NOVA SCOTIA COURT OF APPEAL
Citation: ***Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)***, 2013 NSCA 134

Date: 20131126
Docket: CA 416544
Registry: Halifax

Between:

Cape Breton Explorations Ltd.

Appellant

v.

The Attorney General of Nova Scotia,
Nova Scotia Power Incorporated, and
The Nova Scotia Utility and Review Board

Respondents

Judges: Saunders, Oland and Farrar, JJ.A.

Motion Heard: September 20, 2013, in Halifax, Nova Scotia

Held: The matter of the confidential treatment of Nova Scotia Power Incorporated documents submitted to the Nova Scotia Utility and Review Board is remitted to the Board.

Counsel: Richard P. Stephenson for the appellant

Edward A. Gores Q.C. for the Attorney General of Nova Scotia

Daniel M. Campbell, Q.C., Nicole Godbout and Jack Townsend for Nova Scotia Power Inc.

Richard J. Melanson for Nova Scotia Utility And Review Board

David Henley for Oxford Frozen Foods Limited

Ian Breneman for Minas Basin Pulp and Power Company Limited

Reasons for judgment:

[1] In a hearing before it, the Nova Scotia Utility and Review Board (the "Board") treated certain documents as confidential. In its appeal of the Board's decision, Cape Breton Explorations Limited ("CBEx") alleges, among other things, that the Board erred in doing so. It says that, pursuant to the principle of open courts, much of that material should be disclosed at the hearing of its appeal. The motion which is central to this decision seeks an order to preserve the confidentiality of that material.

[2] Nova Scotia Power Incorporated ("NSPI") applied to the Board for approval of a capital expenditure of over $93,000,000 in a certain project. CBEx was an unsuccessful bidder in that project. When it submitted its material, NSPI sought confidential treatment for a large volume of the documents it filed in support of its application. Subject to minor variances, the Board approved the confidential treatment of that information.

[3] By a decision dated April 26, 2013, reported as 2013 NSUARB 92, and Order dated April 30, 2013, the Board approved NSPI's investment.

[4] On the appellant's motion for dates and directions for the appeal, Farrar J.A. directed that both confidential and non-confidential versions of the Appeal Book be filed, and a motion be heard to determine which filings and/or arguments on the hearing of the appeal will be confidential. Accordingly, NSPI brought this motion for a confidentiality order. It, CBEx and the Board, filed briefs and made submissions. As permitted by the Court, NSPI's minority partners in the project filed written submissions and made short presentations.

Background

The Board Decision:

[5] In its decision, the Board described NSPI's application and the nature of the project thus:

> [1] On December 10, 2012, Nova Scotia Power Inc. ("NSPI", "Company") filed an Application for review and approval by the Nova Scotia Utility and

Review Board ("Board") of a capital item called the South Canoe Wind Project ("Project") in the amount of $93,091,536. This item was included in NSPI's 2013 Annual Capital Expenditure ("ACE") Plan as a capital item for subsequent approval.

[2] The Project is a combination of two wind projects selected by the Renewable Electricity Administrator ("REA") where NSPI has a 49% interest in each. The two projects total 34 turbines, and NSPI will own half of the turbines in each project.

[3] The two projects are located on adjacent properties in an area between provincial Highway 14 and New Russell Road, in Lunenburg County. One project is for 78 MW and is in conjunction with Oxford Frozen Foods Limited ("OFF"), and the other is for 24 MW, in conjunction with Minas Basin Pulp and Power Company Limited ("MBPP").

[4] These projects are two of the three selected by the REA to meet the *Renewable Electricity Regulations*, N.S. Reg 155/2012, as amended ("*RE Regs*.") for NSPI to meet a 25% renewable electricity standard by 2015. Evaluation of the projects submitted in response to a Request for Proposals was undertaken by the REA. The REA's mandate and process and the *RE Regs*. as they relate to this Application are discussed later in this Decision.

[5] These are lease agreements for the lands on which the turbines will be located, some of which is owned by Timberland Holdings (2010) Limited, which is a sister company to MBPP. The other lands are owned by Atlantic Star Forestry Ltd.

[6] Additionally, there is an asset sharing agreement between NSPI, OFF and MBPP, a project construction and operating agreement, as well as agreements relating to the purchase, installation, and maintenance of the wind turbines and foundations. These agreements have been reviewed as part of the Board's consideration of the Application, and are discussed more fully later in the Decision.

[7] NSPI stated that there are four additional work orders for the interconnection substation, transmission line, line upgrades and substation network upgrades which will come forward in 2013 and are related to the Project. The total cost of those four projects is around $23 million. NSPI stated in the Application that the line upgrades and substation network upgrades would be required whether or not NSPI was a part owner of the Project.

> [8] NSPI asked the Board for approval by March 31, 2013, in order to confirm contractual arrangements for turbine purchases and to maintain the construction schedule to have commercial operation in place by December 31, 2014.

[6] According to CBEx, and not disputed by NSPI, the original application NSPI filed with the Board contained 884 pages. NSPI claimed confidentiality over 734 of those pages and redacted terms from an additional three pages, leaving only some 150 pages available for public review. It also sought confidential treatment for most of the other material it filed later. NSPI responded to an Information Request with 224 pages of confidential information, 25 pages of redacted information and 178 pages of publicly available information. Its reply evidence consisted of 368 pages of confidential information, four pages of redacted information and 36 pages of publicly available information.

[7] The hearing before the Board took place on February 20 and 21, 2013. NSPI was represented by counsel, as were CBEx (which the Board had granted intervenor status), the Consumer Advocate and the Small Business Advocate. Not until its closing submissions to the Board did CBEx raise any concerns with regard to the confidential treatment of NSPI documents. Neither the Consumer Advocate nor the Small Business Advocate addressed the confidentiality issue.

[8] In its decision, the Board set out its authority with regard to confidential documents and what had transpired with NSPI's request for confidential treatment:

> [34] The *Board Regulatory Rules* include provisions regarding confidential documents as follows:
>
> **12** **(1)** Subject to Rule 12(2), all documents filed in respect of an application shall be placed on the public record.
>
> **(2)** A party may request that all or any part of the document be held in confidence by the Board, which request shall be placed on the public record.
>
> …
>
> **(6)** A party may object to a request for confidentiality by filing an objection and serving the objection on the parties.
>
> **(7)** An objection shall state the reasons

> (a) why the party requires disclosure of the document; and
>
> (b) why disclosure would be in the public interest.
>
> [35] In its initial Application dated December 7, 2012 and filed on December 10, 2012, NSPI claimed confidential treatment for certain parts of the Application. The Board responded by letter dated December 14, 2012, that it accepted the claim for confidentiality with the exception of two documents, Appendices D and E (the Nova Scotia Power 100 MW – Wind Turbine Generators Request for Information, and the Nova Scotia Power Wind Turbine Generator Request for Proposal, respectively). As a result, NSPI re-filed its Application on December 20, 2012, with Appendix D being entirely non-confidential, and Appendix E being partially redacted.
>
> [36] The Board stated in a letter dated January 14, 2013, that:
>
> > Therefore, in response to NSPI's request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12.
> >
> > [NSPI Reply Submisison, March 8, 2013, p. 17]
>
> [37] No intervenor filed an objection pursuant to *Regulatory Rule 12(6)* with respect to confidentiality prior to the hearing, and no objection was received during the hearing.

[9] Respectfully, the Board's consideration of NSPI's claim of confidentiality was perfunctory at best. For example, the Board began its reasons on the confidentiality aspect of the application before it with this comment:

> "The Board considers that once a hearing has concluded, it should not entertain a request to adjudicate the claim for confidentiality."

Then, after reiterating its recognition of the importance of having "an open and transparent process to the extent possible" [¶ 45], the Board concluded:

> [46] The Board notes that many of the documents filed in confidence in this matter in fact either had or required very limited redactions. While the Board agrees with NSPI that in essence the interests of ratepayers in having good commercial terms and thus lower rates, and not shareholder interests in returns, are the primary consideration in requests for confidentiality, the Board believes

> that filing an entire document as confidential may not always be necessary. As a result, the Board intends to continue to exercise vigilance in future filings regarding requests under *Regulatory Rule 12*, and expects that NSPI will take steps to ensure that confidentiality is claimed only on demonstrably justifiable terms, and not in a routine or wholesale fashion.
>
> [47] The Board is not prepared to allow CBEx's request that "all application documents be made publicly available, subject to limited redactions". As noted earlier, the Board has endeavoured to exercise care in its discussion of the contents of documents over which confidentiality was maintained in this application. The Board's discussion of them is limited to the extent considered imperative in order to provide an understandable and reasoned Decision.

[10] The Board then proceeded to deal with issues such as its jurisdiction to consider NSPI's application, NSPI's inclusion of its capital costs in rate base, and whether NSPI could apply under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended, for approval of its capital costs. In its decision and order, the Board approved NSPI's capital expenditure subject to certain conditions.

The CBEx Appeal

[11] In its appeal from the Board's order, CBEx raises four grounds of appeal:

> 1. The Board erred in law in finding that s. 35 of the *Public Utilities Act* gave the Board jurisdiction to require the ratepaying public to pay for, and guarantee the profits of, Nova Scotia Power Incorporated's ("NSPI") minority financial investment in a renewable electricity project to be controlled and operated by third party independent power producers (the "South Canoe Wind Project");
>
> 2. The Board erred in law in finding no conflict between the inclusion of the costs in the rate base of NSPI's investment in the South Canoe Wind Project and the process established by the *Electricity Act* for procurement of renewable electricity by the Renewable Electricity Administrator and payment for the procured electricity;
>
> 3. The Board erred in law in finding that NSPI was legally permitted to directly own some of the assets of the South Canoe Wind Project;
>
> 4. The Board erred in law in agreeing to treat as confidential from the public a large volume of documents submitted by NSPI to support its

> application requesting that the ratepaying public pay for its investment and profits in the South Canoe Wind Project;

[12] The motion before this Court pertains only to the fourth ground dealing with the confidential treatment of documents. By motion dated October 3, 2013 NSPI brought a motion to sever the first three grounds of appeal from the fourth, and to abridge the record on appeal pursuant to *Rules* 37.01 and 37.05. Justice Farrar dismissed that motion in *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2013 NSCA 116.

The NSPI Motion:

[13] In this motion pursuant to *Rules* 85.04 - 85.06, NSPI seeks a Confidentiality Order which, according to its brief, would provide for the following:

> a. sealing the confidential version of the Appeal Book (the "Confidential Record"), and providing that only the Court and counsel for the parties to the appeal may access the Confidential Record;
>
> b. providing that a factum of any party which refers to information contained only in the Confidential Record must be redacted to remove the references to the confidential information, and sealing the unredacted version of the factum;
>
> and
>
> c. providing that if any party wishes to make reference to information contained in the Confidential Record on the hearing of the argument on the appeal must first ask the Court to go *in camera* for that portion of the discussion only.

In support of its motion, NSPI filed the affidavit of Robin McAdam, its Executive Vice-president, Strategic Business & Customer Service (the "McAdam Affidavit"). It contained numerous attachments, some of which will be described later.

[14] CBEx filed a brief which opposed the motion. The Board submitted a brief limited to general principles relating to its statutory mandate, its process and the *Board Regulatory Rules*.

[15] As recounted in the Board's description of NSPI's application quoted in ¶ 5 above, NSPI has a 49% interest in each of the two wind projects. Oxford Frozen Foods Limited ("Oxford") has the remaining 51% in one of the projects, and Minas Basin Pulp and Paper Company Limited ("Minas Basin") 51% in the other. Shortly before the hearing, each of Oxford and Minas Basin sought to participate in the confidentiality motion. Neither NSPI nor CBEx had consented. In the circumstances, the Court granted Oxford and Minas Basin permission, as non-parties, to participate by the provisional filing of affidavits and a brief on their behalves, and by brief oral submissions by their mutual counsel.

Issue:

[16] The sole issue on this motion is whether the Court should grant the confidentiality order sought by NSPI.

[17] I must first consider if this Court has the jurisdiction to hear such a motion.

Jurisdiction Issue:

[18] *Civil Procedure Rule 85.04* which pertains to proceedings in the Supreme Court of this Province reads:

> **85.04** (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
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> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

> (3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.

[19] *Rule 90.02(1)* provides that the *Civil Procedure Rules* not inconsistent with *Rule* 90 apply to proceedings in the Court of Appeal, with any modifications as directed by the Court or one of its judges. The only provision in *Rule* 90 which deals with confidentiality orders is *Rule* 90.37*(15):*

> **90.37** (15) A judge of the Court of Appeal, on motion, may make an order to do any of the following, until the Court of Appeal provides a further order:
>
> (a) allow the use of pseudonyms in the pleadings;
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> (b) impose a publication ban;
>
> (c) require a sealing of a court file;
>
> (d) require a hearing to be *in camera*.

[20] There being no inconsistency between *Rule* 90.37(15) and *Rule* 85.04, the latter provides authority for the motion for the confidentiality order to proceed before this Court. See also *Rule* 90.48(1)(e) which gives this Court authority to "make any order … that the Court of Appeal considers necessary."

[21] In the result, it is my view that this Court has the jurisdiction to hear and determine the confidentiality motion brought by NSPI.

Analysis:

[22] I begin my consideration of the motion with a brief description of the principle of open courts, and the respective positions of NSPI and CBEx.

[23] The open courts principle is well-established. Importantly, it is linked to the fundamental freedom of expression, including freedom of the press and other media of communication, set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at ¶ 36, the Supreme Court of Canada quoted with approval this passage from

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 at ¶ 23:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.

[24] Confidentiality orders are permitted as an exception to the open courts principle, but only when certain criteria set out in *Sierra Club* at ¶ 53 are met, these being that:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[25] NSPI argues that a confidentiality order is warranted for the hearing of CBEx's appeal in the particular circumstances here. It says that disclosure of the information the Board accepted and treated as confidential would not only cause direct harm to NSPI and its customers, but also would cause NSPI to be in violation of agreements with third parties, including Oxford, Minas Basin and suppliers, which contain confidentiality provisions. According to NSPI, disclosure would also impair the efficient and effective operation of the regulatory processes of the Board. Alternatively, NSPI argues that the salutary effects of the confidentiality order it seeks outweighs its deleterious effects.

[26] CBEx does not dispute NSPI's assertion of confidentiality over the financial terms in the documents the Board treated as confidential. However, it claims that everything else is either not truly confidential or the public interest favours disclosure. It also submits that the agreements with third parties included provisions allowing disclosure before the Board and the courts.

[27] In short, NSPI and CBEx agree that *Sierra Club* is the relevant law. They differ on whether the strict test for the granting of a confidentiality order has been satisfied. The focus of their submissions necessarily turned to the voluminous record before the Board and contained in the materials filed with this Court. The McAdam Affidavit NSPI presented in support of its motion included a table listing over 50 documents and a detailed explanation for each of them as to why confidential treatment for its entirety, or part or parts of it, was justified.

[28] For its part, CBEx argues that NSPI's claim is "grossly overbroad" and that NSPI has not identified a serious risk of harm to a societal interest of sufficient importance to outweigh the *Charter*-protected public interest in open court proceedings. Attached to its brief was a table setting out the identical documents as contained in the McAdam Affidavit. Again, there was a detailed explanation for each, this time by CBEx as to why it disputed confidential treatment or redactions, or indicating those instances where it accepted NSPI's position.

[29] The record before this Court pertaining to the Board's decision to grant confidential treatment to many or portions of NSPI's documents in support of its application for approval of its capital expenditure in the South Canoe Wind Project is slim. In its two-page December 7, 2012 letter to the Board which accompanied its application, NSPI asked that certain information and supporting documentation contained in appendices be maintained as confidential, pursuant to *Board Rule 12(4)* as "Commercial Information – Full and Partial Redaction". It stated that certain items associated with the cost of this project were considered "confidential to protect value for customers and mitigate the risk of prospective proponents having access to pricing quotes and other commercially sensitive information." NSPI also sought Board approval of an attached confidentiality undertaking pertaining to the provisions and access to "Designated Confidential Information" as defined in that document.

[30] The Board's response a week later advised its approval of the confidentiality undertaking and sought justification for confidential treatment of two appendices. In its reply dated December 20, 2012 NSPI re-designated one appendix as non-confidential and supplied a partially redacted version of the other.

[31] By letter dated January14, 2013 the Board accepted NSPI's explanations and continued:

> Therefore, in response to NSPI's request in its letter of December 20, 2012, the Board approves the confidential treatment of information in this Application as requested at this time. Should an intervenor object to such treatment, however, the Board reserves the right to re-consider this issue pursuant to Board Rule 12.

[32] Finally, the record includes the Board's decision on the confidentiality question. In its reasons, the Board observed that no objection had been made pursuant to its *Rule 12(6)* before or during the hearing of NSPI's application. It stated its intention to continue to exercise vigilance in future and its expectations of NSPI in regard to its claims to confidentiality. However, its decision does not squarely address what the Board considered and weighed in determining that all or any part of the documents should be held in confidence.

[33] Without such reasons, it is not apparent that the Board conducted an analysis according to its *Regulatory Rule 12* which its counsel suggests in many respects is a codification of the principles set out in *Sierra Club*. Counsel for the Board acknowledged that, except for the Board's mention of *Nova Scotia Power Incorporated (Re)*, 2009 NSUARB 179 (CanLII) and its inquiry regarding two of NSPI's documents, there was nothing on the record which could suggest that the Board considered those criteria in deciding to accept NSPI's request for confidential treatment of most of its documents.

[34] The result is a hugely difficult situation. This Court would be reviewing the Board's decision without being able to appreciate its reasoning on the confidentiality of the complex and extensive commercial contracts involved in a $93,000,000 project, such as power purchase agreements, financial model spread sheets, land leases, asset sharing agreements, supplier agreements, and a project construction and operating agreement.

[35] Accordingly, at the end of the hearing of the motion, the panel asked counsel for NSPI, CBEx and the Board whether the matter could be remitted to the Board, with an invitation that it provide more detailed reasons for having granted confidential treatment. It asked NSPI, CBEx and, if it wished, the Board, to file post-hearing submissions.

[36] In its post-hearing submissions, CBEx argues that notwithstanding the paucity of its reasons, the Board clearly decided that the documents were confidential. Its fundamental position is that the Board having finally ruled on this

case, it is now *functus officio* and cannot issue further reasons on the confidential treatment of the NSPI materials.

[37] In this regard, CBEx relies on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 where Sopinka J. writing for the majority stated at p. 861:

> … As a general rule, once [an administrative tribunal] has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error …

CBEx also points to *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749 where the Ontario Court of Appeal, relying on *Chandler* for guidance on the application of *functus officio* to administrative tribunals, concluded at ¶ 33 that the *functus officio* principle also precluded a tribunal from issuing supplementary reasons for decision.

[38] With respect, CBEx's reliance on these decisions is misplaced. In *Chandler*, it was the tribunal on its own motion which sought to continue a hearing and prepare a further report after the Alberta Court of Appeal held that the Practice Review Board did not have the powers it initially purported to exercise. In *Jacobs Catalytic*, the Ontario Labour Relations Board rendered supplementary reasons after the successful union, according to the Ontario Court of Appeal at ¶ 70, asked the Board to improve upon its reasons favourable in the result but deficient in their content to immunize them from review. Those are very different situations from what is contemplated here.

[39] In my view, referral back to the Board would be consistent with the observations of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. There the question was how a court may give adequate deference to a tribunal when an issue which was never raised before the tribunal and so not addressed in its decision, is raised before the court on judicial review. Rothstein J. writing for the majority commented:

> [55] In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. Indeed, when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised. [Emphasis added]

In this case, CBEx challenged the confidentiality of the NSPI documents in its final submissions before the Board, and the Board addressed this issue in its decision albeit in a cursory fashion. Consequently the caution against remittal in the above passage does not apply.

[40] CBEx contends that remittance to the Board is a process fraught with peril as any reasons the Board issues could represent not the real reasoning process that led to its decision, but rather a justification of the decision it made earlier. In *R. v. Teskey*, [2007] 2 S.C.R. 267, the majority of the Supreme Court of Canada wrote:

> 18 Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any

> result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

[41] In *Jacobs Catalytic* at ¶ 52, the Ontario Court of Appeal stated that while *Teskey* is a criminal case, the rationale applied where the adjudicator purports to issue final reasons and later issues supplemental reasons without explaining why those were not contained in the initial reasons. I cannot say that a results-driven analysis is outside the realm of possibility. However, as explained in *Teskey*, this is particularly concerning in a criminal proceeding, which involves the presumption of innocence and requires proof beyond a reasonable doubt.

[42] Receiving more fulsome reasons from the Board would accomplish several important objectives:

(a) the Board would be given an opportunity to set out its analytic path of reasoning leading to its determination regarding the confidential treatment of complex industry documents in this particular case,

(b) it being familiar with the application, the materials, and its analysis, the Board's reasons will likely be released on a timely basis. Thus, any undue delay in the hearing of the merits of this appeal might be avoided or reduced; and

(c) such reasons would permit meaningful judicial review by this Court, which would include consideration of the open courts principle and the *Sierra Club* criteria.

[43] The *Alberta Teachers' Association* decision which stated that in some cases a reviewing court cannot adequately show deference without giving the administrative decision maker the opportunity to provide reasons, was a judicial

review. An appeal to this Court from a decision of the Board is a statutory appeal, as the *Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 1 provides:

> 30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.
>
> …
>
> (4) Where there is a conflict between this Section and another enactment, that enactment prevails.

[44] However, remittance to the administrative body in the statutory appeal context has been granted in other cases. See, for example, *Allstate Insurance Company of Canada v. Nova Scotia (Insurance Review Board)*, 2006 NSCA 70, where the issue pertained to the setting of insurance rates, which had actuarial and technical features. The majority stated:

> [58] … The appellants submit that in these circumstances it is inappropriate for the Board to hear their applications again, and that there was sufficient evidence before this court for it to determine whether or not the rates were reasonable. I am unable to agree that the court should make this determination. The Board is given exclusive jurisdiction (s. 16S) subject to appeals on matters of jurisdiction or law (s. 16Z). The *Act* does not specify the remedies available to the court. Moreover, a great deal of specialized and technical evidence was submitted for the Board's consideration. Finally, there is nothing to indicate that a panel, even if some or all of its members sat on the Initial Panels and the Appeal Panels, due to the number of members which constitute the Board, would not deal with the applications appropriately.

While the dissenting judge would have dismissed the appeal, at ¶ 98 he agreed that this Court has neither the time nor the resources to decide whether these applications meet the statutory criteria and that, in light of the specialized and technical evidence in the record, the administrative body was best suited to make that determination.

[45] As to the powers of this Court to send the matter back to the Board, *Civil Procedure Rule* 90.48(1)(e) provides:

> **Powers of the Court of Appeal**

> **90.48** (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> …
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.

[46] CBEx submits that this Court could only order the Board to issue expanded reasons if it ordered this as a remedy, if it allowed the appeal in whole or in part. However, it cites no authority for this proposition. Furthermore, the issue of the confidential treatment of documents is quite distinct from the other grounds of appeal it raises, and further exposition of the Board's reasons will not impact on them.

Disposition

[47] I would remit the matter of the confidential treatment of the NSPI documents submitted to the Board with NSPI's application for Board approval to the Board so that this Court can receive the benefit of its analysis in reaching its decision.

[48] Once the Board's expanded reasons are released, NSPI may apply for a date to bring a confidentiality motion regarding disclosure on the hearing of the appeal. The Chambers judge hearing any such motion will deal with any requests regarding any further submissions or fresh evidence. If NSPI does not bring such a motion within 30 days of the release of the Board's expanded reasons, CBEx may bring a motion to set down its appeal for hearing with all documents before the Board on the public record.

Oland, J.A.

Concurred in:

Saunders, J.A.

Farrar, J.A.