

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *TDC Broadband Inc., in bankruptcy v. Nova Scotia (Attorney General)*,  
2016 NSSC 206

**Date:** 2016-08-05

**Docket:** Hfx, No. 312210

**Registry:** Halifax

**Between:**

TDC Broadband Inc., in bankruptcy, by its participating creditors granted leave  
pursuant to section 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,  
being Owen Huard, Christopher A. Chatterton, Merit Consulting Limited, Murray  
McNutt and Gerald R. Pineo

Plaintiff

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right  
of the Province of Nova Scotia

Defendant

**Judge:** The Honourable Justice Patrick J. Duncan

**Heard:** April 20, 21, 22, 23, 27, 28, 29, 30; May 4, 5, 6, 7, and 11,  
2015 in Halifax, Nova Scotia

**Final Written** June 26, 2015

**Submissions:**

<b>Counsel:</b>	Robert H. Pineo	for the Plaintiff
	Melissa P. MacAdam	
	Jeremy P. Smith	

	Terry Potter	for the Defendant
	Sheldon Choo	

**By the Court:**

**Introduction**

[1] During the campaign leading up to the election of June 13, 2006, the then Premier of Nova Scotia, Rodney MacDonald, promised Nova Scotians that all would have access to affordable high speed internet access (Broadband) by 2009. This was of particular importance to rural regions of the province where this type of service was not available. Following their election the government tasked Nancy Flam with delivering on this promise.

[2] Ms. Flam had no technical background in the provision of broadband internet, no system to deliver the service, no specific geographical area in which to test a delivery system and a tight deadline to meet.

[3] During the years 2004 to 2006 the persons who would become the principals of the plaintiff company invested significant time and capital into developing and deploying a successful internet delivery system that would apparently have satisfied all of the technical criteria of Ms. Flam's project.

[4] The question posed by this action is whether Ms. Flam's "Rural Broadband Project" received, in confidence, unique technical and/or business information of the plaintiff and used it for the purposes of that project without the plaintiff's permission. If so, then the plaintiff submits that it is owed significant damages for the misuse of its information. The Province denies all elements of the claim.

[5] For the reasons that follow I find the defendant liable for breach of confidence.

**Background**

[6] Ted, Dennis and Carter Cockerill are three brothers who together funded, developed, and marketed a system for delivering wireless high speed broadband internet service to rural Nova Scotia.

[7] The brothers initially operated under the names of Practical Networks and Custom Networks and had been experimenting with various technologies for delivering internet service.

[8] In 2004 a rural Nova Scotia company located in Rawdon was looking for a solution to problems in its operations caused by an inadequate internet service that

was hampering its ability to operate and compete. The Cockerills provided a delivery system which met the need.

[9] Their success in delivering the service to that company led to discussions with the Region of Queens Municipality (RQM) which was looking for providers of high speed internet service for residents who, like many in rural Nova Scotia, did not have access.

[10] The Cockerills began working on the project with Everett Backman, a Rural Economic Development Officer with the defendant's Office of Economic Development; Neil Emenau, Executive Director for the defendant's Lunenburg-Queens Regional Development Agency; and Margaret Cartwright, Director of Tourism and Economic Development for the RQM.

[11] In the period January to March 2005 Dennis Cockerill developed a satellite based delivery system to be tested at the North Queens Medical Centre. On March 9, 2005, the system was demonstrated on site to approximately 70 people. It attained excellent data speeds for the time. Notably, this was achieved during a snowstorm, when telephone service and satellite television service in the area were interrupted, and where power was out in parts of the region. The test was considered a success.

[12] Out of this arose the "Caledonia Project". The unique requirements for this project included that the delivery system had to:

- provide a service that was comparable to or better than urban delivery systems;
- be comparable in cost to urban delivery systems; (which is a function of the available income generating base and the cost to construct and deliver the service);
- be able to generate a profit;
- be robust enough to withstand weather in difficult to reach places where power outages were frequent and servicing could be difficult;
- be more reliable than satellite delivery systems which were plagued with weather interruptions to service. (medical centre needs and businesses trading in real time, for example, could not rely on a service that was susceptible to such problems);

- be made available in places where existing infrastructure for wired service was too expensive and/or too old or deteriorated to suit the purpose; and
- be expandable.

[13] To be eligible for government financial assistance for this project the Cockerills needed to incorporate, and in March of 2005 they did so creating the plaintiff company, TDC Broadband. The then Minister of Economic Development, Ernest Fage, sent a letter dated April 13, 2005, to RQM enclosing \$50,000 from the Province of Nova Scotia in “sponsorship” of the broadband to North Queens project.

[14] In the ensuing months TDC focused on using towers as part of its delivery system. As a result it constructed two towers and by February 2006 began to service customers in the Caledonia community.

[15] The delivery system fulfilled the requirements for the provision of high speed wireless internet service in particularly difficult terrain, over a comparatively large geographic area and at a cost that was affordable and expected to be sufficient to sustain the company as it expanded its market. At the time, as the evidence demonstrates, there were no other internet service providers offering the same combination of availability, speed and reliability in this type of topography.

[16] Notwithstanding their technical success, TDC did not develop a sufficient income stream to support the operations and its own resources were being exhausted. Bills from suppliers were not being paid in a timely manner and the service was at risk of being suspended. (In fact, service was suspended for a period beginning in the summer of 2006, due to financial difficulties).

[17] Despite these problems, the Cockerills continued to seek out capital and to market the product around the province. They had considerable interest from Regional Development Agencies (RDAs) and believed that because of their work with local Nova Scotia government officials in Queens they were well placed to obtain significant support from the Province which, if it came, would provide the financial stability to support the wide spread distribution of the delivery service.

[18] However, when the Province decided in March 2006 to seek out proposals to provide broadband internet service to unserved or underserved areas of the province they did it in such a manner that it effectively ensured that TDC could not

compete with the large service providers, even though TDC had a proven delivery model and their competition did not, or were unprepared to deploy one.

[19] By the end of May 2006 the Province had selected an area near Tidnish, Cumberland County for a “Pilot Project”. The Province then sent out a Request for Proposals to deliver broadband to the pilot area. In late November 2006, Seaside Communications was awarded the exclusive right to deliver broadband service to the Pilot area.

[20] Seeing no hope for provincial or private funding the plaintiff could not continue to operate and on May 11, 2007, a Trustee in Bankruptcy took over the affairs of TDC.

[21] In June 2007 the defendant issued a Request for Proposals to provide Broadband throughout Nova Scotia. The province was divided into 7 zones. The successful bidders were Seaside (4 zones), Eastlink (2 zones) and Omniglobe in Halifax Regional Municipality.

[22] A key component of the Province’s Request for Proposals was the “sustainability” of the project. TDC scored poorly in the competition for the pilot project, largely as a result of the government’s view that it was financially unsustainable and that the business side of the company was poorly run.

[23] The deck was stacked against TDC by the government’s roll out plan and the financial requirements of the RFPs. It was a “Catch 22”: in effect, the government would not give TDC the money necessary for their progress because TDC did not have the ability to pay their existing bills and was not attracting new investor money. Having the only technology that was proven to work was not sufficient to overcome their lack of capital, or business acumen.

[24] As time would show, the Province, while requiring the bidders to show significant financial stability at the point of submitting proposals, later gave the successful bidders very substantial grants to carry out their work. Seaside received \$430,000 to assist with the pilot project. This money was characterized in a Cumberland Regional Economic Development Association (CREDA) newsletter as funds to “cover project expenses”.

[25] By the time of trial, the defendant had provided grants totaling \$23.8 million to Seaside and \$2.2 million to Eastlink to assist these companies as they attempted to fulfill the terms of their successful bids.

[26] The plaintiff says that the Request for Proposals that the government put out for the Pilot Project (won by Seaside) included significant confidential information borrowed from TDC's business proposals and technical specifications. The plaintiff alleges that the Province breached their obligation to keep TDC's information confidential and misused the information by giving it to TDC's competitors thereby causing TDC significant financial injury, which ultimately led to the bankruptcy of TDC.

[27] In short, the allegation is that the Province unlawfully gave TDC's technology and business information to its competitors who had the capitalization that TDC lacked but not the technical expertise that TDC did have.

## Issues

1. Did the defendant breach its duty of confidence to TDC?
  - (a) Did the information supplied by TDC, namely the Delivery Method and Business Model, to the defendant have a quality of confidence about it?
  - (b) Was the information communicated in confidence and in circumstances that imparted an obligation of confidence?
  - (c) By providing details of the Delivery Method and Business Model within the Cumberland Request for Proposals, did the defendant misuse the information, or use the information in an unauthorized manner?
2. What compensation is due to TDC?

## Breach of Confidence: legal principles

[28] The test for a breach of confidence was stated by LaForest, J. in *International Corona Resources Ltd. v. LAC Minerals Ltd.* [1989] SCR 574 as consisting of:

10 .... **three elements**: that the information conveyed was **confidential**, that it was **communicated in confidence**, and that it was **misused** by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows (p. 47):

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must 'have the necessary quality of confidence about it.'

Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

[29] The court then described the burden that rests on the confidEE in relation to the third element:

16 If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.

...

20 .... In establishing a breach of a duty of confidence, the relevant question to be asked is what is the confidEE entitled to do with the information, and not to what use he is prohibited from putting it. Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidEE to show that the use to which he put the information is not a prohibited use. In *Coco v. A.N. Clark (Engineers) Ltd.*, *supra*, at 48, Megarry J. said this in regard to the burden on the confidEE to repel a suggestion of confidence:

In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted....

## Analysis

### Issue 1(a): Quality of Confidence

*Did the plaintiff supply information to the defendant which had about it the necessary quality of confidentiality?*

[30] Mason J., writing in *Pharand Ski Corp. v. Alberta*, [1991] A.J. No. 471, 116 A.R. 326 set out a guideline that assists in the determination of this question:

144 A list of factors to be considered to determine if the information has a quality of confidence about it may be found in *Ansell Rubber Co. v. Allied Rubber Industries Pty. Ltd.*, [1967] V.R. 37, and *Deta Nominees Pty. Ltd. v. Viscount Plastics Products Pty. Ltd.*, [1979] V.R. 167 at 193: see *Kearney*, p. 12. They are:

- (1) the extent to which the information is known outside the owner's business
- (2) the extent to which it is known by employees and others involved in the owner's business
- (3) the extent of measures taken by him to guard the secrecy of the information
- (4) the value of the information to him and his competitors
- (5) the amount of money or effort expended by him in developing the information
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others [i.e. by their independent endeavours].

These factors are useful, but as Fullagar, J. states in *Deta Nominees*, [1979] V.R. 167 at p. 193 they are not exhaustive:

I apprehend that neither he [namely Gowans J. in *Ansell's* case] nor McInerney, J. in *Mense v. Milenkovic*, [1973] V.R. 784 at 796-8, intended to convey that one should slavishly check off the factors against the information, as if one were counting spots on some strange creature to see if it was indeed the species of leopard illustrated in the picture book.

[31] The plaintiff asserts that it developed a system to deliver wireless broadband service at market competitive rates in locales that were geographically challenging and with smaller population bases. These areas either had no internet service or relied on less reliable, slower and/or more expensive delivery models, like satellite and hard wire. The plaintiff assembled its system using an array of products generally available to the public.

[32] The defendant argues that the plaintiff's use of "off the shelf" technology means that there was nothing unique about the plaintiff's delivery system and therefore nothing capable of being considered confidential. In the defendant's view the information was in the public domain. It supports its position by pointing to a delivery system being employed at that time by Seaside Communications which the defendant says was similar to that of the plaintiff.

[33] The defendant's argument is not made out simply because the plaintiff's delivery system used publicly available hardware. Lord Greene's decision in



*Saltman Engineering Co. v. Campbell Engineering Co.*, [1963] 3 All ER 413 (CA) pointed out that (at p. 415):

The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind which is the work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

(emphasis added)

[34] The court in *Saltman* found there to be a breach of confidence in that case, concluding that the defendants dispensed with the:

...necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labor and calculation and careful draughtsmanship. (at p. 415)

[35] The court made the point of acknowledging that the work could be recreated by others but that by utilizing the plaintiff's information the defendants saved themselves "*the trouble*".

[36] Dennis Cockerill's evidence detailed the process he undertook over a lengthy period of trial and error researching, testing, and modifying various technologies which he then mixed with other technologies seeking a combination that would overcome the challenges that the topography in rural Nova Scotia presented in delivering broadband service. There is a detailed description of the hardware and general operation of the system set out in the evidence and summarized in paragraph 12 of the plaintiff's post-trial brief. It is unnecessary to describe the technical aspects. The issue is whether I accept that it was unique and had a quality of confidentiality about it.

[37] Defendant's counsel put its' "off the shelf" theory to the witnesses. Carter Cockerill provided a very common sense analogy when he replied by saying: "... I can give you a grocery list, and you can go to a store – it doesn't make you a chef".

[38] There is no question that the Cockerills believe that their delivery system was unique and therefore had a quality of confidence about it. I conclude that they were correct.

[39] Dr. Jean-Francois Bousquet Ph.D., PEng., is a professor of engineering at Dalhousie University. He was qualified as an expert in the field of Electrical and Computer Engineering, capable of giving opinion evidence on all aspects of wireless broadband Internet Technology. A review of his qualifications demonstrates that he has been working since at least 2005 in areas relevant to the technology in this case.

[40] In cross-examination, he explained that he was tasked to identify innovative aspects of the TDC technology as at 2004, and to determine whether there was information in the Province's Request for Proposals that "could refer" to descriptions of TDC's technology.

[41] He concluded that, for its time, there were a number of technically innovative elements in the design of the delivery system. He concluded that the Cockerills "had a leg up" in the use of the available research and technologies of the time. He opined that "They were really working on research".

[42] These elements included but were not limited to the design of the plaintiff's technology which enabled them to provide wireless service to a large rural coverage area and at higher speeds than were available in rural Nova Scotia at that time. Provision of "non-line of sight" service in 2004 was a "relatively new concept." This was particularly important because rough terrain and heavy foliage reduced the "off the shelf" capabilities of the Motorola Canopy system that formed part of the TDC delivery system. It was the ability to overcome those obstacles that made this innovative.

[43] Dr. Bousquet testified that most electrical engineers in the field would not have been able to deploy the TDC system. The knowledge needed was complicated and would take a lot of time to acquire.

[44] I found Dr. Bousquet to be credible and his opinion to be deserving of considerable weight. In saying this, I reject the defendant's argument that his evidence should be afforded little weight because he acknowledged that he had not paid attention to the requirement set out in **Rule 55.04(1)(c)** which states:

55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

- (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion; ...

[45] It was readily apparent that in preparing his opinion and report that Dr. Bousquet looked for systems that could provide similar results to those of the plaintiff's system. He has, by reason of his specialty, special browsing tools that he employed to conduct searches of scientific databases. He testified as to his search of published materials for the relevant time period and noted that he found only one article published in 2004 that described a "somewhat similar" technology. In discussing this he drew attention to the differences in that system from that of the plaintiff.

[46] He also undertook research as to whether other similar systems were in use in Nova Scotia at that time – there were none. He did acknowledge the existence of satellite and DSL Cable delivery systems but did not discuss those in his report because they were not a part of the RFP criteria and operated differently.

[47] In cross-examination he stated that he had no information as to whether other ISPs, like Eastlink or Seaside, were conducting research of a similar type of delivery system. In my view nothing turns on this. There is no evidence that they were doing this research. The results of the Cumberland pilot demonstrates that the successful proponent did not have the same capability as TDC had demonstrated.

[48] Dr. Bousquet was candid in acknowledging that there were aspects of the TDC system that he was not aware of and also that he did not test the system himself to see if it worked. This latter point is not controversial because Nancy Flam conceded in her testimony that the technology worked. Other witnesses also testified to the actual construction and successful operation of the system.

[49] He also agreed that the pace of technology moves quickly and was unable to say how long the TDC delivery system would have remained at the forefront. There are too many variables including whether TDC would have continued to maintain an advantage as it improved the system, and whether competitors committed to developing a similar product.

[50] There is no evidence that contradicts Dr. Bousquet's opinion, so while he may not have specifically turned his mind to the requirement set out in the declaration, it is apparent that he fulfilled the spirit of the requirement. I am confident that if he felt there was "anything that could reasonably lead to a different conclusion", he would have told the court.

[51] Roland McCaffrey testified. He worked at Seaside Communications in 2005-2007. Mr. McCaffrey met with Carter Cockerill July 5, 2006, to explore a possible business relationship between Seaside and TDC.

[52] He described the wireless system being used by Seaside in the relevant time period. Their delivery systems, which included the Motorola Canopy system for delivery of wireless internet service, could be differentiated from the TDC system in a number of particulars:

- Seaside was not using a fibre optic feed;
- Seaside's primary internet delivery was by cable which was expensive and required new cabling for new service areas;
- Seaside only used a wireless system in a couple of locations that were line of sight, primarily across water where even then they encountered a fade in the signal caused by refraction. They did not have the capability to deliver wireless internet through, around or over obstacles, as TDC could;
- Seaside was not "lighting up" entire communities, as TDC was doing in Caledonia; and
- Seaside was only deploying internet in a lateral band of 90-110 degrees, not 360 degrees that TDC was able to deliver.

[53] Perhaps most significantly, Mr. McCaffrey was the most knowledgeable of the defendant's witnesses in relation to the technology utilized to deliver wireless internet service and he was not aware at that time of a technology that would deliver internet 360 degrees from a tower, as TDC was doing.

[54] Whether TDC's confidential information found its way into the RFPs will be addressed later. With that proviso, I make the following findings in relation to the factors set out in *Pharand*:

(1) *the extent to which the information is known outside the owner's business*

[55] The evidence shows that there were many public presentations in various parts of the province in which aspects of the delivery mechanism were discussed as part of the company's marketing efforts.

[56] At various times information that included some of the technology and/or the business plan was provided by the company on a confidential basis to various persons employed by the Province, ACOA and others engaged for the purposes of seeking assistance for the plaintiff's operations.

[57] Even then, the complete information that explained the components of the hardware, the configuration of the software and the interrelationship of the various components in making the system work were not known outside the TDC circle. In fact, Dennis Cockerill maintained a largely exclusive understanding of the configurations that were essential to the operation of the system.

[58] As evidenced by Roland McCaffery's testimony, Seaside had only a rudimentary understanding of what TDC was doing, even after his meeting with Carter Cockerill to discuss possible joint business ventures.

[59] If the plaintiff's argument is accepted then the RFP(s) provided sufficient information about TDC's delivery system to direct the competitors' lines of research and development. Notwithstanding this "leg up" that the competitors might have been given, Eastlink requested an extension to the deadline for submission of a proposal for the pilot RFP stating in an email dated September 14, 2006, that:

... to provide a comprehensive, credible solution to the Province of Nova Scotia will take several weeks of field work, engineering design, and related technical and financial assessment of wireline and/or wireless options.

[60] It is apparent that Eastlink also did not know all that was necessary to develop the system, without some considerable investment of time and resources. This of course does not answer the question of whether the RFP did, in fact, contain the information TDC alleges.

(2) *the extent to which it is known by employees and others involved in the owner's business*

[61] As part of deploying the system in Caledonia it was necessary that a small, fixed group of persons that included the Cockerill brothers, family and employees were aware of the components of the system. As pointed out previously, Dennis Cockerill maintained a largely exclusive understanding of the configurations and programming of the hardware and software that were essential to the operation of the system. There is no evidence that TDC's information contained in the RFP(s) was provided for the purpose of the Rural Broadband Project by any of those persons involved in TDC's business.

(3) *the extent of measures taken by him to guard the secrecy of the information*

[62] I am satisfied that the principals of TDC made every reasonable effort to ensure the secrecy of their information. The plaintiff consistently and methodically sought to ensure that its business and technical information remained confidential. Where it was necessary for business reasons to disclose information they employed one or more of at least four different strategies to ensure confidentiality:

1. A confidentiality agreement;
2. Notice to the recipient on the cover page of confidential documents that the information was “proprietary” and only to be used for authorized purposes;
3. Stating at the bottom of every page of a document that the information was “confidential and proprietary” to TDC; and
4. Verbally or in writing advising people of their intention that the information be treated as confidential.

(4) *the value of the information to him and his competitors*

[63] The fact that Seaside and Eastlink needed significant grants of government money to try to replicate the TDC results in Caledonia renders it self-evident that the TDC information had value. If TDC had the same capitalization and a better business model, then it is reasonable to infer that in a fairly constructed tendering process it could have outscored its competitors in the bidding for the pilot project.

[64] Seaside was concerned that if the technology worked as TDC said, that it could open up their market in Cape Breton to unwanted competition, since they were not able at that point to provide the same service as TDC said that it could. Clearly, Seaside saw value in the system if it proved to work as described.

(5) *the amount of money or effort expended by him in developing the information*

[65] The testimony indicates that the Cockerill brothers devoted their time on a full time basis for three years (2004-2007) to develop and market the TDC delivery system. The amount of \$1,764,642.60 is alleged by the plaintiff to have been invested in the development of the system. It was 2.5 years before they had the system developed and as noted above even large well-funded competitors were expecting significant challenges in developing a product that could provide similar results.

(6) *the ease or difficulty with which the information could be properly acquired or duplicated by others [i.e. by their independent endeavours].*

[66] It is generally conceded that the technology of internet delivery systems advances so that what is cutting edge at one point in time may quickly become obsolete. The cost of delivery to small remote population bases presents a deterrent to private internet service providers investing in better systems. The results of this project show that a large infusion of government money was necessary to attract the large private providers to the project. Mr. McCaffery felt that without provincial money the project goals could not be met as it was too expensive to privately fund 100% coverage as desired.

[67] In this case, TDC demonstrated that it could deliver a broadband signal in a way that others in Nova Scotia did not. So while others could develop the technology, it was not an attractive business proposition to do so, and even with substantial government funding it turned out to be a challenging task to meet the conditions set out by the Province in the RFPs. It is interesting to note that the pilot project was conducted in a topographical area quite unlike Queens. It was largely flat, following the Northumberland Strait and permitted line of sight delivery. There were few large trees and the most significant hill in the Tidnish area required Seaside to “shoot” from Port Howe to New Brunswick and then back into Nova Scotia, rather than delivering the signal over or around the obstruction.

[68] In addition to the technical aspects of the TDC internet project, the plaintiff developed what has been characterized as their “Business Plan” which was less detailed and used for promotional purposes. TDC provided a copy of this to Mr. McCaffrey during the summer of 2006 when there was a meeting and some discussions as between Carter Cockerill and Seaside over a possible business relationship. The contents of that document are not particularly special to a competitor.

[69] The more detailed “Business Proposal” was not shared with the world at large. It contained detailed technical information describing how the service would be delivered within a specified geographical location and how TDC intended to achieve the sought after service results. This document was provided to various Regional Development Agencies for limited purposes that did not include use by the defendant’s Rural Broadband Project.

[70] I have reviewed the evidence and conclude that the “Business Proposal” enjoys the same quality of confidentiality that the technical aspects of the TDC work product enjoyed.

*Conclusion as to Issue 1(a)*

[71] I am satisfied that the plaintiff’s technical information and its business proposals had the “necessary quality of confidentiality” required for the proof of the plaintiff’s case. For reasons set out later in this decision I am also satisfied that the plaintiff’s technical information, business proposal and business plan were supplied by TDC to the defendant.

**Issue 1(b): Communicated in confidence**

*Was the information communicated in confidence and in circumstances that imparted an obligation of confidence?*

[72] Again, the court in *Pharand* offers guidance in deciding this question:

154 Megarry J. in the *Coco* case, *supra*, in discussing the second element states that this is not a well-developed area of law where there are specific guides and tests to be exercised as an aid for the court. He suggests that in the absence of such tests or guides, the test be one imparted from the law of tort, the test of the reasonable man. He states [p. 48]:

It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.

[73] Dennis Cockerill testified that he retained to himself the configurations and programming of the hardware and software, and that he deliberately kept this information to himself to avoid contamination of operations by multiple users. I am satisfied that this information, together with the overall composition and operation of the delivery system was intended by TDC to be kept confidential.

[74] Having said that, it is evident that TDC was required to provide information to various persons and in particular people who were employed by the defendant, or who were engaged by the defendant to assist in Ms. Flam’s “Rural Broadband Project”. I conclude that the plaintiff consistently and methodically sought to



ensure that its business and technical information remained confidential. Where it was necessary for business reasons to disclose information they employed various strategies intended to ensure confidentiality. (*infra*, at para. 62)

[75] I reject the argument that the plaintiff, through its principals, disclosed essential technical or business information to the public or competitors in any way that constituted an intentional or unintentional surrender of the confidentiality attached to their business plans or technology.

[76] I accept that the plaintiff, through its principals, did disclose its confidential information to various members of the Province of Nova Scotia, in particular employees of the Department of Economic Development.

*Everett Backman*

[77] Everett Backman was actively involved in assisting the Cockerills with the establishment of the “Caledonia Project” beginning in early 2005. His support of their work continued into 2007. Over that time he was in close contact with TDC, in particular Carter Cockerill, and became privy to many business and technological aspects of TDC’s operations.

[78] Mr. Backman was a very strong supporter of TDC. He saw the Cockerills as hard working, diligent, honorable, and deserving of any support he could contribute. In his view, their technology was a success in a region that he saw as the most difficult one in the province from both a business perspective (because of the demographics of the area) and a technological perspective because of the difficult topography. He was of the opinion that if TDC could make their delivery system work in the Caledonia area then they could be successful anywhere in the province, but that funding and business guidance was needed to make it a reality. He consulted with and collaborated with representatives of his own Department, with ACOA, and InnovaCorp, among others, in efforts to obtain funding and business consulting assistance for TDC.

[79] Relevant to this issue, Mr. Backman testified that he believed that TDC was a client of the Province and that its information was to be treated as confidential, only to be used for purposes consented to by TDC. He resisted inquiries by those who he testified did not have TDC’s consent for access to their information.

[80] Mr. Backman’s position was known to others. For example, he was asked to share TDC information with Nancy Flam. Ms. Flam admitted in cross-examination

that Mr. Backman told her he could not share TDC's information with her. In an email exchange of January 5, 2007, with Dan MacDonald, Ms. Flam stated:

I don't know if Everett had access to the plan but he did say that he couldn't share anything as the content was confidential.... which I guess makes sense. I know ACOA provided assistance to TDC regarding their financial analysis/statements through one of their programs.

[81] In response Mr. MacDonald emailed:

Let's have the mtg with the minister, neil, me and see what we know. Neil will pump Everett before that mtg.

[82] This is evidence that Mr. MacDonald and Ms. Flam knew that TDC information was not to be distributed to them. It also shows a willingness to access it anyway by using Neil Conrad who was the Director of the Community Development Division in which Everett Backman worked. In other words, they intended to get Mr. Backman's supervisor to "pump" Mr. Backman to disclose TDC's information although they had already been told that it was not to be shared with them.

### *Norman Cook*

[83] Mr. Cook was a Technical Advisor in Public Safety and Field Communications with the Nova Scotia Department of Transportation and Public Works. His responsibilities in the relevant time period included the administration of the 30 provincially owned tower facilities located around the province that were part of the Nova Scotia Integrated Mobile Radio System.

[84] These towers held equipment for a variety of users. The highest priority was given to public safety and emergency services communications equipment. Other users included Nova Scotia Power and Bell Mobility. His office received and vetted applications for use of the towers and managed the licencing costs charged to the users. In particular, he was responsible for the "field work" necessary to ensure that the proposed licensee's installations would meet a number of conditions that were necessary for grant of a licence including:

- That the tower could safely hold the equipment;
- That the installation would meet the standards set by the Province;
- That Industry Canada approved of the use of the proposed bandwidth;

- Confirmation that frequencies would not conflict with existing uses.

[85] Between June 2006 and February 2007, Mr. Cook was in regular communication with Carter Cockerill who presented an application to licence TDC to use some of the towers as points of presence for the delivery of rural broadband. TDC provided extensive information outlining the technical details of the equipment to be installed and the locations where it was to be installed. Mr. Cook was insistent on a great deal of this type of detail being provided to him. Once received he then in turn copied that information to his supervisor Blaise Fraser and to Nancy Flam.

[86] Mr. Cook testified as to the confidentiality that attached to the TDC information.

[87] In an email to Nancy Flam dated January 19, 2007, Mr. Cook included information that he had received from TDC. In the email, which was in turn forwarded by Nancy Flam to Dan MacDonald, Mr. Cook states:

As you know, this info' is confidential since TDC is still a client whose research is proprietary.

[88] In response to a series of questions in cross-examination he agreed with the following:

- That any information TDC gave him was confidential;
- That it was not to be used for any purpose other than what TDC specifically gave consent for;
- That the purpose for which TDC gave him their confidential information was to support its application to use the towers;
- That while no consent was given for him to provide the information to Nancy Flam or Blaine Fraser he viewed the duty to maintain confidentiality as extending to them because they “work as a team” and there is “confidentiality within government”.

*Neil Emenau*

[89] Mr. Emenau, as the Executive Director of the Lunenburg Queens RDA, was responsible to the provincial Department of Economic Development, although funding was provided jointly by the federal, provincial and municipal

governments. Approximately 60% of his work was in the business sector, helping proponents prepare business plans and seeking financing. He was introduced to the Cockerills in early 2005.

[90] At that time, Eastlink was the only provider of internet service in the Lunenburg-Queens region and it was a wired service. Attempts to have them expand their service were unsuccessful due to the lack of a good business case to do so. Similar approaches to Aliant were unsuccessful as the costs were perceived to be prohibitive for the provision of a wired service to a small area.

[91] His agency provided some money to TDC to assist them in developing the broadband project in Queens. He outlined how, over the 2005-2007 timeframe efforts were made to assist TDC in obtaining public or private financing for their business. These were unsuccessful as the company lacked an officer with adequate financial management skills.

[92] He interacted with a number of persons and organizations in the course of his attempts to assist TDC. In his view their technology was “very strong” as was their ability to market the product.

[93] As result of his various efforts on behalf of TDC he came into possession of their financial information. He testified that this information was received in confidence and that he was authorized to discuss it with Everett Backman. He indicated that he would treat such information very carefully as he would with all businesses that he would be required to work with.

[94] In cross-examination Mr. Emenau was referred to an email exchange as between himself and Nancy Flam January 30-31, 2007. In his email to Ms. Flam he states that a request for information about areas serviced with broadband access, originating with her, went initially to Neil Conrad, who referred it to Mr. Mallette, and down the organizational ladder to Mr. Backman who gave it to him. Mr. Emenau questioned Ms. Flam as to the intended purposes of the information that he was asked to provide. He states:

As you are aware, there is a small company in this area working diligently to provide high-speed broadband to unserved rural areas. At this time, I will not provide information that potentially could be given to another service provider that will compete with this small startup company.

[95] Ms. Flam responded:

The information will be used to develop a rollout plan for enabling broadband availability to the unserved areas across Nova Scotia. The Premier's goal is to ensure that broadband is available to all Nova Scotia and so I would caution you against not including currently unserved areas. If you choose not to identify an area that is currently unserved and mark it as served, you may put that area at risk of continuing to be unserved.

[96] In summary, Mr. Emenau acknowledged receiving information in confidence from TDC understanding it to be his obligation to maintain that confidence. He conveyed that same belief to Ms. Flam.

[97] To the extent that the request sought the plaintiff's information Ms. Flam stated an intention to use whatever information she received as part of the Rural Broadband Project.

*Douglas Logan*

[98] Mr. Logan was retained in the late spring of 2006 by ACOA to review the business plan of TDC and to assess whether there was a business case to be made for its continued operation and ultimate growth. He presented his final report entitled "TDC Broadband Financial Diagnostic and Market Analysis", dated October 3, 2006. The Report begins with a "Notice to the Reader" that the information in the report "is intended for the exclusive use of TDC Broadband".

[99] In an email dated October 4, 2006 from Dan MacDonald to Mr. Logan he stated that he "heard you [Mr. Logan] were working on a rural broadband project..." and "would love to chat to you about it". Mr. Logan then emailed Carter Cockerill requesting permission to speak to Mr. MacDonald.

[100] Mr. Logan followed this up with a second email dated October 10, 2006, in which he told Mr. Cockerill that he had informed Mr. MacDonald that he could not speak with him about TDC without Mr. Cockerill's consent. Carter Cockerill responded by email granting "permission to confidentially discuss the Feasibility Study and information contained therein with Dan MacDonald of Innovacorp."

[101] In summary, Mr. Logan received business information from TDC in confidence and acknowledged that he had an obligation to maintain that confidence. When Mr. MacDonald requested the information about TDC he was told that it was confidential and that release required Mr. Cockerill's permission.

[102] Mr. Logan testified that he would have distributed the report to TDC and to ACOA “probably”. He could not recall whether he had provided TDC information to anyone else.

*Nancy Flam*

[103] The evidence clearly demonstrates that Ms. Flam was advised that the technical and business information of TDC was provided to employees of the defendant in confidence and for very limited purposes which did not include distribution of TDC information to the Rural Broadband Project, of which she was a coleader.

[104] In cross-examination, Ms. Flam acknowledged that she had never sought nor obtained permission from TDC to use any of their information. She acknowledged as well that Mr. Backman told her that the information was confidential and that he would not share it with her. Similarly, she acknowledged receipt of Mr. Cook’s email in which she was advised by him that the information he obtained from TDC was “confidential”.

[105] As I will discuss in greater detail at a later point in this decision, Ms. Flam was determined to use her contacts within the Department to obtain the TDC technical and business information, notwithstanding that TDC was not asked for, nor had it provided, permission for their information to be made available for the Rural Broadband Project.

*Dan MacDonald*

[106] Mr. MacDonald testified in cross-examination that the TDC Business Proposal was confidential and proprietary information as was their technology information. As a coleader of the Rural Broadband Project with Ms. Flam he was in regular communication with her and exchanged information about the project on regular basis. This included information received from Norman Cook, among other materials that would be relevant to the TDC project.

[107] There is evidence to indicate that he too, independently, sought out information about TDC. For example, Paul Hopper of CREDA sent an email dated June 21, 2006, that was responding to Mr. MacDonald’s request for information about Carter Cockerill and TDC. The email indicates that this was requested as a follow up to a meeting that Mr. MacDonald had with Mr. Hopper and the “Cumberland Group”.

[108] There is also evidence from Mr. Logan which I referred to above indicating that Mr. MacDonald approached him to obtain information about TDC after learning that Mr. Logan had been engaged to work on their project. Mr. MacDonald would have known that any information obtained by Mr. Logan in this capacity would have been confidential.

[109] Mr. MacDonald also acknowledged receipt of a copy of Everett Backman's email to Ms. Flam citing the confidential nature of the TDC information.

*Conclusion as to Issue 1(b)*

[110] I am satisfied that beginning in 2005 and continuing into 2007 TDC's information was communicated in confidence to various persons employed by the defendant in circumstances that imparted an obligation of confidence on the defendant.

[111] TDC's information was not provided to assist in the development of the "Rural Broadband Project" nor to assist competitors in meeting the objectives of the Province as set out in its Requests for Proposals.

[112] Further, I am satisfied that the nature of the obligation was clear to the various employees of the defendant in that TDC information was being provided for very specific purposes related to developing its business plan, obtaining funding and obtaining access to provincial towers to act as points of presence for the delivery of their internet service.

[113] I am also satisfied that the defendant's employees, including Ms. Flam, knew this to be the case from the outset. My conclusion is not founded on the January 2007 emails referred to above, as they are dated after the pilot RFP was drafted and awarded. In my view they are simply a subsequent confirmation of what was already well understood.

**Issue 1(c): Misuse**

*(c) By providing details of the Delivery Method and Business Model within the Cumberland Request for Proposals, did the defendant misuse the information, or use the information in an unauthorized manner?*

[114] The plaintiff alleges that its confidential information was used by the defendant in the drafting of the Request for Proposals for the pilot project.

[115] The defendant's officials who are central to this allegation were the co-leaders of the Rural Broadband Project, Nancy Flam and Dan MacDonald. The Cumberland pilot RFP is labelled as "Prepared by Nancy Flam" but the evidence is clear that she relied heavily on Mr. MacDonald and others to assist in the drafting.

[116] They needed the TDC information because of the tight timeframe in which to work but had no or insufficient technological background in this very complex area of science. Both had access to TDC's information in the relevant time frame. Both knew that it was not available to them for use as part of the Rural Broadband Project. Both deny having misused the TDC information.

[117] The first question is whether there is evidence to support the allegation that TDC's information was used in structuring the RFP issued in September 2006 seeking proposals for the Cumberland pilot project.

[118] Dr. Bousquet gave evidence comparing the contents of the following documents:

- (i) Exhibit 7, Tab 2: The TDC Business Plan;
- (ii) Exhibit 7, Tab 3: The TDC Broadband "Cumberland County High Speed Internet Proposal" sent to Paul Hopper of the Cumberland Regional Economic Development Association on May 27, 2006 at 6:16:44 p.m. (also found as Exhibit 1, Tab 67);
- (iii) Exhibit 7, Tab 6: The Nova Scotia "Request for Proposals 60130191 Broadband Services for Rural Nova Scotia for the Office of Economic Development" created September 8, 2006 with a closing date of October 2, 2006 (the Cumberland Pilot), "Prepared by Nancy Flam, Corporate Strategist, OED". (Also found as Exhibit 4, Tab 256, pp. 1701- 1723);
- (iv) Exhibit 7, Tab 8: The "Request for Proposals (RFP) Tender #60132228 Broadband for Rural Nova Scotia for the Department of Economic Development" created June 20, 2007, closing July 31, 2007.

[119] Dr. Bousquet was requested to analyze the contents of these documents to determine if the defendant's RFP(s) contained references to TDC's technology. He concluded that there was information in the RFP(s) that was consistent with the TDC technological information.



[120] Dr. Bousquet indicates that the RFPs sought bidders to deliver broadband Internet to rural areas. Although wireless Internet at that time was still a new technology and competing with cable DSL and satellite communications, he concludes that the RFPs “strongly suggested” “wireless technology that is fully connected with the existing wired infrastructure... as a means of achieving cost-effective broadband Internet access to rural communities”. He continues:

In this aspect there are elements of the RFP that reuse the unique features of the wireless technology developed by TDC that are present both in the Business Plan and the Cumberland proposal. These unique features would only be understood by individuals who understand how to deploy cost-effective wireless technology and that techniques must be developed to route it to the International network. These are:

- 1) In the October 2006 RFP, wireless technology is strongly suggested. For example, in page 2, Section 1.5, it is mentioned that: “it is likely that the same service providers will take advantage of state-of-the-art broadband wireless technologies”.
- 2) A map of the towers available in Nova Scotia currently equipped with VHF and Trunked Mobile Radio (TMR) technology is provided. TMR operates in the 800 MHz spectrum and utilizes Motorola technology.
- 3) As written in the October 2006 RFP, bidders can deploy their own equipment on these towers, similar to what TDC Broadband had proposed to accomplish.
- 4) On page 4 of the October 2006 RFP, the government requests “network diagrams of how the local broadband network will connect to the regional, provincial and national systems and how users will access the local service”. This indicates that the network to be proposed will need to be connected through a dynamic IP allocation as was proposed by TDC. The terminology used in this document is very similar to that written by TDC in the Cumberland County proposal, where they write: “TDC Broadband’s architecture is unique in that it provides local, provincial, national and international connectivity”.
- 5) On Page 4 of the October 2006 RFP, a process to ensure security is requested by the government, a service that had also been described by TDC Broadband.

[121] In his review of the provincial RFP he states:

- 1) In Section 5.1.3 of the 2007 RFP, the government also requests an analysis of the performance of the network where there are obstructions, such as foliage. This mode of operation was an important aspect TDC Broadband’s Business Plan in which it was referred to as a “non-line of sight” operation.

2) In the Appendix B of the 2007 RFP, there are some hints that the Motorola Canopy equipment should be used. They are:

- a. A point to multipoint link is described for operation at 900 MHz, which is the operating frequency of the Motorola canopy.
- b. The use of directional and omnidirectional antennas is recommended. This type of equipment is included in the Motorola canopy product.

[122] Dr. Bousquet makes the point, which I accept, that it is as much the concepts as the actual words which signal to the expert reader the significance of the information conveyed.

[123] Dennis Cockerill gave extensive testimony in which he drew attention to the similarities in these documents. Taken individually the paragraph by paragraph comparisons offer seemingly vague similarities as between the Cumberland RFP and the TDC documents. Many of the comments in the RFP would seem to be information that could be general knowledge or easily acquired in other ways than from the TDC proposal. There are some common phrases or language used in the respective documents.

[124] Mr. McCaffrey confirmed (unknowingly) Dr. Bousquet's assessment of the Cumberland RFP when he testified:

The tender was clear on what they wanted to do but you don't always have to follow the tender requirements but if you don't the chances of being kicked out of the tender process are clear and you are taking a risk but sometimes you can ask for certain exemptions in the tender or you can ask for clarifications...

[125] In preparing the Seaside bid for the pilot project Seaside decided to use the Motorola Canopy system, which they had some experience with as described previously. Mr. McCaffery estimated that the cost of preparing the Cumberland proposal was \$10,000-\$20,000, plus a "couple hundred hours" of time expended by consultants and in house employees. So even though the tender was "clear" an experienced ISP found that there was much work necessary to even make a proposal to meet the defendant's objective of rural broadband internet access.

[126] The weight to attach to Mr. Cockerill's (and Dr. Bousquet's) evidence is gauged by the degree to which one accepts that what appears as relatively unscientific language conveys a more substantial meaning to the reader who is technologically proficient in the science being described. Having considered the totality of the evidence I conclude that the RFPs do communicate specialized

information to those who bid or intended to bid on the project. It was intended, as Mr. McCaffrey stated, to convey a desire to achieve a result that paralleled, if not copied, the results of the Caledonia project.

[127] When the evidence is taken in its entirety the contents of the TDC Proposal sent to Mr. Hopper at CREDA in May 2006 provided a “recipe book” for the drafting of the Cumberland pilot RFP. Mr. Hopper was one of the persons that Ms. Flam identified as contributing to the drafting of the RFP.

[128] The commonality of contents of the TDC Proposal and the pilot RFP is challenged by the defendant’s textual analysis of the RFP and the TDC information. Counsel’s submissions attack the comparisons drawn by Dennis Cockerill and asks the court to conclude that all of the individual points of comparison identified by Mr. Cockerill are inconclusive or unconvincing. Therefore, it is argued, the overall conclusion that there was a misuse of information fails.

[129] This argument does not, in my opinion, adequately respond to the argument that the significant number of topics that overlap between the two documents is too much to be coincidence.

[130] Ms. Flam was technologically unsophisticated. She testified that she relied upon Dan MacDonald for the “technical requirements” in the RFP. Mr. MacDonald’s evidence as to his contributions does not adequately explain the degree of overlap that I find in the two documents.

[131] Again, it must be remembered that this RFP was put together in less than 6 months from when Ms. Flam took over the project and less than 4 months from when Mr. Hopper received the TDC proposal, which was then attached to CREDA’s proposal for the pilot project. *See*, Exhibit 3, Tab 186.

[132] Counsel for the plaintiff summarized Dennis Cockerill’s comparison evidence in a chart included at paragraph 68 of their post-trial submissions. [Note: there is an error in the exhibit number associated with the Cumberland Proposal; it is in Exhibit 4 at Tab 238, pages 1482 – 1522, not Tab 239].

[133] Mr. Cockerill identified approximately 22 portions of the Cumberland RFP that he correlated with approximately 28 portions of the TDC proposal to CREDA. (In some instances a specific portion of the RFP may refer to more than one place in the Proposal and in other instances a specific portion of the Proposal may be found in more than one part of the RFP).

[134] The following terms generically describe topics that are in common to the two documents; the meaning of the terms may be found in the evidence and the list is not meant to be all inclusive:

- Adaptability
- Redundancy
- Reliability
- Scalability
- Excess Capacity/Expandable
- Project Management/Project Schedule
- Technical Standards
- Performance Specifications
- Security
- Ongoing maintenance/ Network Reliability
- Confidentiality and proprietary nature of the contents
- Regulatory Compliance
- Environmental Specifications

[135] “Appendix B” of the Cumberland RFP is a map showing the intended coverage area for the broadband access. Mr. Cockerill testified that TDC prepared that map. He is partially correct but perhaps not for the reasons that he believed.

[136] In my review of the evidence there are three versions of the Cumberland coverage map, one of which is flawed in that it was reproduced in the materials as a very small geographic area (possibly a reproduction error).

[137] The other two may be distinguished for ease of reference by the border of the coverage at the northeast corner of the area. In one version the coverage area stops at a point between Port Howe and Pugwash (the smaller area). In the other version (the larger area), the boundary is to the east of Wallace, several kilometers further east than in the first version.

[138] Carter Cockerill emailed two versions of Cumberland coverage maps to Paul Hopper of CREDA on May 27, 2006. The smaller area map was emailed May 27, 2006 at 6:07 p.m. attaching the TDC Business Proposal to CREDA. That map can be found in Exhibit 1, Tab 66 at page 373.

[139] A few minutes later, at 6:16 pm, Carter Cockerill emailed a second version to Mr. Hopper attaching a corrected map showing the larger coverage area. This is Exhibit 1, Tab 67, at page 384. This version was attached to the TDC tender for the pilot which includes the larger map at page 1502 (and also shown at p. 1822).

[140] The Cumberland RFP at Exhibit 4, Tab 251, at page 1666 (also found at p. 1721) includes a coverage map with the Northeast border at the same location as in the first one sent by Carter Cockerill to Paul Hopper at page 373. i.e., the smaller area. This map is labelled as “Prepared by Service Nova Scotia... Nova Scotia Geometrics Centre” and cites the “Source Data” as “NS Atlas, June 2001 (revised).

[141] The RFP map varies slightly along the southern border from that in the TDC smaller map sent to Mr. Hopper in error, and also does not extend as far into the Northumberland Strait as the TDC map but its boundary at the northeast corner is a distinct location that matches the TDC smaller area.

[142] The evidence satisfies me that Paul Hopper was an active participant in drafting the pilot RFP and in close contact with Nancy Flam. He had a copy of the TDC proposal to CREDA and the opportunity to make it available to the Project team. It is probable, in my estimation, that Mr. Hopper provided the erroneous first map to Ms. Flam or someone on the project team and that it became the template for the final version included in the RFP; or that as a result of his involvement in drafting the RFP he provided it specifically for that purpose. Like the text of the RFP, it borrowed liberally on TDC ideas, but without replicating them identically.

[143] Counsel for the plaintiff has also directed me to a distinct textual error that I am urged to accept as a further indicator that the defendant was using the TDC information improperly.

[144] TDC incorrectly used the word “premise” where it intended the word “premises” in its Business Proposals. This error was identified in 40 different locations in the TDC documentary evidence presented in the trial. One of those is found in its Cumberland Business Proposal at Exhibit 3, Tab 238, page 1490 where it states in respect of the expense of satellite technologies:

Satellite connections-These use satellites to provide “cable” TV as well as Internet connections to residential and remote consumers. This technology is costly to purchase and install at the customer premise and is quite expensive to use on a monthly throughput plan.

(emphasis added)

[145] In an email to Dan MacDonald, dated August 28, 2006, Nancy Flam attached a draft copy of the RFP which she describes as containing some changes that she had made. The tracked change found in Exhibit 4, tab 250, at page 1637 states:

There have been also emerging service offerings based on satellite technologies. However, functionality and price (customer premise equipment, installion [sic] and costly monthly connectivity costs) seemed to have affected the take-up of this offer.

(emphasis added)

[146] The erroneous use of the word “premise” is repeated in the final version of this paragraph located under heading 1.5 found in the Cumberland RFP at Exhibit 4, tab 251, at page 1653.

[147] Counsel for the plaintiff is correct in saying that the word “premise”, as found in various dictionaries, is properly defined as a “previous statement or proposition from which another is inferred or follows as a conclusion”. There are other alternate definitions for the word, but none describe it as the singular version of the word “premises”. The latter word does refer to houses, buildings and other forms of property, and is clearly the correct word for use in the context of the RFP provisions set out above.

[148] I will add to this that the context for the use of the term in the RFP and in the TDC material is identical. i.e., The high cost of satellite-based Internet delivery systems. I accept that this is further evidence that the RFP drew on the contents of the TDC Business Proposal to CREDA.

*The evidence of the defendant as to the manner in which the RFP was composed.*

[149] In 2006, 72% of Nova Scotia communities and 85% of Nova Scotia’s population had access to broadband internet connectivity. Nancy Flam was appointed as leader of the defendant’s Rural Broadband Project in March 2006 and was directed to fulfill the government’s promise to increase that to 100% broadband internet coverage by 2009.

[150] She faced many challenges, the most significant of which were her complete lack of knowledge about the technology involved and a very tight time line in which to complete the project. As she testified, from the onset there was “a lot of pressure” being exerted on her by her Director and that she “was continually asked - when will this be done? When will this be done? When will this be done?”.

[151] None of the established ISPs were attempting nor interested in servicing that remaining segment of Nova Scotians because it was a population that was difficult to reach with the existing technologies, without the density to make it economically attractive and with demographics (as demonstrated in Caledonia) where the take up rate was not guaranteed.

[152] As of March 2006 the plaintiff was the only ISP that had taken up the challenge and, with relatively minimal government financial assistance, had developed a delivery system that was proven to work. The business model, however, was not proving to be successful in that region due largely to the low uptake of service. In time TDC ran out of capital.

[153] Ms. Flam engaged Dan MacDonald as her co-leader. The parties did not seek to qualify Mr. MacDonald to give opinion evidence. In his testimony he admitted that while he was relied upon to provide technical guidance to the project he was not an engineer and not so proficient that he could design internet technology. In cross-examination, after being directed to his earlier Discovery evidence, he agreed that he did not provide technical expertise on the drafting of the RFPs.

[154] There is evidence that Ms. Flam engaged a “technical advisor” from Dalhousie University to participate as a member of the team that evaluated the pilot RFP bids, but no evidence was adduced to show that similar technical expertise was employed for the drafting of the RFP itself.

[155] So the question is: how did this project, relying upon persons who apparently did not have substantial technical expertise choose a suitable pilot area by the end of May 2006, design and issue an RFP for the pilot project by September 2006, and then design and issue a RFP in June 2007 that was to determine which ISPs would service the province? The plaintiff says that I should draw the inference from the proven facts that this was accomplished by using its confidential information. The defendant says the evidence does not support such a conclusion.

[156] There are a number of troubling elements in the responses of Ms. Flam to the TDC and RQM entreaties for government assistance during the May to September 2006 period. It is clear that TDC had serious financial problems and were not sustainable if relying on its own resources. That is not in issue.

[157] Mr. Backman described Ms. Flam as “cool” toward TDC and that he could not understand why, given the success of their work in Queens.

[158] On August 17, 2006, Ms. Flam sent an email (Exhibit 3, Tab 199, at p. 1245) to Peter Wright of ACOA seeking “financial statements and projections” being prepared by Doug Logan. She also wanted any “technical, operational or support aspects” of the TDC project.

[159] The following day, August 18, 2006, Ms. Flam presented a Briefing Note (Exhibit 4, Tab 248, page 1629) to her CEO about an article to be released in a Queens County newspaper that would call into question the selection of Cumberland over RQM for the pilot project. Her comments are revealing. She outlines private financial information of TDC that she testified would probably have come from Neil Conrad’s Division (Mr. Emenau and Mr. Backman worked there), and ACOA. Mr. MacDonald thought some of the contents looked familiar to him, but he could not recall contributing to the Note. Ms. Flam’s Note included:

- TDC’s attempts to find financing at a Credit Union;
- the assistance provided to TDC by ACOA (the Doug Logan report);
- her belief that “If TDC goes under, there are at least 2 companies that are interested in buying them out and continuing to deliver the service.”
- She expresses a lack of understanding for why TDC wouldn’t partner with these companies. (Of course, Seaside had just met with TDC a few weeks before this which begs the question of her source for this information).

[160] The note also includes an assertion that a “sustainable” model, which TDC’s “model was anything but”, meant that any such proposal would “require minimal, if any, government funding.” This of course was not accurate. Mr. McCaffrey testified that this project would not proceed without substantial government assistance and that Seaside received \$430,000 without conditions attached as part of its start up on the pilot project. It is difficult to believe that by August of 2006, when she prepared this Note, Ms. Flam did not understand that substantial government funding was going to be necessary and that it was available to the successful proponents. It was disingenuous of her to suggest otherwise.

[161] In responding to questions about the drafting of the pilot RFP Ms. Flam testified that in addition to Mr. MacDonald, she relied upon the input of Norm Cook and Paul Hopper in drafting the RFP. Paul Hopper’s contribution to the RFP is evidenced in Exhibit 4, Tab 249 at p. 1631. Both of the latter, of course, had intimate knowledge of TDC’s technology and/or business proposals and were possible sources for including TDC’s information in the RFP.



[162] Ms. Flam denied inputting section 2.2, (*see*, Exhibit 4, Tab 257 at page1733) which contains the detailed description of the proposed broadband service. This is a multi-point section which contains much of the information that Dennis Cockerill identified as correlating to the TDC Business Proposal. She testified that this information "...would have come from either Dan or from a previous [RFP].".

[163] Dan MacDonald testified that he may have contributed to sections 1.3, 1.5, 3.9. Later he was referred to Exhibit 4, Tab 250 at pp. 1633-1649. This was the draft RFP Nancy Flam sent to him on August 28, 2006. Mr. MacDonald identified contributions that he made, in particular at pages 1638- 1640 which was an earlier draft of section 2.2. When asked where his contributed information came from he answered that it would have originated with himself. He later testified that:

I don't recall specifically where I obtained that text..... I would say I had in my opinion I would have a fairly deep knowledge of those headings. When we were looking at other projects like this around the world we would of pulled different knowledge from different documents, different websites, etc. across the world and tried to come up with a logical way to present these different issues.

[164] Ms. Flam acknowledged that information about TDC's financial problems was a factor in their low score on the pilot project RFP result. She could not remember who "on the evaluation team" provided TDC's "financial and management restructuring" information. She could not remember who brought information to the discussion about TDC's suspension of service in late July 2006.

[165] The 2007 RFP for the provincial rollout was put to tender after the plaintiff went into bankruptcy. Dr. Bousquet noted similarities in this RFP with the TDC information.

[166] Ms. Flam was cross-examined on a number of aspects of this provincial RFP and how it was constructed. While the plaintiff does not rely on this in support of its claim, it does reflect the continued access to and probable use of TDC information to guide the construction of the RFP.

[167] For example, Exhibit 5, Tab 286 at pages1968-1970 is in attachment to an email dated June 18, 2007, from Todd Brown to Nancy Flam setting out three "deliverables" for inclusion to the RFP. The third is "Specification – Wireless Broadband Equipment". Many of the equipment specifications point to the delivery system used by TDC.

[168] An ensuing exchange of emails involving Dan MacDonald, Nancy Flam and Todd Brown focus on the degree of specificity they would include in the RFP to

identify the use of the Motorola Canopy system and the 900MHz band. On the latter question it was offered that Norm Cook recommended the 900 MHz because of its “superior coverage” and ability to “penetrate foliage”. This is the type of information that Norm Cook obtained from the Cockerills when they were negotiating the use of the provincial towers for use in the delivery system.

*Conclusion as to Issue 1(c)*

[169] There is a conflict in the evidence on this issue. I have concluded that the position of the plaintiff has been proven notwithstanding the evidence of Ms. Flam and Mr. MacDonald that the plaintiff’s confidential information was not used in the Rural Broadband Project, a purpose for which they acknowledge TDC had not given consent.

[170] The defendant’s employees had the need for TDC’s information and sought it out. The evidence establishes that this information came into the possession of various employees of the defendant for certain well defined purposes and that some of those same persons were actively involved in drafting the pilot RFP.

[171] The question of whether the information found its way into the pilot RFP is resolved by having regard to the totality of the evidence. I accept the evidence of Dr. Bousquet and that of Dennis Cockerill. Dr. Bousquet is an expert in the area and one whose opinion I accept as worthy of considerable weight. His testimony and report were objectively based and fairly described.

[172] While Dennis Cockerill was significantly affected by the failure of TDC I found his evidence also to be credible and consistent with the conclusion that TDC’s information was misused by the defendant. As the developer of the system, he had a keen understanding of the technology that TDC developed and was able to relate that information to the RFP. He was also aided in notes made at the time.

[173] I am satisfied that the evidence establishes that the TDC’s confidential information was used to assist in constructing the pilot RFP. The evidence of Roland McCaffery supports the plaintiff’s view that a person with expertise in the discipline would understand what the defendant intended by the contents of the RFP.

[174] The events that are the subject of this action occurred approximately 9 years before the principal parties were called upon to give their testimony in a trial. For those like Ms. Flam and Mr. MacDonald it is a long time to try to recall important details and their testimony reflected that problem. In particular Ms. Flam could not

recall, beyond generalities, who contributed what information to the draft of the pilot RFP, and similarly certain of TDC's confidential information used in the assessment of TDC's bid for the pilot project. No other logical explanation was offered to explain how so much of the TDC information was referenced in the pilot RFP.

[175] Mr. MacDonald testified that he contributed to various parts of the pilot RFP, and notably much of paragraph 2.2 which Dennis Cockerill argues was based upon TDC's information. I found Mr. MacDonald's evidence to be vague and unconvincing when asked the sources of the information he used in preparing this text. It may be that he had the knowledge base to contribute this information and it may be that he was able to locate this kind of detail from internet references and his memory of previous experiences in the industry, but even if that is so it does not eliminate the use of TDC information in the drafting, which was similar in so many subjects areas.

[176] In summary, I am satisfied that the confidential technical and business information of the plaintiff was used by members of the defendant's Rural Broadband Project which operated under the direction of Nancy Flam. I am further satisfied that Ms. Flam and others working on the project or within government divisions who had access to that information were aware that the information was confidential and that no permission had been granted by the plaintiff for use in the Rural Broadband Project.

#### *Conclusion as to Issue 1:*

[177] In consequence of these findings I conclude that the plaintiff has proven that the defendant is liable for breach of confidence.

#### **Issue 2: Remedy**

[178] The plaintiff submits that the defendant's breach of confidence caused it to suffer a compensable loss. TDC seeks damages for economic loss in the amount of \$2,495,000; special damages associated with its bankruptcy in the amount of \$56,147; general damages of \$300,000; punitive damages of \$275,000; together with prejudgment interest, costs and disbursements.

[179] Liability and damages were tried together in this trial. The plaintiff's focus was on demonstrating the complete loss of value for the delivery system. The calculation of damages flowed from that premise. I have concluded that the loss of value was something less than that claimed.

[180] There were two significant aspects of the plaintiff's confidential information used by the defendant to construct the RFP. The first was the Business Proposal, spoken to at length by Dennis Cockerill. The second was described by Dr. Bousquet who identified 5 different aspects of the TDC information in the pilot RFP. These are more fully described in paragraph 120, *infra*. They may be summarized as:

1. identification of wireless technology for the delivery system (as acknowledged by Mr. McCaffery);
2. a map of available towers equipped with VHF and Trunked Mobile Radio technology;
3. the opportunity for bidders to deploy their equipment on the towers, as TDC proposed to use in its system (notwithstanding the agreement that Mr. Cook was negotiating with TDC);
4. the necessity of connecting the network through a dynamic IP allocation as proposed by TDC;
5. a requirement for network security, as proposed by TDC.

[181] I find that the defendant did not include TDC information in the pilot RFP that detailed the most valuable part of the delivery system, which was the overall assembly of the many off the shelf constituent hardware parts together with Dennis Cockerill's configurations that made them work together.

[182] Also, the evidence does not support a conclusion that Seaside had the ability to or did deploy the TDC delivery system in the Cumberland pilot. Nor does the evidence demonstrate that other bidders subsequently deployed a system based upon the pilot RFP information.

[183] The theory of the plaintiff as to damages is set out in its closing submissions beginning at paragraph 81. The question posed by the defendant is whether the evidence supports the basis upon which the requested damages are calculated. The plaintiff's argument opens:

81... Absent the Province improperly using the confidential information regarding the Delivery System, TDC would have been the only provider with a technology that was proven to work in the topography of rural Nova Scotia.

[184] This opening premise is overstated. It is accurate to say that TDC had the only fixed wireless system in Nova Scotia that worked in difficult topography. Wired systems such as ADSL or cable internet had the capability of providing the

service but each had disadvantages – typically they were too expensive to provide service to the end of the line user in sparsely populated areas. However, the service could be delivered if there was sufficient funding and a willingness to invest in the delivery system. Satellite delivers a wireless service but has cost and line of sight issues.

[185] Fixed wireless also has limitations, including signal holes and signal interference. It was these two disadvantages in particular that the TDC delivery system addressed.

[186] The question of whether the TDC delivery system could be provided at a much more favorable cost was never adequately demonstrated. The Caledonia project failed, from a business perspective, and projections of a sustainable business model relied upon unproven hypotheses. I will speak to this more directly when assessing the KPMG Report as to the alleged economic loss.

[187] The plaintiff’s argument continues:

82. What the Province did by entering the fray was to set up a monopoly for the provision of rural broadband service. It used the Delivery System for the basis of that monopoly to other providers – shutting TDC out of the game. This ended TDC’s bid to become financially stable and provide the service themselves. Even if the Delivery System had not been used, but a monopoly set up, TDC would have been the only provider of a proven service. They either would have had the \$40 million plus in funding made available to Seaside and Eastlink and therefore met the threshold opined by Mary Jane Andrews, or could have licenced, sold or partnered and used the Delivery System for their profit. By providing the Delivery System to TDC’s competitors by basing the RFPs on it, the Province deprived TDC of its ability to use its own technology.....

...

87 Absent the RFP process undertaken by the Province that disclosed the Delivery System, TDC would have been the only provider available to service the market in the 2.5 years following the summer of 2007 (the time of the 2nd RFP)...and there is no reason to believe, and no evidence to the contrary, that the over \$40 million given as grants to Seaside and Eastlink would not have been advanced to TDC as the only possible supplier of rural broadband internet.

[188] These two paragraphs set out the underlying assumptions upon which the KPMG report was directed to operate when assessing the plaintiff’s economic loss.

[189] I do not agree that what the Province did was create a “monopoly for the provision of rural broadband service”. As I have stated, other technologies existed

to provide this service, and there is no evidence that competing suppliers were barred from establishing a competing business using any delivery system it chose. For example, Barrett Xplore Inc., a satellite based system, did not win a contract but was free to continue offering its service in competition to the successful proponents. However, it could not rely on government funding to do so.

[190] TDC was the only company that had attempted to provide fixed wireless broadband to this very difficult and underserved segment of the Nova Scotia marketplace, but it had not shown that its system was financially viable. If it had the necessary funding from non-governmental sources then it could have continued to operate, notwithstanding the Province's decision to "enter the fray".

[191] The Province decided, in a sense, to "invest" in getting the service established. It decided, using a tender procurement approach, which company or companies it was prepared to financially assist.

[192] Refusing to award TDC the pilot on the basis of its lack of financial stability, business acumen, lack of customer support and service capability is not the same as setting up a process whereby competition is eliminated from the market through the designation of a single company or group of companies to be the sole provider of that service. The Cumberland RFP demonstrated that there was competition in the marketplace, having received proposals from Aliant, Barrett Xplore Inc., Seaside Communications, and TNC Wireless, in addition to TDC.

[193] The scoring of the bids that responded to the pilot RFP leads to certain observations:

1. Aliant and Barrett's proposals relied, in part, on satellite for delivery service. This was seen as not complying with the criteria in the RFP;
2. Seaside was credited for employing fixed wireless in Cape Breton, and for its proposal to provide fixed wireless coverage of 98 -100% of their proposed coverage area, which was larger than the pilot footprint called for;
3. Aliant and Seaside each committed to contributing in excess of \$400,000 of own funds, which TDC did not, and could not do;
4. Aliant and Seaside were well established companies with proven records for customer service and support capability, which TDC was not.

[194] And so there was competition for the pilot project which TDC engaged in but lost, despite its technology.

[195] There is no question that government funding, such as that awarded to Seaside would have assisted TDC with the capitalization needed to carry out the project, but the KPMG report does not support the conclusion that TDC would have received government funding of \$40 million or anything close to that amount. For reasons that I address in greater detail later it is doubtful that TDC could have completed the pilot project with \$430,000 - the amount provided to Seaside.

[196] I am satisfied that without a substantial contribution of government funding and a significant rapid development of its business expertise TDC would not have been able to continue to develop its operations beyond 2006, with or without the Province's decision to support other providers. There is no evidence that TDC could meet either of its needs, in particular because the requisite business experience was dependent upon non-existent funds to hire qualified people to take the company forward.

[197] The plaintiff submits that but for the intervention of the government into the marketplace TDC would have had options to its further progress. One that was offered is that TDC "... could have licenced, sold or partnered and used the Delivery System for their profit." I agree in part.

[198] TDC was too confident in its belief that the strength of its technology could overcome the company's financial problems. There was an erroneous assumption that the Province would have to do business with TDC. It is easy to see in hindsight that once it became apparent that there was insufficient capital available to carry on the business the company needed to:

1. Partner with someone who had the resources to take the development and distribution of its technology to the next level; or
2. Hire themselves out to the Province or another ISP on a consulting basis to share their expertise; or
3. Sell the rights to the delivery system.

In my view these were TDC's only viable options.

[199] The evidence is clear that Seaside was interested in a collaboration with TDC as of July 2006 and that it was TDC who walked away from the discussions. There is no evidence that TDC attempted to partner with any other person or company.

[200] The Province provided TDC with opportunities to engage with Ms. Flam. In a letter dated July 13, 2006 Minister Hurlbert directed the company to contact Ms. Flam to discuss the Rural Broadband Project. TDC representatives did not act on this advice. (I note that this was concurrent with TDC running into financial problems that caused a suspension of service in Caledonia. It would not have been a good time, strategically, for TDC to be arguing for support as the ISP for the province or even the Cumberland pilot)

[201] There is no evidence that TDC made efforts to explore licencing or sale of its product.

[202] The option to licence, sell or partner was certainly open to TDC at least until the award of the Cumberland Pilot, which was before the successful bidder would have to begin developing their delivery system. The extent to which it was still an option until TDC's May 2007 bankruptcy depends upon the extent to which the Cumberland RFP damaged the commercial value of the TDC confidential information.

[203] I turn now to the specific claims advanced by the plaintiff.

### *Economic loss*

[204] The claim of "economic loss" is intended to provide compensatory damages for harm to economic interests. It is based on the principle of *resitutio in integrum*, that is, to award money to the plaintiff that is intended to return the plaintiff to the position that it would have been in but for the wrong committed by the defendant.

[205] Previously accepted means of setting a compensation amount for breach of confidence that are relevant to this case, include a calculation factoring in one or more of the following:

- (a) the plaintiff's lost profits;
- (b) the value of the misused information;
- (c) the "savings" achieved by the defendant in using the plaintiff's information;



- (d) the plaintiff's opportunity cost. *i.e.*, the amount that the defendant would have had to pay the plaintiff to acquire or to obtain a licence to use the plaintiff's delivery system;
- (e) an amount representing the consulting fees or costs of developing the product which were saved by the defendant ( in particular where it could have acquired the same information by research).

[206] The plaintiff has presented two alternative ways to compensate for its economic loss. Those have been characterized as : (i) Net Present Day Value of the Delivery System's Earning Capacity; and (ii) Cost of Investment in the Delivery System and a Consulting Fee.

[207] The first of these alternatives relies upon the KPMG Report to establish the amount of compensation due using a "lost profits" approach.

[208] Mary Jane Andrews was qualified in the "field of forensic accounting, capable of giving opinion evidence on the subjects of business income losses, lost profits, economic loss, economic damages and business valuation." Her firm, KPMG, was engaged by Dennis Cockerill to prepare a Report (Exhibit 8) that quantifies the plaintiff's economic loss.

[209] The Report's conclusion estimates the plaintiff's economic loss at between \$2,035,000 and \$2,495,000. This represents the difference between the projected profits from the Delivery Method, but for the "Alleged Harm" (disclosure of TDC's confidential information in the Cumberland RFP), and the actual cash received by TDC during the projection period (September 12, 2006 – September 11, 2018).

[210] The report defines "Economic Loss" as the:

...past, present or future loss of money or money generating ability suffered by plaintiff as a result of the alleged harmful actions of a defendant, as expressed in terms of money, and determined at a particular assessment date.

(Exhibit 8 at p. 5)

[211] It was decided to use the Lost Profits Approach to determine the economic loss. In this approach:

Lost profits are commonly calculated based on the difference between the expected profits assuming the harmful event did not occur and the actual profits

received. The Lost Profit Approach can provide an appropriate measure of loss when the period of loss is for a specific period of time.

(Exhibit 8 at p. 16)

[212] In paragraph 5.1 of the Report, at page 16, the reasons for the selection of this approach were explained as follows:

In assessing the appropriate approach to use in quantifying the Economic Loss, we considered the period of time that the Alleged Harm affected the financial results of TDC. We understand that the foundation of TDC's claim with respect to the Litigation Matter is its contention that the Defendant destroyed the commercial value of the information contained in the Delivery Method, the Business Model and the Feasibility Study. Accordingly, we considered the period of time that the Delivery Method would potentially have generated cash flows leading to commercial value for TDC, but for the Alleged Harm. Generally, products in technology-driven industries have accelerated lifecycles, impelled by the need to continually innovate to keep pace with new advances, ever-changing requirements and customer expectations. Consequently, we considered that, but for the Alleged Harm, the delivery method would have potentially contributed to the generation of cash flows for a defined period of time, and we concluded that the Lost Profits Approach was appropriate to determine the Economic Cost.

(Emphasis added)

[213] Counsel for the plaintiff instructed KPMG to make the following assumptions:

- That the Delivery Method and Business Model were disclosed in the Cumberland RFP rendering it to have no commercial value as of September 12, 2006 the date on which the Cumberland RFP was issued. (The Report sets this date as the Valuation Date - the date that the period of loss commences. *i.e.*, when the Alleged Harm occurred); ( section 5.2 at p.17)
- That but for the Alleged Harm, TDC would have been awarded the Cumberland pilot and subsequently awarded Zone 1; (section 5.4.1 at p. 18)
- That because of TDC's operations in Queens County the plaintiff would have been awarded Zones 5 and 6 on terms equivalent to those in the Seaside Contract; (section 5.4.1 at p.18)

[214] In addition to these, the report makes certain other assumptions, including:

- That but for the Alleged Harm, TDC would have commenced deployment on a provincial basis in December 2007, with service provision commencing in 2008; (Section 5.4.1 at p. 19)
- That but for the Alleged Harm, the Minister's contribution to TDC would include \$430,000 for the Cumberland Pilot; \$3,831,976 for Zone 1 and \$2,211,000 for Zones 5 and 6. (section 5.5.2 at p. 28 – Tables 13 and 14)
- That capital expenditures, net of the Minister's contributions would be \$9.2 million for the period 2008 – 2016; (section 5.5.2 at p. 29)

[215] The scope of Ms. Andrews' review was limited by certain factors:

- Dennis Cockerill advised her that she was not permitted to discuss the matter under litigation, projected financial information, or the outlook for TDC with either of Carter Cockerill or Ted Cockerill;
- the estimated amount and basis of governmental contribution to the Broadband for Rural Nova Scotia Initiative was an important factor in the quantification of the economic loss. KPMG was not provided with the specific actual amounts nor the basis of the governmental contributions, and so any difference in those amounts from the estimates made for the preparation of the Report have the potential to influence the conclusion;
- KPMG was not provided with documentation to confirm the projected costs to construct towers, which the Report describes as "a key element of our analysis".

[216] Ms. Andrews is an impressive witness and the Report is well constructed. As the Report makes clear, the conclusions are dependent upon the accuracy of the assumptions that underpin them. The defendant submits that the plaintiff has not proven the factual assumptions upon which this conclusion is based. In my view, the defendant is correct.

[217] The Report notes at different points, without comment, the amount of capital that TDC would need in each phase of the project. Counsel for TDC submits in closing argument that had TDC been the successful bidder it could have accessed the:

...\$40 million plus in funding made available to Seaside and Eastlink and therefore met the threshold opined by Mary Jane Andrews, or could have

licenced, sold or partnered and used the Delivery system for their profit. By providing the delivery system to TDC's competitors by basing the RFPs on it, the Province deprived TDC of its ability to use its own technology.

(Final submission at paragraph 82)

[218] Ms. Andrews's analysis was that TDC would only be able to access government assistance of \$430,000 for the Cumberland Pilot. The TDC bid projected costs of \$771,400 (Appendix D at p. 51). The report notes that this bid did not set out a number of costs, including Operating Costs, tower co-location costs, tower build costs ( if applicable) and cost of backhaul modules. Amounts for these costs would be in addition to the \$771,400 budgeted by TDC.

[219] In Schedule 4.0, the report provides a "Projected Capital Expenditures, net of Minister's Contributions – Zones 1, 5 and 6" for the fiscal years 2008 – 2016. It projected that capital expenditures net of the Minister's contributions would total \$9,201,329 of which \$3,309,040 would be incurred in 2008 and a further \$2.3 million in each of 2009 and 2010.

[220] The Report indicates, at page 9, that on December 5, 2007, the Province indicated that the total cost of the BRNS Initiative would be \$74.5 million of which the ISPs were expected to contribute \$40.4 million of own funds. The governments of Canada and Nova Scotia were to contribute \$14.5 million and \$19.6 million respectively for a total of \$34.1 million (not \$40 million suggested by the plaintiff).

[221] In short, the Report presumes that TDC would have been able to find capital and/or income of at least \$340,000 for its contribution to the pilot project financing, and a further \$3.3 million of own funds in 2008. The Report projected the EBITDA (earnings before interest, taxes, depreciation, and amortization) to be in a loss position of \$2 million dollars in the year ending December 31, 2008. There is no evidence that supported a conclusion that the plaintiff had access to sufficient funds to satisfy these assumptions. In fact the evidence shows the opposite to be true - that TDC's sources of capital were exhausted by the summer of 2006.

[222] I conclude that the evidentiary basis upon which Ms. Andrews made her calculations has not been proven on the balance of probabilities and therefore reject the claim advanced on this basis.

[223] The plaintiff's alternative argument for economic loss, is that:

...it is entitled to the value of the cost of developing the Delivery System and a consulting fee as the Province saved itself those costs, by taking and improperly using the delivery system.

[224] The amount claimed is \$2,252,142.60 plus prejudgment interest. The evidence upon which TDC relies to assess this quantum of damages consists of \$487,500 as the amount of fees that the Province should be required to pay to the three Cockerill brothers as consultants for 2 years. i.e., \$81,250 per year for each of the 3 brothers over the 2 year period, together with \$1,764,642.60 as the entire amount said to have been invested in the company, prior to its failure.

[225] I am satisfied that the TDC delivery system and Business Proposal had value and that some of that value was lost by the inclusion of TDC's confidential information in the Cumberland RFP. Further, I find that a sum that recognizes the value to the Province for its use of the plaintiff's confidential information is also an appropriate basis upon which to assess damages.

[226] I do not agree that most or all of the value of the delivery system was lost by the disclosure to bidders of TDC's information in the Cumberland RFP. As such, I do not accept that the defendant should be liable for the entire value of the cost of developing the Delivery System.

[227] The extent of the damage to the commercial value of the plaintiff's confidential information is integral to the assessment of the loss suffered. Specifically, I find that:

- (a) The pilot RFP contained TDC information that conveyed to Seaside (and other bidders) the general structure of the TDC system, but did not reveal all of the technical detail necessary to duplicate the TDC system;
- (b) Seaside did not use the most technologically advanced aspects of the TDC delivery system in the pilot area, likely because it did not have the intellectual property that Dennis Cockerill held to himself;
- (c) The choice of the coverage area of Cumberland County set out in the pilot RFP provided a much less challenging topography than Caledonia and almost certainly guaranteed the technological success of Seaside's pilot without using the TDC technology. As such, the advantages of TDC's delivery system were not as necessary to the success of the pilot project;

- (d) The choice of Cumberland County for the pilot also offered a greater potential for subscriber uptake, by reason of the demographics for that area as compared to Caledonia;
- (e) The provincial RTF issued in 2007 contained further technical information that was consistent with the TDC system but still did not provide detailed specifications or configurations that were held only by Dennis Cockerill;
- (f) The use of the Motorola Canopy system was known to the industry and in particular to Seaside which was already using it as part of a fixed wireless delivery system in certain parts of Cape Breton in the summer of 2006;
- (g) The Province could not grant TDC an exclusive right to use the 900 MHz spectrum– that was a factor controlled by Industry Canada;
- (h) The Province did not and would not have entered into a contract providing TDC with the exclusive use of its towers to provide Broadband delivery. TDC would have received a licence to use the towers but because of TDC's constantly changing plans an agreement was never finalized;
- (i) During the period of its lease of the provincially owned towers TDC could expect to be the beneficiary of a similar clause to that in their draft agreement, that is, that no subsequent user could install in a way that interfered with the signals of existing tower users. The result could have aided TDC in maintaining any competitive edge it had by getting to the market with its product before other ISPs, but it was not a guarantee against competition that also used the towers;
- (j) TDC overreached by trying to widely expand when it should have been consolidating in more profitable areas while it had the capital to do so;
- (k) TDC had exhausted its funding by the summer of 2006, and did not have a viable business plan in the absence of government funding;
- (l) The Province had no legal obligation to TDC to support its business nor to ensure its ongoing viability;
- (m) It was unrealistic for TDC to assume that the Province would sole source contracts of this magnitude and complexity, or that the Province would skew the tender process so as to overlook the financial instability and customer service inadequacies of TDC;

- (n) There was no basis upon which TDC could have been justified to rely upon the defendant to provide funding for its operations;
- (o) By the time of the trial in this matter, Premier MacDonald's promise of 100% broadband coverage in Nova Scotia was still not achieved despite the expenditure of millions of dollars by the defendant.

[228] Lord Denning, writing in *Seager v. Copydex Ltd.* (No. 2) [1969] 2 All E.R. 718 addressed the approach to valuation of information unlawfully taken by a defendant:

The difficulty is to assess the value of the information taken by the defendant company. ... The value of the confidential information depends on the nature of it. If there was nothing very special about it, that is, if it involved no particular inventive step but was the sort of information which could be obtained by employing any competent consultant, and the value of it was the fee which a consultant would charge for it; because in that case the defendant company, by taking information, would only have saved themselves the time and trouble of employing a consultant. But, on the other hand, if the information was something special, as for instance, if it involved an inventive step or something so unusual that it could not be obtained by just going to a consultant, then the value of it is much higher. It is not merely a consultant's fee, but the price which a willing buyer-desirous of obtaining it-would pay for it. It is the value as between a willing seller and a willing buyer.... The court, of course, cannot give a royalty by way of damages; but it could give an equivalent by calculation based on the capitalization of a royalty. Thus it could arrive at a lump sum. Once a lump sum is assessed and paid, and the confidential information would belong to the defendant company in the same way as if they had bought and paid for a final agreement of sale. The property, so far as there is property in it, would vest in them.... In other words, it would be regarded as a real outright purchase of the confidential information. The value should, therefore, be assessed on that basis; and damages awarded accordingly.

[229] I have concluded that "something special" was misused by the defendant.

[230] The defendant was able to describe with clarity a fixed wireless broadband delivery system providing service using provincially owned towers in areas of the province where it was economically and topographically impractical for a private ISP to provide such a service. The Rural Broadband Project specified this system in the pilot RFP because it knew from TDC's technological information, which it had obtained confidentially through various Divisions of the defendant, that such a system was feasible and generally how it worked. I do not accept that the TDC information that was in the public domain would have given this same detailed

understanding to the Project members, nor have given it the confidence to effectively specify it in an RFP.

[231] As well, the Project learned from the Business Proposal what the issues were that the bidders needed to address in developing such a delivery system. Again, the pilot RFP was able to clearly identify significant issues for bidders to respond to.

[232] Therefore this information provided great value to the Rural Broadband team in drafting its pilot RFP and in being able to do so quickly, which was crucial to Ms. Flam's superiors. In effect, TDC's information educated the Project members in a highly complicated technology where otherwise its only apparent source of technical information was Dan MacDonald, who was not an expert in the field. As I have found, the evidence has not explained to my satisfaction the existence of any other sources used by the team to draft the substantive information in the pilot RFP.

[233] The defendant submits that a consultant could have provided this type of assistance to the defendant at a cost of between \$10,000 and \$20,000. This was based upon the cost to Seaside, who had the necessary technical expertise, of preparing their winning bid for the pilot. This misses the point. Seaside costed this, using in house technical expertise, in responding to a set of knowns that originated from the TDC proposal. It was not being asked to develop, with no starting information, the structure of the pilot RFP itself. Also, the product Seaside delivered in Cumberland was not significantly different from what it was already doing in Cape Breton so its cost to prepare the bid would be reduced since it was relying upon its already acquired expertise.

[234] There is an added factor that creates value in what was misused. The problems that needed to be solved to make it a successful system were determined by TDC through its trial and error work over two years. As such the value of the information in the Business Proposal represents a blending of the Cockerills' intellectual creativity and the business factors they found were necessary to deliver the service to the end user at an acceptable price. It was a summary of the issues that were encountered and understood to be necessary to the development of the project in the special circumstances of rural Nova Scotia, together with some of the technical directions that were key to solving the delivery issues. The "consultant" contemplated by the defendant's submission would need to know why the various components of the Proposal that Dennis Cockerill spoke to were necessary to the successful delivery of the service, from both a technological and a business perspective.



[235] It is for these reasons that I have concluded that the loss should be valued as “something special”. Had the defendant the ability to, and then did disclose the entire delivery system, including the configurations Dennis Cockerill retained to himself, the loss would have attracted valuation as “very special indeed”.

*What is the value of the loss?*

[236] The documentary and in person testimony received in the trial provides some financial indicators which may guide the valuation. TDC had three principle assets when the RFP went public in September 2006. They were the hardware necessary to the delivery system, the real and personal property assets necessary to the operation of the business, and the intellectual property associated with the development and deployment of the delivery system. It is the latter that forms the basis of the value taken by the defendant.

[237] Dennis Cockerill maintained notes of his research activity which are found in Exhibit 1, Tab 7 at pp. 57-70. They span the period November 28, 2004, to June 17, 2006, and were made contemporaneously. They are in effect a diary and it demonstrates the diligence, creativity and hard work that he and his brothers devoted over an extended period of testing through trial and error to develop the fixed wireless delivery system that ultimately was successfully deployed in Caledonia.

[238] Many of the topics developed in the Business Proposal and which show up in the pilot RFP and the 2007 provincial RFP are spoken to over the period covered in the notes. *e.g.* security, scalability, redundancy, network reliability, performance specifications, capacity, the role of fibre op and the use of towers, the evolution of thinking leading to the adoption of the 900 MHz bandwidth. These were all real life issues for the Cockerills that were being addressed as the project progressed.

[239] Learning what the issues were and determining the ways to address those problems made that information a valuable asset. However, what ultimately ended up in the RFP was an identification of the issues and not a lot of the answers arrived at by TDC. However, the RFP designers were not experts in the industry and so the TDC information that the Project members sought and obtained provided a shortcut, which the defendant did not have the permission to take and did not pay for.

[240] The Province gained from the knowledge acquired by TDC’s principals over an extended period of time. There is an important difference though between what

the Rural Broadband Project team members knew of the TDC delivery system and Business Proposal, and what it misused. The defendant is only liable for that which it provably misused. There is no basis upon which to conclude that members of the Rural Broadband project passed on any TDC confidential information to Seaside or the other bidders in ways other than that set out in the pilot RFP.

[241] Once the pilot RFP was released the extent of the damage to TDC had crystallized. There was no basis upon which the defendant would have required TDC's further assistance, unless it was prepared to seek the undisclosed and more valuable TDC information held by Dennis Cockerill. It did not and so TDC cannot be compensated for that which it did not provide.

[242] The defendant retained Srinivas Sampalli of Dalhousie University to provide the technical expertise necessary to evaluating the Cumberland bids. As such, TDC's services were not necessary to the Rural Broadband Project for that evaluative process.

[243] The plaintiff's calculation of the investment in TDC includes an amount for "sweat equity" which is calculated on the basis of the three Cockerills working full time on this project without taking a personal income – their wives' incomes provided for their personal expenses. The value given to their unpaid work is \$81,250 per year for the period April 2004 to April 2006. There is an evidentiary basis to support this value found in the testimony of Carter Cockerill, the comparisons with previous incomes, and in the projections contained in the Feasibility Study.

[244] Other amounts claimed by the plaintiff as "investment" are not tied directly to the intellectual property and so I infer that those funds went to cover current expenses, debt costs and acquisition costs for real property, office furniture, office equipment, electronic equipment such as subscriber modules, connection and relay equipment and related hardware, and a co-location agreement for the Baker Settlement Tower. I do not see these amounts as useful to valuation of what the defendant acquired from the plaintiff.

[245] I have concluded that the value of the plaintiff's economic loss is to be measured by considering the value to the Province of retaining TDC to assist the Rural Broadband Project between the Project's inception in March 2006 and the release of the RFP in September 2006; and also as a product of the intrinsic value of the information that was lost by TDC and gained by the defendant. A way of looking at the value of the misused information is the cost that would be agreed to

by a willing buyer and a willing seller where the product purchased was the provision of TDC's information and in person expertise, together with the right for the Project to use the information for the development of the Rural Broadband project and the construction of the pilot RFP. In giving up this information to the Province there would be a corresponding diminishment in the overall commercial value of the information provided by TDC, once published in the RFP.

[246] I have weighed the evidence and conclude that the value of the plaintiff's economic loss is \$125,000.

#### *Costs incurred in the Bankruptcy Process*

[247] The bankruptcy of TDC is not causally connected to the defendant's tortious conduct as I have found it. The bankruptcy was an inevitable result of the Plaintiff's inability to find new capital or to develop an adequate revenue stream to maintain its operations. As I have described previously, the market place was still open to TDC after the Province initiated the Rural Broadband project. Any ISP that was not selected in the tender process was free to compete to the limit of its financial and technological capabilities. TDC did not have the funding to continue.

#### *General Damages*

[248] The plaintiff claims general damages in the amount of \$300,000 for loss of goodwill and business reputation. It relies on the decision in *2703203 Manitoba Inc. v. Parks* 2007 NSCA 36. In that case the Nova Scotia Court of Appeal upheld a finding of entitlement to general damages for the loss of intellectual property in the amount of \$135,000 (present day value \$153,620).

[249] I find no evidence to support the conclusion that the plaintiff suffered a loss of goodwill and business reputation that was caused by the defendant. No valuation of these assets has been tendered and having regard to the evidence it is unlikely that there was significant value in these accounts by the time the pilot RFP was made public in September 2006.

[250] By August 2006 TDC was unable to raise funding, despite the considerable efforts of Everett Backman and others. The uptake of service was significantly less than what was anticipated and there was an interruption of service that month due to non-payment of bills. The evidence supports the conclusion that TDC's business reputation and technical reputation were already seriously damaged before the publication of the pilot RFP.

[251] The claim for general damages based upon the loss of goodwill and business reputation is dismissed.

*Punitive Damages*

[252] The plaintiff seeks punitive damages. The Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 held:

**196** Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[253] What the plaintiff had the Province's Rural Broadband Project needed and wanted, but the defendant did not want to pay TDC for the hard work and financial risk taking that the Cockerills and their supporters put into developing their system. The manner in which the defendant went about achieving its goals caused compensable damage to the plaintiff. The plaintiff says that that conduct was so egregious as to merit an award of punitive damages.

[254] The defendant's position is that any requests made by Ms. Flam to other parties concerning TDC information were undertaken as follow-ups to correspondence or briefing notes that she had to write, or in advance of a meeting that she was going to attend. The defendant questions the relevance of emails between Ms. Flam and Norman Cook and others that were exchanged after the pilot RFP was issued. It is also submitted that the pilot RFP did not identify the TDC delivery method, instead leaving it to the bidders to determine an appropriate delivery method in Cumberland. Counsel argues that Ms. Flam's motivations throughout were honourable and focused on fulfilling the mandate given to her by the government to ensure a sustainable basis.

[255] The evidence satisfies me and I conclude that Nancy Flam and Dan MacDonald:

- (a) Were aware that TDC's technology worked;

- (b) Knew that TDC shared confidential and proprietary information about its technology and business plans with Everett Backman, Norman Cook, Neil Emenau, Paul Hopper and Doug Logan;
- (c) Pursued disclosure of TDC's information from those persons, when they knew or ought to have known that it was confidential;
- (d) Knew or ought to have known that they did not have consent to access this information and that it certainly was not intended to be used to assist them in developing their rural broadband project;
- (e) Knew that by setting a very short timeline for submissions by the RDAs seeking to be named the community for the pilot project that they would be given copies of confidential proposals TDC presented to the Regional Development Agencies from across the province;
- (f) Drafted the Pilot RFP guided, at least in part, by the information that they had obtained that originated with the TDC technical information and Business Proposal;
- (g) Accessed TDC's confidential business information and utilized TDC's poor financial condition in the assessment of TDC as a prospective bidder for the pilot project;
- (h) Failed to acknowledge that significant funding was available to the successful bidder for the pilot project;
- (i) Appear to have been in communication with TDC's competitors at relevant and material times to the competition for the pilot project as evidenced by the knowledge that there were "at least two potential partners" that TDC could work with.

[256] I agree that Ms. Flam and Mr. McDonald sought information that was consistent with Ms. Flam's responsibilities for reporting to her superiors. I do not accept that that was her sole motivation.

[257] Ms. Flam and Mr. McDonald showed antipathy toward TDC's project from the outset. As Mr. Backman explained, there was a potentially ready-made broadband delivery system up and operating in Queens County. It had already benefited from indirect provincial funding and local funding. Notwithstanding these facts, Ms. Flam's focus was in developing a new delivery system in a new area. This was true notwithstanding her total lack of prior experience with this type of technology and a tight timeline.

[258] It is mystifying as to why Ms. Flam would not have made efforts to engage with TDC at the outset, even if it was only to determine whether they could be useful as consultants. Instead she and Mr. MacDonald went through the back door for this information asking for increasingly detailed information from Mr. Cook, among others. I believe that there were at least three reasons for their conduct: (i) their negative predisposition toward TDC; (ii) that when Ms. Flam's superiors asked for reports about TDC and the Caledonia project she saw it as questioning her decision not to engage with TDC. In my view, Ms. Flam sought out TDC's information to justify why she was not giving consideration to the Caledonia project; and (iii) realizing that she could obtain TDC's information by other means allowed her to benefit from their experiences without having to engage them.

[259] Notwithstanding these conclusions I find that the defendant's misconduct does not meet the very high threshold for the imposition of punitive damages. Ms. Flam and Mr. MacDonald do not appear to have acquired any personal benefit from their conduct, nor to have been motivated by a hope of personal benefit.

[260] The misuse of information was not the cause of TDC's bankruptcy. The company's dire financial problems, including the shutdown of its service in August 2006, pre-existed the publication of the pilot RFP.

[261] While TDC information was clearly confidential it was not patented or copyrighted so the misconduct did not offend these types of proprietary protections.

[262] The conduct while blameworthy did not reveal the most valuable aspects of the TDC delivery system.

[263] The scoring for the pilot RFP makes it apparent that TDC lacked most of the requirements necessary to the bid. It suffered from the fact that its delivery system had been shut down in Caledonia and so its technology was scored as not being verifiable. The defendant has no responsibility for these liabilities of the defendant.

[264] Finally, I saw no indication in the evidence of Ms. Flam or Mr. MacDonald of any malice toward the plaintiff. Rather, I observed that they made a decision that TDC was not a credible business entity capable of meeting the objectives of the Rural Broadband Project. This was a reasonable decision. Any ISP chosen had to have the capability of meeting the financial and technical challenges of the project. TDC could not. When challenged by TDC and by Ms. Flam's superiors over their lack of support for TDC they reacted defensively, but that does not undermine their intended good faith to fulfill the government's promise.

[265] I conclude that punitive damages are not warranted in this case.

### **Prejudgment interest and Costs**

[266] If counsel are unable to agree in the matters of prejudgment interest and costs then they can elect to provide written submissions or seek a date for hearing as they consider necessary.

### **Conclusion**

[267] I find that the defendant received, in confidence, unique technical and business information of the plaintiff and used it for the purposes of the Rural Broadband Initiative without the plaintiff's permission. As such the plaintiff has established a breach of confidence by the defendant and is entitled to the sum of \$125,000 in damages plus prejudgment interest and costs to be assessed.

[268] I direct counsel for the plaintiff to prepare the Order.

Duncan, J.