cumming, counsel for the University, wrote to counsel for Dr. Kane as follows:

I refer you to our telephone conversation of December 14th in which you sought some clarification of the affidavit sworn by Mr. George Morfitt.

attaquait la présence et la conduite du président de l'Université au cours des délibérations du conseil, après que M. Kane et son avocat se sont retirés. Cet argument était fondé sur le fait que le président aurait témoigné au cours de la séance tenue après le repas en l'absence de M. Kane. On allègue que cela équivaut à une violation des principes de justice naturelle et à l'inobservation de la règle exprimée dans la maxime *audi alteram partem*. Je vais étudier cet argument dès maintenant car, à mon avis, il s'agit d'un argument auquel l'Université ne peut répondre de façon irrésistible. Si ce moyen d'appel est recevable, comme je pense qu'il l'est, il sera inutile d'examiner l'argument fondé sur le double rôle du président, la maxime *nemo judex in causa sua* et les ramifications des arrêts *King, French* et *Ringrose*.

La preuve de ce qui s'est produit après l'ajournement pour le dîner est mince. Le paragraphe 7 de la requête de M. Kane se lit comme suit:

[TRADUCTION] 7. Le président, Douglas T. Kenny, était présent pendant que le conseil d'administration examinait l'appel qui a abouti à la résolution et il a participé à l'examen et à la discussion du bien-fondé de l'appel.

L'affidavit de M. Kane à l'appui de sa requête se lit en partie comme suit:

[TRADUCTION] 6. Je tiens mes renseignements de Roberts [M^e^ David Roberts, avocat de M. Kane] et j'ai la ferme conviction qu'un membre du conseil d'administration, M. George Morfitt, l'a informé qu'à la fin de l'audition de mon appel interjeté en vertu de l'art. 58 de la *Universities Act* et durant l'examen de celui-ci par le conseil d'administration, le président de l'Université de la Colombie-Britannique, Douglas T. Kenny, dont la décision faisait l'objet de l'appel en question, était présent et a participé à la discussion qui a abouti à l'adoption de la résolution.

M. Morfitt, un membre du conseil d'administration, a déposé un affidavit dans lequel il atteste que durant la réunion qui a suivi le dîner, le président Kenny n'a pas participé aux discussions concernant le requérant. Afin d'éclaircir l'affidavit de M. Morfitt, M^e^ George S. Cumming, l'avocat de l'Université, a écrit à l'avocat de M. Kane en ces termes:

[TRADUCTION] La présente fait suite à notre conversation téléphonique du 14 décembre où vous m'avez demandé des éclaircissements sur l'affidavit de M. George Morfitt.

Mr. Morfitt has advised me as follows:

"I note that Item 7 on page 2 of the Petition Facts states that President Kenny 'was present and took part in the consideration and discussion of the minutes [should read "merits"] of the said appeal'. While the President did provide the Board with the necessary facts relating to the Kane suspension it can be asserted that the President was at all times most careful not to take part in the consideration and the discussion of the merits of the appeal. A similar comment could be made in respect of the statement made in Item 6 of the Affidavit."

I think it would be appropriate if this were filed with the Court on the hearing of the Petition. We can thereby avoid the necessity of any cross-examination upon affidavits.

The critical words are " ... the President did provide the Board with the necessary facts relating to the Kane suspension ... " There was no cross-examination upon affidavits. The clarification which the letter sought to achieve is less than entire but this much is clear: the Board was furnished with "the necessary facts" relating to the suspension, in the absence of Dr. Kane and his counsel. In those circumstances, I do not see how the resolution of the Board can stand.

The following propositions, in my view, govern the outcome of this appeal:

1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate. The Board need not assume the trappings of a court. There is no *lis inter partes*, no prosecutor and no accused. The Board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case. Members of the Board are drawn from all constituencies of the community. They normally serve without remuneration in the discharge of what is frequently an arduous and thankless form of public service. Few, if any, of the members of the Board will be legally trained. It would be wrong, therefore, to ask of them, in the discharge of their quasi-judicial duties, the high standard of technical performance which one may properly expect of a court. They are not fettered by the strict evidential and other rules applicable to proceedings before courts of law. It is sufficient

M. Morfitt m'a fait part de ce qui suit:

«Je remarque que le point 7 à la page 2 de la requête indique que le président Kenny «était présent et a participé à l'examen et à la discussion du bien-fondé de l'appel». Même si le président a effectivement fourni au conseil les faits nécessaires relativement à la suspension de M. Kane, on peut affirmer qu'il a toujours pris grand soin de ne pas participer à l'examen ni à la discussion du bien-fondé de l'appel. On peut faire un commentaire semblable en ce qui concerne la déclaration faite au point 6 de l'affidavit.»

Je pense qu'il serait opportun de déposer la présente au dossier de la Cour au moment de l'audition de la requête. Nous éviterions ainsi la nécessité de contre-interroger sur les affidavits.

Les mots cruciaux sont: « ... le président a effectivement fourni au conseil les faits nécessaires relativement à la suspension de M. Kane ... ». Il n'y a pas eu de contre-interrogatoire sur les affidavits. L'éclaircissement que visait la lettre est moins que complet, mais une chose est claire: le conseil a été informé «des faits nécessaires» relativement à la suspension en l'absence de M. Kane et de son avocat. Vu ces circonstances, je ne vois pas comment la résolution du conseil peut être maintenue.

L'issue du présent pourvoi repose, à mon avis, sur les propositions suivantes:

1. Il incombe aux cours de justice d'attribuer à un tribunal, tel le conseil d'administration d'une université auquel la loi donne mandat de siéger en appel, une large mesure d'autonomie de décision. Le conseil n'a pas à faire siens les rites d'une cour de justice. Il n'y a pas de litige entre des parties et pas de poursuivant ni d'accusé. Il lui est permis, dans des limites raisonnables, d'établir ses propres règles de procédure qui varieront suivant la nature de l'enquête et les circonstances de l'affaire. Les membres du conseil sont choisis dans tous les secteurs de la collectivité. Ils ne sont habituellement pas rémunérés pour s'acquitter de ce qui est souvent une forme ardue et ingrate de service public. Peu de membres ont une formation juridique, parfois aucun. Par conséquent, il serait injuste de leur demander d'avoir, dans l'exécution de leurs fonctions quasi judiciaires, la haute tenue en matière de procédure que l'on est en droit d'attendre d'une cour. Ils ne sont pas liés par les règles de preuve strictes et les autres règles applicables aux

that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice: per Lord Parmoor in *Local Government Board v. Arlidge*[5], at p. 140. Let me make it clear that in this appeal nothing has been said which in any way impugns the integrity or *bona fides* of any member of the Board of Governors of the University of British Columbia.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*[6], at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk*[7], at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake. *Abbott v. Sullivan*[8], at p. 198; *Russell v. Duke of Norfolk, supra*, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views". *Board of Education v. Rice*[9], at p. 182; *Local Government Board v. Arlidge, supra*, at pp. 133 and 141.

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellante authority must not hold private interviews with witnesses (de Smith, *Judicial Review of Administrative Action* (3rd. ed.) 179) or, *a fortiori*, hear evidence

[5] [1915] A.C. 120.
[6] [1962] 1 All E.R. 834 (C.A.).
[7] [1949] 1 All E.R. 109.
[8] [1952] 1 K.B. 189.
[9] [1911] A.C. 179 (H.L.).

procédures engagées devant une cour de justice. Il suffit que la cause soit entendue dans un esprit d'impartialité et conformément aux principes de justice fondamentale: lord Parmoor dans *Local Government Board v. Arlidge*[5], à la p. 140. Je tiens à préciser que, dans ce pourvoi, rien de ce qui est dit n'attaque de quelque façon l'intégrité ou la bonne foi des membres du conseil d'administration de l'Université de la Colombie-Britannique.

2. En tant qu'élément constitutif de l'autonomie dont il jouit, le tribunal doir respecter la justice naturelle qui, comme l'a dit le lord juge Harman *Ridge v. Baldwin*[6], à la p. 850, équivaut simplement [TRADUCTION] «à jouer franc jeu». Dans chaque cas, les exigences de la justice naturelle varient selon [TRADUCTION] «les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.»: le lord juge Tucker dans *Russell v. Duke of Norfolk*[7], à la p. 118. Les règles de justice naturelle ne peuvent être abrogées que par un texte de loi exprès ou nettement implicite en ce sens.

3. Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. *Abbott v. Sullivan*[8], à la p. 198; *Russell v. Duke of Norfolk*, précité, à la p. 119. Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

4. Le tribunal doit entendre équitablement les deux parties au litige afin de leur donner la possibilité [TRADUCTION] «de rectifier ou de contredire toute déclaration pertinente préjudiciable à leurs points de vue». *Board of Education v. Rice*[9], à la p. 182; *Local Government Board v. Arlidge*, précité, aux pp. 133 et 141.

5. C'est un principe fondamental de notre droit qu'à moins d'être autorisée à agir *ex parte* de façon expresse ou nettement implicite, une juridiction d'appel ne doit pas avoir d'entretiens privés avec les témoins (de Smith, *Judicial Review of Administrative Action* (3e éd.) 179) ou, a fortiori,

[5] [1915] A.C. 120.
[6] [1962] 1 All E.R. 834 (C.A.).
[7] [1949] 1 All E.R. 109.
[8] [1952] 1 K.B. 189.
[9] [1911] A.C. 179 (Ch. L.).

in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Government of the Federation of Malaya*[10], at p. 337, " . . . know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. . . . Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other." In *Errington v. Ministry of Health*[11], Greer L.J. held that a quasi-judicial officer must exercise powers in accordance with the rules of natural justice, and must not hear one side in the absence of the other:

> If . . . he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given *ex parte* without the owners having any opportunity whatsoever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the *Act*. (p. 268)

The principle was summarized in the headnote in these words:

> If the Minister holds a private inquiry to which the owners are not invited or takes into consideration *ex parte* statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice . . . .

In the early case of *Re Brook and Delcomyn*[12], Erle C.J. came to the conclusion that the law had been violated when an arbitrator brought before the umpire evidence which had never been communicated to the other arbitrator and which, consequently, one of the parties never had an opportunity of meeting by contradictory evidence. Erle C.J. referred to this as "not a point of form" but a matter of substance, and "one of the last and deepest importance". A similar case is *Re an*

[10] [1962] A.C. 322.
[11] [1935] 1 K.B. 249.
[12] (1864), 16 C.B.R. (N.S.) 403.

entendre des témoignages en l'absence de la partie dont la conduite contestée fait l'objet de l'examen. Cette partie doit, selon lord Denning dans *Kanda v. Government of the Federation of Malaya*[10], à la p. 337 [TRADUCTION] « . . . connaître la preuve réunie contre [elle]. [Cette dernière] doit être informé[e] des témoignages et des déclarations qui l'intéressent et avoir la possibilité de les rectifier ou de les contredire . . . quiconque appelé à rendre une décision ne doit pas recueillir des témoignages ou entendre des arguments d'une partie dans le dos de l'autre.» Dans *Errington v. Ministry of Health*[11], le lord juge Greer a décidé qu'un fonctionnaire qui a des pouvoirs quasi judiciaires doit les exercer conformément aux règles de justice naturelle et ne doit pas entendre une partie en l'absence de l'autre:

> [TRADUCTION] s'il . . . tient compte de la preuve qui aurait pu être produite à l'enquête publique mais qui ne l'a pas été, mais qui, par contre, a été produite *ex parte* sans que les propriétaires aient eu la possibilité de la réfuter, alors j'estime que l'ordonnance de ratification était illégale. (p. 268).

Le principe est résumé dans le sommaire en ces termes:

> [TRADUCTION] Si le Ministre procède à une enquête privée à laquelle les propriétaires ne sont pas invités à participer ou s'il tient compte de déclarations *ex parte* que les propriétaires n'ont pas eu la possibilité de réfuter, il n'agit pas conformément aux principes de justice reconnus . . . .

Dans une décision ancienne *Re Brook and Delcomyn*[12], le juge en chef Erle a conclu qu'il y avait violation des principes juridiques parce qu'un arbitre avait présenté au juge-arbitre des éléments de preuve qui n'avaient jamais été communiqués à l'autre arbitre et que, par conséquent, l'une des parties n'avait jamais eu la possibilité de réfuter par une preuve contradictoire. Selon le juge en chef Erle, il ne s'agit pas [TRADUCTION] «d'une question de forme» mais bien d'une question de

[10] [1962] A.C. 322.
[11] [1935] 1 K.B. 249.
[12] (1864), 16 C.B.R. (N.S.) 403.

*Arbitration between Gregson and Armstrong*[13], in which an award was set aside at the instance of a landlord when, all of the evidence on both sides having been heard, the arbitrators on a subsequent day, before making their award, held a meeting on the farm at which the outgoing tenant was present, but not the landlord. In a much later case, *R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones*[14], the tribunal received evidence which was both fresh and highly prejudicial to the applicant's position. The case at bar cannot be put so strongly, but the principle to be applied is the same. Lord Parker C.J., in granting the order for *certiorari*, stated that a tribunal is not entitled to continue privately to obtain evidence between the end of a hearing and the reaching of decision "without notifying the parties thereafter of the advice or information received, so as to give the parties an opportunity of having a further hearing if need be, or, at any rate, commenting on the information and making their submissions thereon" (p. 686).

A recent decision of this Court which has relevance for this appeal is *Pfizer Company Limited v. Deputy Minister of National Revenue for Customs and Excise*[15], in which Pigeon J., speaking for the Court, said at p. 463:

> While the Board is authorized by statute to obtain information otherwise than under sanction of an oath or affirmation . . . this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it.

*Pfizer* is not a case in which a tribunal heard one party in the absence of the other. It establishes, however, the principle that each party to a hearing is entitled to be informed of, and to make representations, with respect to evidence which

[13] (1894), 70 L.T. 106.
[14] [1962] 2 Q.B. 677.
[15] [1977] 1 S.C.R. 456.

fond, [TRADUCTION] «une question de la plus haute et de la plus grande importance». Dans une autre décision semblable, savoir *Re an Arbitration between Gregson and Armstrong*[13], une sentence a été annulée à la demande d'un propriétaire parce qu'une fois entendue la preuve des deux parties, les arbitres ont tenu une réunion à la ferme le lendemain, avant de rendre leur sentence, réunion à laquelle assistait le locataire sortant, mais non le propriétaire. Dans une décision beaucoup plus récente, *R. v. Deputy Industrial Injuries Commissioner, Ex p. Jones*[14], le tribunal a été saisi d'une preuve à la fois nouvelle et très préjudiciable à la situation du requérant. Même si la situation présente n'est pas aussi manifeste, le principe à appliquer est le même. Le juge en chef, lord Parker, a déclaré en accordant le *certiorari*, qu'un tribunal n'a pas le droit de continuer à recueillir des éléments de preuve en secret entre la fin de l'audience et le prononcé de la décision [TRADUCTION] «sans communiquer ensuite aux parties les avis ou les renseignements reçus de manière à leur donner la possibilité de procéder à une nouvelle audition si nécessaire ou, du moins, de commenter les renseignements et de faire valoir leurs prétentions» (p. 686).

Cette Cour a récemment rendu un arrêt pertinent au présent pourvoi. Il s'agit de *Pfizer Company Limited c. Le sous-ministre du Revenu national pour les douanes et l'accise*[15], où le juge Pigeon, qui rend le jugement au nom de la Cour, déclare à la p. 463:

> Bien que la loi autorise la Commission à obtenir des renseignements autrement que sous la sanction d'un serment ou d'une affirmation . . . elle n'est pas pour autant autorisée à s'écarter des règles de justice naturelle. Il est nettement contraire à ces règles de s'en rapporter à des renseignements obtenus après la fin de l'audience sans en avertir les parties et leur donner la possibilité de les réfuter.

L'arrêt *Pfizer* ne vise pas le cas d'un tribunal qui entend une partie en l'absence d'une autre. Mais il établit le principe que chaque partie à une affaire a le droit d'être informée des éléments de preuve qui ont trait à la décision et de faire valoir ses

[13] (1894), 70 L.T. 106.
[14] [1962] 2 Q.B. 677.
[15] [1977] 1 R.C.S. 456.

affected the disposition of the case. See also *R. v. Birmingham City Justices, Ex p. Chris Foreign Foods (Wholesalers) Ltd.*[16]; *R. v. Barnsley Metropolitan Borough Council, Ex p. Hook*[17]; *R. v. Justices of Bodmin, Ex p. McEwen*[18].

6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. *Kanda v. Government of the Federation of Malaya, supra*, at p. 337. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. See *Jeffs v. New Zealand Dairy Production and Marketing Board*[19], at p. 567. We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

Applying the foregoing principles, I think this appeal must succeed. The Board was aware of the possibly anomalous position of the President during the after dinner deliberations. The Chairman, vigilant in ensuring that Dr. Kane receive a fair hearing, advised the meeting that the President should not participate in discussion, nor vote. There can be no criticism of this direction. The vigilance, unfortunately, was not carried to its full length for, despite the care with which the appeal was conducted, the Board, as appears to be the case, found that it needed additional, "necessary" facts before reaching a decision, and the President furnished those facts. It is quite immaterial whether the facts were furnished by the President or, for example, another professor at the University. It cannot improve matters that the informant was the University President.

The Board was under an obligation to postpone further consideration of the matter until such time as Dr. Kane might be present and hear the addi-

[16] [1970] 1 W.L.R. 1428.
[17] [1976] 3 All E.R. 452.
[18] [1947] 1 K.B. 321.
[19] [1967] 1 A.C. 551 (P.C.).

arguments à leur égard. Voir également *R. v. Birmingham City Justices, Ex p. Chris Foreign Foods (Wholesalers) Ltd.*[16], *R. v. Barnsley Metropolitan Borough Council, Ex p. Hook*[17]; *R. v. Justices of Bodmin, Ex p. McEwen*[18].

6. La Cour ne cherchera pas à savoir si la preuve a de fait joué au détriment de l'une des parties; il suffit que cette possibilité existe. Voir *Kanda v. Government of the Federation of Malaya*, précité, à la p. 337. En l'espèce, la Cour ne peut conclure qu'aucun préjudice n'était possible car elle ne sait pas quels éléments de preuve ont réellement été fournis par le président Kenny après l'ajournement pour le dîner. Voir *Jeffs v. New Zealand Dairy Production and Marketing Board*[19], à la p. 567. Nous ne sommes pas concernés ici par la preuve de l'existence d'un préjudice réel mais plutôt par la possibilité ou la probabilité qu'aux yeux des gens raisonnables, il existe un préjudice.

Si l'on applique ces principes, j'estime qu'il faut faire droit au présent pourvoi. Le conseil était conscient de la situation probablement anormale du président de l'Université durant les délibérations postérieures au dîner. Le président du conseil, soucieux d'assurer à M. Kane une audition impartiale, a avisé les membres du conseil que le président de l'Université ne devrait pas participer aux discussions ni voter. On ne peut critiquer cette directive. Malheureusement, la vigilance du président du conseil n'a pas été aussi loin que possible, car, malgré le soin apporté à l'audition de l'appel, le conseil, comme il ressort du dossier, a conclu qu'il avait besoin de faits additionnels, «nécessaires», avant de rendre une décision et le président de l'Université les lui a fournis. Il importe peu que les faits aient été fournis par le président ou, par exemple, par un autre professeur de l'Université. Mais que l'informateur ait été le président de l'Université n'arrange pas les choses.

Le conseil était tenu d'ajourner l'examen ultérieur de la question jusqu'à ce que M. Kane puisse être présent afin d'entendre les faits additionnels;

[16] [1970] 1 W.L.R. 1428.
[17] [1976] 3 All E.R. 452.
[18] [1947] 1. K.B. 321.
[19] [1967] 1 A.C. 551 (C.P.).

tional facts adduced; at the very least the Board should have made Dr. Kane aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made. In the event, the Board followed neither course. The Board heard the further facts, deliberated, and ruled against Dr. Kane. In so doing, it made a fundamental error. The danger against which the Courts must be on guard is the possibility that further information could have been put before the Board for its consideration which affected the disposition of the appeal. See *R. v. Architects' Registration Tribunal, Ex p. Jaggar*[20], at p. 447.

le conseil aurait dû, à tout le moins, lui faire part de ces faits et lui donner une possibilité réelle et valable de rectifier ou de réfuter toute déclaration défavorable. En l'espèce, le conseil n'a fait ni l'un ni l'autre. Le conseil a entendu les faits additionnels, il a délibéré et tranché la question à l'encontre de M. Kane. Ce faisant, il a commis une erreur fondamentale. Le danger dont les cours doivent se méfier est la possibilité que le conseil ait pu être saisi d'autres renseignements à même d'influer sur l'issue de l'appel. Voir *R. v. Architects' Registration Tribunal, Ex p. Jaggar*[20], à la p. 447.

I would allow the appeal, set aside the judgment of the Court of Appeal, and quash the resolution passed on July 5, 1977, by the Board of Governors of the University of British Columbia relative to the appellant, with costs to the appellant in all Courts.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et d'annuler la résolution adoptée le 5 juillet 1977 par le conseil d'administration de l'Université de la Colombie-Britannique relativement à l'appelant, avec dépens à ce dernier dans toutes les cours.

The following are the reasons delivered by

Version française des motifs rendus par

RITCHIE J. (*dissenting*)—This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing an appeal from a judgment rendered at trial by Mr. Justice Macdonald whereby he dismissed the petition of the present appellant brought pursuant to the *Judicial Review Procedure Act*, 1976 (B.C.), c. 25, seeking to quash a resolution passed by the respondent Board of Governors on July 5, 1977, approving the suspension of the appellant from his employment as a professor at the University of British Columbia for the three months May to July 1977, inclusive.

LE JUGE RITCHIE (*dissident*)—Il s'agit d'un pourvoi formé contre un arrêt de la Cour d'appel de la Colombie-Britannique qui a rejeté l'appel interjeté d'un jugement rendu en première instance par le juge Macdonald qui avait rejeté la requête de l'appelant introduite conformément à la *Judicial Review Procedure Act*, 1976 (C-.B.) chap. 25. Par cette requête, l'appelant cherchait à faire annuler une résolution adoptée par le conseil d'administration intimé, le 5 juillet 1977, laquelle entérinait la suspension de l'appelant, un professeur à l'Université de la Colombie-Britannique, pour une période de trois mois, soit de mai à juillet 1977.

I have had the advantage of reading the reasons for judgment prepared for delivery by Mr. Justice Dickson in this case, but as I am unable to agree with the conclusion at which he arrives on the very slender record before us, I find it necessary to express my views separately.

J'ai eu l'avantage de lire les motifs de jugement préparés par le juge Dickson dans la présente affaire. Comme il m'est impossible de souscrire à la conclusion à laquelle il parvient à partir du dossier très peu étoffé qui nous a été soumis, j'estime nécessaire d'exprimer mon opinion dans des motifs distincts.

The judgment rendered at trial by Mr. Justice Macdonald is now conveniently reported in 82 D.L.R. (3d) at p. 494 and the reasons for judgment of the Court of Appeal of British Columbia

Le jugement rendu en première instance par le juge Macdonald est maintenant publié (82 D.L.R. (3d) à la p. 494); les motifs de l'arrêt de la Cour d'appel de la Colombie-Britannique le sont égale-

[20] (1945), 61 T.L.R. 445.

[20] (1945), 61 T.L.R. 445.

are also now reported in 11 B.C.L.R. 318; both of these reports contain a full review of the circumstances giving rise to this appeal.

The petitioner, Julius Kane, is a professor at the University of British Columbia with tenure of appointment but it was recommended by the Deans of the Faculty of Graduate Studies and of the Faculty of Science that his employment with the University be terminated for cause, the chief complaint being that he had made improper use of the university computer facilities for personal purposes.

Professor Kane at no time disputed the allegation that he had made use of the University computer in the manner complained of, but he complained of the penalty sought to be imposed by way of termination of his services, and following a meeting which was called by the President of the University, Dr. Douglas T. Kenny, at which Kane and his counsel were present, the Deans changed their recommendation to that of suspension without salary for three months and a requirement of financial restitution to the University by Kane. President Kenny complied with this latter recommendation and issued an order in conformity with it pursuant to s. 58(1) of the *Universities Act*, 1974 (B.C.), c. 100 (hereinafter called the Act). Section 58 of that Act reads:

> 58. (1) The president has power to suspend any member of the teaching and administrative staffs and any officer or employee of the university.
>
> (2) Upon the exercise of the power, he shall forthwith report his action to the board with a statement of his reasons.
>
> (3) A person who is suspended under this section has a right of appeal to the board.

Professor Kane exercised the right of appeal to which he was entitled under s. 58(3) and in due course the appeal came on for hearing before a regular meeting of ten members of the Board of Governors which included the Chairman (The Honourable T. A. Dohm, Q.C.) and the President whose presence was required by s. 61 of the Act. This meeting of the Board was also attended by the Dean of Science, the Dean of Geology and the Dean of Graduate Studies together with three other faculty members. Professor Kane together

ment (11 B.C.L.R. 318). Les deux décisions rapportent de façon détaillée les circonstances qui sont à l'origine du présent pourvoi.

Le requérant, Julius Kane, est professeur permanent à l'Université de la Colombie-Britannique. Les doyens de la Faculté des Études supérieures et de la Faculté des Sciences ont toutefois recommandé qu'il soit mis fin à son emploi à l'Université, avec motifs à l'appui, savoir, principalement, qu'il avait irrégulièrement utilisé les services d'informatique de l'Université à des fins personnelles.

M. Kane n'a jamais contesté l'allégation qu'il avait utilisé l'ordinateur de l'Université de la manière qui lui est reprochée, mais il se plaint de la sanction qu'on a cherché à lui imposer en mettant fin à son emploi. A une réunion convoquée par le président de l'Université, Douglas T. Kenny, à laquelle étaient présents Kane et son avocat, les doyens ont modifié leur recommandation et demandé que M. Kane soit suspendu sans traitement pendant trois mois et qu'il rembourse l'Université. Le président Kenny a suivi cette recommandation et a rendu un ordre en ce sens conformément au par. 58(1) de la *Universities Act*, 1974 (C.-B.), chap. 100 (ci-après appelé la Loi). L'article 58 de cette Loi se lit comme suit:

> [TRADUCTION] 58. (1) Le président a le pouvoir de suspendre tout membre du personnel enseignant et administratif et tout cadre ou employé de l'université.
>
> (2) Lorsqu'il exerce ce pouvoir, il doit sans délai communiquer sa décision au conseil avec motifs à l'appui.
>
> (3) La personne suspendue en vertu du présent article a un droit d'appel devant le conseil.

M. Kane a interjeté appel comme il en avait le droit en vertu du par. 58(3), et en temps voulu, l'appel est venu à audience à une réunion ordinaire du conseil d'administration composée de dix membres dont le président du conseil (l'honorable T. A. Dohm, c.r.) et le président de l'Université dont l'art. 61 de la Loi exige la présence. Y assistaient également le doyen de la Faculté des Sciences, le doyen de la Faculté de Géologie et le doyen de la Faculté des Études supérieures, en plus de trois autres professeurs. Le professeur Kane, de même

with his counsel and the counsel for the Board were also present. There is no report in the record of the proceedings at this meeting of the Board of Governors but I am prepared to adopt the account contained in the judgment of the learned trial judge at 82 D.L.R. (3d) at p. 497:

> The appeal came before the board of governors at a regular meeting on July 5th. It was one of many items on the agenda. Among the members of the board present was Dr. Kenny. When the appeal came on for hearing other persons joined the meeting, including the petitioner and his counsel, Mr. Roberts. The board heard from both Mr. Roberts and Dr. Kane. Dr. Kane was questioned by board members on points he had brought forward. During the hearing president Kenny did not ask questions of the petitioner or Mr. Roberts. He did answer questions directed to him by other members of the board and may have responded to statements made by Dr. Kane or Mr. Roberts. At the conclusion of the hearing the chairman requested Mr. Roberts and his client to leave so that the board could deliberate. The other non-members who attended for the hearing of the appeal also left. The board's deliberations upon the appeal commenced after adjournment for dinner. Dr. Kenny did not participate in the discussions. Nor did he vote upon the resolution. He did, however, answer questions directed to him by board members.

Accepting as I do this version of the proceedings, it appears to me to be plain that at the initial meeting of the Board the appellant was given full opportunity to answer all allegations against him and to present his version of the case. This opportunity was offered to him in the presence of a group of persons who as governors must be taken to have had the welfare of the University at heart, and whose chairman, the Honourable Mr. Dohm, was a former judge of the Supreme Court of British Columbia. Evidence was given by both the appellant and President Kenny and Dean Larkin, who as Dean of Graduate Studies had been one of those responsible for recommending that the appellant's employment with the University should be terminated, and I would think it to be a fair inference that all relevant facts having to do with the plight of the appellant would have been canvassed by either one or more of these witnesses at that time. It is to be remembered that the Board was acting pursuant to statutory authority and

que son avocat et l'avocat du conseil, étaient également présents. Le procès-verbal de cette réunion du conseil d'administration n'a pas été versé au dossier, mais je suis disposé à adopter le récit qu'en fait le savant juge de première instance, 82 D.L.R. (3d) à la p. 497:

> [TRADUCTION] Le conseil d'administration a été saisi de l'appel au cours d'une réunion ordinaire le 5 juillet. C'était un des nombreux points à l'ordre du jour. Parmi les membres du conseil présents se trouvait M. Kenny. Au moment de l'audition de l'appel, d'autres personnes sont venues à la réunion dont le requérant et son avocat, M^e^ Roberts. Le conseil a entendu M^e^ Roberts et M. Kane. Les membres du conseil ont interrogé M. Kane sur les points qu'il avait soulevés. Au cours de l'audience, le président Kenny n'a pas posé de question au requérant ni à M^e^ Roberts. Il a répondu aux questions que lui ont posées d'autres membres du conseil; il a peut-être répondu aux déclarations de M. Kane ou de M^e^ Roberts. A la fin de l'audience, le président a demandé à M^e^ Roberts et à son client de se retirer pour que le conseil puisse délibérer. Les autres personnes étrangères au conseil, qui avaient assisté à l'audition de l'appel, se sont également retirées. Les délibérations du conseil postérieurement à l'appel ont commencé après l'ajournement pour le dîner. M. Kenny n'a pas participé aux discussions ni pris part au vote de la résolution. Il a toutefois répondu aux questions que lui ont posées les membres du conseil.

En acceptant, comme je le fais, cette version des procédures, il me paraît clair que l'appelant a eu amplement la possibilité à la première réunion du conseil de réfuter toutes les allégations portées contre lui et de présenter sa version de l'affaire. Cette possibilité lui a été offerte en présence d'un groupe de personnes qui, en leur qualité d'administrateurs, doivent être considérées comme ayant à cœur le bien de l'Université; le président du conseil, M. Dohm, est un ancien juge de la Cour suprême de la Colombie-Britannique. L'appelant et le président Kenny ont tous deux témoigné, de même que le doyen Larkin qui, en qualité de doyen de la Faculté des Études supérieures, était l'un des auteurs de la recommandation de mettre fin à l'emploi de l'appelant à l'Université. J'estime qu'il est raisonnable de conclure que tous les faits pertinents se rapportant à la situation critique de l'appelant ont été exposés par un ou plusieurs de ces témoins au moment de l'audition. On doit se rappeler que le conseil a agi en vertu du pouvoir que

there is no suggestion anywhere in the record that the proceedings which took place at the initial hearing were not fairly and properly conducted giving due weight to the position of the appellant and the results flowing from his suspension from office.

However, the main complaint of the appellant relates to the fact that after the hearing had terminated the Chairman, President and other members of the Board adjourned for dinner and, in the absence of the appellant and his counsel, reconvened to continue their meeting which had been concerned with a number of issues in addition to the appellant's appeal and which culminated in so far as the appellant was concerned with the passage of the resolution ordering his suspension. By para. 7 of his petition the appellant complained that:

> During the consideration by the Board of Governors of the said appeal leading to the said Resolution, the President, Douglas T. Kenny, was present and took part in the consideration and the discussion of the merits of the said appeal.

The affidavit filed by the appellant in support of his petition contained the following paragraph:

> I am informed by the said Roberts and verily believe that he was informed by a member of the Board of Governors, Mr. George Morfitt, that following the hearing of my appeal pursuant to Section 58 of the Universities Act and when the Board of Governors was considering my appeal following the hearing, the President of the University of British Columbia, Douglas T. Kenny, from whose decision the said appeal was brought, was present and took part in the discussion leading to the said Resolution.

This affidavit was dated August 8, 1977, but it is noteworthy that an affidavit was filed by Mr. Morfitt on September 6th of the same year in which he stated as follows after having described the Board meeting:

> 11. Mr. Roberts and the petitioner left the hearing. The hearing was adjourned
> 12. Following dinner the meeting of the Board was called to order.
> 13. President Kenny did not participate in the discussions with regard to the petitioner.

lui confère la Loi et le dossier ne laisse nullement entendre que les procédures suivies au cours de la première audience ne l'ont pas été de façon équitable et régulière, en accordant tout le poids voulu à la situation de l'appelant et aux conséquences de sa suspension.

Pourtant, l'appelant se plaint essentiellement du fait qu'à la fin de l'audience, la président du conseil, le président de l'Université et les autres membres du conseil ont ajourné pour le dîner et qu'en l'absence de son avocat et en son absence, ils ont repris leur réunion qui devait porter sur un certain nombre de points en plus de l'appel de l'appelant et qui s'est terminée, pour ce qui est de l'appelant, par l'adoption de la résolution ordonnant sa suspension. Dans le par. 7 de la requête, l'appelant se plaint que:

> [TRADUCTION] Le président, Douglas T. Kenny, était présent pendant que le conseil d'administration examinait l'appel qui a abouti à la résolution et il a participé à l'examen et à la discussion du bien-fondé de l'appel.

L'affidavit déposé par l'appelant à l'appui de sa requête renferme le paragraphe suivant:

> [TRADUCTION] Je tiens mes renseignements de Roberts [Me David Roberts, avocat de M. Kane] et j'ai la ferme conviction qu'un membre du conseil d'administration, M. George Morfitt, l'a informé qu'à la fin de l'audition de mon appel interjeté en vertu de l'art. 58 de la *Universities Act* et durant l'examen de celui-ci par le conseil d'administration, le président de l'Université de la Colombie-Britannique, Douglas T. Kenny, dont la décision faisait l'objet de l'appel en question, était présent et a participé à la discussion qui a abouti à l'adoption de la résolution.

Cet affidavit date du 8 août 1977, mais il convient de noter que M. Morfitt a déposé un affidavit le 6 septembre de la même année dans lequel il déclare après avoir décrit la réunion du conseil:

> [TRADUCTION] 11. Me Roberts et le requérant se sont retirés. L'audience a été ajournée.
> 12. Après le dîner, l'assemblée du conseil a repris ses travaux.
> 13. Le président Kenny n'a pas participé à la discussion concernant le requérant.

This latter affidavit constitutes the only sworn evidence coming from any member of the Board who was present at the after dinner meeting and if it stood alone there can be no doubt that it would support the contention that nothing adverse was said about the appellant at that meeting. There was, however, a letter written by the solicitor for the University to Dr. Kane's counsel in which he quotes from Mr. Morfitt in part as follows:

While the President did provide the Board with *the necessary facts relating to the Kane suspension* it can be asserted that the President was at all times most careful not to take part in the consideration and the discussion of the merits of the appeal.

The words which I have italicized are treated by the appellant as being potentially prejudicial to him in that they might be taken to mean that the President stated some necessary facts relating to the Kane suspension which could be construed adversely to him and he had no opportunity to answer. This submission is supported by reference to the case of *Kanda v. Government of the Federation of Malaya*[21] in which the report of an inquiry containing a most damaging indictment against Inspector Kanda as an unscrupulous scoundrel was made available to the adjudicating officer before he sat to inquire into the charge while it was withheld from Kanda. It was in these circumstances that Lord Denning said at p. 337:

It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

The facts of the *Kanda* case are obviously vastly different from those with which we are here concerned. In the present case Kane knew from the outset exactly what it was that he was charged with and as I have explained, he had an opportunity to present his case and to examine the witnesses against him, and it cannot in my view be suggested that the President decided to wait until Kane was absent before providing the members of

[21] [1962] A.C. 322.

Ce dernier affidavit constitue la seule preuve donnée sous serment par un membre du conseil présent à la séance tenue après le dîner et, en l'absence de tout autre élément, il ne fait aucun doute qu'il étayerait la prétention qu'aucune déclaration défavorable n'y a été faite au sujet de l'appelant. Il y a toutefois une lettre écrite par l'avocat de l'Université à l'avocat de M. Kane où les propos de M. Morfitt sont en partie cités:

[TRADUCTION] Même si le président a effectivement fourni au conseil *les faits nécessaires relativement à la suspension de M. Kane*, on peut affirmer qu'il a toujours pris grand soin de ne pas participer à l'examen ni à la discussion du bien-fondé de l'appel.

L'appelant allègue que les mots que j'ai soulignés pourraient lui être préjudiciables en ce sens qu'ils pourraient signifier que le président a fait état de certains faits nécessaires relativement à la suspension de M. Kane qui pourraient être interprétés à son encontre sans qu'il ait eu la possibilité de les réfuter. L'appelant appuie sa prétention sur l'arrêt *Kanda v. Government of the Federation of Malaya*[21]. Dans cette affaire, le rapport d'une enquête qui renfermait une accusation extrêmement préjudiciable à l'inspecteur Kanda (ce dernier y était traité de scélérat), a été mis à la disposition du fonctionnaire juge avant l'ouverture de l'enquête portant sur l'accusation, alors qu'on le cachait à Kanda. C'est dans ce contexte que lord Denning a dit à la p. 337:

[TRADUCTION] Il s'ensuit bien entendu que le juge ou quiconque appelé à rendre une décision ne doit pas recueillir des témoignages ou entendre des arguments d'une partie dans le dos de l'autre. La cour ne cherchera pas à savoir si les témoignages ou les arguments ont joué au détriment de l'autre partie; il suffit que cela ait pu se produire. La cour n'étudiera pas la probabilité de partialité. Il suffit qu'il y ait un risque de partialité.

Il est clair que les faits dans *Kanda* sont très différents de ceux de l'espèce. Dès le début, M. Kane connaissait exactement l'accusation portée contre lui et, comme je l'ai déjà expliqué, il a eu la possibilité de se défendre et d'interroger les témoins à charge et on ne peut, à mon avis, laisser entendre que le président a décidé d'attendre que Kane soit absent pour fournir aux membres du conseil des faits préjudiciables à ce dernier, la

[21] [1962] A.C. 322.

the Board with facts prejudicial to Kane, what the allegations really were and the reasons why the penalty was reduced from termination to suspension. If this had been the case there would indeed have been a grave breach of good faith on the part of the President and other Board members and a denial to the appellant of the fundamental right to be heard in his own defence in breach of the elementary principles of natural justice.

In my view the statement contained in Mr. Morfitt's letter to the effect that the President provided the Board with necessary facts without in any way discussing the merits of the appeal, is too slender a thread upon which to support an accusation of such gravity against men of presumed integrity acting under a statutory authority. I say this having in mind particularly the reasons for judgment of Mr. Justice Pennell in *Re Schabas and Caput of the University of Toronto*[22], which is referred to by Macdonald, J.A., in the present case at 11 B.C.L.R. 326 and where he said:

> Subject to evidence of actual bias, I am of the opinion that the Court should be reluctant to say that a presumption of bias can arise in so far as it relates to the personnel of a *quasi*-judicial body where the composition of the tribunal is specifically authorized by the Legislature: . . . .It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.

The Latin maxim "*omnia praesumuntur rite acta esse* . . . " has been interpreted as meaning that where acts are of an official nature or require the concurrence of official persons a presumption arises in favour of their due execution. The maxim is an old one but not I think dead in the administration of our law, and in my view it expresses a principle applicable to the present circumstances. In Halsbury's Laws of England, 3rd ed., vol. 10, at p. 457 it is said:

> The presumption *omnia rite esse acta* (for example, that a man who has acted in a public capacity was duly appointed and has properly discharged his official duties) is common to criminal and civil proceedings.

[22] (1974), 52 D.L.R. (3d) 495.

nature véritable des allégations et les motifs à l'origine de la décision de réduire la sanction de renvoi à suspension. S'il en avait été ainsi, le président et les autres membres du conseil auraient effectivement gravement fait fi de la bonne foi et du droit fondamental de l'appelant d'être entendu pour faire valoir sa défense, le tout contrairement aux principes élémentaires de justice naturelle.

A mon avis, la déclaration dans la lettre de M. Morfitt selon laquelle le président a fourni au conseil les faits nécessaires sans discuter de quelque façon du bien-fondé de l'appel est un moyen beaucoup trop ténu pour étayer une accusation aussi sérieuse contre des hommes dont on présume l'intégrité et qui agissent en vertu d'un pouvoir conféré par la loi. Je dis ceci en pensant plus particulièrement aux motifs de jugement du juge Pennell dans *Re Schabas and Caput of the University of Toronto*[22], motifs auxquels renvoie le juge Macdonald dans la présente affaire en ces termes, 11 B.C.L.R. 326:

> [TRADUCTION] Sous réserve d'une preuve de partialité réelle, je suis d'avis que la Cour doit se montrer peu disposée à conclure à une présomption de partialité dans le cas des membres d'un organisme quasi judiciaire, lorsque la composition en a été expressément autorisée par le législateur . . . Il faut présumer qu'un groupe de personnes à qui le législateur a conféré de vastes pouvoirs touchant les droits d'autrui feront preuve de bonne foi.

Selon l'interprétation donnée à la maxime latine «*omnia praesumuntur rite acta esse* . . », lorsque des actes revêtent un caractère officiel ou exigent l'approbation de personnes qui exercent des fonctions officielles, il existe une présomption que ces actes ont été dûment exécutés. C'est une maxime ancienne, mais, à mon avis, elle n'a pas disparu de l'administration de notre droit. A mon avis, elle énonce un principe applicable aux circonstances présentes. On explique dans *Halsbury's Laws of England*, 3[e] éd., vol. 10, à la p. 457 que:

> [TRADUCTION] La présomption *omnia rite esse acta* (par exemple, qu'une personne dans l'exercice de ses fonctions publiques a été dûment nommée et s'est adéquatement acquittée de ses fonctions) s'applique tant en matière criminelle que civile.

[22] (1974), 52 D.L.R. (3d) 495.

For all these reasons, as well as for those contained in the reasons for judgment of Mr. Justice McFarlane and in the cases decided in this Court to which he has made reference, I would dismiss this appeal with costs.

*Appeal allowed with costs*, RITCHIE J. *dissenting.*

*Solicitors for the appellant: Macrae, Montgomery, Spring & Cunningham, Vancouver.*

*Solicitors for the respondent: Cumming, Richards, Underhill, Fraser, Skillings, Vancouver.*

Pour ces motifs, et pour ceux contenus dans les motifs du juge McFarlane et dans les arrêts de cette Cour qu'il a mentionnés, je suis d'avis de rejeter ce pourvoi avec dépens.

*Pourvoi accueilli avec dépens, le juge* RITCHIE *étant dissident.*

*Procureurs de l'appelant: Macrae, Montgomery, Spring & Cunningham, Vancouver.*

*Procureurs de l'intimé: Cumming, Richards, Underhill, Fraser, Skillings, Vancouver.*

# TAB15

| | | | |
|---|---|---|---|
| Citation: | C.N. Railway v. H.M.T.Q. in Right of Canada et al<br>2002 BCSC 1669 | Date:<br>Docket:<br>Registry: | 20021122<br>C975257<br>Vancouver |



# IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Henderson
Pronounced in Chambers
November 22, 2002

BETWEEN:

**CANADIAN NATIONAL RAILWAY COMPANY**

PLAINTIFF

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the MINISTER OF TRANSPORTATION AND HIGHWAYS and HMC SERVICES INC.**

DEFENDANTS

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the MINISTER OF TRANSPORTATION AND HIGHWAYS, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, CANADIAN PACIFIC RAILWAY COMPANY, KEVIN JOHN BOUX and HAROLD JACKSON YOUNG**

THIRD PARTIES

| | |
|---|---|
| Counsel for the Plaintiff: | E. Lyall, M. Dery, K. Siddall |
| Counsel for HMTQ in Right of Canada: | P. Partridge<br>S. Postman |

| | |
|---|---|
| Counsel for HMTQ in Right of British Columbia.: | D. Eastwood<br>H. Mickelson<br>A. Gay |
| Counsel for Boux and Young: | W. Everett, Q.C.<br>S. Gregory |



[1] **THE COURT:** The defendant, Her Majesty the Queen in Right of the Province of British Columbia, supported by the other defendants and third parties, applies for a determination prior to the commencement of trial of whether certain expert reports delivered by the plaintiff as "reply reports" are admissible in that capacity. The scope of the application is best captured by this quote from the written argument of the defendant Province:

> This is an application for a ruling that the entirety of the BGC Engineering Inc. report dated October 26th, 2002 authored by Peter Byrne and portions of the report of John Bredehoeft and the report of BCG Engineering dated October 30, 2002 prepared by Dr. Wayne Savigny are inadmissible. Specifically, the province seeks to have excluded from CN's reply reports any evidence which refers to or relies upon any new cross-sections and any new models based on hydraulic conductivity and soil property assumptions which depart from the assumptions used in CN's original expert report. The principle footing of this application is that the October 2002 reports are not properly in the nature of reply evidence and therefore their contents offend the timing requirements of Rule 40A and the strict requirements of the case management order concerning the tendering of expert reports.

[2] The plaintiff delivered (within the appropriate timeframe) an expert report of Dr. Wayne Savigny in support of its case in

chief. In response to that, the defendants and third parties delivered a variety of reports from their experts. The admissibility of the reports delivered by the plaintiff in chief and by the defendants is not in issue on this application.

[3] The plaintiff then delivered to the other parties three expert reports which it termed "reply" or "rebuttal" reports. These reports were clearly outside the time limit contemplated in the case management order and probably outside the time limit imposed by Rule 40A. I say “probably” because it will be noted that Rule 40A requires delivery of an expert report 60 days prior to the tendering of the report in evidence as opposed to 60 days prior to the commencement of the trial. In a long case such as this, it would be entirely feasible for a party to deliver a report within the time limit set at out Rule 40A, but after the case had commenced and the defendants and third parties had already committed themselves to certain positions through cross-examination and applications during the course of the trial. It is for this reason, particularly, that case management orders need to vary the time limits in Rule 40A.

[4] The report of Mr. Savigny, which forms part of the plaintiff's case in chief, concerns itself with the reason why a certain slide occurred in March 1997 in the Fraser Canyon which

resulted in the collapse of a section of railway track, with consequent property damage and the death of two employees of CN.

[5] Dr. Savigny formed the opinion that the design of the 1959 TransCanada Highway embankment in the area, which is relatively close to the railway track, was flawed or, alternatively, that maintenance of the surface drainage control measures relating to that highway embankment was deficient. As a direct result, he said a prolonged run-off during February and March of 1997 infiltrated the TransCanada Highway embankment and the railway track embankment against which it abuts, causing the elevated water table within the embankment that triggered the fatal landslide on March 26, 1997.

[6] The opinion flows partly from Dr. Savigny's expertise, training and experience in his profession as a geotechnical engineer, but rests to a large extent, also, on a computer model which he constructed and utilized to affirm his hypothesis. Much of the report is concerned with his explanation for how the various input parameters were selected and how the results of the modelling should be interpreted.

[7] The defendants' reports took issue with Dr. Savigny's analysis in a number of ways which I need not describe.

[8] The three reply reports need some detailed description.

[9] The first reply report which I will address is the report of Dr. Peter Byrne and Dr. Marcel Sincraian. I will refer to this as the “Byrne report”.

[10] Dr. Byrne carried out a stress and deformation analysis using a type of computer modelling which differs very significantly from that used by Dr. Savigny. He said in the introduction to his report:

> The purpose of the analysis carried out in this report was to examine the stability of the slopes as the water table rose, using state of the art procedures.

[11] He went on to say that he had used certain data which had been presented by Bredehoeft and Hedberg in their reply report. He then described in some detail the way in which he approached his analysis and the conclusions he reached. He used an analysis procedure called F.L.A.C. - Fast Lagrangian Analysis of Continua. He said it represents the state of the art in this area and has worldwide recognition as a reliable procedure.

[12] He analyzed four different scenarios. Ultimately, he found that his analyses predicted that a failure would have occurred in the railway embankment fill, given the conditions that existed in March 1997, but that that failure could have been avoided through curtailment of pore water pressure build-up by engineered control drainage at the site. That finding implies (at least) that those

who were maintaining the highway and in charge of the highway embankment could and should have done more than they did to avoid the catastrophe.

[13] There is virtually nothing in the Byrne report which refutes, rebuts or expressly takes issue with the opinions expressed in the defendants' expert reports. The authors of the Byrne report betray no recognition that that was a part of their mandate. They approach the problem as if they had been retained to give the very sort of opinion that Dr. Savigny gives in his report filed by the plaintiff as part of its case in chief.

[14] The report by Bredehoeft and Hedberg, to which I will refer as the “Bredehoeft report”, takes a two-fold approach. At page 4 the authors say:

> We were asked to perform two tasks:
>
> (1) To review critically the groundwater model analysis of the site done by Beckie...
>
> [“Beckie” is one of the defence experts]
>
> (2) To provide our assessment of the potential impact of the 1959/1961 highway expansion fill on groundwater conditions at the site.
>
> We reviewed Beckie's report and analysis and found it to be seriously flawed. In an effort to correct the flaws in Beckie's model, we performed an independent analysis. The purpose of this opinion is to show the impact of placing the 1959/1961 highway fill on the groundwater conditions at the site and by so doing show where Beckie's analysis was flawed.

[15] In their report, they go on to take issue with the Beckie report in a number of ways. They then describe the results of their own analysis, during which they comment at some length on the input parameters selected by them for the computer modelling they did.

[16] It seems to me, having read the entire report and considered it as a whole, that the modelling done by Bredehoeft and Hedberg and the affirmative opinions they reach about the impact of the expansion fill on groundwater conditions played some role in their criticisms of Beckie's report and methodology, but not one that was substantial. For the most part, I view the Bredehoeft report as having two discrete parts: the criticism of the defence expert Beckie, and the affirmative opinion of the authors on the merits of the plaintiff's claim.

[17] The third and final reply report is from Dr. Savigny himself. Most of that report consists of his reply to or rebuttal of the various opinions expressed by the defence experts. In some sections of his report, he makes reference to the Byrne report and the Bredehoeft report and summarizes and comments upon their content.

[18] I turn to a consideration of the case law.

[19] Some confusion with respect to the admissibility of evidence in reply or rebuttal is engendered by the practice of delivering expert reports prior to trial in accordance with Rule 40A. The admissibility questions can be best approached by pretending, for the sake of the analysis, that the evidence is being adduced orally through the mouth of the expert at trial in the traditional manner. Reply reports are directly analogous to oral evidence adduced by the plaintiff in reply or rebuttal at the conclusion of the defence case.

[20] The rule regarding the admissibility of such evidence is well captured by the decision of the Ontario Court of Appeal in ***Allcock Laight and Westwood Ltd. v. Patten and others***, [1967], 1 O.R. 18. This was an oral judgment of the court. At page 3, Mr. Justice Schroeder said:

> Counsel for the appellants voiced strong objection to the admissibility of this evidence on the ground that, while it was offered under the guise of reply, it was overwhelmingly supportive of the plaintiffs' cause of action as proven in chief. In our opinion, the objection was well taken, and a consideration of the evidence admitted after it had been made clearly leads to the conclusion that, while that evidence constituted to some extent a rebuttal of some of the defence evidence and theories, it was preponderantly confirmatory of the plaintiffs' case and clearly offended against the rule that a plaintiff may not split his case.
>
> It is well settled, where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his

> case by first relying on prima facie proof and, when this has been shaken by his adversary, adducing confirmatory evidence: ***Jacobs v. Tarleton*** (1848), 11 Q.B. 421, 116 E.R. 534. That case was considered by this Court and the principle therein enunciated was applied in ***R. v. Michael***, [1954] O.R. 926. The rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence, and it is not open to a plaintiff, under the guise of replying, to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.

[21] With that, Mr. Justice McLennan agreed. Mr. Justice Laskin agreed also but made this observation:

> It is not, in my opinion, ground for a new trial that fresh witnesses, who are properly called in reply, give some confirmatory, evidence in the course of their reply evidence. Where, however, as is the case here, the evidence of the reply witnesses is overwhelmingly confirmatory and this was apprehended by the defendants by previous objection, and it appears from the reasons of the trial Judge that he relied on the confirmatory reply evidence in his findings in favour of the plaintiff, a new trial must follow...

[22] In ***Kroll v. Eli Lily Canada Inc***., [1995] B.C.J. No. 412, Madam Justice Saunders (as she then was) noted that the law enunciated in ***Pedersen v. Degelder*** is still applicable (notwithstanding Rule 40A) to what she called "response" to expert reports. She said:

> ...this exception to the requirement for advance written notice of the expert's view, limited strictly to true

> response evidence, does not permit fresh opinion evidence to masquerade as answer to the other side's reports.

[23] That decision was cited with approval by the Court of Appeal in ***Stainer v. Plaza***, [2001] B.C.J. No. 421 (B.C.C.A.). The court there also mentioned and quoted from a decision of Mr. Justice Williamson in ***Kelly v. Kelly*** (1995), 20 B.C.L.R. (3d) 232, in which he said:

> I would restrict, of course, as courts I think must, the practice of having opinion evidence without notice strictly to truly responsive rebuttal evidence, and I think if that rule is carefully observed, there should be no difficulties.

[24] The court agreed.

[25] When I come to apply that settled principle of law to these reports, I find that the Byrne report is clearly inadmissible as reply or rebuttal evidence, in its entirely. It is simply a fresh opinion on the merits. It makes no effort to respond directly to the defence experts or to criticize their assumptions and methodology. It simply asserts (or reasserts) the merits of the plaintiff's claim. The report represents a classic instance of case splitting and should be adduced, if it is adduced at all, as part of the plaintiff's case in chief.

[26] Parts of the Bredehoeft report are admissible as reply evidence and parts are not. Those portions of the Bredehoeft

report which consist of a critical review (in the words of the authors) of the analysis of the defence expert reports are admissible as true rebuttal or reply evidence. Those portions which describe the author's own assessment of the cause of the embankment failure are not admissible as reply evidence and must be admitted, if they are admitted at all, as part of the plaintiff's case in chief.

[27] The Savigny reply report is largely admissible. Those portions of the Savigny report which summarize or comment upon the first two reply reports I have mentioned must be excised if the report is to be admitted as reply or rebuttal evidence.

[28] I leave it to counsel to agree on redacted versions of the Bredehoeft and Savigny reply reports.

[29] It should be noted that I have said that the Byrne report and portions of the other two reports are not admissible "as reply evidence". It is still open to the plaintiff to apply under Rule 40A(15), (16) and (17) for an order dispensing with the requirement for the delivery of the reports within the appropriate time limits and seeking the admission in evidence of those reports as part of the plaintiff's case in chief. Different criteria would fall to be considered on such an application. I make no

comment on the merits of that application as the matter is not yet before me.

"A.G. Henderson, J."
The Honourable Mr. Justice A.G. Henderson