Federal Court Cour fédérale

Date: 20240617

Docket: T-236-20

Citation: 2024 FC 669

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 17, 2024

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

HYDRO-QUÉBEC, a company incorporated under the *Hydro-Québec Act*, CQLR, c H-5

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC JUDGMENT AND REASONS
(Identical to the Confidential Judgment and Reasons issued on May 8, 2024)

I. Overview

[1] The applicant, Hydro-Québec, a company incorporated under the *Hydro-Québec Act*, CQLR, c H-5, is seeking judicial review of a portion of the decision dated December 4, 2019, [the Decision] by David Spicer, then acting on behalf of the Minister of Industry [Minister]

under the aegis of section 29.16 of the *Electricity and Gas Inspection Act*, RSC 1985, c E-4 [the Act].

[2] Mr. Spicer, who is also Measurement Canada's Vice President, Regulatory Modernization, acted as the person designated to determine, on behalf of the Minister [Minister's Delegate], the outcome of the challenge lodged by Hydro-Québec, pursuant to paragraph 29.13(2)(b) of the Act, against Notice of Violation number 2018-05-EG drawn up by Measurement Canada on February 1, 2019 [Notice of Violation].

[3] Before the Court, Hydro-Québec is challenging the portion of the Decision in which the Minister's Delegate (1) concluded that Hydro-Québec was liable for the violations alleged in the Notice of Violation with respect to 246 meters located on non-Indigenous lands, under subsection 12(1) and paragraph 33(1)(e) of the Act; and (2) imposed a penalty of $123,000.00 on Hydro-Québec pursuant to the provisions of the Act and those of the *Electricity and Gas Inspection Regulations*, SOR/86-131 [Regulations].

[4] Furthermore, Hydro-Québec does not dispute the Minister's Delegate's conclusion that Hydro-Québec was not liable for the alleged violations regarding 443 meters located on Indigenous territory.

[5] In support of its application for judicial review, Hydro-Québec argues that the decision-making process leading to the Decision was compromised by significant breaches of the principles of natural justice and procedural fairness that fatally tainted the Decision. Hydro-Québec points out that the Minister's Delegate, supposedly an independent decision-maker, had

communications with the other party to the dispute, i.e., Measurement Canada, without the presence and knowledge of Hydro-Québec, and that the Minister's Delegate also had communications with, or retained the services of, Measurement Canada's counsel, without Hydro-Québec's knowledge. Thus, Hydro-Québec maintains that it did not receive the impartial hearing by an independent decision-maker to which it was entitled.

[6] In addition, Hydro-Québec argues that the Decision was unreasonable and unintelligible because the Minister's Delegate misapplied the Act, failing to examine the condition of each meter or seal, and ignored the evidence. Hydro-Québec points out in particular that the Decision confirms a violation in connection with each and every one of the 246 meters in non-Indigenous territory, *en masse* whereas the evidence reveals that there were no violations for at least some of the meters at the time of the Ministerial Review; that there were no reasonable grounds to believe in a violation for at least some meters at the time the Notice of Violation was issued; and that the due diligence defence applied in respect of at least some of the meters in non-Indigenous territory.

[7] Hydro-Québec is asking the Court to allow the application for judicial review, declare that it was not open to the Minister's Delegate to conclude that violations had occurred with respect to the 246 meters in non-Indigenous territory, set aside part of the Decision and vacate the Notice of Violation.

[8] The respondent, the Attorney General of Canada [the AGC], essentially argues that the evidence on the record demonstrates that no reasonable apprehension of bias arose from Measurement Canada's conduct and that no breach of procedural fairness occurred.

[9] The AGC added that it was reasonable for Measurement Canada to have found that Hydro-Québec had not exercised due diligence to prevent meters with expired seals from remaining in service.

[10] For the reasons set out below, the application for judicial review is allowed.

[11] In short, Hydro-Québec first demonstrated that it did not receive the impartial hearing by an independent decision-maker that it was entitled to expect, and it also demonstrated that this fatally tainted the Decision. This reason alone was sufficient to set aside the Decision.

[12] Alternatively, Hydro-Québec has also demonstrated that the Decision was unreasonable.

[13] First, in subsections 29.11(1), 29.12(1) and 29.12(4), the Act requires that each violation be proven, which the AGC does not dispute, recognizing also that a finding of violation must, and can, relate to only one meter. Hydro-Québec provided evidence that some of the meters had been replaced at the time of the Ministerial Review, whereas the Minister's Delegate did not mention, discuss, dismiss or identify evidence that contradicted his conclusion that a violation had occurred and that the seals had expired on all of the meters. The Minister's Delegate therefore failed to consider the individual condition of each meter, as required by the Act, or disregarded the evidence submitted to that effect, or both.

[14] In addition, Hydro-Québec provided proof that some of the meters had been replaced when the inspector issued his Notice of Violation. However, the Minister's Delegate did not mention, discuss, discard or distinguish the evidence that contradicted his determination that the

inspector did in fact have reasonable grounds to believe a violation had occurred, for all of the meters, at the time he issued the Notice of Violation. The Minister's Delegate therefore disregarded the individual condition of each meter, as required by the Act, or disregarded the evidence submitted to that effect, or both.

[15] In addition, the Court finds that the Minister's Delegate also fatally erred in assessing the due diligence defence open to Hydro-Québec under subsection 29.2(1) of the Act, since the Minister's Delegate did not take into account the specific condition of each of the meters in non-Indigenous territory, some of which were not even in a situation of violation, as he should have done, or ignored the evidence to that effect, or both.

[16] The Decision is therefore untenable in light of the relevant factual and legal constraints (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 101 [*Vavilov*]) and the Court's intervention is therefore warranted.

II. Background

[17] In 2013, Hydro-Québec undertook a project to replace nearly 3.8 million electromechanical electricity meters with new-generation meters. As part of these replacements, Hydro-Québec submitted applications to Measurement Canada for temporary dispensations from the verification requirement set out in paragraph 12(1)(a) of the Act. On May 6, 2013, Measurement Canada granted a dispensation to Hydro-Québec, in accordance with subsection 9(2) of the Act, allowing it to use electricity meters without reverification until December 31, 2015. In 2015, 2017 and 2018, Measurement Canada granted additional temporary

dispensations. Between 2013 and 2018, Hydro-Québec and Measurement Canada met regularly to discuss the status of the deployment of the new meters.

[18] On September 27, 2018, Measurement Canada sent Hydro-Québec a *Violation Warning.* In that warning, Measurement Canada expressed concern about 1,420 meters with expired seals, noting that this contravened subsection 12(1) and paragraph 33(1)(e) of the Act and could result in the imposition of sanctions. Measurement Canada therefore asked Hydro-Québec to remove said meters no later than December 31, 2018, and to correct the violation. Measurement Canada also pointed out that the dispensation for 6,074 meters, valid until December 31, 2018, could not be renewed. Lastly, Measurement Canada asked Hydro-Québec to submit an action plan by October 27, 2018 (Applicant's Record at 141–42, Exhibit PGL-3 of Patrick Grignon-Labine's affidavit (Exhibit HQ-6 of the Ministerial Review file)). On October 26, 2018, Hydro-Québec submitted this action plan to Measurement Canada by email.

[19] On November 20 and December 11, 2018, a Measurement Canada inspector visited Hydro-Québec to validate the steps in the documentation being done by Hydro-Québec at the time in connection with meters with expired seals and performed verifications on a sampling of 16 meter records.

[20] On January 2, 2019, Measurement Canada asked Hydro-Québec to provide, by January 7, 2019, the complete list of meters with expired seals still installed that were included in the *Violation Warning* dated September 27, 2018, and whose action plan had ended on December 31, 2018. Measurement Canada then listed 10 types of information that Hydro-Québec was required to record for each meter.

[21] On January 11, 2019, after receiving an extension of the initial deadline, Hydro-Québec sent Measurement Canada a list of 844 meters and included, for each one, some brief pieces of information, including the reason for the delay in replacing them and the steps currently being taken (Applicant's Record at 409–19, Exhibit PGL-3 of Patrick Grignon-Labine's affidavit (Exhibit HQ-13 of the Ministerial Review file)). Hydro-Québec then offered to meet with Measurement Canada's representatives to show them details of the steps taken for each meter.

[22] On or about January 18, 2019, Measurement Canada issued a *Violation Report* which would be used to draft the Notice of Violation. The report states that during its two-day inspection visit on November 20 and December 11, 2018, Measurement Canada verified a total of 16 meter records. The Measurement Canada inspector recorded the following comments in the Appendix to the *Violation Report*:

> [TRANSLATION]
>
> HQ's efforts with regard to some of the meters with expired seals in 2014 are insufficient. We have evidence that some customers were contacted only once or twice over very long periods of time. In some of these cases, after HQ received Measurement Canada's violation warning letter, we noticed an increase in warning/moderated letters sent by them.
>
> Verification of HQ's documentation shows that a systematic and uniform approach had not been applied over the years, as HQ had committed to for all of the meters with expired seals.

[23] On February 1, 2019, a designated Measurement Canada official, Mario Dupuis, issued the Notice of Violation pursuant to subsection 29.12(1) of the Act. In it, Mr. Dupuis stated his opinion that the alleged violator, Hydro-Québec, had committed a violation of subsection 12(1) and paragraph 33(1)(e) of the Act by allowing a meter to remain in service beyond the date set

for a new verification. In the section of the Notice of Violation relating to the alleged facts, Mr. Dupuis noted that on January 1, 2019, Hydro-Québec still had 844 meters with expired seals and that these meters were covered by the *Violation Warning* that had been issued on September 27, 2018. Mr. Dupuis further noted that after reviewing the measures taken by Hydro-Québec to replace the remaining meters with expired seals, Measurement Canada exempted 155 meters from the administrative penalty, assessing that Hydro-Québec was not using them for customer billing or had exercised due diligence in removing them from service, and that 689 meters with expired seals were therefore subject to the administrative penalty.

[24] Mr. Dupuis also pointed out that under section 49 and subsection 50(1) of the Regulations, the violation was described as very serious, and the penalty for a very serious violation was $1,000. However, in view of the past history (subsection 50(2) of the Regulations), he reduced the penalty by half to $344,500.00, which in turn would be reduced by half if the penalty was paid within 15 days.

[25] The Notice of Violation confirmed the three options available to the alleged violator in response to the Notice of Violation: (1) pay the penalty and correct the violation immediately; (2) request to enter into a compliance agreement with Measurement Canada; or (3) request a review of the facts of the alleged violation or of the amount of the penalty.

[26] On February 4, 2019, the Notice of Violation was served on Hydro-Québec. On February 18, 2019, Mr. Dupuis confirmed to Hydro-Québec that he expected a response to the Notice of Violation by March 6 and that Hydro-Québec would then have an additional 30 days to submit supporting documents.

[27] On March 5, 2019, Hydro-Québec submitted a response form to the Notice of Violation to Measurement Canada pursuant to paragraph 29.13(2)(b) of the Act and requested a ministerial review of the facts of the alleged violation or of the amount of the penalty.

[28] Hydro-Québec attached to this form written submissions and exhibits identified as HQ-1 to HQ-20 (Applicant's Record, Exhibit PGL-3 of Patrick Grignon-Labine's affidavit). Hydro-Québec then argued that (1) the proceedings in respect of a violation were null and void, since they were prescribed; (2) the penalty claimed was unlawful, since it exceeded $2,000 (subsection 29.11(3) of the Act) and included multiple alleged acts in the same notice of violation; (3) the Notice of Violation was unlawful, since a notice of violation had to be issued for each violation, which was not done (subsections 29.11(1) and 29.12(1) of the Act) and the inclusion of 689 alleged violations within the same Notice of Violation did not allow for a response adapted to each situation; (4) Hydro-Québec could not be found liable since it did not commit the alleged violation; and (5) there were no reasonable grounds (subsection 29.12(1) of the Act) since, in particular, the Notice of Violation was drawn up on the basis of information that Measurement Canada knew to be incomplete, and the requirement of reasonable grounds for each violation under the Act was incompatible with the sampling process. By way of example, Hydro-Québec pointed out that the meter bearing number 392J7683695 had nevertheless been replaced on May 1, 2018, by the meter bearing number G9SJ3579648 and that the meter bearing number 320H6089201 had been replaced on November 15, 2018, by the meter bearing number G4SXB001332 and that no violation therefore existed for these meters on January 1, 2019 (Applicant's Record at 2436).

[29] Also in response to the Notice of Violation, Hydro-Québec argued that a breach of procedural fairness had occurred, that it had a due diligence defence and that it had exercised due diligence to prevent the commission of the alleged violation. Hydro-Québec also indicated that the supporting documents in support of the due diligence defence, with respect to the meters covered by the Notice of Violation, would be submitted no later than April 4, 2019.

[30] On March 19, 2019, in response to the response form and Hydro-Québec's choice to challenge the Notice of Violation before the Minister, Diane Allan, President of Measurement Canada, instructed Mr. Spicer to proceed, on behalf of the Minister, with the review of the challenge.

[31] That same day, Mr. Dupuis confirmed to Hydro-Québec that Measurement Canada had received the request for review and pointed out that the request and written submissions would be forwarded to an independent reviewer. Mr. Dupuis also informed Hydro-Québec that Mr. Spicer had been appointed to conduct the review.

[32] On April 3, 2019, without waiting for the submission of supporting documents announced by Hydro-Québec on the previous March 5, Mr. Dupuis transmitted Measurement Canada's response to Hydro-Québec's submissions to the Minister's Delegate. Mr. Dupuis then confirmed in particular that the Notice of Violation had been served on Hydro-Québec on the basis of the follow-up information submitted on January 11, 2019, for each of the meters in question. He also pointed out that Measurement Canada had incorporated the same alleged act involving a total of 689 meters into a single Notice of Violation, and [TRANSLATION] "that a group of meters that were covered by the same dispensation and subsequent action plan will also

be included on the same notice of violation. The calculation then takes into account the maximum amount provided by apparatus . . . ” (Applicant’s Record at 2453). On page 3 of his reply, Mr. Dupuis pointed out that [TRANSLATION]“[a]ccording to Measurement Canada, the Régie de l’énergie provides [Hydro-Québec] with powers of entry, and according to a legal opinion obtained by [Measurement Canada], they are entitled to exercise their right of entry provided for in the [Electricity and Gas Inspection Act]” (Applicant’s Record at 2454). Mr. Dupuis did not include a copy of that legal opinion with his reply. Lastly, Mr. Dupuis referred to the evidence available at the time and left it to the Minister’s Delegate to consider Hydro-Québec’s arguments regarding procedural fairness and the due diligence defence.

[33] On April 4, 2019, Hydro-Québec submitted its amended written submissions. Hydro-Québec then maintained that it had exercised due diligence to prevent the commission of the alleged violation, and added a voluminous file of over 1,500 pages containing supporting documents, namely Exhibits HQ-21 and HQ-22, detailing the measures taken in connection with each of the meters on non-Indigenous and Indigenous lands respectively (see Exhibit PGL-3 of Patrick Grignon-Labine’s affidavit). Hydro-Québec then suggested, among other things, that Measurement Canada had only reviewed the information that Hydro-Québec had provided on January 11, 2019, when it transmitted the requested list, and in November and December 2018, when it inspected 16 meters by sampling. Hydro-Québec therefore maintains that it is incorrect to assert that Measurement Canada reviewed the measures taken to replace the 844 meters.

[34] Hydro-Québec then pointed out that between January 11, 2019, and the date of issuance of the Notice of Violation, 33 meters had already been replaced, so that the review carried out by Measurement Canada could not have been contemporaneous with the issuance of the Notice of

Violation, whereas the reasonable grounds required by the Act to issue the Notice of Violation must be contemporaneous with it. Hydro-Québec pointed to other factual situations that demonstrate, in its opinion, that Measurement Canada had limited itself to using the information provided by Hydro-Québec at the time the list of meters was sent on January 11, 2019, that Measurement Canada had interpreted the information on the list based on the information obtained during the November 20 and December 11, 2018, verifications of a sample of 16 meters, and essentially, that Measurement Canada did not perform its own verifications with respect to each meter and each violation following receipt of the list of meters with expired seals. Lastly, Hydro-Québec maintains that it exercised due diligence and took the necessary precautions to prevent the commission of the alleged violation. Hydro-Québec is therefore requesting that the Notice of Violation be set aside or, alternatively, that the amount of the penalty be revised to $500 for a single violation, in accordance with the Act. In addition, Hydro-Québec added examples of meters that had allegedly been replaced, including the meter bearing number 392JD011677, which had been replaced by the meter bearing number G9SJ3722660 on September 21, 2018, well before the Notice of Violation was issued.

[35] At the beginning of April 2019, Measurement Canada representatives had discussions with the Minister's Delegate, unbeknownst to Hydro-Québec. This is the first of the issues raised by Hydro-Québec to support the allegation of the violation of the principles of natural justice, examined later in these reasons.

[36] On April 18, 2019, Hydro-Québec sent the Minister's Delegate its reply to Measurement Canada's response dated April 3, 2019. Hydro-Québec also emphasized that (1) Measurement Canada's response had been issued before the expiry of Hydro-Québec's deadline for submitting

its supporting documents; (2) the supporting documents sent by Hydro-Québec on April 4 comprised several thousand pages; (3) Measurement Canada referred to a legal opinion without providing a copy of that legal opinion, which Hydro-Québec had requested; and (4) the Notice of Violation cannot be based on a sample of 16 verifications, since each violation requires reasonable grounds for believing that a violation was committed in support of the alleged facts.

[37] On May 6, 2019, the Minister's Delegate, writing to the parties, indicated that they should [TRANSLATION] " . . . ensure that all parties have access to the same documents" (Applicant's Record at 3511).

[38] In May 2019, Sherri Anderson, Measurement Canada's counsel who helped draft the Notice of Violation, communicated with the Minister's Delegate without Hydro-Québec's knowledge. This is the second of the problematic issues raised by Hydro-Québec, which is examined later in these reasons.

[39] In the fall of 2019, Measurement Canada representatives met with the Minister's Delegate once again to discuss Hydro-Québec's request for an extension of the dispensation, once again without Hydro-Québec's knowledge. This is the third issue Hydro-Québec has identified as problematic.

[40] In this context, on December 4, 2019, the Minister's Delegate issued his Decision and Hydro-Québec applied for judicial review before the Federal Court.

[41] As part of its application for judicial review, Hydro-Québec filed a request for transmission of the tribunal record pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[42] On September 14, 2020, in response to this request for transmission under Rule 317, Measurement Canada transmitted its Certified Tribunal Record [CTR] to the parties, although certain portions were redacted. Hydro-Québec requested disclosure of the redacted information, but Measurement Canada objected under Rule 318 of the Rules, invoking solicitor-client privilege. Measurement Canada then filed a *Motion to object to the transmission of the tribunal record and for an order of confidentiality*, pursuant to Rules 369, 151, 152, 317 and 318 of the Rules. One of the redacted documents was the legal opinion dated December 28, 2018, prepared by the aforementioned Measurement Canada counsel, for Ms. Campeau and Mr. Dupuis, Measurement Canada officials. In fact, Mr. Dupuis referred to this legal opinion in his April 3, 2019, reply to the Minister's Delegate and it was this legal opinion that was delivered, in May 2019, by the counsel to Mr. Spicer while he was acting as the Minister's Delegate.

[43] On April 26, 2021, Associate Justice Mireille Tabib allowed Measurement Canada's motion to object and concluded that the parts of the CTR identified as being covered by solicitor-client privilege should not be disclosed. Hydro-Québec is appealing the part of that decision that redacts the legal opinion.

[44] In this appeal, Measurement Canada argues, among other things, that the disclosure of a document protected by solicitor-client privilege from one government institution to another, let alone from one public servant to another working for the same institution, does not entail a

waiver of the privilege. Measurement Canada therefore maintains that the official acting as Minister's Delegate and Measurement Canada officials shared the same solicitor-client privilege. Measurement Canada further submits that administrative decision-makers may seek and obtain a legal opinion from a counsel.

[45] On October 26, 2021, the Court allowed Hydro-Québec's appeal and ordered that Hydro-Québec be provided with an unredacted version of the legal opinion dated December 28, 2018. The Court noted, among other things, that the Minister's Delegate could not share the same solicitor-client privilege as the Measurement Canada officials who issued the Notice of Violation that the Minister's Delegate was tasked with reviewing. Measurement Canada did not appeal that decision.

III. Impugned decision

[46] In his Decision, the Minister's Delegate explained that his role as a reviewer is to (1) determine whether Hydro-Québec has committed the violation or established that it has exercised due diligence to prevent the commission of the violation; and (2) determine whether the amount of the penalty has been established in accordance with the Regulations. He emphasized his obligation to review all of the relevant documents relating to the Notice of Violation submitted by the parties. The Minister's Delegate provided an overview of the facts and noted that, despite the measures taken by Hydro-Québec to replace the meters, in actual fact, there were still 844 meters whose seals had expired as of January 1 , 2019.

[47] As part of his analysis, the Minister's Delegate addressed the acts or omissions constituting an alleged violation (Part 1) and the amount of the penalty (Part 2).

[48] In Part 1, the Minister's Delegate pointed out that it is clear from the documentary evidence provided by the parties that the 844 meters referred to in the Notice of Violation had expired seals and that both parties were aware of the meters and had additional details on each of those meters. He noted that despite Hydro-Québec's best efforts, the meters did not meet the requirements of section 12 of the Act. He concluded that Hydro-Québec had therefore committed the violation set out in the Notice of Violation.

[49] Still in Part 1, the Minister's Delegate then addressed the four arguments raised by Hydro-Québec which were, in his opinion, necessary and relevant in this case, namely that (1) Measurement Canada did not meet the requirements of section 29.26 of the Act; (2) there should be a separate Notice of Violation for each meter and a corresponding penalty under section 29.11 of the Act; (3) the inspector had no reasonable grounds for issuing a Notice of Violation under section 29.12; and (4) Measurement Canada failed to meet the requirements of procedural fairness and Hydro-Québec had exercised all due diligence.

[50] As for the argument that Measurement Canada failed to meet the requirements of section 29.26 of the Act, the Minister's Delegate pointed out that the concept of a six-month limitation period did not seem to apply, since a regular succession of temporary dispensations had been granted. He added that, just as the temporary dispensation exempts meters from the Act's sealing and verification requirements, the temporary dispensation must also exempt parties from the requirements of section 29.26 of the Act.

[51] As for the argument that there should be a separate Notice of Violation for each meter and a corresponding penalty under section 29.11 of the Act, the Minister's Delegate opined that,

since it was the failure to replace meters whose seals had expired that constituted a violation, it was open to Measurement Canada to include all of the meters associated with this violation in a single Notice of Violation and attach the appropriate penalty, which is the sum of the penalties for each meter.

[52] As for the argument that the inspector had no reasonable grounds for issuing a Notice of Violation under section 29.12, the Minister's Delegate pointed out that Hydro-Québec had provided several examples of situations in which Measurement Canada had not met the threshold of reasonable grounds for issuing a Notice of Violation. Nevertheless, the Minister's Delegate noted that the fact remains that according to Hydro-Québec's list, the seals on the meters in question had expired, which contravened the Act and constituted sufficient grounds for Measurement Canada to issue a Notice of Violation.

[53] Lastly, with respect to the argument that Measurement Canada failed to meet the requirements of procedural fairness and that Hydro-Québec had exercised due diligence, the Minister's Delegate further argued that, for the purposes of this application, from the documents he had reviewed, (a) it appeared that Hydro-Québec had sufficient opportunity to resolve a number of difficult cases; (b) in some situations there were gaps of several months or years between communications; (c) it appears that no systematic approach was adopted by Hydro-Québec for regular and ongoing communications; (d) Hydro-Québec could have asked Measurement Canada for assistance on difficult cases; (e) having been granted several temporary dispensations, it is possible that Hydro-Québec was not motivated to do more; (f) due diligence is established on a case-by-case basis and is measured against the balance of probabilities; and

(g) the evidence clearly demonstrated a lack of due diligence with respect to the meters located on non-Indigenous lands.

[54] In Part 2 of his analysis, the Minister's Delegate concluded that the amount of the initial penalty of $689,000 (reduced by half to $344,500) was correct in light of the provisions of the Act and its Regulations, and given the facts set out in the Notice of Violation.

[55] The Minister's Delegate therefore determined that Hydro-Québec had failed to exercise due diligence with regard to the meters located on non-Indigenous lands, and consequently the violations related to those 246 meters were upheld. The Minister's Delegate therefore found that the amount of the penalty to be imposed was $246,000 and that, in accordance with subsection 50(2) of the Regulations, the penalty was reduced by half to $123,000.

IV. Issues

[56] In light of the parties' submissions, the Court must determine:

1. whether the decision-making process violated the principles of procedural fairness in such a way as to taint the Decision;
2. whether Hydro-Québec has established that the Decision was unreasonable; and
3. if so, what the appropriate remedies would be.

V. Analysis

A. *Alleged breach of principles of natural justice*

(1) Parties' positions

[57] Hydro-Québec maintains that the process leading up to the issuance of the Decision was fundamentally tainted by significant breaches of the principles of natural justice.

[58] Hydro-Québec argues that, contrary to what had been presented to it, the decision-making process was not objective and independent, since the Minister's Delegate maintained communications with Measurement Canada officials during his deliberations and without Hydro-Québec's knowledge, which constitutes a violation of the principles of procedural fairness and fatally taints the Decision.

[59] Hydro-Québec points out that the most worrying communication was certainly the one that emerged from a chain of emails dated April 3 and 4, 2019. Hydro-Québec maintains that the content of these exchanges is troubling since (1) they demonstrate that exchanges took place without Hydro-Québec's knowledge between the allegedly independent decision-maker, the Minister's Delegate, , and one of the parties to the dispute that the decision-maker was responsible for adjudicating; (2) these exchanges concerned the substance of the debate before the Minister's Delegate and the arguments to be raised in response to Hydro-Québec; (3) these exchanges themselves refer to other exchanges between the Minister's Delegate and the author of the disputed Notice of Violation; and (4) certain exchanges confirm that it was neither a

coincidence nor an oversight that Hydro-Québec was not kept informed of the exchanges between Measurement Canada and the Minister's Delegate.

[60] Next, Hydro-Québec points out that, again without its knowledge, the Minister's Delegate communicated directly with Ms. Anderson, the counsel retained by Measurement Canada to prepare a legal opinion for the issuance of the Notice of Violation. It is understood that Ms. Anderson would then communicate to Mr. Spicer, in his capacity as Minister's Delegate, the legal opinion she had prepared for Measurement Canada in connection with the preparation of the Notice of Violation.

[61] Finally, in the fall of 2019, while the Minister's Delegate was deliberating, he exchanged several emails with Measurement Canada officials about the meters covered by the Notice of Violation, again without Hydro-Québec's knowledge.

[62] Hydro-Québec states that it learned of these exchanges when it received the CTR on or about September 11, 2020, well after the Decision had been issued.

[63] Hydro-Québec maintains that there is no doubt that these numerous exchanges were inappropriate and constitute clear violations of the most elementary principles of procedural fairness, that they manifestly contravene the procedure adopted by Measurement Canada and the assurances given by Mr. Dupuis and the Minister's Delegate as to the objectivity and independence of the process, and demonstrate the absence of any basis for Ms. Allan's claims with respect to the transparency of the process.

[64] The AGC replies that there was no breach of procedural fairness. He points out that the following factors must be analyzed here, namely (1) the nature of the decision sought and the process for reaching it; (2) the nature of the applicable statutory scheme; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of those individuals; and (5) the procedural choices of the decision-maker (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21–28 [*Baker*]). In short, the AGC argues that his analysis demonstrates that Hydro-Québec was entitled to a moderate level of procedural fairness.

[65] The AGC adds that the decision-maker's conduct gives rise to no reasonable apprehension of bias under the established test (*Committee for Justice and Liberty v National Energy Board*), 1976 CanLII 2 (SCC), [1978] 1 SCR 369 [*Committee for Justice and Liberty*]). Moreover, the AGC adds that since Measurement Canada is not a quasi-judicial administrative tribunal, the application of the impartiality test is relaxed (*Baker* at para 44, *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 89 DLR (4th) 289 at 636 [*Newfoundland Telephone Co.*]; *Enquête Énergie v Comm. de contrôle de l'énergie atomique*, [1985] 1 FC 563, 14 DLR (4th) 48 at 584 [*Enquête Énergie*]; *Gardaworld Cash Services Canada Corporation v Smith*, 2020 FC 1108 at para 33 [*Gardaworld*]; Patrice Garant, *Droit administratif*, Montreal, Yvon Blais, 7th ed, 2017 at ch X, L'impartialité - Introduction, L'impartialité décisionnelle : La crainte raisonnable de partialité, L'impartialité - La situation des organismes exerçant des fonctions administratives) and adds that the burden of proof resting on Hydro-Québec is high because of the presumption of impartiality enjoyed by

administrative decision-makers (*Committee for Justice and Liberty* at 394; *Telus Communications Inc. v Telecommunications Workers Union*, 2005 FCA 262 at paras 36–38).

[66] As for the first exchange of emails dating from April 2019, the AGC maintains that the Minister's Delegate did not participate in these exchanges and that they were simply forwarded to him by the President of Measurement Canada, Ms. Allan, in order to ensure greater transparency in the decision-making process. The AGC qualifies the fact that one email contained a brief discussion between the Minister's Delegate and a Measurement Canada official as insinuations, suppositions and suspicions.

[67] The AGC acknowledges that a decision-maker should not communicate with one party in the absence of the other party (*Gardaworld* at para 38; *Canada* (*Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391, 151 DLR (4th) 119 at paras 74–75 [*Tobiass*]). However, the AGC maintains that a party can conversely communicate with the decision-maker on the substance of the case without including the other party in that communication. The AGC adds that there is no apprehension of bias if the decision-maker subsequently forwards this communication to the opposing party (*Gardaworld* at para 39; *GRK Fasteners v Leland Industries Inc.*, 2006 FCA 118 at para 17 [*GRK Fasteners*]).

[68] As for the second exchange in June 2019 between the Minister's Delegate and Ms. Anderson, the AGC points out that the exchange was redacted in application of solicitor-client privilege. Since Measurement Canada and the Minister's Delegate were bound by solicitor-client privilege, the AGC further argues that the redaction was challenged by Hydro-

Québec and upheld by the Federal Court, and that Hydro-Québec's argument is therefore based on innuendo and must be rejected.

[69] The AGC also maintains, paradoxically, that the Minister's Delegate could seek and obtain legal advice in the course of his duties and that, in fact, the Minister's Delegate retained the services of Measurement Canada's counsel as his legal counsel. The AGC suggested at the hearing that the hiring of the same counsel by Measurement Canada and the Minister's Delegate may have resulted from operational constraints within Measurement Canada.

[70] As for the third exchange between the Minister's Delegate, Mr. Dupuis, and other Measurement Canada officials, the AGC notes the subjects of the exchanges, namely the meters to be replaced, a question about the expected timing of the decision and an exchange beginning with a request for an extension of Hydro-Québec's dispensation. He points out that what emerges from these exchanges is that the Minister's Delegate indicated that he could not answer [TRANSLATION] "any of the applicant's questions in this regard" due to his limited role in evaluating the evidence and written submissions. The AGC adds that Measurement Canada was raising issues of a procedural nature regarding the status of the meters covered by the request for ministerial review, which does not concern the substance of Hydro-Québec's challenge. The AGC argues that since the communications were administrative in nature, they constituted an exception to the general principle prohibiting *ex parte* communications with only one of the parties (*Gardaworld* at paras 33, 39; *Grey v Whitefish Lake First Nation No. 459*, 2020 FC 949 at paras 44–51. See also *Baker* at para 44; *Newfoundland Telephone Co.* at 636; *Enquête Énergie* at 584).

(2) Decision

(a) *Standard of review*

[71] With respect to procedural fairness, no standard of review is applied, but the Court's exercise of review is "best reflected in the correctness standard" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway Company*], citing *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20; see also *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57). Thus, the Court must ask whether the process was fair in view of all the circumstances (*Canadian Pacific Railway Company* at paras 54–56).

[72] In *Canadian Pacific Railway Company*, the Federal Court of Appeal emphasized that the ultimate question, regardless of the deference accorded to administrative tribunals, "remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway Company* at para 56).

[73] As Hydro-Québec points out, the Act stipulates that, in the event of a dispute, the Minister is to consider only written evidence and written submissions in determining whether a person has committed a violation. The Act also provides that the Minister's decision, in the event of a dispute as to the facts, shall be based on a balance of probabilities (subsection 29.16 (5) and section 29.21 of the Act).

[74] In terms of fairness, the Supreme Court of Canada emphasized in *Baker* that:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision (*Baker* at para 28).

(b) *Undisclosed communications between a party or its counsel, or both, and the administrative decision-maker*

[75] The evidence reveals that several communications took place (1) between the Minister's Delegate and Measurement Canada officials, including the President and the persons responsible for issuing the Notice of Violation; and (2) between the Minister's Delegate and Measurement Canada counsel, all without Hydro-Québec's knowledge.

[76] The first series of exchanges, on April 3 and 4, 2019, can be found on pages 3457 *et seq*. of the Applicant's Record (CTR at 5–106). Thus, on April 3, 2019, Mr. Dupuis forwarded to Carl Cotton, Ms. Campeau and Ms. Allan, all of Measurement Canada, the response he had sent to the Minister's Delegate and told them (in English in the text) in substance that (1) Hydro-Québec's additional elements were due at the Minister's Delegate the following day; (2) after reflection and a quick discussion with the Minister's Delegate, it was decided that he (Mr. Dupuis) would provide his response to the Minister's Delegate for review, and not to Hydro-Québec; (3) the Minister's Delegate would seek legal advice if necessary; and (4) this manner of proceeding was chosen to maintain an independent review process.

[77] On April 4, 2019, Mr. Cotton replied to all (in English in the text) and indicated, among other things, that one should be mindful about providing too much information to Hydro-Québec

about these other arguments, as Hydro-Québec could use that information if it wished to appeal to the Federal Court.

[78] On April 4, 2019, Ms. Allan forwarded the message chain to the Minister's Delegate. She did not ask that Hydro-Québec be informed.

[79] The evidence shows that these communications between Mr. Dupuis, Ms. Allan and other Measurement Canada officials between April 3 and 4, 2019, were not forwarded to Hydro-Québec, and that Hydro-Québec became aware of them only after initiating the present application for judicial review and after having received Measurement Canada's CTR.

[80] As Hydro-Québec also points out, an important aspect of procedural fairness is the fact that one party cannot have any communication with the decision-maker in the absence of the other party to the dispute (*R v Curragh Inc.*, [1997] 1 SCR 537, 144 DLR (4th) 614 at para 104; *Tobiass* at paras 74–75; *R v Peters*, 2001 SCC 34 at para 2). Thus, administrative decision-makers cannot confer with one party without notifying the other and giving it the opportunity to respond, even in the absence of a formal adjudicative process (*Kane v Board of Governors of U.B.C.*, [1980] 1 SCR 1105, 110 DLR (3d) 311 at 1114 [*Kane*]; *Pfizer Co. Ltd. v Deputy Minister of National Revenue*, 1975 CanLII 194, [1977] 1 SCR 456 at 463).

[81] Measurement Canada itself recognizes this obligation in its *Ministerial Review Procedure* [Procedure], and Ms. Allan also confirmed it unequivocally during her cross-examination in this proceeding.

[82] The AGC himself acknowledges, in the context of the present application for judicial review, that there is no apprehension of bias if the decision-maker immediately forwards this communication to the opposing party (*Gardaworld* at para 39; *GRK Fasteners* at para 17).

[83] However, the evidence on the record contains no indication that the Minister's Delegate forwarded the communications to Hydro-Québec, which is the opposing party in this case. The AGC does not dispute that the exchanges between Measurement Canada and the Minister's Delegate were not transmitted, or disclosed, to Hydro-Québec and I conclude that they were indeed not transmitted or disclosed to Hydro-Québec, the latter only learning of their existence upon receipt of the CTR.

[84] I am satisfied that all of these exchanges, which were not administrative in nature, were inappropriate. They constitute clear violations of the principles of procedural fairness and taint the decision-maker's impartiality. Furthermore, they clearly contravene the Procedure adopted by Measurement Canada and the assurances of independence and objectivity given by Mr. Dupuis and the Minister's Delegate to Hydro-Québec as well as the assurance as to the transparency of the process given by the President of Measurement Canada. These exchanges, which were not disclosed to Hydro-Québec, have no place in a process that must be fair, impartial and open, as required by the Supreme Court of Canada in *Baker*. They are likely to fatally taint the decision-making process and the Decision reached at the end of that process.

[85] Hydro-Québec aptly points out that [TRANSLATION] "[o]n cross-examination, Ms. Allan attempts to justify transmitting the exchanges between officials to the Minister's Delegate on the grounds that she thought that the information would be shared with HQ" (Applicant's

Memorandum of Fact and Law at para 90 at footnote 104; see cross-examination of Diane Allan at 48–53, Applicant's Record at 3710–15). I agree with Hydro-Québec that this is a very unhelpful attempt at an *a posteriori* justification, given that Ms. Allan acknowledged that she did not follow up in any way to ensure that the exchanges had actually been forwarded to Hydro-Québec, that the emails themselves indicate a desire not to disclose the information to Hydro-Québec, and that the said exchanges were not shared with Hydro-Québec.

[86] The second series of problematic exchanges occurred between Measurement Canada's counsel and the Minister's Delegate.

[87] The AGC first points out that the exchanges between Measurement Canada's counsel and the Minister's Delegate were redacted, protected by solicitor-client privilege, and moreover, that the Court had upheld the redaction.

[88] To begin with, it is not entirely accurate to state that the Court upheld the redaction without specifying that I did, in October 2021, order the disclosure of the legal opinion dated December 28, 2018, after concluding that its transmission by Ms. Anderson to the Minister's Delegate, a third party, had resulted in Measurement Canada's waiver of solicitor-client privilege. Indeed, I concluded that it was obvious that Measurement Canada and the Minister's Delegate could not be bound by and/or invoke the same solicitor-client privilege, a privilege that would bind them both to Measurement Canada's counsel, when they are respectively party (Measurement Canada) and decision-maker (the Minister's Delegate) to a dispute in the context of challenging the Notice of Violation.

[89] From the hearing on appeal from Associate Justice Tabib's Decision, it was clear that the AGC was arguing that Measurement Canada's counsel was concurrently counsel for the Minister's Delegate, therefore constituting a single "client" since counsel was, he argued, bound by the same solicitor-client privilege.

[90] In the present application for judicial review, the AGC submits (1) that Ms. Anderson was counsel for both Measurement Canada and the Minister's Delegate, both constituting one and the same client, and that she was bound by the same solicitor-client privilege; and alternatively, (2) that the Minister's Delegate retained the services of counsel to advise him separately, in his role as Minister's Delegate, and that he had to choose the counsel who was also advising Measurement Canada because of operational constraints within the organization.

[91] The AGC adduced no evidence to support this second proposition, which contradicts the position he had submitted in his motion to object that led to the October 2021 order. That said, there is no need to clarify which of these two options applies in this instance because, with all due respect, they both appear highly problematic and both fatally taint the decision-making process. Indeed, the evidence confirms that the Minister's Delegate was advised by the very counsel who was advising, or had advised, Measurement Canada, one of the parties to the dispute, and that the Minister's Delegate had access to at least one legal opinion prepared for Measurement Canada, without Hydro-Québec's knowledge. The evidence also reveals that the counsel who had advised the Minister's Delegate had also advised Measurement Canada specifically on the subject of the dispute, i.e., the Notice of Violation.

[92] Thus, one of two things is true: either Measurement Canada's counsel was advising Measurement Canada and the Minister's Delegate simultaneously or concurrently, or Measurement Canada's counsel was advising the Minister's Delegate separately, when there is no indication that steps were taken to separate and compartmentalize the cases (presuming even that such steps could be taken) between Measurement Canada and the Minister's Delegate (*MacDonald Estate v Martin* [1990] 3 SCR 1235 at 1261–62). On the contrary, the evidence shows that at least one legal opinion was shared without Hydro-Québec's knowledge.

[93] It seems obvious that an informed person, viewing the matter realistically and practically—and having thought the matter through—would think that it is more likely than not that the Minister's Delegate, whether consciously or unconsciously, would not decide fairly according to the test formulated in *Committee for Justice and Liberty* decision (see *Baker* at paras 45, 46; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at paras 46–57; *Kohl v Canada (Attorney General)*, 2024 FC 45 at para 61). The Minister's Delegate received arguments and opinions directly from Measurement Canada, one of the parties, and did not allow Hydro-Québec to know their content or respond to them.

[94] In his decision in *Bank of Montreal v Brown*, 2006 FC 503, the Honourable Justice Yves de Montigny, now Chief Justice of the Federal Court of Appeal, emphasized the importance of benefiting from impartial decision-makers:

> [41] . . . The reason for insisting on impartiality of decision makers was aptly explained by the Supreme Court in *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] 1 D.L.R. 370, page 373:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set-up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended through it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs. [Emphasis added.]

[95] I conclude that the decision-making process was tainted by significant breaches of the principles of procedural fairness that infringed on Hydro-Québec's fundamental rights to be heard, to respond and to receive a fair hearing before an impartial decision-maker. The result is a reasonable apprehension of bias that requires the Court's intervention. As Hydro-Québec points out, it is not necessary to show that the information transmitted to the Minister's Delegate actually worked to the detriment of the other party; it is sufficient that this possibility exists (*Kane* at 1116).

[96] Given my conclusions with respect to the first two situations, There is no need to examine the impact of the third round of exchanges in autumn 2019.

B. *Was the decision unreasonable?*

(1) Parties' positions

[97] Hydro-Québec argues that (1) the Notice of Violation could not validly multiply the number of violations and the amount of the penalty by the number of meters; and (2) the Decision *a quo* was based on a fundamentally flawed conception of the due diligence defence.

[98] As to the first ground raised by Hydro-Québec, it argues in particular that (a) the provisions of the Act prohibit the grouping of several violations into a single Notice of Violation; (b) the grouping of the alleged violations into a single Notice of Violation substantially infringed Hydro-Québec's rights; and (c) the Notice of Violation really identifies only one violation.

[99] As for the second ground it raised, Hydro-Québec specifically argues that the Decision (a) fails to analyze the violations sought since the Minister's Delegate did not address the specific violations before him, and (b) is based on fundamental errors of law as to what constitutes due diligence by transforming the due diligence imposed by the Act into an obligation of result.

[100] The AGC argues, on the contrary, that the decision was reasonable and responds in substance that (1) Hydro-Québec has a legal obligation to prevent its meters with expired seals from remaining in service; (2) the nature of the violation was Hydro-Québec's failure to replace the meters before the seals expired, thereby allowing them to remain in service; (3) only one Notice of Violation could be issued and the penalty cannot be set aside by the Court; (4) Hydro-Québec allowed meters with expired seals to remain in service; and (5) Hydro-Québec has not demonstrated that it exercised due diligence.

(2) Decision

[101] Hydro-Québec raises several arguments, but three are sufficient to overturn the Decision. The Minister's Delegate erred (1) by failing to analyze the alleged violations for each of the meters, concluding that a violation had been committed for all of the meters when the evidence

showed that no violation had been committed, for at least some of the meters, at the time of the ministerial review; (2) by confirming that the inspector had reasonable grounds to believe that a violation had been committed for all of the meters in the Notice of Violation, even though some of those meters had been replaced; and (3) by failing to take into account the specific steps taken with regard to each meter located on non-Indigenous territory in assessing the due diligence defence.

(a) *Relevant provisions of the Act and Regulations*

[102] It is important first to examine the provisions of the Act relating to the verification and sealing obligation, the offence created in the event of default, and the regime of violations.

[103] Subsection 9(1) of the Act provides that, with certain exceptions, where a contractor or purchaser intends to use or cause to be used a meter for the purpose of obtaining the basis of a charge for electricity or gas supplied by or to him, the meter shall not, until it has been verified and sealed in accordance with this Act and the regulations, be put into service.

[104] Subsection 12(1) of the Act stipulates that every meter must be submitted to reverification; in particular, a meter used for the purpose of obtaining the basis of a charge for electricity must be reverified within the period of eight years from verification, and the period of eight years from each reverification (paragraph 12(1)(a) of the Act). The meter shall be submitted to reverification, together with resealing or marking, or to cancellation of the seal or mark, as the case may require, under this Act and the regulations (subsection 12(1) of the Act).

[105] Subsection 33(1) of the Act provides, among other things, that every person is guilty of an offence who, being a contractor, permits any meter, in default of compliance with section 12, to continue in service beyond the period within which it is required by that section to be dealt with in the manner provided thereby (paragraph 33(1)(e) of the Act).

[106] Subsection 29.11(1) of the Act provides that every person who contravenes a provision designated under paragraph 29.1(a) commits a violation and is liable to a penalty established in accordance with the regulations. In addition, violations under section 12 and paragraph 33(1)(e) of the Act are designated as “very serious” violations in Schedule 2 to the Regulations and receive 5 points (sections 48 and 49 of the Regulations).

[107] Sections 29.11 *et seq*. of the Act govern violations.

[108] Thus, subsection 29.12(1) of the Act states that an inspector may issue a notice of violation and cause it to be provided to a person if the inspector has reasonable grounds to believe that the person has committed a violation.

[109] In addition, subsection 29.2(1) of the Act provides that a person may not be found to be liable for a violation if they establish that they exercised due diligence to prevent the commission of the violation.

[110] There is a provision for ministerial review in sections 29.16 *et seq*. of the Act. Thus, the Minister shall determine whether the person who is named in the notice—in this case Hydro-

Québec—committed the violation and, if the Minister determines that the person did so but considers that the amount of the penalty for the violation was not established in accordance with the Regulations, the Minister shall correct that amount and cause the person to be provided with a notice of the Minister's decision.

[111] Lastly, under subsection 29.16(5) of the Act, the Minister is to consider only written evidence and written submissions when determining whether a person committed a violation or whether the amount of a penalty was established in accordance with the Regulations.

(b) *Standard of review*

[112] The Supreme Court of Canada has confirmed that the reasonableness standard applies to judicial review of administrative decisions (*Vavilov* at para 85). None of the situations that justify rebutting this presumption arise in this judicial review (*Vavilov* at paras 25, 33, 53; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27).

[113] The role of the Court is therefore to examine the reasons given by the administrative decision-maker and to determine whether the decision was based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The Court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15).

(c) *Hydro-Québec has established that the Decision was unreasonable*

(i) Evidence in support of the alleged facts

[114] In connection with the alleged facts, and given the evidence on the record, two of the Minister's Delegate's findings appear to be unreasonable, namely (1) its finding on page three of the Decision in which the Minister's Delegate concluded that [TRANSLATION] "it is evident from the documentary evidence provided by [Hydro-Québec] and [Measurement Canada] that the 844 meters referred to in the Notice of Violation have expired seals"; and (2) its finding on page five of the Decision, in which, assessing whether the inspector had reasonable grounds to believe that a violation had been committed, the Minister's Delegate concluded that [TRANSLATION] "the fact remains that, according to [Hydro-Québec's] list, the seal on the meters in question had expired and this contravenes the Act".

[115] These conclusions were unreasonable, given that the evidence shows that some of the meters had in fact been replaced.

[116] It was therefore not open to the Minister's Delegate, on the basis of the evidence and submissions presented to him by Hydro-Québec, to conclude that all of those meters had expired seals. In reaching this conclusion, the Minister's Delegate either failed to assess the condition of each of the meters individually, as he is required to do under the Act or ignored the evidence before him, or both.

[117] Indeed, Hydro-Québec had specifically pointed out in its response to the Notice of Violation dated March 5, 2019, transmitted to the Minister's Delegate, that the meter bearing

number 392J7683695 had been replaced on May 1, 2018, by the meter bearing number G9SJ3579648; that the meter bearing number 320H6089201 had been replaced on November 15, 2018, by the meter bearing number G4SXB001332; and that no violation therefore existed, at least for these meters, as of January 1, 2019.

[118] Hydro-Québec then provided proof of these specific facts by filing its voluminous evidence record on April 4, 2019 (Exhibit PGL-25 of Mr. Patrick Grignon-Labine's affidavit (Exhibit HQ-21.50 of the Ministerial Review file), Exhibit PGL-27 of Mr. Patrick Grignon-Labine's affidavit (Exhibit HQ-21.202 of the Ministerial Review file)).

[119] In addition, the evidence shows that other meters had been replaced at the time of the Ministerial Review, including:

1. meter number Q6DJ0008355, replaced on August 22, 2018, by meter number G9SJ0009779 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.152 of the Ministerial Review file), Applicant's Record at 1496);
2. meter number 392J6080553, replaced on January 18, 2019, by meter number G9SJB062129 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.235 of the Ministerial Review file), Applicant's Record at 2003);
3. meter number 392J3155028, replaced on January 21, 2019, by meter number X95J0012861 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.205 of the Ministerial Review file), Applicant's Record at 1779);

4. meter number 372P0310845, replaced on January 22, 2019, by meter number G9SR0040626 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.76 of the Ministerial Review file) Applicant's Record at 880);
5. meter number 372E0199274, replaced on January 25, 2019, by meter number G9SR0049850 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.74 of the Ministerial Review file), Applicant's Record at 874);
6. meter number Q64J0007367, replaced on February 5, 2019, by meter number G9SJ3834222 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.75 of the Ministerial Review file), Applicant's Record at 877);
7. meter number 320C0132210, replaced on February 7, 2019, by meter number G4ACOJOO178 (Exhibit PGL-4 of Patrick Grignon-Labine's affidavit (Exhibit HQ-21.233 of the Ministerial Review file), Applicant's Record at 1995);

[120] The administrative decision-maker is presumed to have considered all of the documents. However, in this case, I am satisfied that this presumption has been rebutted given the elements in the record that directly contradict the Minister's Delegate's conclusion, elements that confirm that at least two of the meters had been replaced before January 1, 2019, and brought to the Minister's Delegate's attention in the response to the Notice of Violation, and of which he makes no mention whatsoever. At the very least, the Minister's Delegate should have explained why he was upholding a finding of violation for each of the meters when the evidence showed that no violation had occurred for at least some of the meters, and that this evidence had been presented to him.

[121] Under section 29.16 of the Act, the Minister's Delegate is required to determine the interested party's liability. He must therefore examine whether the alleged facts have been proven. However, it is clear that no violation existed for at least some meters at the time of the Ministerial Review, March 5, 2019, since the evidence shows that a number of meters had been replaced by then. In his Decision, the Minister's Delegate did not mention the condition of those meters and did not subtract the meters that were not in violation from the total. This conclusion is inexplicable and is not within the range of the possible outcomes (*Vavilov* at paras 86, 304).

[122] Furthermore, in assessing whether the inspector had reasonable grounds to believe that a violation had been committed with regard to the meters covered by the Notice of Violation, the Minister's Delegate failed to take into account the fact that some of the meters included in the Notice of Violation had been replaced even before January 1, 2019, (Patrick Grignon-Labine`s affidavit at paras 67–70, Exhibit PGL-3, Applicant's Record at 15–16) and that, for those meters at least, the inspector could not reasonably have had reasonable grounds to believe that a violation had been committed.

[123] Thus, according to the evidence on the record, it was not open to the Minister's Delegate to conclude that the inspector had reasonable grounds to believe, in the words of the Act, that a violation had been committed for each and every meter, since some of the meters were clearly not in violation of the Act at the time the Notice of Violation was issued.

[124] The Minister's Delegate's conclusions in the two above-mentioned cases fail to consider each meter individually or ignore the evidence, or both. In both cases, in my opinion, this is a fatal error.

(ii) The due diligence defence for each violation

[125] Here again, it appears that the Minister's Delegate failed to consider each meter individually and/or ignored the voluminous evidence Hydro-Québec HAD provided to him on April 4, 2019, indicating that it had exercised due diligence and, above all, that some of the meters had already been replaced.

[126] In connection with the 246 meters on non-Indigenous lands, the evidence reveals, as Hydro-Québec points out, that certain meters whose seals had expired and not been replaced were in a very unusual situation, including some meters that had been locked by customers opposed to their replacement (including meter number 320H2226213, see Patrick Grignon-Labine's affidavit at para 76, Exhibit PGL-31 (Exhibit HQ-21.188 in the Ministerial Review file), Applicant's Record at 18) and meters to which Hydro-Québec could not gain access without the owner demolishing or modifying constructions made after their installation (including meter number 392J6086157 or number 392J9197809; see Patrick Grignon-Labine's affidavit at para 80–81, Exhibit PGL-33 and Exhibit PGL-34 (Exhibit HQ-21.225 and Exhibit HQ-21.187 in the Ministerial Review file), Applicant's Record at 20–21).

[127] Here again, the Minister's Delegate did not examine the condition of each meter, or the due diligence exercised by Hydro-Québec with respect to each meter. As Hydro-Québec points

out, the Minister's Delegate appears to be imposing an obligation of result on the company, given that it is not possible to resolve the situation with some of the meters, the Minister's Delegate considered that Hydro-Québec had not exercised due diligence, that it had not taken reasonable care, and that it had committed a violation with regard to each and every meter on non-Indigenous land.

[128] The Act provides that no one can be held liable for a violation if they establish that they "exercised due diligence to prevent the commission of the violation" (subsection 29.2(1) of the Act). Due diligence is "[a]n objective standard . . . under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances" (*Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc.*, 2006 SCC 12 at para 15 [*Lévis*]). The person can thus "avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable [person] would have done in the circumstances" (*Lévis* at para 15 citing *R v City of Sault Ste-Marie*, [1978] 2 SCR 1299 at 1326). The Federal Court of Appeal also confirms that, in the context of due diligence imposed on a corporation under the *Income Tax Act*, "although positive steps are required of directors, they need only be reasonable, positive steps, not foolproof ones" (*Cameron v The Queen*, 2001 FCA 208 at para 4).

[129] Hydro-Québec has highlighted certain measures, which it considers sufficient, and believes that those measures should have been considered. However, it is not necessary to analyze these measures or to determine whether it was reasonable to conclude that the measures taken by Hydro-Québec were, or were not, sufficient. Once again, the seals on at least some of the meters had been replaced by the time the Notice of Violation was issued, and by the time of

the Ministerial Review. The replacement of seals, or meters, certainly qualifies as exercising due diligence to prevent the commission of a violation, and the Minister's Delegate should have considered the condition of each of the meters individually rather than confirming a violation for all of them.

C. *Remedies sought*

[130] The AGC maintains that the remedies sought by Hydro-Québec are inappropriate. I agree. Where the Decision is found to be unreasonable, the appropriate remedy is not, save in exceptional circumstances, for the Court to substitute itself for the Minister's Delegate, but rather to remit the request for ministerial review for reconsideration before a different decision-maker (*Vavilov* at paras 140–42). Hydro-Québec has not convinced me that there is only one possible outcome in this case that would justify the Court issuing the judgment it is seeking.

VI. Conclusion

[131] The Court will therefore set aside the disputed portion of the Minister's Delegate's Decision, i.e., the portion dealing with meters in non-Indigenous territory, and remit the matter for redetermination, with respect to these meters, by a different decision-maker.

JUDGMENT in T-236-20

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed.

2. The portion of the decision challenged by the present application for judicial review is hereby set aside.

3. The matter is returned for a new determination of the portion of the decision that has been disputed, by a different decision-maker.

4. Costs are awarded in favour of Hydro-Québec pursuant to Rule 407 of the *Federal Courts Rules.*

5. In view of the confidentiality order, the parties have 15 days from the release of these confidential reasons to make submissions on the redactions to be made before a public version is released.

"Martine St-Louis"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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