Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date:	May 21, 2021
Citation:	*Bell Canada v. Canada (Environment and Climate Change),* 2021 EPTC 3
EPTC Case No:	0028-2020
Case Name:	*Bell Canada v. Canada (Environment and Climate Change)*
Applicant:	Bell Canada
Respondent:	Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under section 15 of the *Environmental Violations Administrative Penalties Act*, SC 2009, c 14, s 126, of an Administrative Monetary Penalty issued under section 7 of that Act for a violation of paragraph 3(a) of the *Federal Halocarbon Regulations, 2003,* SOR/2003-289, made under the *Canadian Environmental Protection Act, 1999,* SC 1999, c 33.

Appearances:

Parties	**Counsel**
Bell Canada	Stéphane Richer Julien Boudreault
Minister of Environment and Climate Change Canada	Marilou Bordeleau

ORDER DELIVERED BY: **PAUL DALY**

[1] This is a claim for confidentiality filed by way of motion by the applicant, Bell Canada ("the Applicant"). The Applicant wishes to file documents in support of the affidavits it has already placed on the record for the arguments it will make at the hearing stage. It does not want the documents to be available to the general public, however. Rule 23 of the Tribunal's *Draft Rules of Procedure* provides for the possibility of a party filing such a motion. The respondent, the Minister of Environment and Climate Change Canada ("the Minister"), objects to the motion, arguing that the public interest requires that the documents not be filed under seal.

[2] The Tribunal grants the Applicant's claim for confidentiality. The Tribunal will begin by analyzing the language of rule 23. The Tribunal will then consider the jurisprudence of the Supreme Court of Canada with respect to confidentiality claims. In this case, the Applicant's claim meets the Supreme Court's criteria and is therefore consistent with rule 23. The Applicant's claim should therefore be granted.

Background

[3] The Applicant was issued a notice of violation on June 11, 2020, in the amount of $5,000 for a violation of paragraph 3(a) of the *Federal Halocarbon Regulations, 2003*, SOR/2003-289.

[4] Pursuant to paragraph 3(a), certain releases of halocarbons–primarily releases of large quantities of halocarbons–are prohibited.

[5] In the notice of violation, the Minister alleges that more than 200 kg of halocarbons were released on May 28, 2019, in a building that houses a computer centre used for the operation of the Applicant's communication system.

[6] Through a request for review filed on July 8, 2020, the Applicant initiated the review process for an administrative monetary penalty under the *Environmental Administrative Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA").

[7] As part of this review process, the parties agreed to a protocol for the case that provided for the preparation of a joint statement of facts and the filing of affidavits, as required, including any necessary supporting documentation.

[8] Since the parties were unable to agree on a joint statement of relevant facts, the record must be supplemented with affidavits and supporting documentation.

[9] On March 22, 2021, the parties placed affidavits on the record, as required by the case protocol.

[10] The Applicant filed an affidavit signed by Martin Girard. Mr. Girard refers to certain documents in his affidavit, hence the claim at hand. The Applicant wishes to produce these documents in support of the affidavit, arguing that the documents are necessary for

it to exercise its right to make full answer and defence. However, according to the Applicant, the documents in question are confidential. It therefore proposes to file them under seal, so that the Tribunal and the Minister's counsel may access them, but not the general public.

[11] Specifically, the documents covered by this motion are:

a) copies of the Real Estate Management Services Agreement between Bell and BGIS O&S Solutions ("BGIS"), its schedules "A" and "B," and the amending agreements (collectively, the "Real Estate Management Agreement"), filed in an bundle (Exhibit P-1)

b) a copy of [TRANSLATION] "Environmental Procedure ENV 040–Ozone Depleting Substances (ODS) Guidelines" (Exhibit P-2);

c) a copy of [TRANSLATION] "Environmental Procedure ENV 001–Environmental incident management–Internal procedure" ("ENV 001 Procedure") (Exhibit P-3);

d) a copy of [TRANSLATION] "Environmental Procedure ENV-016–Incident reporting" (Exhibit P-4);

e) a copy of the Halocarbon Management Standard (Exhibit P-5); and

f) a copy of the BGIS Halocarbon Guidelines (Exhibit P-6).

[12] The Minister defers to the discretion of the Tribunal with respect to the Real Estate Management Contract, but strongly objects to the proposal that the other documents that are the subject of this motion be filed under seal.

Issues

[13] The Court must decide whether to allow the Applicant to file the documents in support of Martin Girard's affidavit under seal. There are two issues:

a) What analytical framework should the Tribunal follow when dealing with a motion filed pursuant to rule 23 of the *Draft Rules of Procedure*, bearing in mind how the case law dealing with open justice applies to an administrative tribunal?

b) In applying that analytical framework to the documents covered by this motion, should the Tribunal grant the motion, and if so, under what conditions?

Analysis and Findings

Analyzing claims for confidentiality filed with the Tribunal

[14] Let us begin with the language of rule 23 of the *Draft Rules of Procedure*:

[23.1] Where a document is filed with the presiding Review Officer, the Review Officer will make the document available for inspection unless a Party asserts a claim of confidentiality at the time of the filing.	[23.1] Le réviseur qui préside doit mettre à la disposition du public, pour consultation, tout document déposé au Tribunal, à moins que le déposant fasse demande de confidentialité au moment du dépôt, exigeant que ceux-ci demeurent confidentiels.
[23.2] Any claim for confidentiality made in connection with a document filed with the presiding Review Officer or requested by the presiding Review Officer must be accompanied by reasons for the claim of confidentiality and, where it is alleged that specific direct harm would occur from a breach of confidentiality, sufficient details regarding the nature and extent of harm must be provided.	[23.2] Toute demande de confidentialité concernant un document déposé auprès du réviseur qui préside ou requis par ce dernier doit contenir les motifs sur lesquels elle est fondée et, s'il y est allégué que le manque de confidentialité peut causer directement un préjudice réel et sérieux, elle doit contenir des précisions suffisantes sur la nature et l'étendue des dommages.
[23.3] A claim for confidentiality will be placed on the public record of the review and a copy of the claim must be provided to the Parties and Intervenors, if any, by the person claiming confidentiality.	[23.3] La demande de confidentialité est versée au dossier public de l'instance en révision et copie de la demande doit être transmise aux parties et aux intervenants, lorsque présents, par l'auteur de la demande de confidentialité.
[23.4] The Party claiming confidentiality must provide the presiding Review Officer with a non-confidential summary or a non-confidential edited version of the information, which will be placed on the public record.	[23.4] L'auteur de la demande de confidentialité doit transmettre au réviseur qui préside un résumé non confidentiel des informations qui seront versées au dossier public.
[23.5] A Party to a proceeding or an Intervenor seeking the public disclosure of information for which confidentiality has been claimed may request the presiding Review Officer to order disclosure. The person seeking disclosure must set out reasons for the request, including the relevance of the document to the review and public interest considerations, if any.	[23.5] Une partie ou une partie intervenante requérant la divulgation publique d'informations faisant l'objet d'une demande de confidentialité, peut présenter requête au réviseur qui préside. L'auteur de la demande doit en donner les motifs, notamment la pertinence du document par rapport à l'instance en

[23.6] In determining whether information provided to the presiding Review Officer is of a confidential nature, the presiding Review Officer will take into account the provisions of the Privacy Act and the Access to Information Act. [23.7] Where a Party has asserted a claim to confidentiality, the Review Officer may disclose or require the disclosure where he or she determines, after considering the representations from the Party and other interested persons, that disclosure, in full or in part, is in the public interest or is required by fairness and natural justice.	révision et les considérations d'ordre public. [23.6] En statuant sur la confidentialité de l'information transmise au réviseur qui préside, celui-ci doit prendre en considération les dispositions de la Loi sur la protection des renseignements personnels et de la Loi sur l'accès à l'information. [23.7] Lorsqu'une personne fait une demande de confidentialité, le réviseur peut procéder ou ordonner à la divulgation totale ou partielle, après avoir entendu l'auteur de la demande et les personnes intéressées au nom de l'intérêt public, de l'équité et de la justice naturelle.

[15] Rule 23.1 is not a model of clarity.

[16] Read literally, rule 23 provides that a claim for confidentiality must be granted automatically. As long as there is a “claim of confidentiality at the time of the filing” (section 23.1) and the applicant complies with the requirements of rules 23.2, 23.3 and 23.4, the Tribunal has no discretion. If another party or an intervenor subsequently asks the Tribunal to order disclosure of the document (rule 23.5), the Tribunal may do so “after considering the representations from the Party and other interested persons” (rule 23.7). Simply put, this would be a two-step process: (1) filing the documents under seal and (2) deciding whether or not to disclose them after hearing representations. This is the position of the Applicant.

[17] The Minister submits that rule 23 must be interpreted in light of a fundamental principle of Canadian public law, that of open justice. First, rule 23 sets out as a general principle that any document filed with the Tribunal will be available to the public. Indeed, the open court principle is a fundamental one that should not be dismissed lightly. Moreover, a claim for confidentiality must be accompanied by “details” of “specific direct harm”, a requirement not easily reconciled with the proposition that the claim should automatically succeed. Finally, rule 23 incorporates several concepts found in the case law dealing with open justice, such as public interest and natural justice: see *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522.

[18] The Tribunal agrees with the Minister’s argument in this regard.

[19] At first glance, the open justice (or open court) principle is inescapable, both in the context of a review process before the Tribunal and in a judicial context: *Toronto Star v AG Ontario*, 2018 ONSC 2586, at paras 54–55. It should be noted that this principle has a strong constitutional basis, because open courts feed public debate, allowing individuals to exercise their constitutional right to freedom of expression: *Canadian Charter of Rights and Freedoms*, paragraph 2(b) (a principle that is echoed in quasi-constitutional provisions such as the *Canadian Bill of Rights*, SC 1960, c 44, paragraphs 1(d) and 1(f), and the *Charter of Human Rights and Freedoms*, CQLR c C-12, section 3).

[20] While application of the principle may be nuanced in some administrative contexts, in the case of administrative tribunals exercising quasi-judicial functions, the presumption that the principle of open justice applies is clear: *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025, at paras 50–51.

[21] Parliament has given the Tribunal a quasi-judicial function: when dealing with a request for review, the Tribunal verifies that the violation as alleged in the notice of violation did in fact occur and that the amount of the administrative monetary penalty imposed was calculated in accordance with the rules set out by Parliament. As such, the Tribunal impartially and independently resolves disputes between the government and its citizens. This is, simply put, the application of objective standards to facts determined through an adversarial process: see for example *F. Legault v Canada (Environment and Climate Change); R. Legault v Canada (Environment and Climate Change)*, 2021 EPTC 1. This is the very definition of a quasi-judicial function. It follows that the requirements of open justice apply to the Tribunal.

[22] Rule 23 must therefore be interpreted in light of the principle of open justice. The starting point is that any proceeding before the Tribunal must be accessible to the general public.

[23] According to the *Draft Rules of Procedure,* open justice is the starting point in rule 23.1, as well as in rule 25.1, dealing with hearings. In both cases, the general principle is open justice: filings are not redacted, and hearings are not held *in camera*. A party seeking an exception to this general principle must duly submit a reasoned claim to support the exception sought.

[24] The Minister's interpretation is consistent with the principle of open justice. The Tribunal cannot automatically grant a claim for confidentiality without violating this fundamental principle. Rather, a detailed analysis of the claim and its underlying reasons must be undertaken to determine whether the fundamental principle of open justice should be overridden.

[25] Second, the Minister's interpretation is consistent with the language of rule 23. It would be absurd to require a party wishing to file documents with the Tribunal under seal to provide reasons for its claim for confidentiality, as required by rule 23.2, but to look at those reasons only if a party or intervenor subsequently filed a request for disclosure. If

the objective were to impose a two-step process (a confidentiality claim followed, if necessary, by a disclosure request), the requirement to give reasons for the confidentiality claim would be meaningless. Ideally, rule 23 should be interpreted in a consistent manner that gives meaning to each of its elements. As we have stated, a comprehensive analysis of any claim for confidentiality at the time the claim is made is consistent with the language of rule 23.

[26] Third, a two-step process would be inefficient. Parliament has signalled its intent that the review process before the Tribunal be less cumbersome and more flexible than the judicial process: see EVAMPA, section 3. The Minister's interpretation is consistent with this legislative intent.

[27] Fourth, the Minister correctly argues that rule 23 incorporates concepts developed by the Supreme Court of Canada in its decisions dealing with confidentiality claims. As will be explained in more detail below, the concepts of public interest and natural justice embodied in rule 23 are prominent in the *Sierra Club* decision. In that judgment, the Supreme Court did not provide for a two-step process, but rather an integrated process in which a claim for confidentiality is never granted automatically. Although the language of rule 151 of the *Federal Courts Rules* that was at issue in *Sierra Club* differs from the language of rule 23, the Supreme Court was clear that any claim for confidentiality raises concerns because it violates the principle of fundamental justice:

> In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is <u>seen</u> to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22 (*Sierra Club* at para 52).

[28] It follows that a claim for confidentiality under rule 23 requires a thorough examination of the nature of the claim and the reasons underlying it in order to determine whether it should be granted. As explained, this is as true for an administrative tribunal exercising a quasi-judicial function as it is in the judicial realm itself.

[29] The Supreme Court identified the requirements for such a review in *Sierra Club*, which we will now look at.

The Sierra Club criteria

[30] In *Sierra Club*, the Supreme Court set out a two-branch test for analyzing a confidentiality claim. A claim will be dismissed unless:

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

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

[31] There is thus an element of necessity under the first branch and an element of proportionality under the second. Both are assessed at the time the claim for confidentiality is made.

[32] With regard to the necessity element, the Supreme Court added three qualifications:

(1) "[T]he risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question." (at para 54)

(2) "In order to qualify as an 'important commercial interest', the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. . . . [C]ourts must be cautious in determining what constitutes an 'important commercial interest'. It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule." (at paras 55–56)

(3) "[T]he phrase 'reasonably alternative measures' requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question." (at para 57)

Application of Sierra Club criteria to documents referred to in claim for confidentiality

[33] Each document to which the claim for confidentiality refers must be examined to determine whether the Applicant should be permitted to file it under seal. It will therefore be necessary to describe each document, relying on information provided by the Applicant. We will first analyze the issue of necessity, followed by proportionality.

Necessity

[34] The documents are all expressly confidential.

[35] The first is the Real Estate Management Agreement. This is an expressly confidential document. The Applicant refers to section 36 of Schedule A to the Agreement: "notwithstanding anything to the contrary, this Agreement and the transactions contemplated hereby shall be deemed Confidential Information".

[36] The second, third and fourth documents are the Applicant's environmental procedures. These documents are confidential, according to the terms of Schedule B to the Real Estate Management Agreement. The relevant portion reads:

> Ownership of all Bell environment-related procedures are the exclusive property of Bell. For greater certainty, Service Provider hereby assigns and agrees to assign in the future to Bell any present and future intellectual property rights it has in said environment related procedures. All environment related procedures developed by Service Provider for Bell or by Bell prior to, or after, the Service Commencement Date shall be deemed to be Bell's Background Intellectual Property and Bell's Foreground Intellectual Property respectively. If Service Provider wishes to issue individual instructions/procedures on a piecemeal basis, such instructions/procedures are to be submitted to Bell for its review and approval prior to being issued.
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> . . .
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> All Bell-owned information pertaining to the Environmental Management Services, including but not limited to procedures, practices, legal analyses, gap analyses, corrective measures, AWP, and CEAP, content of information systems, is not to be used for commercial purposes by Service Provider, nor is it to be divulged to any third parties without the expressed consent of Bell and shall be considered Confidential Information of Bell for purposes of this Agreement.

[37] The fifth document, the *BGIS Halocarbon Management Standard*, includes the following statement: "This document contains trade secrets and proprietary information of BGIS Global Integrated Solutions. Disclosure of this publication is absolutely prohibited without the express written permission of BGIS Global Integrated Solutions".

[38] It is clear that these documents meet the necessity test as set out in *Sierra Club*. We can cite the Supreme Court in this regard.

> For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. <u>However, if . . . exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general</u>

commercial interest of preserving confidential information (*Sierra Club*, at para 55, emphasis added).

[39] The interests invoked by the Applicant have the required broader significance in that we are dealing not only with prejudice to the Applicant's commercial interests, but potential prejudice to the public interest in the confidentiality of commercial documents, without which it would be more difficult, if not at times impossible, for contracting parties to enter into contractual relations.

[40] The sixth document is the *BGIS Halocarbon Guidelines*. It does not contain an express statement of confidentiality. According to the Applicant, however, the document belongs to a third party, and given that it represents that party's expertise in the management of halocarbon-containing equipment, has always been treated as confidential: Affidavit of Martin Girard in support of the Claim for Confidentiality, at para 18.

[41] Moreover, disclosure of the six documents could prejudice the commercial interests of the Applicant and BGIS, either by giving an undue advantage to competitors or by making available to the general public the expertise developed by the Applicant and BGIS in the field of environmental management: Affidavit of Martin Girard in support of the Claim for Confidentiality, at para 19.

[42] Because the documents are expressly confidential (or, as in the case of the sixth, have always been treated as such), the Applicant satisfies the necessity requirement.

[43] With regard to the necessity test, the Minister questions the relevance to the review process of the documents referred to in the claim for confidentiality. Arguing that the documents are not relevant because they appear to be intended to support a due diligence defence that is not admissible before the Tribunal (see EVAMPA, section 11), the Minister argues that the confidentiality of the documents cannot be necessary: if the documents are not necessary, then neither is their confidentiality.

[44] The Tribunal cannot accept this argument of the Minister. The Minister is, with respect, mistaken in employing the ordinary language meaning of necessity rather than the technical meaning applicable in this context. The concept of necessity as set out by the Supreme Court in *Sierra Club* applies in situations where confidentiality "is necessary in order to prevent a serious risk to an important interest" (at para 53) and not in relation to situations where the document in question would be "necessary" (in the common sense of the term) to the litigation.

[45] The Minister's argument about the relevance of the documents is appropriately addressed in respect of the proportionality test.

Proportionality

[46] With respect to proportionality, the Tribunal must strike a balance between two fundamental principles: open justice and natural justice. “[T]he salutary effects of the confidentiality order, including the effects on the appellant’s right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings” (*Sierra Club*, at para 69).

[47] According to the Applicant, the documents covered by the claim for confidentiality are relevant and material to its defence in the review process.

[48] In this regard, it should be noted that the alleged violation underlying the notice of violation for which the Applicant is seeking review involves section 3 of the *Federal Halocarbon Regulations, 2003*, SOR/2003-289:

No person shall release, or allow or cause the release of, a halocarbon that is contained in	Il est interdit de rejeter un halocarbure — ou d’en permettre ou d’en causer le rejet — contenu, selon le cas :
(a) a refrigeration system or an air-conditioning system, or any associated container or device, unless the release results from a purge system that emits less than 0.1 kg of halocarbons per kilogram of air purged to the environment;	a) dans un système de réfrigération ou de climatisation, ou dans tout contenant ou dispositif complémentaire, sauf si le rejet se fait à partir d’un système à vidange qui émet moins de 0,1 kg d’halocarbure par kilogramme d’air vidangé dans l’environnement;
(b) a fire-extinguishing system or any associated container or device, except to fight a fire that is not set for training purposes, or unless the release occurs during the recovery of halocarbons under section 7; or	b) dans un système d’extinction d’incendie ou dans tout contenant ou dispositif complémentaire, sauf pour lutter contre un incendie qui n’est pas allumé à des fins de formation ou si le rejet a lieu durant la récupération des halocarbures aux termes de l’article 7;
(c) a container or equipment used in the reuse, recycling, reclamation or storage of a halocarbon.	c) dans un contenant ou du matériel servant à la réutilisation, au recyclage, à la régénération ou à l’entreposage d’un halocarbure.

[49] The defence the Applicant intends to present is as follows, as explained in its motion:

> [TRANSLATION]
> 27. In this respect, the documents referred to in the motion for confidentiality will allow for establishing, *inter alia*, that Bell did in fact transfer custody, control and

> monitoring of the air conditioning system in question, such that—to the extent that the leak could have been avoided, which is denied—Bell would not have been in a position to prevent it.
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> 28. In the alternative, with regard to enforcement measures, the documents referred to in the motion for confidentiality will establish that Bell ensure—notably by imposing contractual obligations to that effect—that its property manager, BGIS, takes all necessary measures to ensure that equipment containing halocarbons complies with legal and regulatory requirements, including the Regulations.

[50] The Minister submits that the Applicant clearly intends to rely on a due diligence defence, which is expressly excluded by EVAMPA. In the Minister's view, referring in this regard to the recent Tribunal order in *BCE Inc. v Canada (Environment and Climate Change),* 2021 EPTC 2, since this defence is doomed to failure, the documents cannot be relevant. In the Minister's view, this would have no effect on the Applicant's right to a fair trial, and it follows that the claim for confidentiality must be rejected.

[51] The Tribunal is of the view that the claim for confidentiality meets the proportionality test set out by the Supreme Court of Canada in *Sierra Club*.

[52] First and foremost, the Applicant appears to raise a valid defence. Certainly, as the Minister argues, EVAMPA provides for a regime of absolute liability in which defences are limited. The defence of due diligence is excluded: *F. Legault v Canada (Environment and Climate Change)*; *R. Legault v Canada (Environment and Climate Change)*, 2021 EPTC 1, at paras 51–52; *Sirois v Canada (Environment and Climate Change)*, 2020 EPTC 6, at para 41; *Fontaine v Canada (Environment and Climate Change)*, 2020 EPTC 5, at para 2; *Kruger v Canada (Environment and Climate Change)*, 2020 EPTC 1, at para 14; *Bhaiyat v Canada (Environment and Climate Change), 2020* EPTC 1, at para 14; Kruger v *Canada (Environment and Climate Change)*, 2019 EPTC 1, at paras 44–45; *Hoang v Canada (Environment and Climate Change)*, 2019 EPTC 2, at para 19. However, the Applicant raises the possibility of due diligence only [TRANSLATION] "in the alternative". The Applicant's argument is, rather, that it is not covered by section 3 of the *Regulations*.

[53] On the one hand, this is an issue of statutory interpretation, or more precisely, the scope of a regulatory provision. The Tribunal has heard arguments regarding the scope of a regulatory provision on a number of occasions: *Nyobe v Canada (Environment and Climate Change)*, 2020 EPTC 7; *Kruger v Canada (Environment and Climate Change)*, 2020 EPTC 1; *1952157 Ontario Inc. v Canada (Environment and Climate Change)*, 2019 EPTC 5. Moreover, in *Nyobe* and *Kruger*, the Tribunal ruled that the provisions in question did not extend to the alleged violation or to the amount imposed as an administrative monetary penalty.

[54] On the other hand, subsection 11(2) of EVAMPA maintains common law defences: "Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in

respect of a violation to the extent that it is not inconsistent with this Act" ("Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une loi environnementale s'appliquent à l'égard d'une violation dans la mesure de leur compatibilité avec la présente loi."). This particular case echoes the criminal law principle that individuals are not liable for actions beyond their control, the automaton defence.

[55] In any event, as the Applicant rightly argues, we are at a preliminary stage of the review process. It is incumbent upon the Tribunal to take a broad and liberal approach to ensure that the Applicant is able to present full answer and defence.

[56] Indeed, in *Sierra Club*, the Supreme Court addressed the possibility that documents covered by a confidentiality order could prove to be irrelevant:

> In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the CEAA, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.
>
> In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order (at paras 88–89).

[57] In the Tribunal's view, this case presents a similar situation. If, as the Minister contends, the documents are not relevant, a confidentiality order would not cause prejudice to the principle of open justice or the fairness of the proceeding. And if a confidentiality order is granted and the documents are found to be relevant, the situation would be neutral—although the order would infringe on freedom of expression, it would facilitate the search for truth. However, if a confidentiality order is denied and the documents are subsequently determined to be irrelevant, the Tribunal would be interfering with the legitimate business interests of the Applicant without any benefit to the public interest and the search for truth.

[58] The Minister points to the recent order in *BCE Inc. v Canada (Environment and Climate Change),* 2021 EPTC 2. However, the context was quite different. The applicant in that case was seeking documents held by the Minister, thereby invoking the Tribunal's enforcement powers against the Minister. Moreover, the concept of necessity was of paramount importance, narrowly circumscribing the Tribunal's power to compel the disclosure of documents. The provision relied on in that case was rule 15 of the *Draft Rules of Procedure*, which provides that the Tribunal may require disclosure of documents "necessary in order to obtain a full and satisfactory understanding of the subject matter of the review" ("nécessaires pour pouvoir acquérir pleine connaissance de l'objet de la procédure de révision"). Within the analytical framework established in *Sierra Club*, however, necessity has a completely different meaning.

[59] The Tribunal is therefore of the view that the Applicant has satisfied the proportionality test as established by the Supreme Court in *Sierra Club*.

Summary

[60] The Tribunal grants the Applicant's claim for confidentiality in its entirety.

Decision

[61] The claim for confidentiality is granted.

Motion granted

Procedural directions given

"Paul Daly"

PAUL DALY
REVIEW OFFICER