Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

REPLY OF THE APPLICANT, AIR PASSENGER RIGHTS

Motion to Compel Answers and Documents and Document Preservation Order
(pursuant to Rules 97 and 369.2 of the *Federal Courts Rules*)

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REPLY OF THE MOVING PARTY / APPLICANT

1. The CTA's response brings to light critical new evidence. First, while this Court was seized with motions for the production of documents in 2021, the CTA consciously wiped from its servers the Outlook accounts of departing key personnel. Second, the CTA's practice is to encrypt all sensitive email exchanges with Transport Canada. Third, the CTA's Outlook Server keyword search could not capture relevant encrypted emails.

2. These circumstances create a considerable practical difficulty for the Court to ensure that the October 2021 Order was complied with and that the panel hearing the Application has before it the complete story. The practical difficulty faced by the Court is solely due to the CTA's failure to properly appreciate its duty to the Court to preserve documents at the onset, which allowed relevant documents to be deleted in the interim.

3. Relying on a superficial search only, the CTA misdirects the Court to find that relevant documents cannot be found and/or restored. The Applicant presents a practical solution for the search and recovery of relevant documents, including encrypted emails.

4. Regardless of whether one labels the Transport Canada behind-the-scenes exchanges "backchannel," they fall squarely within the scope of the October 2021 Order.

A. The CTA Flouted Its Duty to the Court to Preserve Relevant Documents

5. The CTA invites this Court to upend the long-standing common law duty that when litigation is commenced or anticipated, parties are to preserve documents that could reasonably be anticipated to be relevant.[1] A functional legal system requires all participants, particularly sophisticated parties with legal representation, to preserve relevant documents for the trier of fact, so as to ensure integrity of the judicial process.[2]

6. The CTA is urging the Court to summarily find on this motion that:[3]

(a) when the CTA was served with the Notice of Application on April 9, 2020, it had no duty to preserve all documents that could reasonably be anticipated to be relevant, but only the limited items whose transmission was specifically requested in the concurrent Rule 317 request [**April 2020 R. 317 Request**]; and

(b) the CTA's document retention policy allows the subject CTA personnel to freely delete documents they perceive to have no "business value," and prevails over the duty owed to the Court to preserve all relevant documents.

7. Taking the CTA's position to its logical conclusion, an administrative body is at liberty to delete documents even after receiving the Notice of Application, as long as it has not been served with an all-encompassing Rule 317 request to transmit every plausible document. Surely, this cannot be right and would sow chaos for judicial reviews in the federal courts. Indeed, if the CTA's position were accepted, it would encourage deletion of relevant documents until a court order is issued. Accordingly, every applicant on a judicial review would have to first seek at the outset, possibly even *ex parte*, a document preservation order or even an Anton Piller Order.

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1 A "Century" Overdue: Revisiting the Doctrine of Spoliation in the Age of Electronic Documents, 2022 CanLIIDocs 1647, pp. 907-909 [Tab 7, pp. 103-105].

2 *Doust v. Schatz*, 2002 SKCA 129 at para. 27 [Tab 6, p. 84]; and The Sedona Canada Principles, 3rd ed, 2022 CanLIIDocs 1167 at p. 195 [Tab 8, p. 121].

3 CTA's Written Representations (Nov. 24, 2022), paras. 29-33.

8. The CTA's submissions miss the mark and are without merit for the following three reasons, which are expanded in greater detail below:

(i) The CTA cannot sidestep its legal duty to the Court to preserve relevant documents by relying on the CTA's own internal document retention policies.

(ii) The April 2020 Notice of Application triggered the common law duty to preserve relevant documents, *independent of* the April 2020 R. 317 Request.

(iii) In any event, the TC-CTA Backchannel Documents were already within the scope of the April 2020 R. 317 Request, and should have been preserved.

i. CTA's Document Retention Policy is Not a Shield

9. The CTA filed the affidavit of Mr. Guindon, its IT manager, detailing the CTA's IT and document retention policies. Mr. Guindon's affidavit confirms that, despite the Rule 318 motion pending before this Court between January and October 2021, the CTA still proceeded to permanently delete from its servers the Outlook accounts of departing personnel, including Mr. Streiner, Ms. Jones, and likely Ms. Hurcomb.[4]

10. The CTA's practice of departing personnel signing a form that data in their Outlook has no "business value" and can be deleted[5] does not excuse the CTA's failure to preserve documents. This Court's determination of the relevance of any document is not to be subordinated to the CTA's view that the document has no "business value."

11. A litigant "may need to act promptly at the outset of possible litigation to suspend automatic electronic file destruction policies in order to preserve evidence."[6] An organization's document retention policy serves an entirely different purpose than a

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[4] Affidavit of Mr. Jonathan Guindon [**Guindon Affidavit**], paras. 19-20 [CTA's Responding Record (**RR**), Tab 3, p. 55].

[5] Guindon Affidavit, paras. 11-13 and 19-20 [RR, Tab 3, pp. 53 and 55].

[6] The Sedona Canada Principles, 3rd ed, 2022 CanLIIDocs 1167 at p. 195, fn. 57 [Tab 8, p. 121].

plan to preserve documents for pending litigation.[7] A document retention policy cannot serve as a shield when relevant documents were destroyed after litigation commenced.

12. In any case, the CTA has not provided to the Court the departure forms, within its exclusive control, that Mr. Streiner, Ms. Jones, and Ms. Hurcomb may have signed.

ii. The Duty to Preserve Relevant Documents Arose in April 2020

13. The CTA suggests that its duty to preserve relevant documents was limited solely to the documents itemized in the April 2020 R. 317 Request that accompanied the Notice of Application.[8] There is no legal authority supporting the CTA's position.

14. The *Federal Courts Rules* do not limit an applicant to making one Rule 317 request only, nor do they require that a Rule 317 request be served with the Notice of Application. The logical consequence of the CTA's position is that relevant documents would be at risk of destruction until the applicant can itemize *all* of the possibly relevant documents in a single Rule 317 request, or a court order is issued. This cannot be right.

15. In any event, as explained further below, the TC-CTA Backchannel Documents were covered by the April 2020 R. 317 Request and ought to have been preserved.

iii. April 2020 Request Covers the TC-CTA Backchannel Documents

16. The CTA advances three arguments, relying on the April 2020 R. 317 Request.

17. **Firstly**, the CTA claims that the April 2020 R. 317 Request was narrower than the Rule 318 motion in January 2021 or the October 2021 Order, and as such the CTA's initial duty to preserve documents was narrower.[9] Actually, this Court has already determined that the Rule 318 motion was narrower than the April 2020 R. 317 Request.[10]

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7 *Ibid*.
8 CTA's Written Representations, paras. 30-33 [RR, Tab 4, pp. 97-98].
9 CTA's Written Representations, para. 33 [RR, Tab 4, p. 98].
10 Reasons of Gleason, J.A. (Apr. 11, 2022), para. 29 [Motion Record (**MR**), Tab 6, p. 239].

18. **Secondly**, the CTA says that the first category in the April 2020 R. 317 Request only covered members of the CTA, but not Ms. Jones and her team, such as Ms. Hurcomb.[11] The CTA overlooked that this category of the April 2020 R. 317 Request captures documents on Mr. Streiner's interactions with Transport Canada on the Statement on Vouchers, such as the meetings around the weekend of March 21-22, 2020.[12]

19. The CTA's representations about its understanding of the scope of the April 2020 R. 317 Request are belied by the CTA permanently deleting Mr. Streiner's Outlook account upon his departure. By the CTA's own interpretation, the first category of the April 2020 R. 317 Request required preserving Mr. Streiner's Outlook account.

20. **Thirdly**, the CTA suggests that the third category in the April 2020 R. 317 Request only covered correspondences *directly* with the travel industry, but not otherwise.[13] The CTA's position is disingenuous. The March 18, 2020 Transport Canada encrypted email was Transport Canada funnelling, as an intermediary, requests by Air Transat, which was specifically identified in the email subject line.

21. The CTA's representations about its understanding of the scope of the third category of the April 2020 R. 317 Request is again belied by its conduct. By January 2021, at the latest, the CTA's counsel was aware that Ms. Jones was involved in the Statement on Vouchers,[14] but Ms. Jones's Outlook account was still wiped from the CTA's server on her departure in June 2021. The CTA has no valid explanation for this.

22. Furthermore, Ms. Jones's March 25, 2020 announcement email to air carriers is clearly covered by the April 2020 R. 317 Request, but this email was not preserved despite the CTA's representations *emphasizing* that it covered the travel industry.

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[11] CTA's Written Representations, para. 32 [RR, Tab 4, p. 98].
[12] APR's Written Representations, para. 13(k) [MR, Tab 10, p. 475].
[13] CTA's Written Representations, paras. 31-32 [RR, Tab 4, pp. 97-98].
[14] Cuber Cross-Examination, Q48-Q52, Q77, Q146-Q147, and Q390 [MR, Tab 9, pp. 303-305, 311, 331-332, and 394].

B. Search and/or Recovery of the TC-CTA Backchannel Documents

23. The CTA's failure to preserve documents presents this Court with a practical challenge of ensuring that relevant evidence is before the panel hearing the Application.

24. For the first time in this Application, the CTA's IT manager confirmed that sensitive email exchanges between the CTA and other government departments (e.g., Transport Canada) are typically encrypted.[15] This revelation buttresses the need of a targeted search for these encrypted emails in order to comply with the October 2021 Order.

25. The CTA resists an Order for a proper search of the TC-CTA Backchannel Documents on three grounds: (1) Ms. Cuber's search already covered encrypted emails; (2) any encrypted emails involving the departed personnel were already deleted; and (3) even if any encrypted content can now be located, the CTA cannot open them, because the personnel that was issued the encryption key had departed from the CTA.

26. As detailed below, the CTA's encryption keys' manufacturer allows retrieval of backup keys for such circumstances. The affidavit of the CTA's IT manager both confirms the deficiencies in the CTA's previous searches and reveals the ingredients for how a proper search should have been conducted. The Applicant summarizes below a roadmap for a proper search, based largely on the evidence of the CTA's IT manager.

i. Ms. Cuber's Search Overlooked Encrypted Content

27. The CTA falsely claims that Ms. Cuber was merely unaware of the distinction between unencrypted and encrypted emails, and invites the Court to find that Ms. Cuber's search specifically encompassed encrypted emails,[16] when that was not the case.

28. The CTA ignores Ms. Cuber's evidence on encryption, which stated that:

> **289. Q.** Let's go back to Exhibit 11. At the top it says, "Hi Colin. I am

[15] Guindon Affidavit, para. 18 [RR, Tab 3, p. 54].
[16] CTA's Written Representations, para. 43 [RR, Tab 4, p. 101].

sending this unencrypted as our remote network access is patchy and we are not able to open encrypted emails on our Samsungs at the Agency." Do you see that?

A. Yes.

290. Q. Did you look into why Ms. Jones was referring to encryption there?

A. No.

291. Q. Did you enquire with IT why there is reference to encryption?

A. No.

292. Q. Is it the CTA's policy to send emails encrypted?

A. I am aware of no policy by which the Agency sends encrypted email.

293. Q. Right here we see Ms. Jones saying, "I am sending this unencrypted as our remote network access is patchy." It seems to suggest that Ms. Jones would have sent encrypted emails on her own previously. Do you agree?

A. I can't make that assumption. I don't know why she said that. I can't speak to why she said that.

294. Q. Did you enquire with IT what the policy is in terms of encrypting emails?

A. No.

[...]

299. Q. No enquiries were ever made with IT about searching encrypted emails? Is that correct?

A. I didn't have to make an enquiry with IT about searching encrypted emails because I didn't come across any encrypted email.

[...]

301. Q. Ms. Cuber, is it correct to say that you did not ask IT to do a specific search for encrypted emails?

A. I did not ask them to do a specific search for encrypted emails.

> **302. Q.** Do you know if IT has any policy in terms of encrypted emails?
>
> **A.** No.
>
> **303. Q.** Were you informed of any policies in regards to encrypted emails?
>
> **A.** No.[17]

29. It is apparent that Ms. Cuber was oblivious to the necessity to search for encrypted emails with her "circular" reasoning in Q. 299 that she did not inquire with IT on "searching encrypted emails because I didn't come across any encrypted email." This is peculiar when encrypted emails were already raised in the January 2022 motion.

ii. Keyword Search and Manual Search Did Not Cover Encrypted Emails

30. The CTA is misdirecting the Court to find that encrypted emails were searched, when that was not the case. The CTA misquoted the CTA IT manager's evidence in claiming that "[t]his search was performed in accordance with Government of Canada Treasury Board policy, including the steps required to ensure that encrypted emails are searched."[18] The IT manager did not testify about the specifics of the CTA's search in this instance. The CTA tendered no evidence capable of showing that the Treasury Board guidance was actually followed in performing the search(es) for this case.

31. Contrary to the CTA's representations, the evidence is clear that **neither** the Outlook Server keyword searches **nor** the manual ATI search covered encrypted emails.

32. Mr. Guindon revealed the deficiencies of keyword searches on the Outlook Servers, confirming that the contents in the body of encrypted emails were not searchable:

> 29. The centralized mailbox search will however be able to search the envelope of the e-mail, which includes the sent date, Sender e-mail address, recipients(s) e-mail address(es) and subject. If the executed

[17] Cuber Cross-Examination, Q289-Q294, Q299, and Q301-Q303 (emphasis added) [MR, Tab 9, pp. 365-369].

[18] CTA's Written Representations, para. 40 [RR, Tab 4, p. 100].

> query matches information from within the envelope of an encrypted e-mail, the message will show as a result. We would be unable to see the content from this system, but would have enough information to contact the employee to gain access to the decrypted e-mail.
>
> 30. In this specific case, we would be unable to search the accounts of CTA personnel that left the Agency in 2021. For those personnel, there are no mailboxes to search from.
>
> The Agency searched for emails in existing, active mailboxes in November 2021 in the event that there were copies of the e-mails of departed personnel in the accounts of remaining personnel.[19]

33. A keyword search on the CTA's Outlook Server can only search: (1) sent date; (2) sender or recipient email address; and (3) subject line. Both Ms. Cuber's November 2021 Outlook Server search and the Outlook Server search for the A-2020-00029 ATI request[20] were based on specific keywords that would not generate a hit on subject lines of encrypted emails between Transport Canada and the CTA, such as Mr. Stacey's March 18, 2020 encrypted email with the subject line "RE: From MinO: Air Transat."

34. The CTA's manual ATI search similarly omitted Ms. Jones and her team from "tasking", which is coincidentally the exact same deficiency as Mr. Matte's notification process, where Mr. Matte omitted Ms. Jones and her team from the notice to preserve documents in April 2020. On May 5, 2020, all CTA department heads were notified of *the existence* of a new ATI request and that "**[t]his notice is for information purposes only, a tasking email will follow shortly**...."[21] The subsequent "tasking email" was directed only to the Office of the Chair, and *only* the Office of the Chair signed the form confirming completion of that task.[22] Ms. Jones and her Analysis and Outreach Branch were inexplicably omitted from any "tasking" for that manual ATI search.

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[19] Guindon Affidavit, paras. 29-30 (emphasis added) [RR, Tab 3, pp. 56-57].

[20] Lukács Affidavit (Nov. 14, 2022), Exhibit "T" [MR, Tab 2T, p. 101]; and Cuber Cross-Examination, Exhibit 8 [MR. Tab 9, p. 463].

[21] Lukács Affidavit (Nov. 14, 2022), Exhibit "U" [MR, Tab 2U, p. **109** - Notification].

[22] Lukács Affidavit (Nov. 14, 2022), Exhibit "U" [MR, Tab 2U, pp. **104** and **108** - Tasking Email and Confirmation Form from Office of the Chair only].

35. The CTA's bald assertion that the manual ATI search followed the Treasury Board's guidelines on searching encrypted emails is beside the point.[23] Even assuming the Office of the Chair applied the Treasury Board guidelines, despite the "tasking" email being entirely silent on searching encrypted emails,[24] Ms. Jones's Analysis and Outreach Branch was clearly excluded from any "tasking" for that manual ATI search.

iii. Data on Local User Devices Were Never Searched

36. The CTA's IT manager's testimony under the heading "Data recovery" focused exclusively on recovering deleted accounts on the MS Outlook Server, and did not speak to recovering or searching the data on a departed personnel's local device(s).[25]

37. Besides a server keyword search, Mr. Guindon confirmed that encrypted email searches are typically performed locally from a subject personnel's devices,[26] as provided in the Treasury Board guidelines. Outlook data for each CTA personnel are stored *both* on the Outlook Server and on their local devices, as confirmed in screenshots.[27]

38. The departed CTA personnel in this case (i.e., Mr. Streiner, Ms. Jones, and Ms. Hurcomb) should have returned all their phones, computers, and USB drives.[28] However, Ms. Cuber failed to follow the Treasury Board guidance by not searching for encrypted emails on these local devices. With great respect to Ms. Cuber, she clearly lacked the technical expertise to conduct a technical search on these returned devices.

39. Mr. Guindon did not testify that a search for these local devices was no longer possible, nor did he testify that such local searches were ever performed.

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[23] CTA's Written Representations, paras. 39-40 [RR, Tab 4, p. 99-100].
[24] Lukács Affidavit (Nov. 14, 2022), Exhibit "U" [MR, Tab 2U, pp. 104-107].
[25] Guindon Affidavit, paras. 31-35 [RR, Tab 3, pp. 57-58].
[26] Guindon Affidavit, paras. 4, 22, and 29 [RR, Tab 3, p. 52, 55 and 56].
[27] Affidavit of Ms. Barbara Cuber [**Cuber Affidavit**], Exhibit "C" [RR, Tab 2, p. 45 - **screenshot of the Outlook data storage on the bottom right**].
[28] Cuber Cross-Examination, Q46 and Q60-63 [MR, Tab 9, pp. 302-303 and 307]; Guindon Affidavit, Exhibit "C" [RR, Tab 3, bottom of p. 86 "Return all IT equipment"].

iv. Encryption Keys of Departed Personnel Can be Recovered

40. The CTA seeks to present this Court with a further hurdle that even if encrypted emails between Transport Canada and the CTA were found, they could not be opened because "we do not have access to the encryption keys used to encrypt information."[29]

41. Entrust, the manufacturer of the CTA's encryption keys, offers a complete solution to the CTA's technical concern. Entrust has procedures for recovery of encryption keys including a backup copy stored on Entrust's secured facilities for safekeeping.[30]

v. Applicant's Roadmap for a Proper Search and/or Recovery

42. Mr. Guindon's evidence, and the discussions above, suggest a workable solution to the predicament that the CTA is facing. An Order for the search and/or recovery of the TC-CTA Backchannel Documents should be particularized to give the CTA a clear and practical step-by-step outline for an effective search, as explained below.

43. For a new **Outlook Server keyword search**, the CTA should conduct separate searches for items between March 18-25, 2020 using these two separate criteria:

(a) **Sender or Recipient E-mail address** containing "@tc.gc.ca", or

(b) **Subject line** containing "From: MinO", "CTA announcement tomorrow", **or** any other subject line found from the "@tc.gc.ca" search criteria above.

44. The first search for "@tc.gc.ca" would generate hits for encrypted envelopes of emails to/from Transport Canada.[31] The second search is based on the subject line of two known threads with Transport Canada during that time period,[32] and any new threads that may be discovered, and further capture any exchanges evolving from them.

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[29] Guindon Affidavit, para. 34 [RR, Tab 3, p. 57].

[30] Lukács Supplementary Affidavit (Nov. 29, 2022), paras. 3 and 5 and Exhibits "A" and "B", FAQs on recovering encryption keys, including for departed employees.

[31] Guindon Affidavit, para. 29 [RR, Tab 3, p. 56-57].

[32] Lukács Affidavit (Nov. 14, 2022), Exhibits "I"-"J" [MR, Tabs 2I & 2J, pp. 65-70].

45. The CTA's assertion that it made a specific search for emails whose subject line contained the words "From MinO" is misleading.[33] That search was only on RDIMS, the repository where personnel save documents perceived to have "business value."[34] Ms. Cuber never did an Outlook Server search or local device search for "From MinO."

46. While the Outlook accounts for Mr. Streiner, Ms. Jones, and Ms. Hurcomb were wiped from the server after they departed, there is utility in this search "in the event that there [are] copies of the e-mails of departed personnel in the accounts of remaining personnel."[35] Indeed, Mr. Guindon has endorsed the utility of Ms. Cuber's Outlook Server search in November 2021, albeit with terms that did not capture encrypted emails.

47. The new Outlook Server keyword search results should then be specifically reviewed with **a keen eye** for encrypted emails. Ms. Cuber's previous review(s) overlooked that a blank email may be one of the indications of encryption.[36] The same review exercise, with a keen eye for encrypted emails, should also be repeated on the search results for the searches previously conducted (i.e., the ATI search from May 2020 [A-2020-00002], the ATI search from August 2020 [A-2020-00029], the TRAN Committee bundle, and the Outlook Search Mr. Shaar performed in October 2022).[37]

48. For the **local devices search(es)**, which Ms. Cuber had never performed to date, a CTA personnel with technical expertise, such as Mr. Guindon, should review all of the devices that Mr. Streiner, Ms. Jones, and Ms. Hurcomb should have returned before their departures. In particular, that individual should focus on the locally stored MS Outlook data and/or backup or locally-stored copies of emails or calendar events between the time period covered in the October 2021 Order (i.e., March 9-25, 2020).

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[33] CTA's Written Representations, para. 39 [RR, Tab 4, pp. 99-100].
[34] Cuber Cross-Examination, Q270-272 [MR, Tab 9, pp. 360-361].
[35] Guindon Affidavit, paras. 24 and 30 [RR, Tab 3, pp. 56-57].
[36] APR's Written Representations, para. 36 [MR, Tab 10, p. 483].
[37] Cuber Affidavit, paras. 17, 21, and 29-30 [RR, Tab 2, pp. 20-22]; Lukács Affidavit (Nov. 14, 2022), Exhibit "S", item 7 [MR, Tab 2S, p. 98].

49. After completing the aforementioned searches, the individual(s) performing the searches should report back to the Court with all pertinent details from the searches, and/or provide a detailed explanation why they were not able to perform the search(es).

C. Preservation of Documents at Transport Canada

50. The CTA did not object to the Transport Canada Document Preservation Order. The CTA's evidence underscores the necessity for early court intervention to ensure that relevant documents would not be lost from Transport Canada's indiscriminate application of its information policies (i.e., deleting documents with no "business value").[38]

51. An order for document preservation usually does not arise for litigation in the federal courts because counsel for the parties can typically resolve the concern by providing a written assurance that documents have been retained. However, the circumstances of this case are peculiar because the AGC, who represents all government departments including Transport Canada, refused to cooperate.[39]

52. Instead of filing a motion record to oppose the Transport Canada Document Preservation Order, the AGC sent a letter after the deadline in the *Federal Courts Rules*, raising three technical objections: (1) Transport Canada is not a named party in the case; (2) the Court's September 2, 2022 scheduling order somehow precludes the Transport Canada Document Preservation Order; and (3) the Notice of Motion raises the *Access to Information Act* [***ATIA***] and that remedies be sought under the *ATIA* instead.

53. The AGC's technical objections have no merit.

54. Firstly, government departments have no legal personalities separate from the Crown, and need not be specifically named as respondents.[40] Government departments,

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[38] Guindon Affidavit, paras. 7-14 [RR, Tab 3, p. 52-54].
[39] Lukács Affidavit (Nov. 14, 2022), Exhibits "AL" [MR, Tab 2AL, p. 193].
[40] *Canada (AG) v. Zalys*, 2020 FCA 81 at para. 25 [Tab 4, p. 53]; *Canada (OIC) v. Calian Ltd.*, 2017 FCA 135 at para. 63 [Tab 3, p. 41].

such as Transport Canada, would be represented by the AGC. In any event, the AGC cited no authority suggesting that Transport Canada needs to be a named party before the Court can order it to preserve or produce documents on a Rule 41 motion.

55. Secondly, the September 2, 2022 scheduling order contemplated a Rule 41 motion. The Transport Canada Document Preservation Order protects the judicial review process's integrity by ensuring that Transport Canada would not take any action, whether inadvertent or otherwise, that may render moot any subpoena that may issue after the Applicant's Rule 41 motion.

56. Thirdly, and finally, the Applicant does not seek any remedies under the *ATIA* on this motion. Rather, the Applicant simply relies on documents obtained through access to information requests to establish that relevant documents whose preservation is sought do indeed exist. The suggestion to utilize procedures under the *ATIA* instead of this Court's inherent jurisdiction with respect to evidence was previously raised by the CTA,[41] but not accepted by this Court. Indeed, the law does not require an applicant to pursue an access to information request.[42]

57. The AGC has provided no valid reason why this Court should not issue the Transport Canada Document Preservation Order to protect the integrity of its processes.

D. Relevance of the Two Disputed Documents

58. On November 22, 2022, the AGC brought a motion to assert privilege over the two disputed documents: the Withheld C5 Urgent Debrief Call Documents and the Jones-Cuber Email. The Applicant will respond to the issue of privilege in a separate motion record, in accordance with the Court's November 25, 2022 Order.

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[41] CTA's Written Representations (Jan. 18, 2021), para. 75 [Doc. No. 57].

[42] *Association des crabiers Acadiens v. Canada (A.G.)*, 2006 FC 222 at para. 15 [Tab 2, p. 21]; and *Cooke v. Canada*, 2005 FC 712 at para. 22 [Tab 5, p. 76].

59. For the Withheld C5 Urgent Debrief Call Documents, if the redacted portions are exclusively about a s. 64 decision for the *Canada Transportation Act*,[43] then it is of course not relevant to the Application. It is for the Court to review and decide whether the contents of that document reveal any discussion(s) about refunds and/or vouchers.

60. For the Cuber-Jones Email, the CTA is attempting to sidestep the uncontradicted evidence before the Court on this motion, which shows that Ms. Jones's email exchange directly impacted the thoroughness and direction of Ms. Cuber's subsequent search:

> **146. Q.** Between October 15, 2021, and the present, did you attempt to contact Ms. Marcia Jones to request documents or request her assistance in providing or locating documents for the October Order, April Order, or July Order?
>
> **A.** No because we had already had an exchange in January 2021 and I knew where to find responsive documents and I knew the documents that she didn't have knowledge of.
>
> **147. Q.** What do you mean documents she didn't have knowledge of?
>
> **A.** She indicated that she had no knowledge of anything like meeting minutes or memos on the subject of the Statement on Vouchers and that responsive documents had been collected in the context of Access to Information searches.
>
> [...]
>
> **389. Q.** Thank you. Let's go back to Exhibit 9, the search that you prepared. Here we see that there was only a box for "Emails were found" but there was no indication that RDIMS was searched. Why did you not request an RDIMS search?
>
> **A.** Because there had been searches done in RDIMS. I had spoken to Marcia Jones who told me that responsive search results would be found in the ATIP search results, that she had no knowledge of other minutes or memos. I asked individuals like Lesley Robertson to look into responsive search results and she looked into RDIMS in order to find them.
>
> **390. Q.** When did you speak with Ms. Jones? You mentioned a discussion with Ms. Jones.

[43] CTA's Written Representations, para. 56 [RR, Tab 4, p. 104].

> **A.** January 5th, 2021. I keep saying speak but I exchanged with her. I think we had a discussion but it certainly began as a written exchange and I don't know that we had a discussion. I have evidence of a written exchange.[44]

61. It is a material fact that the CTA's sensitive communications with Transport Canada are typically encrypted,[45] and it has a direct bearing on the results of any search. If Ms. Jones omitted to inform Ms. Cuber of this material fact, it may be open to the panel to find that Ms. Jones improperly "steered" the document search efforts.

62. By the same token, as demonstrated above, Ms. Jones was not tasked to gather documents for the ATIP search in May 2020, nor initially notified to preserve documents in April 2020. The panel hearing the Application should therefore have before it the communications between Ms. Jones and Ms. Cuber that discouraged Ms. Cuber from conducting the necessary search in Ms. Jones's Outlook account, whether on the server or on the local device(s), before Ms. Jones departed or thereafter.

63. Ultimately, it is for the Court to determine whether the exchanges between Ms. Cuber and Ms. Jones are relevant, and whether the email chain submitted by the AGC to assert privilege was the only exchange between Ms. Jones and Ms. Cuber.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 30, 2022

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

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[44] Cuber Cross-Examination, Q146-Q147 and Q389-Q390 (emphasis added) [MR, Tab 9, pp. 331-332 and 393-394].

[45] Guindon Affidavit, para. 18 [RR, Tab 3, p. 54].

LIST OF AUTHORITIES

Case Law

Doctrine

2006 FC 222, 2006 CF 222
Federal Court

Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)

2006 CarswellNat 433, 2006 CarswellNat 4610, 2006 FC 222,
2006 CF 222, [2006] F.C.J. No. 294, 154 A.C.W.S. (3d) 565

Association des Crabiers Acadiens, duly incorporated under the laws of the province of New Brunswick, Association des Crabiers de la Baie, an association duly registered under the laws of the province of Quebec and Association des Crabiers Gaspésiens, an association duly registered under the laws of the province of Quebec, Applicants and Attorney General of Canada, Respondent

Harrington J.

Heard: February 13, 2006
Judgment: February 17, 2006
Docket: T-775-05

Counsel: Brigitte Sivret, pour demanderesse
Dominique Gallant, Kim Duggan, pour défendeur

***Harrington J.*:**

1. Introduction

1 This motion is made in connection with an application for judicial review. The motion is seeking an order directing the defendant (respondent) to provide the plaintiffs (applicants) with additional documents. Pursuant to Rule 317, the applicants are seeking the filing of two documents and any changes to the said documents in the possession of the federal entity which took the impugned decision. The respondent maintained that the documents are not relevant since they were not before the decision-maker. Further, he noted that these documents were created only after the decision was rendered.

2 The applicants are seeking judicial review of the decision by the Minister of Fisheries and Oceans made on or about April 4, 2005 to issue a snow crab fishing permit authorizing the taking of a quota of 480 metric tons of snow crabs to the Association des pêcheurs de poissons de fond

acadiens (APPFA) in exchange for a payment to the Department of Fisheries and Oceans (DFO) of $1,900,000 to enable the DFO to finance its activities.

3 The decision, at least as communicated to the applicants by fax on April 4, 2005, reads as follows:

> [TRANSLATION]
>
> Further to call for tenders on project F4697-040016, the bid received from the Association des Pêcheurs de Poissons de Fond Acadiens has been accepted by the Department.

4 As to the application for judicial review, the applicants (that is, the plaintiffs) are seeking a declaration that the Minister did not have jurisdiction and/or exceeded his jurisdiction when he made the decision to issue a snow crab fishing permit to the APPFA in exchange for the sum of $1,900,000 to be used to finance the DFO's activities; a declaration that the snow crab fishing permit issued to the APPFA is invalid since the Minister did not have the power to issue a fishing permit in exchange for the sum of $1,900,000 to finance the DFO's activities; a declaration that the Minister did not have the power to delegate and/or exceeded his power to delegate his discretionary authority to issue fishing permits and his duty to manage fisheries efficiently to the APPFA; and an order quashing the Minister's decision of April 4, 2005 to issue a snow crab fishing permit to the APPFA authorizing the taking of 480 mt.

5 As to the motion at bar, the applicants are seeking an order from this Court that the following documents be filed: a copy of the draft agreement concluded with APPFA in 2005 regarding the issuing of a fishing permit and the taking of 480 metric tons of snow crabs; a copy of the fishing permit issued to the APPFA for the 480 metric tons; and a copy of any changes to the aforesaid documents.

6 This case began when the [TRANSLATION] "project call for tenders", the closing date of which was March 23, 2005, was sent to the DFO, Finance and Material Management, in Moncton. Its primary purpose was, *inter alia*:

> [TRANSLATION]
>
> ... the purpose of improving fishing management in these zones and financing the additional activities of the Department. A quota not exceeding 480 metric tons of snow crabs was identified for the DFO's additional activities to improve the overall management of fishing in these zones. The promoter's financial obligations amount to $1,900,000.

7 The call for tenders was issued by Carole LeBlanc, contracting and procurement officer.

8 The fax of April 4, 2005 indicating that the APPFA bid [TRANSLATION] "has been accepted by the Department" was sent out by Monique Baker, Senior Advisor, Shellfish, with the DFO for the Gulf region.

9 Ms. Leblanc and Ms. Baker both signed affidavits regarding this case. Ms. Baker stated that the documents sought by the applicants existed, but the draft agreement with the APPFA was concluded on April 12, 2005 and the fishing permit issued on April 29, 2005.

10 Ms. LeBlanc, Ms. Baker and other individuals were members of the review committee. On March 30, 2005, Ms. LeBlanc sent a letter to J.B. Jones, General Manager of the Gulf region, recommending that the quota be awarded to the APPFA. On the same day, Francis R. Breau, Acting Regional General Manager, signed the approval on behalf of Mr. Jones.

2. Issues

A. Are the documents relevant?

B. If the documents are relevant, must they be filed despite the fact that they did not exist when the decision was made?

C. If the documents are relevant, must they be filed despite the fact that they were not before the decision-maker?

3. Analysis

11 The documents are clearly relevant in view of the decision challenged by this application for judicial review.

12 It does not much matter that the documents did not exist when the decision was made. The applicants were informed that the decision received from the APPFA had been approved by the Minister. As it is not only necessary to have a contract but a fishing licence for the contract to be enforceable, and in the case at bar the contract had been awarded, the Minister could not then argue that he could not provide the documents since the contract was not finalized. "Equity looks on as done that which ought to be done".

13 As to the fact that the documents were not before the decision-maker, the filing thereof cannot be avoided by failing to supply them to the decision-maker. As indicated in *Tremblay v. Canada (Attorney General)*, 2005 C.F. 339, [2005] F.C.J. No. 421 (F.C.), the issue is not only whether the documents were before the decision-maker but whether they should have been before him.

14 Irrespective of the time of creation of the documents, they are directly related to the decision nevertheless and in such circumstances cannot be ignored. The documents in question still flow directly from what was decided, whether on March 30 or April 4, 2005.

15 In general, an application for judicial review is based on the documentation before the original decision-maker. However, if it is not possible to decide the question, there are exceptions, for instance where the tribunal's authority is in issue. It will not suffice for the Minister to argue that the documents could have been obtained by an access to information application. As mentioned by Phelen J. in *Cooke v. Canada (Correctional Services)*, 2005 CF 712, [2005] F.C.J. No. 886 (F.C.), at paragraphs 22 and 23:

> ¶ 22 I reject any suggestion made by the Respondent that an applicant must use such indirect means as the *Access to Information Act* to secure materials in a tribunal's possession where the tribunal had failed to meet its obligations under Rule 318(1).
>
> ¶ 23 Since the material which is "relevant to an application" is material which may affect the decision that this Court may make; and, in this instance the Applicant clearly attacked the adequacy of the investigation, the material requested by the Applicant under Rule 317 should have been provided to him. (*CBC v. Paul*, [2001] F.C.J. No. 542, 2001 FCA 93).

16 In accordance with the analysis in *Gitxsan Treaty Society v. H.E.U.* (1999), 249 N.R. 37, [2000] 1 F.C. 135 (Fed. C.A.), I am of the view that the documents should be filed.

17 The applicants also sought an order varying an earlier order on deadlines to have a cross-examination postponed on account of circumstances beyond the parties' control, and a further deadline for filing their record pursuant to Rule 309. The respondent consented to the extension of time.

Order

THIS COURT ORDERS:

1. The motion is granted;

2. The respondent shall provide the applicants with the following documents:

   (a) a copy of the draft agreement concluded with the APPFA in 2005 regarding the issuance of a fishing permit and the taking of 480 metric tons of snow crabs;

   (b) a copy of the fishing permit issued to the APPFA regarding the 480 metric tons; and

   (c) a copy of any changes to the aforesaid documents;

3. The applicants have until April 24, 2006 to file their record;

4. The respondent has until May 30, 2006 to file his record;

5. The whole with costs.

2017 CAF 135, 2017 FCA 135
Federal Court of Appeal

Canada (Office of the Information Commissioner) v. Calian Ltd.

2017 CarswellNat 2793, 2017 CarswellNat 8738, 2017 CAF 135,
2017 FCA 135, 280 A.C.W.S. (3d) 415, 414 D.L.R. (4th) 165

ATTORNEY GENERAL OF CANADA (Appellant) and CALIAN LTD. AND INFORMATION COMMISSIONER OF CANADA (Respondents)

INFORMATION COMMISSIONER OF CANADA (Appellant) and
CALIAN LTD. AND ATTORNEY GENERAL OF CANADA (Respondents)

Yves de Montigny, Mary J.L. Gleason, J. Woods JJ.A.

Heard: January 25, 2017
Judgment: June 22, 2017
Docket: A-20-16, A-31-16

Proceedings: reversing in part *Calian Ltd. v. Canada (Attorney General)* (2015), 2015 FC 1392, 2015 CarswellNat 7513, Henry S. Brown J. (F.C.)

Counsel: Kirk G. Shannon, for Attorney General of Canada
Nicholas McHaffie, for Calian Ltd.
Richard G. Dearden, Patricia Boyd, for Information Commissioner of Canada

***Yves de Montigny J.A.*:**

1 These appeals raise the interesting question of the interplay between contractual law and the statutory regime governing access to information in Canada. More particularly, the ultimate result of these appeals turns on the impact of a disclosure clause on the third party information exemptions found under the Access to Information Act, R.S.C. 1985, c. A-1 (the Act). For the reasons that follow, I am of the view that the clause in question constitutes consent to disclosure to the public of otherwise exempt information under the Act. However, such consent is not determinative of whether the information in question must be disclosed. I would therefore grant the appeals in part, but would make no award of costs as success on the various arguments was divided.

I. Background

2 The respondent Calian Ltd. (Calian) is an Ottawa-based company that provides flexible and short-term personnel services in the engineering, information technology, health care, and telecommunications sectors. A large portion of its business activities arises from the procurement of placement services to the federal government. As such, it routinely participates in federal procurement processes.

3 In 2009, Public Works and Government Services Canada (PWGSC, represented by the Attorney General of Canada) launched a tendering process by way of a Request for Standing Offer (RFSO) for the provision of research assistance to the Royal Military College of Canada (RMC or the College). RMC is mandated to equip the Department of National Defence (DND) and a number of other governmental departments with research and other forms of support. As the College's funding to hire research assistants is linked to federal grants obtained by professors, it utilizes the federal procurement process every five years to fulfill its various and complex personnel needs.

4 The purpose of the 2009 RFSO was framed as seeking to assist RMC in the carrying out of its research and development activities within three Faculties (Arts, Engineering and Science) and two Divisions (Graduate Studies & Research and Continuing Studies). The RFSO required that bidding parties include detailed personnel rates, in the form of "firm all-inclusive hourly rates", for approximately 100 different categories of personnel, along with any annual adjustments to those personnel rates over the five-year life of the contract (see RFSO, Exhibit "A" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at pp. 1849 and following).

5 The RFSO also specified that PWGSC's 2005 (25/05/07) General Conditions - Standing Offers - Goods and Services (the General Conditions) form a part of the Standing Offer. These General Conditions require that bidding parties agree to the disclosure of their standing offer unit prices or rates pursuant to the following clause (the Disclosure Clause):

> The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.
>
> Disclosure Clause, Exhibit "E" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at p. 1870. See also Clause 3.1 of the RFSO, Exhibit "A" to the Affidavit of Louise Kelly sworn May 30, 2014, Appeal Book, Vol. 8, Tab 20 at p. 1833.

6 Calian, which had successfully tendered bids in 1997 and 2002 for a similar type of work for RMC, was again successful in its 2009 bid to PWGSC. On November 30, 2009, standing offer W0046-080001/001/TOR (the 2010-14 Standing Offer) was issued to Calian, thereby making it the exclusive supplier of specialized research personnel to RMC for the period of January 1, 2010 to December 31, 2014, with the possibility of extension by PWGSC for a further one-year period.

7 On November 1, 2013, PWGSC received a request under the Act for a copy of "all contracts, contracts amendments, correspondences and e-mails" relating to the contract awarded to Calian for the period of 2009/11/30 to 2013/03/01 (2013 Access Request, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). Pursuant to subsection 27(1) of the Act, PWGSC consulted Calian before responding to the request regarding the disclosure of certain information. In its correspondence, PWGSC invited Calian to make representations as to why the records subject to the 2013 Access Request should not be disclosed. PWGSC also notified Calian that the disclosure of information clause incorporated in the 2010-2014 Standing Offer prevented it from treating its unit prices and personnel rates as confidential third party information.

8 In addition to requesting that any information regarding its employees and its own procurement and GST numbers be redacted, Calian took the position that the information contained in its personnel rates was proprietary in nature, and thus exempt from disclosure under paragraph 20(1)(b) of the Act. Indeed, in earlier versions of the same RFSO, the Crown had specified "base rates" for different categories of personnel, to which bidders would add their mark-ups and quote an all-inclusive, "fully-burdened rate" (see Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1415, para. 19). Departing from that practice, the 2009 RFSO did not include the base rates for each labour category, thus requiring bidders to develop competitive pricing without any guidance as to what would constitute an acceptable level of compensation for each category of research contractors. Calian argued that the risk of harm arising from the disclosure of the billing rates found in its 2009 bid was significantly increased, as it had to rely on its extensive and proprietary skills in managing personnel services to develop competitive pricing. Calian further submitted that for the purpose of paragraph 20(1)(c) of the Act, disclosure of its rates would result in substantial and important material financial loss.

9 As for the Disclosure Clause, Calian responded that it did not apply to its personnel rates, mainly for three reasons. First, it argued that the clause had been developed to only apply to material related values (i.e. base rates developed by the Crown for each labour category, as found in previous standing offers), and not to the fully-burdened rates included in the 2009 bid. Second, Calian put forward the past treatment of the Disclosure Clause by DND, the previous contracting authority for the RMC research assistance bid, as evidence of the clause's narrow meaning. It noted that, based on this past experience with the federal procurement process, it understood the Disclosure Clause as constituting consent to disclosure to other government departments, and not as consent to disclosure to the public. Third, and given the modalities of this specific RFSO (i.e. awarding the successful bid to only one supplier, compared to the more common situation where there are multiple vendors), Calian submitted that disclosure in this specific context would cause irreparable harm from a competitive standpoint, thus heightening the need for a restrictive reading of the clause.

10 On January 3, 2014, PWGSC communicated its decision under section 28 of the Act to redact only those portions of the 2010-14 Standing Offer referencing (1) Calian's employee names, titles, extensions, cell phone numbers and/or personal phones/fax numbers; (2) Calian's procurement business number; and (3) Calian's GST registration number. PWGSC rejected Calian's request to redact the personnel rates, stating that "[...] as the disclosure of information clause has already been incorporated in the Standing Offer, the unit prices and rates cannot be considered to be confidential third party information that would prejudice your competitive position and we must therefore release them" (see Section 28 Decision, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). While the reasons are not explicit in this respect, it can be inferred that PWGSC considered the Disclosure Clause as an outright bar or waiver from claiming confidentiality under subsection 20(1) of the Act.

11 As a result of PWGSC's section 28 decision, Calian filed the first judicial review application underlying the current appeals pursuant to section 44 of the Act. During the course of this application, it became clear that additional records responsive to the request had been identified but not included in the original third party consultation. PWGSC therefore conducted further consultations with Calian with respect to these additional records, which ultimately led to the same result regarding disclosure of the personnel rates. Calian applied for judicial review of that second decision, and the two applications were consolidated and ordered to be heard together by order dated September 18, 2014. A decision was made by Justice Brown of the Federal Court (the Judge) on December 18, 2015 (reported as *Calian Ltd. v. Canada (Attorney General)*, 2015 FC 1392 (F.C.)).

II. The Federal Court's decision

12 The Judge first identified the applicable standard of review as being that of correctness. Relying on *Merck Frosst Canada Ltée c. Canada (Ministre de la Santé)*, 2012 SCC 3 (S.C.C.) at para. 53, [2012] 1 S.C.R. 23 (S.C.C.) [*Merck*], he found that there are no discretionary decisions under subsection 20(1) of the Act, and that the application of the exemptions to the requested records must be reviewed without any deference to the decision-maker.

13 The Judge then made a number of factual findings that bore on his interpretation of the relevant statutory provisions. He started off by noting that the personnel rates were much more "business-sensitive" and "confidential" in nature than those included in previous RFSOs, given the absence of "base rates" for each labour category in the 2009 RFSO (see Reasons at para. 47). This meant that bidders had to develop pricing from the ground up. He also noted that pricing was the most important factor weighing in the decision to award the 2009 RFSO, constituting 60% of the assessment (Reasons at para. 41).

14 As for the history of the parties' dealings, the Judge found that it was both of the parties' intention to treat and consider the personnel rates as exempt. His conclusion on this point rested

primarily on the treatment of an access request filed in 2009 in relation to one of Calian's previous successful bids (the 2003-09 Standing Offer) which resulted in an exclusion from disclosure of the "fully-burdened" unit prices pursuant to paragraph 20(1)(c) and subsection 24(1) of the Act. In comparing the 2003-09 Standing Offer with the one currently at issue, the Judge noted that both involved the same government contracting party, namely, the Crown (despite the change in contract administration from DND to PWGSC); both covered the same subject matter, being the supply of specialized consultancy services to RMC; and both contained a similarly worded disclosure clause. He thus found no basis upon which to treat the 2013 Access Request differently than the one submitted in 2009. If anything, he noted that there were more important confidentiality concerns regarding the information contained in the 2010-14 Standing Offer (given the nature of the personnel rates and the structure of the contract now being silent on the "base rates" for each labour category) which gave rise to a heightened expectation that disclosure would reasonably result in material financial loss and/or prejudice to Calian's competitive edge (Reasons at paras. 49-54).

15 In light of the above findings, the Judge concluded that disclosure of the personnel rates would result in prejudice or harm to Calian's competitive position under paragraph 20(1)(c) of the Act. He determined that such disclosure would allow competitors to "spring board" off the skills and experience of Calian, effectively harming its ability to submit a winning bid, and that the risk of undermining Calian's competitive advantage was more than a mere possibility (Reasons at para. 61). The Judge based this finding on the fact that, given the tendering cycle in the provision of personnel services to RMC, Calian had every reason to believe that another bidding process would soon be launched (Reasons at para. 59).

16 On the issue of the impact of the Disclosure Clause, the Judge found that it was but one factor to be taken into consideration when determining what "could reasonably be expected" under paragraph 20(1)(c) of the Act, in conjunction with, for instance, the history of the dealings between the parties. He accepted the evidence of Calian to the effect that its understanding of the clause was shaped by years of experience and discussions with several governmental entities, and that its inclusion was meant to allow the disclosure of rates between various government departments. As the Crown did not file any evidence on its understanding of the Disclosure Clause, the Judge found that the parties reasonably intended the clause to permit disclosure of the personnel rates only to other governmental departments. He thus exempted disclosure of the personnel rates in accordance with paragraph 20(1)(c) of the Act (Reasons at paras. 65-78).

17 The Judge also found that the personnel rates were exempt from disclosure under paragraph 20(1)(d) of the Act, determining that such information could reasonably be expected to interfere with contractual or other negotiations of a third party. Relying on the test for interference set out in *Burnbrae Farms Ltd. v. Canadian Food Inspection Agency*, 2014 FC 957 (F.C.) [*Burnbrae*], according to which it must be more than speculative and may not merely consist in the heightening of competition, he concluded that the risk of Calian's customers seeking to improve

their negotiating position following the disclosure of its rates was probable. He also determined that this would put pressure on Calian to pay its consultants at higher rates. For the same reasons outlined above, the Judge did not see in the Disclosure Clause an outright bar to claiming the exemption under paragraph 20(1)(d). Again, he determined that the Disclosure Clause had to be read together with all of the other relevant factors in order to assess whether exemption from disclosure would be warranted in the circumstances. He thus exempted the personnel rates on the additional ground of paragraph 20(1)(d) of the Act (Reasons at paras. 79-88).

18 Finally, the Judge also found that the decisions should be set aside, independently of his findings related to paragraphs 20(1)(c) and 20(1)(d), on the basis that PWGSC failed to consider its discretion to refuse to disclose otherwise exempt information under subsection 20(5) of the Act. Having found that PWGSC missed a critical step in its reasons that could not be cured, the Judge decided to quash the decisions on this additional basis (Reasons at paras. 89-101). On the other hand, the Judge determined that neither paragraph 20(1)(b), nor section 18 of the Act, could be relied upon by Calian to support its request for redaction (Reasons at paras. 102-107).

III. Issues

19 The Attorney General of Canada (File No. A-20-16) and the Information Commissioner of Canada (File No. A-31-16) (the Commissioner) both appealed the decision of the Judge. By Order dated April 6, 2016, the files were consolidated and ordered to be heard together.

20 The issues in both appeals overlap considerably, and different formulations are used by the parties to address similar questions. In essence, the issues to be decided by this Court boil down to the following questions:

> A. Are the personnel rates exempt from disclosure under paragraphs 20(1)(b), 20(1)(c), and/or 20(1)(*d*) of the Act?
>
> B. What is the proper interpretation of the Disclosure Clause?
>
> C. How does the Disclosure Clause interact with the scheme of the Act?

21 As will soon become apparent, I am of the view that both PWGSC and the Federal Court erred in their reading of the Disclosure Clause. PWGSC erred in finding that it constitutes waiver to treat the information as exempt and the Federal Court erred in finding that the Disclosure Clause provided a limited consent. In my view, the proper course of action would have been to first determine whether the information sought to be protected would otherwise be exempt under the Act. Such will be the question I answer under issue A. On a proper interpretation of the Disclosure Clause as consent to disclosure to the public of otherwise exempt information, which I will canvass under issue B, it must be decided whether there are any circumstances militating against disclosure, notwithstanding consent to such a clause. This aspect of my analysis, which will be dealt with

under issue C, pertains to the discretion given to the head of the government institution to refuse to disclose information which would be treated as exempt had it not been for the presence of the Disclosure Clause. My findings on this front will bear on the appropriate remedy to be granted in the current appeals.

IV. The relevant legislative provisions

22 The purpose of the Act is to extend the right of access to information under government control, subject only to limited and specific exceptions set out in the Act (s. 2(1)). As stated by Justice La Forest in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) at para. 61, (1997), 148 D.L.R. (4th) 385 (S.C.C.) (dissenting but not on this point), "[t]he overarching purpose of access to information legislation [...] is to facilitate democracy", first by ensuring "that citizens have the information required to participate meaningfully in the democratic process", and second "that politicians and bureaucrats remain accountable to the citizenry". Consistent with that goal, the head of a government institution must disclose, where a request is made for access to a record, any portion of that record that does not contain information that warrants exemption and that can reasonably be severed from information that calls for being withheld (s. 25 of the Act).

23 One of the exceptions to the disclosure principle relates to third party information. The relevant excerpts of subsection 20(1) provide as follows:

> 20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> . . .
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant:

. . .

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la *Loi sur la gestion des urgences* et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

24 Even when such exemptions apply, the third party may consent to the disclosure, and where such consent is given, the head of the government institution possesses discretion as to disclosure:

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(5) Le responsable d'une institution fédérale peut communiquer tout document contenant les renseignements visés au paragraphe (1) si le tiers que les renseignements concernent y consent.

25 The Act also requires that notice be given to third parties if the head of a government institution intends to disclose a record that the head has reason to believe might contain information described in paragraphs 20(1)(b), 20(1)(b.1), 20(1)(c) or 20(1)(d) (see subs. 27(1) of the Act). The third party to whom such a notice is given may then make representations, within 20 days after the notice is given, as to why the record or parts thereof should not be disclosed (subs. 28(1)). If the head of the government institution nevertheless decides to disclose the record or part thereof, the third party may apply to the Federal Court for review of the matter (subs. 44(1)).

V. The standard of review

26 The parties are all in agreement that appellate review in the context of the Act must be conducted in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*]. This is consistent with the position taken in *Merck*, where the Supreme Court stated that "[t]he decision of the judge conducting a review under the Act, which will often have a significant factual component, is subject to appellate review in accordance with the principles set out in Housen [...]" (at para. 54). Accordingly, the focus of this Court's review is on the decision of the Federal Court, and the standard is that of correctness on questions of law, and of palpable and overriding error on findings of fact and of mixed fact and law. Where a question of mixed fact and law contains an extricable legal question, the standard of review will also be that of correctness.

27 The impact, if any, of the subsequent decision rendered by the Supreme Court in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at paras. 45-47, [2013] 2 S.C.R. 559 (S.C.C.), is better left for another day. While this Court is obviously not bound by the parties' agreement as to the applicable standard of review, the argument should nevertheless be fully canvassed before setting aside an established line of cases in the absence of clear indication from the highest court. Not only have such discussions not taken place here, but it would in any event be of an academic nature in light of my conclusion that the Judge's reasons with respect to the first question withstand scrutiny on the most exacting standard of review.

28 Indeed, I am of the view that the Judge did not commit a reviewable error in determining that the decision to disclose or not to disclose must be judicially reviewed on the correctness standard. As the Supreme Court properly noted in *Merck*, there is no discretion involved when the institutional head of a government institution determines whether a record can be disclosed or not (at para. 53). Pursuant to the opening words of subsection 20(1) of the Act, a record "shall" not be disclosed if it contains the type of information described in paragraphs (*a*) to (*d*). As a result, the reviewing court must examine whether the exemptions to the general principle of disclosure have been applied correctly to the requested records:

> [...] It follows that when a third party [...] requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue [...]
>
> *Merck* at para. 53

29 The Judge was therefore called upon to determine whether Calian's personnel rates were correctly found to fall outside the exemptions from disclosure under the Act. This is not to say that there is no factual component in such an assessment. As recognized by the Supreme Court in *Merck*, the relevant legal principles cannot be applied in a contextual vacuum and must always be considered in light of the evidence disclosed in each case (at para. 150). With this *caveat* in

mind, I shall therefore proceed to determine whether the Judge erred in respect of the first question identified above.

30 As for the second and third questions, being ones of contractual interpretation and of the interplay between the clause and the Act, the applicable standard of review is that of correctness. The Supreme Court of Canada recently held in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53S.C.C. at para. 50, [2014] 2 S.C.R. 633 (S.C.C.) [*Sattva*] that questions of contractual interpretation, being so intricately connected to the facts of any given case, will generally be construed as questions of mixed fact and law. Absent a showing of an "extricable question of law", such a characterization considerably limits the scope of appellate intervention, and is a clear call for deference on these types of questions. In the administrative context, the reasonableness standard of review will thus generally be said to apply to such questions. In the appellate context, it will be that of overriding and palpable error.

31 Appellate courts have wrestled, in the period following the *Sattva* decision, with identifying the circumstances under which the interpretation of a contract will properly be said to involve an "extricable question of law", thus attracting a more scrutinized form of review by way of the correctness standard. One line of recent cases has held that a lower threshold of judicial intervention should apply to standard form contracts (see for instance *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663 (Ont. C.A.) [*MacDonald*]; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, 386 B.C.A.C. 82 (B.C. C.A.); *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121, 386 D.L.R. (4th) 482 (Alta. C.A.) [*Ledcor*, ABCA]). The Supreme Court recently endorsed this approach (see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.) [*Ledcor*, SCC], reversing *Ledcor*, ABCA (though affirming, in part, the Court of Appeal's analytical framework)).

32 The Supreme Court came to that conclusion for two reasons. First, it held that the factual matrix is much less relevant to the interpretation of a standard form contract than it generally is for contractual interpretation. As the Ontario Court of Appeal put it in *MacDonald*, at paragraph 33:

> The importance of the factual matrix is far less significant, if at all, in the context of a standard form contract or contract of adhesion where the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave- it proposition. Any search for the intention of the parties in the surrounding circumstances of these contracts "is merely a legal fiction". [references omitted]

33 Second, unlike the majority of contractual interpretation cases where the decision has no impact beyond the interests of the parties to the dispute, a court's interpretation of a specialized standard form contract will have a wide impact with significant precedential value. Consistency

is essential where numerous parties will be impacted by shifting interpretations of a particular contract clause:

> [...] It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts - "ensuring the consistency of the law" (*Sattva*, at para 51) - is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.
>
> *Ledcor*, SCC at para. 39

34 In the case at bar, the terms of the Disclosure Clause, and indeed of the procurement contract as a whole, were clearly not negotiated by the parties (Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1419, para. 33). Calian does not dispute that the General Conditions were in fact a standard form contract.

35 The Attorney General further argues that this Court's interpretation of the Disclosure Clause will have an impact beyond the interests of the parties to the current dispute, as the General Conditions are standard form terms which apply to all standing offers for goods and services and have been used for more than 10 years. In fact, it appears that the clause at issue in the present case has been the subject of repeated adjudication (see *Stenotran Services v. Canada (Minister of Public Works & Government Services)* (2000), 186 F.T.R. 134 (Fed. T.D.) [*Stenotran*]; *Top Aces Consulting Inc. v. Canada (Minister of National Defence)*, 2011 FC 641, 391 F.T.R. 14 (F.C.) [Top Aces], affirmed 2012 FCA 75430 N.R. 260 (F.C.A.)). Counsel for the Attorney General also notified this Court that a stay has been granted in another matter pending the resolution of this case, given that it bears on similar legal issues as the ones involved in the current appeals (*The Typhon Group Ltd. et al. v. Attorney General of Canada*, File No. T-1246-15, Order of Prothonotary Aalto issued December 14, 2015).

36 Counsel for Calian, however, submits that there is no precedential value in interpreting the meaning of the Disclosure Clause, as this question is but one among many other relevant factors in determining whether a record is exempt from disclosure under the Act. Calian further opines that the present case involves a meaningful factual matrix that is specific to the parties and that sheds particular light on how the contract should be interpreted. Counsel relies for that proposition on the Supreme Court's cautioning in *Ledcor*, SCC that the interpretation of a standard form contract may call for deferential review on appeal in some circumstances, notably when "the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation" (at para. 48).

37 Calian's first argument is without merit. The interplay between the Disclosure Clause and the various exemptions to disclosure found in subsection 20(1) of the Act, and whether the Disclosure Clause operates as a total bar to the exemptions or must be construed as but one factor in assessing the application of paragraphs 20(1)(b), 20(1)(c) and (d), is a pure question of law. Moreover,

these questions are separate and distinct from the contractual interpretation issue. Therefore, no deference is owed to the Judge.

38 Calian's second argument is at first sight more appealing but must nevertheless similarly be rejected. The subjective intention of one party to a contract cannot be relied upon to interpret the meaning of a contract, particularly where a standard form contract is involved as this would be contrary to the principles of contractual interpretation and antithetical to the need for certainty, consistency and predictability in the interpretation of clauses that are widely used in a particular field of activity. This is particularly true in a case like the present one, where a number of reasons could explain why a different government department decided not to disclose the information requested in a previous access to information request. At the end of the day, to quote from Justice Iacobucci in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 37, (1997), 144 D.L.R. (4th) 1 (S.C.C.) (relied upon by the majority in *Ledcor*, SCC at para. 48), it seems to me that the dispute is first and foremost over a "general proposition", and not about "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future". Accordingly, I am of the view that the interpretation of the Disclosure Clause and how it interacts with the scheme of the Act involve extricable questions of law, and thus the standard of review applicable to the second and third issues identified above must be that of correctness, pursuant to the *Housen* appellate standard of review.

VI. Analysis

A. Are the personnel rates exempt from disclosure under paragraphs 20(1)(b), 20(1)(c), and/or 20(1)(d) of the Act?

39 The general rule of disclosure enshrined in the Act is subject to a number of exemptions. Of relevance to this appeal are various exemptions relating to third party confidential commercial information set out in subsection 20(1). Of particular relevance are paragraphs 20(1)(b), 20(1)(c) and 20(1)(d), which have been reproduced at paragraph 23 of these reasons.

40 There is no dispute between the parties as to the legal principles underlying the application of paragraph 20(1)(c). Indeed, the appellant Commissioner acknowledges that the Judge correctly cited the legal test for determining the applicability of paragraph 20(1)(c). Relying on *Merck*, the Judge set out the following principles:

- The onus is on the applicant to establish its entitlement to the exemption, which depends on the nature of the material and the particular context of the case;

- A third party claiming an exemption under paragraph 20(1)(c) must show that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, based on evidence provided by the party opposing the disclosure, but need not prove on a balance of probabilities that disclosure will in fact result in such harm;

• The types of harm covered by paragraph 20(1)(c) are disjunctive (financial loss to the third party or gain to its competitors, on the one hand, and competitive prejudice on the other).

Reasons at para. 38

41 Counsel for the Commissioner submitted that the Judge failed to properly apply these principles, and erred in finding that Calian's evidence was sufficient to establish a reasonable expectation of probable harm under paragraph 20(1)(c). Relying on a number of cases from this Court and from the Federal Court, counsel argued that the evidentiary burden required to claim the exemption provided by paragraph 20(1)(c) cannot be satisfied by affidavit evidence that simply affirms that disclosure would cause the type of harm described in that provision (*Merck* at para. 227, affirming 2009 FCA 166 (F.C.A.) at paras. 84-86, (2009), 400 N.R. 1 (F.C.A.), citing *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (Fed. T.D.) at para. 43, (1994), 49 A.C.W.S. (3d) 211 (Fed. T.D.). See also *Brainhunter (Ottawa) Inc. v. Canada (Attorney General)*, 2009 FC 1172 (F.C.) at para. 32, (2009), 182 A.C.W.S. (3d) 244 (F.C.); *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)*, 2007 FC 1091 (F.C.) at para. 27, (2007), 62 C.P.R. (4th) 337 (F.C.); *Astrazeneca Canada Inc. v. Health Canada*, 2005 FC 1451 (F.C.) at para. 90, [2005] F.C.J. No. 1775 (F.C.), affirmed 2006 FCA 241, 353 N.R. 84 (F.C.A.); *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2003 FCA 257 (Fed.)C.A. at para. 20, 2003305 N.R. 317 (Fed. C.A.); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works & Government Services)*, 2003 FCT 254 (Fed. T.D.) at para. 21, (2003), 121 A.C.W.S. (3d) 397 (Fed. T.D.), affirmed 2004 FCA 214 (F.C.A.) at para. 18, (2004), 322 N.R. 388 (F.C.A.); *Viandes du Breton Inc. c. Canada (Ministère de l'Agriculture & de l'Agroalimentaire)* (2000), 198 F.T.R. 233 (Fed. T.D.) at para. 9, (2000), 107 A.C.W.S. (3d) 3 (Fed. T.D.); *Canadian Broadcasting Corp. v. Canada (National Capital Commission)* (1998), 147 F.T.R. 264 (Fed. T.D.) at paras. 25-27, [1998] F.C.J. No. 676 (Fed. T.D.) [*Canadian Broadcasting Corp.*]).

42 In my view, the Judge correctly applied the *Merck* framework and committed no reviewable error in concluding, on the basis of the evidence that was before him, that releasing Calian's detailed personnel rates would give its competitors a "free ride" and "tilt the level playing field" against Calian (Reasons at para. 58). Contrary to the position taken by the Commissioner, the Judge did not merely rely on bald and unsupported assertions found in the affidavit of Calian's Vice President of Operations (Mr. Jerry Johnston). He came to the conclusion, based on his own assessment, that the personnel rates individually and in the aggregate were the most significant factor in the success of Calian's bid and were crucial to Calian's competitive position (Reasons at para. 41). He also accepted Mr. Johnston's evidence that the development of the personnel rates was effected through the confidential and proprietary salary and other information that Calian directly obtained from, or negotiated with, the numerous potential providers of the required specialist labour services, in addition to its own business analyses of overhead, other costs, and profit (Reasons at para. 45). While the absence of cross-examination and of contradictory evidence is not conclusive one way

or another, the Judge could certainly take these factors into consideration to determine whether Calian had met its burden of establishing a reasonable expectation of probable harm.

43 That being said, the Judge erred in taking the history of past dealings between the parties as a factor to be considered for the purposes of assessing whether the information sought to be disclosed could reasonably be expected to result in material financial loss or gain to Calian or to prejudice its competitive position. In that respect, the Judge wrote (at para. 51):

> While the Respondents [appellants before this Court] disagree, in my view, the inference arising from the parties' past dealings and course of conduct is compelling in terms of what is asked for under paragraph 20(1)(*c*) of the *Act*. In 2009, the Crown recognized that disclosure of the fully burdened unit prices could reasonably be expected to result in material financial loss to the Applicant, could reasonably be expected to result in material financial gain to a competitor, or could reasonably be expected to prejudice the Applicant's competitive position. While we know that paragraph 20(1)(*c*) was relied upon in 2009, we do not know which part(s) of it the head of the institution actually based his or her decision on. But we do know the head of the institution, as required by paragraph 20(1)(*c*), redacted the fully burdened unit price information from the disclosure and did so notwithstanding his or her consideration of the same Disclosure Clause now raised by the Respondents [appellants before this Court].

44 I agree with the Commissioner that such evidence should not have been considered by the Judge when deciding whether the paragraph 20(1)(c) exemption applied to the information at issue in these appeals. First of all, we do not know why the head of the government institution redacted the information relating to the personnel rates in 2009. Secondly, the Judge assumed that the previous decision made by DND was correct and binding. Finally, and more importantly, the evidence of harm flowing from disclosure can only be determined on the basis of the specific records at issue in an access request; such an assessment is fact specific and turns on the circumstances of each case.

45 Despite this flaw in his reasoning, it was open to the Judge to come to the conclusion that there was sufficient evidence before him to meet the *Merck* standard. There was no need for Calian to provide specific evidence about its competitors or the ability of these competitors to compete for comparable future service contracts in response to future requests for standing offers. Neither the Act, nor the case law, exact such a high standard.

46 The Supreme Court made it clear in *Merck* that "[i]t is for the reviewing judge to decide whether the evidence shows that disclosure could reasonably be expected to result in harm of the nature specified in s. 20(1)(c)" (at para. 211). The Supreme Court went on to say that disclosure of information "that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements of s. 20(1)(c)" (at para. 219). This is precisely what the Judge found, on the basis of "broadly-

sourced" evidence that he characterized as reliable and credible from a "very senior officer" of Calian (Reasons at paras. 74 and 59). These findings were available to him, and I see no basis upon which to interfere with his conclusion.

47 The same is true for the exemption provided by paragraph 20(1)(d). Once again, the Judge correctly identified the applicable principles and made it clear that the obstruction or interference with contractual or other negotiations of a third party "must be probable and not merely speculative" (Reasons at para. 80). He also accepted that evidence of heightened competition or increased competitive pressure is not sufficient to establish that the harm described in paragraph 20(1)(d) can reasonably be expected to occur. These principles have been consistently applied by the Federal Court, and I see no reason to depart from them (see *Burnbrae* at paras. 124-125; *Oceans Ltd. v. Canada-Newfoundland and Labrador (Offshore Petroleum Board)*, 2009 FC 974 (F.C.) at para. 64, 2009356 F.T.R. 106 (Eng.)(F.C.); *131 Queen Street Ltd. v. Canada (Attorney General)*, 2007 FC 347 (F.C.) at paras. 42-43, 2007334 F.T.R. 298 (Eng.)(F.C.); *Canada Post Corp. v. Canada (National Capital Commission)*, 2002 FCT 700 (Fed. T.D.) at para. 18, (2002), 115 A.C.W.S. (3d) 353 (Fed. T.D.); *Canadian Broadcasting Corp.* at paras. 28-29; *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (Fed. T.D.) at para. 10, (1994), 47 A.C.W.S. (3d) 898 (Fed. T.D.)).

48 Applying these principles, the Judge concluded that it was probable that two forms of pressure, both working against Calian, were at play and risked negatively impacting negotiations with both its employees and potential suppliers, separately and in combination (Reasons at para. 83). Specifically, the Judge found that if Calian's personnel rates, and in particular, the precise micro-level unit rates, were disclosed, its other customers, who are currently paying more, would probably seek to pay less, and its specialized consultants would probably demand higher rates of remuneration (Reasons at para. 81).

49 Counsel for the Commissioner objected to the Judge's assessment and argued that Calian offered no specific evidence of any actual or ongoing negotiations with other customers or regarding the identity of said customers. The Commissioner further noted that there was also no evidence regarding the bargaining strength of Calian's current or prospective employees or the likelihood of these individuals insisting on higher pay rates should Calian's personnel rates be disclosed.

50 For many of the same reasons spelled out earlier in the context of paragraph 20(1)(c), I find that the interference with contractual or other negotiations that would result from the disclosure is not merely speculative but rests on cogent, credible and reliable evidence. As noted by the Judge, Mr. Johnston spoke both from his many years of experience and for others in his company with whom he had consulted. His experience with Calian goes back 25 years, and his credibility was not challenged by the appellants. There is every reason to believe that the risks Mr. Johnston alluded to in his affidavit were heightened given the upcoming tender. Having carefully considered the case

law marshalled by the appellants in support of their argument, I have not been convinced that the level of specificity that they have insisted upon to establish a reasonable expectation of probable harm is warranted. As frequently mentioned in those cases, there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable. Accordingly, it was open to the Judge to find that Calian could rely on the paragraph 20(1)(d) exemption to request the redaction of its personnel rates.

51 Finally, I see no reason to vary the Judge's finding with respect to paragraph 20(1)(b). The Judge correctly found that to claim the exemption under that provision, an applicant must meet the four-part test outlined in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453 (Fed. T.D.) at para. 34, (1989), 16 A.C.W.S. (3d) 45 (Fed. T.D.), as summarized in *St. Joseph Corp. v. Canada (Public Works & Government Services)*, 2002 FCT 274 (Fed. T.D.) at para. 41, (2002), 112 A.C.W.S. (3d) 812 (Fed. T.D.):

> 1. financial, commercial, scientific or technical information as those terms are commonly understood;
>
> 2. confidential in its nature, according to an objective standard which takes into account the content of the information, its purposes and the conditions under which it was prepared and communicated;
>
> 3. supplied to a government institution by a third party; and
>
> 4. treated consistently in a confidential manner by the third party.

52 The Judge found that the first and third parts of the test were met, but not the second and fourth, since Calian agreed to some type of disclosure, albeit limited in scope. In other words, Calian was unable to meet the requirement that the information be communicated with a reasonable expectation of confidentiality since the personnel rates, though confidential in nature, were both prepared and communicated under an understanding of the Disclosure Clause which allowed, in Calian's view, disclosure to other government departments.

53 Calian submitted that agreement to disclosure of information to other departments within government does not constitute an outright waiver of confidentiality, as it is perfectly possible for numerous government departments to have a party's confidential information while maintaining the confidentiality of that information *vis-à-vis* the public. Given my interpretation of the Disclosure Clause, which, as will be more fully explained below, does not expressly nor impliedly limit disclosure of the personnel rates to other government institutions, there is no need to address Calian's submissions on this point.

54 Having found that the Judge committed no reviewable error for the purposes of issue A, I am therefore in agreement with the Judge that PWGSC erred in determining that the information requested could not be treated as third party exempt information under the Act.

B. What is the proper interpretation of the Disclosure Clause?

55 So far, I have addressed the issue as if the situation was exclusively governed by the application of subsection 20(1) of the Act. What are we to make, however, of the Disclosure Clause that forms part of the 2010-14 Standing Offer? As previously noted, the Judge found that the Disclosure Clause was not, in and of itself, determinative and did not operate as a complete bar to a finding that the exemptions found under subsection 20(1) of the Act could apply. Instead, he was of the view that it was only one of the considerations to be taken into account when assessing what could reasonably be expected by a third party in the context of paragraphs 20(1)(c) and 20(1)(d). As he stated (Reasons at para. 72):

> [...] In other words, the *Act*, in asking what "could reasonably be expected" requires the Court to engage in a comprehensive analysis of relevant circumstances, not the one-dimensional truncated review advanced by the Respondents [appellants before this Court]. Specifically, while I agree the Court must consider the Disclosure Clause, it must also assess the history of dealings between the parties, their past experiences dating back to 1997 including the 2009 access request, the 2009 decision to redact notwithstanding a materially identical Disclosure Clause. The Court for the same reasons must also assess and consider the Applicant's [respondent before this Court] understanding of how and why that clause would be applied. These are components of the required analysis of the statutory test.

56 Against this backdrop, the Judge came to the conclusion that the Disclosure Clause had to be interpreted in accordance with the reasonable understanding of Calian, which was shaped by its years of experience and discussions with various government procurement officers. As a result, he accepted Calian's understanding of the clause according to which it was only meant to allow PWGSC to share its personnel rates with other government departments, but not with its competitors or to the public at large. He therefore concluded as follows (Reasons at para. 76):

> Assessing the matter generally, and assessing it at the time of signing the 2010-14 Standing Offer, which I believe is appropriate, the Applicant was reasonably expecting that any access request related to the Personnel Rates would have similar outcomes to the 2009 and other access requests, where the Crown redacted similar information under paragraph 20(1)(*c*). Indeed, it is likely this was the reasonable expectation of both parties given the 2010-14 Standing Offer was essentially contemporaneous with the 2009 decision to release with redactions. These facts, together with the Applicant's credible and reasonable understanding of the limited nature of the Disclosure Clause, and the fact that such rates were not disclosed over the Applicant's objections, in my respectful view, have the effect of depriving the

> Disclosure Clause of the determinative effect urged by the Respondents; the Disclosure Clause is not fatal to this application.

57 In my view, this reasoning is flawed for a number of reasons. First, as previously indicated, it is by now well established that the interpretation of a standard form contract is a question of law. Following the decision of the Supreme Court in *Ledcor*, SCC, recourse to the reasonable expectations of a party and to its subjective intent clearly have no place in the analysis of a standard form contract. Such a contract is not negotiated in any meaningful way; as recognized by Mr. Johnston, a standing offer is "a framework agreement which sets out pre- negotiated terms and conditions against which specific orders (call-ups) can be made by authorized users" (Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1412, para. 7). In that context, it would be illusory to suggest that anything could be inferred about the meaning of the contract from the facts surrounding its formation or from the subjective understanding of one of the parties.

58 Moreover, consistency is of particular importance when interpreting standard form contracts. The meaning of a given RFSO's disclosure clause cannot change from one bidder to the next based on the bidder's prior history with any government institution and the bidder's subjective understanding of the clause's meaning. Fairness among bidders requires consistency and predictability.

59 As a matter of fact, the clear language of a contract must always prevail over the surrounding circumstances, even when interpreting a negotiated contract. As the Supreme Court stated in *Sattva* (at para. 57):

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [references omitted]

60 In the case at bar, I agree with the appellants that the Disclosure Clause is unambiguous on its face. Whether read in isolation or within the context of the General Conditions, there is no explicit or implicit restriction to the type of disclosure agreed upon by the Offeror regarding its standing offer unit prices or rates. This interpretation is consistent with previous Federal Court decisions confirming that clauses of this sort constitute consent to disclose records not only within government, but also to the general public (see *Stenotran* and *Top Aces*).

61 Counsel for Calian tried to distinguish these two cases on their facts. It is true that in *Top Aces*, the Federal Court was considering whether a disclosure clause amounted to "consent" for the purposes of section 30 of the Defence Production Act, R.S.C. 1985, c. D-1, thereby removing the information in question from the protection afforded by subsection 24(1) of the Act. Nevertheless, the disclosure clause in that case was virtually identical to the one at issue here, and both the Federal Court and this Court found that it amounted to consent to disclosure by the third party of its unit prices without any restriction. Likewise, I accept that the Federal Court relied on a similarly worded clause in *Stenotran* to conclude that the third party had not met its burden of proving that the information was confidential and should not be disclosed under paragraph 20(1)(b) of the Act. While this finding does not speak directly to the third party's consent to disclosure, it is nonetheless further evidence of the disputed Disclosure Clause's broad application.

62 In addition to the clear wording and the principles established by these two cases, there are further reasons why the Disclosure Clause must be interpreted as encompassing consent to disclosure not only to other government institutions, but also to the public at large. First, the Act itself does not distinguish between disclosure within government and disclosure to the public. In the absence of a contrary indication, be it explicit or implied, it must be presumed that the Disclosure Clause found in the General Conditions was meant to be consistent with the intent and spirit of the Act.

63 Second, the Disclosure Clause appears to be superfluous if it were to be interpreted merely as a licence for government departments to share between themselves standing offer unit prices or rates. Neither party raised the issue at the hearing, but it is well established that departments have no legal personality distinct from that of the Crown, and are mere administrative divisions under the control of a minister acting on behalf of the Crown (see René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1985) at p. 85; Patrice Garant, *Droit Administratif*, 6th ed. (Cowansville, Qc.: Éditions Yvon Blais, 2010), at p. 20, citing *Wood v. R.* (1877), 7 S.C.R. 634 (S.C.C.) at p. 645. See also *Canada (Conseil des ports nationaux) v. Langelier* (1968), [1969] S.C.R. 60 (S.C.C.) at p. 71, 19682 D.L.R. (3d) 81 (S.C.C.)). To the extent that the information sought to be protected by Calian does not fall within a statutory or policy limitation on disclosure within the government, such as section 3 of the Privacy Act, R.S.C. 1985, c. P-21, which prevents the circulation of "personal information", there seems to be no impediment to government departments sharing that kind of information.

64 As a matter of fact, the Judge himself seemed to acknowledge in his Reasons, the principle that government departments are pure emanations of the Crown, stating, at paragraph 50, that the 2003-09 and 2010-14 Standing Offers "both involved the same government contracting party, namely, the Crown (represented by DND in 2003 and PWGSC in 2010)". He reiterates this view a few paragraphs later, as part of his discussion relating to the relevance of the 2009 Access Request and of the decision then made by DND to redact the requested information. Responding to the

appellants' argument that the 2009 decision involved a different decision-maker and a different subject matter, the Judge wrote (at para. 54):

> These are not persuasive grounds to deny the Applicant [respondent before this Court] the statute's protection from public disclosure of the Personnel Rates. The institutions implementing and managing the RFSO processes and the processes under the *Act* in this case are materially the same, whether DND which redacted in 2009 or PWGSC which refused to redact in 2014. The executive authority in both cases is the Crown, acting through the relevant head of the institution. To accept otherwise would see form triumph over substance. There is no evidence the change of delegated contracting administration or management from DND to PWGSC made any difference to the outcome of this case, given the nature of the information is the same. And, as noted already, the Disclosure Clauses are materially the same.
>
> [emphasis added]

65 If, therefore, the Crown is managing the procurement process and is ultimately the designated contracting authority, I see no reason why a disclosure clause would be needed in order to enable the government to share the information contained in a bid between its various departments. If such were the case, the Disclosure Clause would be redundant and deprived of any meaningful significance; it would, in effect, merely state the obvious. As a result, it seems to me that the correct interpretation of the Disclosure Clause, consistent not only with its clear wording but also with the general scheme and purpose of the Act together with basic principles of administrative law, must be to permit disclosure not only within government but also more broadly to the public at large.

66 In conclusion, I find that the Judge erred in accepting Calian's subjective understanding of the scope of the Disclosure Clause instead of focusing on the unambiguous wording of that clause and on the judicial interpretation of similarly worded clauses. That approach led him to an erroneous and overly restrictive interpretation of the Disclosure Clause, which in turn skewed his overall appreciation of the Act.

67 I would even venture to add that the interpretation given by the Judge to the Disclosure Clause is not only incorrect, but also cannot stand on the overriding and palpable error standard of review. Even assuming that surrounding circumstances could be taken into account in interpreting the terms of this standard form contract, Calian's subjective understanding of the Disclosure Clause cannot be given effect on the record before us. There is simply no evidence that such an interpretation was shared by the government.

68 In his affidavit, Mr. Johnston asserted that the government had always protected detailed billing rates in contracts, and put much emphasis on the 2009 Access Request to DND. The Judge accepted Mr. Johnston's evidence, and found in particular that Calian "was reasonably expecting that any access request related to the Personnel Rates would have similar outcomes to the 2009 and other access requests, where the Crown redacted similar information under paragraph 20(1)

(c)" (Reasons at para. 76). Yet, a careful examination of what took place in 2009 leads to a more nuanced evaluation of DND's prior treatment of the Disclosure Clause.

69 In response to DND's request for Calian's views and recommendations on the disclosure of the information involved in the 2009 Access Request, counsel for Calian offered a number of grounds of objection to its unit prices being disclosed. In its letter providing Calian with an opportunity to submit representations regarding the disclosure of the contract, DND had drawn Calian's attention to the fact that as of August 15, 2006, standing offers are subject to the General Conditions, which form part of the procurement contract and contain a standard disclosure clause. Counsel for Calian responded that retroactive changes to the General Conditions could not give rise to either a right or an obligation on DND to disclose Calian's pricing information, unless those terms were incorporated by reference into the original contract. Calian acknowledged that a similar disclosure clause had in fact been included in the draft contract that was produced for review, but noted that it had not been signed (see Exhibit "D" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1483).

70 In its submissions to DND, Calian also communicated its understanding that the disclosure clause at issue for the purposes of the 2009 Access Request, and in particular its reference to the disclosure of "unit prices or rates", referred only to the disclosure of the Crown's base rates (which had already been disclosed as part of the RFSO), and not to the fully burdened rates offered by Calian or any of its competitors (see Exhibit "D" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1483).

71 Following further discussions about the confidential pricing information and the redactions Calian had proposed, DND eventually refused to release the fully burdened rates, yet provided no detailed reasons for doing so. In these circumstances, I am unable to accept the Judge's inference that DND's decision was based on its acceptance of Calian's restrictive interpretation of the Disclosure Clause. In the absence of any evidence to the contrary, there might be a number of explanations for DND's course of action, including the non-retroactivity of the General Conditions and the unenforceability of a clause found in an unsigned contract. As submitted by the Commissioner, DND may even have been of the view that the non-finalized contract with Calian was not responsive to the 2009 Access Request for a "[*c*]*opy of an existing contract*" (Call for submissions regarding 2009 Access Request, Exhibit "C" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1479 [emphasis in the original]). Considering the range of possible rationales for DND's refusal to release the requested information, it was a palpable and overriding error for the Judge to conclude that based on past treatment, Mr. Johnston's understanding of the Disclosure Clause should prevail. This is particularly so considering that Calian made no attempt to confirm with departmental officials that its reading of the Disclosure Clause was shared by the government.

C. How does the Disclosure Clause interact with the scheme of the Act?

72 I have determined, above, that the Disclosure Clause constitutes consent to disclosure to the public at large of otherwise exempt information under the Act. As previously mentioned, the Judge found (in *obiter*) that there was a further ground upon which the decisions to disclose the personnel rates ought to be set aside. According to the Judge, the head of the government institution failed to discharge his or her legal duty to consider the discretion he or she had to refuse to disclose the information which stems from the use of the word "may" in subsection 20(5). I am of the view that the Judge came to a proper determination on this front, but for different reasons.

73 The Judge held, at paragraphs 94 and 95 of his Reasons, that this Court's pronouncement in *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, 337 D.L.R. (4th) 552 (F.C.A.) regarding the discretionary exemption found in subsection 15(1) of the Act was applicable to this case, because the two subsections are worded very similarly. With all due respect, these two provisions cannot be analogized. While they both call for the use of discretion by the head of a government institution, they operate in a completely different set of circumstances. Subsection 15(1) allows the head of a government institution to "refuse to disclose" a record, whereas subsection 20(5) allows the head of a government institution to "disclose" a record even if it falls within one of the exemptions provided in subsection 20(1), and then only with the consent of the third party to whom the information relates. In other words, subsection 20(5) does not provide a further (discretionary) ground of exemption over and above the enumerated grounds found in subsection 20(1). Quite to the contrary, it allows the disclosure of a record that would otherwise be exempted, provided the affected third party consents to that course of action. Such is precisely the case in the current instance.

74 The discretion granted to the head of a government institution is entirely compatible with the purpose of the Act, which is meant to provide for a general right of access to information contained in records under the control of government, subject to necessary and limited exceptions (section 2 of the Act). Where the third party that is protected by an exemption to the right of access consents to disclosure, there may be public policy objectives served by continuing to refuse access. The same logic underpins section 19 of the Act, which protects personal information. Pursuant to subsection 19(2), the head of a government institution may disclose information falling within the scope of the mandatory exemption for personal information if, *inter alia*, "the individual to whom [the information] relates consents to the disclosure" (para. 19(2)(*a*)).

75 That being the case, I find that the Judge was correct in coming to the conclusion that the decisions be set aside for failure to consider the discretion found under subsection 20(5). PWGSC decided that as the exemptions claimed by Calian with respect to its personnel rates did not apply, there was no residual discretion to refuse the disclosure of the information requested. In finding that the exemptions did not apply, I am of the view that PWGSC proceeded on an incorrect reading of the Disclosure Clause. In its first section 28 decision, PWGSC noted that the clause prevented Calian from treating the information as "confidential third party information that would prejudice

your competitive position and we must therefore release them" (see Section 28 Decision, Exhibit "H" to the Affidavit of Jerry Johnston sworn March 10, 2014, Appeal Book, Vol. 7, Tab 18 at p. 1565). As mentioned above, it appears that PWGSC construed the Disclosure Clause as an outright bar to claiming the third party information exemptions, which led to its finding that there was no residual discretion to exercise under subsection 20(5) of the Act.

76 With respect, this interpretation is not supported by the language of the clause, or by the scheme of the Act. In fact, it proceeds on a conflation between the wording of the clause and its effect. The Disclosure Clause merely stipulates that the Offeror is agreeing to disclosure of certain information which may otherwise be treated as exempt under the Act. A necessary corollary to this involves, as I have explained above, an initial determination that the information would in fact be treated as exempt under the Act had it not been for the existence of the clause. Thus it cannot be said that the clause precludes certain information from being characterized as third party confidential information, nor can it be said to convey that parties agreeing to its contents are outright prevented from claiming the exemptions found under the Act. In other words, the clause's impact is not that the exemptions found under subsection 20(1) do not apply; rather, it is that despite them applying, the third party nonetheless agrees to disclosure.

77 PWGSC's reading of the Disclosure Clause as a waiver of claiming the section 20(1) exemptions is at odds with the scheme of the Act. I am of the view that agreeing to the Disclosure Clause simply constitutes the sort of consent contemplated by subsection 20(5) of the Act. Parliament clearly envisioned the situation under which information otherwise considered as third party confidential information could be disclosed by way of consent, and I must give effect to its intent. By making such a provision discretionary in nature, Parliament unequivocally considered that there would be circumstances where notwithstanding consent to disclosure, the head of the government institution may still decide to not disclose the requested information. One could think of a host of scenarios under which, despite the existence of consent, disclosure of requested information would still be misguided. On such a reading of the interaction between the Disclosure Clause and the scheme of the Act, it becomes clear that the reasons behind a section 28 decision must show that the head of the government institution turned its mind to the discretion afforded to it under subsection 20(5). Such was not done here.

78 PWGSC decided, on the basis of an erroneous reading of the Disclosure Clause, that it had to order disclosure because the exemption regime found under subsection 20(1) of the Act had been waived by Calian. In so doing, it incorrectly interpreted the terms of the Disclosure Clause, and was not alive to the situation codified in subsection 20(5) under which Calian clearly fell. Accordingly, it failed to consider the discretion afforded to it under that provision. Such was a reviewable error warranting that the matter be remitted back for reconsideration.

VII. Conclusion

79 For all of the foregoing reasons, I am therefore of the view that the proper framework under subsections 20(1) and 20(5) of the Act in the face of a disclosure clause of this type requires that the head of a government institution (1) determine whether the information would otherwise be treated as exempt under the Act, and then (2) decide whether any circumstance militates against the information being shared with the public, notwithstanding the consent to disclosure. Both the Judge and PWGSC erred in their interpretation of the Disclosure Clause. Had a proper analysis of that clause been conducted, it would have been found to constitute Calian's consent to disclosure to the public of otherwise exempt information pursuant to subsection 20(5) of the Act, thus triggering the discretion found under that provision. PWGSC made a reviewable error in not turning its mind to the discretion afforded to it as head of a government institution under that provision.

80 I would grant the appeals in part and set aside the decision of the Federal Court. Making the decision that the Federal Court ought to have made, I would grant the applications for judicial review, and remit the matters back to PWGSC for redetermination in accordance with these reasons. The parties shall be allowed to make representations as to the proper exercise of PWGSC's discretion. As there has been divided success on appeal, no costs should be awarded.

***Mary J.L. Gleason J.A.*:**

I agree

***J. Woods J.A.*:**

I agree

Appeals allowed in part.

2020 CAF 81, 2020 FCA 81
Federal Court of Appeal

Canada (Attorney General) v. Zalys

2020 CarswellNat 1375, 2020 CarswellNat 5644, 2020 CAF 81,
2020 FCA 81, 325 A.C.W.S. (3d) 129, 85 Admin. L.R. (6th) 179

THE ATTORNEY GENERAL OF CANADA (Appellant) and ALLAN BRADLEY ZALYS (Respondent)

Richard Boivin, Mary J.L. Gleason, Marianne Rivoalen JJ.A.

Heard: January 15, 2020
Judgment: April 28, 2020
Docket: A-406-18

Proceedings: reversing *Zalys v. Royal Canadian Mounted Police* (2018), 2018 CarswellNat 8599, 2018 CF 1122, 2018 CarswellNat 6686, 2018 FC 1122, Peter Annis J. (F.C.)

Counsel: Susanne Pereira, Courtenay Landsiedel, for Appellant
Christopher C. Rootham, for Respondent

***Richard Boivin J.A.*:**

1 I have had the benefit of reading the reasons drafted by my colleague, Gleason J.A. I agree with the facts as she has set out, as well as her conclusion that the style of cause should be amended as the appellant requests. However, and with respect, I am unable to agree with her that the appeal should be allowed only in part with costs to the respondent.

2 The appellant appeals from the judgment of the Federal Court in *Zalys v. Royal Canadian Mounted Police*, 2018 FC 1122, 298 A.C.W.S. (3d) 863 (F.C.), which granted the respondent's application for judicial review of the June 8, 2017 decision of a Level II Adjudicator (the Adjudicator) appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014). The Adjudicator denied the respondent's grievance in which he sought to have service pay included in the lump sum payout of annual leave he received when he retired from the RCMP. The respondent then sought judicial review before the Federal Court. The Federal Court found that the Adjudicator's decision was unreasonable and remitted the matter back with directions for the Adjudicator to "adopt an interpretation upholding the [respondent's] position" (Federal Court's Reasons at paras. 26, 69-70).

3 For the following reasons, I would allow the appeal with costs, set aside the judgment of the Federal Court, dismiss the application for judicial review, and restore the decision of the Adjudicator.

4 On an appeal of a judicial review decision, as stated by my colleague, our Court must determine whether the Federal Court appropriately selected and properly applied the standard of review: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.) at paragraphs 45-47; *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212 (F.C.A.) at paragraph 18. The standard of review in this application for judicial review is reasonableness. Our Court must therefore focus on the decision of the Adjudicator and determine whether, in reviewing it, the Federal Court identified reasonableness as the standard of review and applied it correctly.

5 In assessing the Adjudicator's decision, I am guided by the Supreme Court's teachings in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (S.C.C.) [*Vavilov*]. When the Court determines that the applicable standard is reasonableness, the Court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para. 15). While the majority reasons in *Vavilov* describe reasonableness review as "robust", they also reiterate that it involves deference. Reasonableness review "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" and is "meant to ensure that courts intervene in administrative matters only where it is truly necessary [...] to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at paras. 12-13). The reasons themselves need "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov* at para. 91, citing *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at para. 16). What distinguishes reasonableness review from correctness review is the court's focus on the administrative decision and the justification offered for it, "not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov* at paras. 15, 83). It is, furthermore, only appropriate to quash a decision on the reasonableness standard where "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para. 100).

6 Turning to the substance of the Adjudicator's decision before us, I am of the view that it is reasonable. Although it would have been preferable for the Adjudicator to acknowledge the definition of "allowance" in finding that service pay was an "allowance" that is excluded from the definition of "salary", this alleged shortcoming, on its own, does not justify finding that the decision is unreasonable as a whole. Not only does the record demonstrate that the definition of "allowance" was not central to the respondent's submissions at the administrative stage, but it

is, more importantly, not determinative of the matter. Whether service pay is considered to be an "allowance" that is excluded from the definition of "salary" or not, the Adjudicator was still required to address the effect of the term "substantive" in section 7.1 of the RCMP's Administration Manual. The Adjudicator did just that, making other findings that are independent from the notion that service pay is an "allowance" and that justify her ultimate conclusion that the respondent did not demonstrate that the payout he received was inconsistent with the relevant legislation and policies.

7 Indeed, on the basis of the record that was before her, the Adjudicator appropriately observed that "[t]he crux of the dispute" concerned the definition of "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and signalled her focus on this chapter, which pertains to annual leave (Adjudicator's Reasons at paras. 38, 55, 61). Instead of relying on her finding that service pay was an "allowance", the Adjudicator went on to address the impact of the word "substantive" in section 7.1. In circumstances where "substantive salary" was not defined in the applicable policy manuals or enabling legislation at the relevant time, she reasonably concluded that the term "substantive" had a restrictive connotation and "denote[d] a basic salary void of any other form of compensation" (Adjudicator's Reasons at paras. 62, 64-65; Appeal Book, vol. II at pp. 345, 471, 489).

8 The Adjudicator was also responsive to the respondent's argument that excluding service pay from "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual created an inequity. She disagreed with his contention for two reasons. First, she found that retiring members could choose to receive service pay by taking their remaining leave as vacation prior to retiring, or they could choose to receive their annual leave in a lump sum payout without service pay (Adjudicator's Reasons at paras. 66, 68-69, 73). Second, she considered how members in the officer cadre of the RCMP receive payouts of annual leave when their annual leave exceeds their carry-over entitlement, according to the RCMP's Administration Manual. She noted that in the provisions she consulted, "substantive" denoted "that the payout must be based on the member's base salary, void of any allowances or other forms of compensation" and suggested that excluding service pay from "substantive salary" in section 7.1 would allow for a consistent application of annual leave payout policy for serving and retiring members (Adjudicator's Reasons at paras. 70-71, 73).

9 Furthermore, the Adjudicator provided a coherent and intelligible explanation for why service pay is not tied to annual leave, but to a member's bi-weekly salary instead, which a discharged member no longer receives (Adjudicator's Reasons at paras. 67-68).

10 None of these additional findings depend on the notion that service pay is an "allowance". Instead, they demonstrate an appropriate analysis of section 7.1 of the RCMP's Administration Manual in context, leading to a transparent, intelligible, and justifiable conclusion that the payout

of annual leave the respondent received was appropriately calculated to exclude service pay in accordance with the relevant legislation and policies.

11 Unlike my colleague, I also remain unconvinced that the Adjudicator was required to explicitly address, in her reasons, an amendment to the RCMP's National Compensation Manual subsequent to the respondent's retirement regarding service pay. This omission is relatively insignificant because the amendment does not clearly militate in favour of the respondent's position, any assertion regarding the motivation for this amendment, on the basis of the record, is speculative, and the amendment does not detract from the soundness of the Adjudicator's analysis of section 7.1 of the RCMP's Administration Manual that led her to conclude that service pay was excluded from "substantive salary" at the relevant time. In my opinion, finding that the Adjudicator was required to explicitly address the amendment in her reasons runs counter to the observation of the majority in *Vavilov* at paragraph 128 that:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. [...]

12 In addition, I find that the record does not support the contention that the respondent noted the difference in wording between section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and sections 6.1.1 and 6.2.2, which address payout of annual leave to RCMP members in the officer cadre, at the administrative stage of this matter. While the respondent raised arguments about the difference in wording between these provisions before this Court, there was no reference to sections 6.1.1 and 6.2.2 in the respondent's submissions at the administrative stage. By raising this argument before this Court, the respondent is in fact attempting to reargue his case.

13 Finally, the Adjudicator's finding that the respondent bore the burden of establishing his claim was reasonable. It accords with past practice of RCMP adjudicators and the record does not suggest that the appellant failed to provide information to which only it had access (See e.g. *Marsh v. Royal Canadian Mounted Police Commissioner*, 2006 FC 1466, 305 F.T.R. 303 (Eng.) (F.C.) at para. 59).

14 Applying the teachings of *Vavilov* to the present case, the Adjudicator's decision is reasonable and her reasons demonstrate as much. More specifically, her reasons explain that the term "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual, undefined in the relevant RCMP policies, does not include service pay because: the word "substantive" denotes the "essential part of the salary", not a salary that includes allowances or other forms of compensation; service pay is tied to the receipt of a member's salary, not to annual

leave; retiring members can choose the option upon retiring that allows them to receive service pay if they want it; and compensation in addition to base salary, such as service pay, is not paid out to active members when they receive a lump sum payout of annual leave that exceeds their carry-over entitlement (Adjudicator's Reasons at paras. 63-64, 67-68, 71).

15 For its part, the Federal Court correctly identified the applicable standard of review as reasonableness (Federal Court's Reasons at para. 13). However, it conducted its own analysis of how the relevant provisions of the RCMP's Administration Manual and National Compensation Manual should be interpreted (Federal Court's Reasons at paras. 27-37, 39, 45-50). Consequently, it was insufficiently deferential and clearly engaged in a disguised correctness review, erroneously focused on its own interpretation of the RCMP's policy manuals, and compared that interpretation to that of the Adjudicator, using its own interpretation as a "yardstick to measure what the [Adjudicator] did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 28; See also *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, [2019] 3 F.C.R. 81 (F.C.A.) at para. 49).

16 For the foregoing reasons, I would allow the appeal in full, set aside the judgment of the Federal Court dated November 8, 2018 in file T-1635-17 (2018 FC 1122 (F.C.)), dismiss the respondent's application for judicial review, and restore the decision of the Adjudicator dated June 8, 2017. I would grant costs to the appellant in the agreed-upon amount of $5,300.00, and I would also amend the style of cause in the manner the appellant has requested. The style of cause on this document and on the judgment of this Court in file A-406-18 reflect this proposed amendment.

***Marianne Rivoalen J.A.*:**

I agree.

***Mary J.L. Gleason J.A.* (dissenting):**

17 The appellant appeals from the judgment of the Federal Court in *Zalys v. Royal Canadian Mounted Police*, 2018 FC 1122 (F.C.), in which the Federal Court (*per* Annis, J.) granted an application for judicial review of the June 8, 2017 decision of a Level II Adjudicator appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014) (the RCMP Act). In that decision, the Adjudicator denied the respondent's grievance seeking service pay on the accrued annual leave that the Royal Canadian Mounted Police (RCMP) paid out to him as a lump sum when he retired from the Force. The appellant also requests that the style of cause in this appeal be amended to name as the appellant the Attorney General of Canada, as opposed to the RCMP, P. Lebrun and Supt. Jennie Latham.

18 For the reasons that follow, I would amend the style of cause in the way the appellant requests and would allow the appeal, but only to the extent of varying a portion of the order made by the Federal Court. As I would accordingly conclude that the respondent has been substantially

successful in this appeal, I would grant him costs, fixed in the all-inclusive agreed-upon amount of $4,700.00.

I. The Proper Appellant

19 Turning first to the request to amend the style of cause, in an application for judicial review seeking to set aside a decision of an adjudicator under the RCMP Act, the proper respondent is the Attorney General of Canada. Thus, the Attorney General of Canada should be substituted as the appellant in this appeal.

20 Rules 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106, provide as follows regarding respondents to judicial review applications:

> 303 (1) Subject to subsection (2), an applicant shall name as a respondent every person
>
> (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or
>
> (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.
>
> (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.
>
> 303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur:
>
> a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
>
> b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
>
> (2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

21 P. Lebrun was the RCMP's National Compensation Services representative, who made submissions to the Adjudicator, and Supt. Jennie Latham was the Adjudicator, who rendered the decision under review, acting as the delegate of the Commissioner of the RCMP pursuant to subsections 5(2) and 32(1) of the RCMP Act. Neither are proper respondents to an application for judicial review.

22 Rule 303(1)(*a*) prohibits naming the decision-maker whose decision is being reviewed as a respondent to a judicial review application, and an individual who made representations before the Adjudicator or who acted on behalf of an employer in the grievance process is not directly affected

by an order sought in a judicial review application and thus should not be named as a respondent under Rule 303(1)(*a*). Thus, neither P. Lebrun nor Supt. Jennie Latham should have been named as respondents and should therefore be removed as appellants.

23 The propriety of naming the RCMP as a respondent is perhaps less clear-cut. There are many cases where the RCMP has been named as a respondent in judicial review applications seeking to challenge a decision made by an adjudicator under the RCMP Act (see, for example, *Marsh v. Royal Canadian Mounted Police Commissioner*, 2006 FC 1466, 305 F.T.R. 303 (Eng.) (F.C.) (naming RCMP Commissioner Zaccardelli, the RCMP, and the Attorney General of Canada as respondents); *Smiley v. Royal Canadian Mounted Police*, 2007 FC 29, 155 A.C.W.S. (3d) 202 (F.C.) (naming the RCMP as respondent); *Lee v. Royal Canadian Mounted Police* (2000), 184 F.T.R. 74, [2000] F.C.J. No. 887 (Fed. T.D.) (QL) (naming Her Majesty the Queen (Royal Canadian Mounted Police) and RCMP Commissioner Murray as respondents)). However, the issue of how the respondent should be named appears not to have been raised in these cases and, accordingly, the style of cause was set by the parties in their pleadings and not questioned before the Court.

24 While the RCMP is undoubtedly affected by the order sought in this application, subsection 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, Part II prohibits naming the RCMP as the respondent. That subsection provides:

> Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency.
>
> Les poursuites visant l'État peuvent être exercées contre le procureur général du Canada ou, lorsqu'elles visent un organisme mandataire de l'État, contre cet organisme si la législation fédérale le permet.

25 There is nothing in the RCMP Act or other legislation that authorizes the taking of proceedings like the present against the RCMP in its name. As this Court noted at paragraph 38 in *Gingras v. Canada* (1994), 113 D.L.R. (4th) 295, 165 N.R. 101 (Fed. C.A.), the RCMP is a division of the federal public administration and is a "department" within the meaning of section 2 and Schedule I.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. This Court has held that government departments do not have legal personalities separate from the Crown (*Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135, 414 D.L.R. (4th) 165 (F.C.A.), at para. 63). It follows that as departments are not separate legal entities, they are not appropriately named as respondents in a judicial review application, unless legislation directs otherwise (see for example, *Enniss v. Canada (Human Rights Commission)*, [1995] F.C.J. No. 1593 (Fed. T.D.) (QL), (1995), 104 F.T.R. 145 (Fed. T.D.) at paras. 7-9; and *Gravel v. Canada (Attorney General)*, 2011 FC 832, 393 F.T.R. 219 (Eng.) (F.C.) at para. 6). Similar reasoning applies to the RCMP.

26 Because the RCMP ought not have been named as a respondent, Rule 303(2) of the *Federal Courts Rules* provides that the Attorney General of Canada should have been named as the respondent in the Federal Court. The style of cause should therefore be amended to substitute the Attorney General of Canada as the appellant before this Court.

II. Background

27 Turning to the merits of this appeal, it is useful to next briefly review the relevant background to the respondent's grievance. The respondent was a regular member of the RCMP. At the time of his retirement, he had 37 years of service with the Force and held the rank of staff sergeant, a non-commissioned officer rank within the RCMP.

28 When employed, the respondent was entitled to paid annual leave and to service pay. The latter is an amount paid to entitled RCMP members on each bi-weekly pay cheque and is based on their length of service. At the time of his retirement, the respondent was receiving service pay at the maximum rate of 10.5% of his staff sergeant's salary.

29 When the respondent decided to retire in 2012, he had accumulated 1,398 hours of annual leave that he had not been able to use during his career. The RCMP offered the respondent the option of either taking the leave and postponing his retirement date until after his leave credits were exhausted or retiring and electing to be paid out the unused annual leave in a lump sum. The respondent elected the latter option. Had the respondent instead chosen to remain on the payroll, the RCMP would have paid him service pay for each hour of annual leave he took.

30 Following the respondent's retirement and discharge from the Force, the RCMP paid him the value of his accumulated annual leave credits, but did not add an amount for service pay on the annual leave. Had it done so, the gross amount of the lump sum payment would have been increased by $7,257.01.

31 The RCMP's Administration and National Compensation Manuals set out the terms and conditions of service for RCMP members. The key provision in this appeal is section 7.1 in chapter 19.1 of the Administration Manual, which provided as follows at the relevant time:

> **7. Payout of Annual Leave on Discharge/Death**
>
> 7.1 When a member is discharged from the RCMP or dies, the member or his/her estate will be paid an amount equal to the number of days of earned but unused annual leave to the member's credit, **calculated at his/her substantive salary** on the date of discharge or death.
>
> [emphasis added]

32 The terms "substantive salary" and "substantive" are not defined in either Manual. However, as the respondent notes, the term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was noted by this Court in *Sinclair v. Canada (Treasury Board)* (1991), 137 N.R. 345, 92 C.L.L.C. 14,008 (Fed. C.A.) [*Sinclair*] and *Canada (Attorney General) v. Dupuis* (1991), 137 N.R. 349, 30 A.C.W.S. (3d) 1009 (Fed. C.A.) [*Dupuis*].

33 The RCMP's National Compensation Manual, at the relevant time, provided in the "Definitions" section that the term "salary" means "an annual *rate of pay; not an allowance* or any other compensation [...]" [emphasis added].

34 In addition, the National Compensation Manual, at the time of the respondent's retirement, contained the following definitions within the "Definitions" section which are of relevance to this appeal:

> Allowance - the remuneration payable in respect of a position, **by reason of duties of a special nature, or for duties that the employee is required to perform** in addition to his/her regular duties.
>
> [emphasis added]
>
> Compensation - the pay and non-pay remuneration provided to an employee for services rendered, and includes, but is not limited to: salary and other compensation, e.g. performance awards; pension and insurance benefits; paid time off; **various allowances, e.g.** senior constable provisional allowance, **service pay**, bilingual bonus; and, compensation for the costs of serving in difficult environments [...]
>
> [emphasis added]
>
> Daily rate of pay - a salary divided by 260.88, which is the average number of working days in a year [...]
>
> Premium pay - a non-pensionable sum of money paid in addition to salary.
>
> Remuneration - pay and/or allowances.

35 The RCMP's Administration Manual at the relevant time also contained provisions governing the payout of annual leave to commissioned officers prior to retirement. The relevant portions of these provisions in chapter 19.1 stated:

> 6.1 On Mar. 31, a member in the officer cadre whose annual leave bank exceeds his/her yearly annual leave entitlement will be automatically paid the excess leave credits to a maximum of one year's entitlement.

> 6.1.1 The payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the current leave year. This does **not include** performance awards or **allowances**.
>
> 6.2 With the approval of his/her supervisor, a member in the officer cadre can cash out his/her earned but unused annual leave credits at any time during the leave year.
>
> [...]
>
> 6.2.2 The voluntary payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the previous leave year. This does **not include** performance awards or **allowances**.
>
> [emphasis added]

36 Finally, section 7.2 of chapter 19.1 of the RCMP's Administration Manual provided at the relevant time:

> 7.2 If the termination of employment is for reasons other than a medical discharge or death, when unearned annual leave credits have already been used by the member, the employer will recover an amount equivalent to the unearned annual leave credits from any monies owed to the member, calculated at the member's substantive salary on the date of discharge.

37 The respondent filed a grievance in which he sought, among other things, payment of the disputed service pay. At the time, the RCMP Act and the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181 (CSO (Grievances)) provided for a two-level grievance process, where second level hearings were conducted on a *de novo* basis, pursuant to subsections 31(1) and 32(1) of the RCMP Act and sections 13 and 17 of the CSO (Grievances). As is more fully discussed below, the respondent advanced before the grievance adjudicators some - but not all - of the arguments he made before this Court regarding the import of the foregoing provisions in the two RCMP Manuals.

III. The Decision of the Level II Adjudicator

38 As the Level II Adjudicator proceeded on a *de novo* basis, albeit based on the written submissions made at both levels of the grievance procedure, it is only necessary to review the Level II Adjudicator's decision. Before her, the respondent pursued only the request for service pay on the payout of his annual leave credits. (His original grievance had sought additional relief.) The Adjudicator denied the grievance, finding that the RCMP's decision to exclude service pay on the lump sum payout was not inconsistent with legislation or applicable RCMP and Treasury Board policies.

39 The Adjudicator commenced her analysis at paragraph 54 by noting that, pursuant to Part III of the RCMP Act, a grievor "is required to present evidence capable of supporting the facts alleged in order to satisfy the Adjudicator, on a balance of probabilities, of the merit of the grievance".

40 She continued by stating that the crux of the dispute related to the definition of "substantive salary" as used in section 7.1 of the RCMP's Administration Manual and centred on whether that term includes allowances. The Adjudicator noted that the definitions of "salary" and "compensation", contained in the RCMP's National Compensation Manual, were helpful. She stated that the definition of "salary" excludes allowances and that the "compensation" definition makes it clear that service pay is a form of allowance. From this, she reasoned that service pay was not salary.

41 She then queried whether this conclusion was impacted by the use of the word "substantive" in section 7.1 of the Administration Manual. In answering this query, the Adjudicator turned to the Oxford Dictionary definition of "substantive" and relied on the meaning of "having separate and independent existence". She reasoned that, when so used as an adjective, the term "substantive" suggests a restrictive connotation, rather than a broadening of the noun it describes. She went on to give the example of the term's being used to describe a rank or position, where it relates to a permanent as opposed to a temporary position, akin to an acting role. She continued by stating at paragraph 64 that the term relates to one's basic right and, if "assigned the same relationship to salary, substantive can only denote the essential part of the salary or the base salary, rather than one that is dependent on the amount of allowances attributed to each individual employee".

42 The Adjudicator went on to dismiss the respondent's argument that this interpretation resulted in inequitable treatment as compared to the treatment offered to those who elect to take their accrued leave as vacation, stating at paragraph 73 that, "[t]he choices provided are not offered as equitable options, but rather as options for individual consideration".

43 The Adjudicator finally noted that her interpretation was consistent with the treatment afforded to members in the officer cadre under articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual, which expressly provide that payouts of accrued annual leave are based on the individual's base salary and therefore exclude service pay.

44 As a consequence, the Adjudicator denied the respondent's grievance.

IV. The Federal Court's Decision

45 The Federal Court intervened, finding the Adjudicator's decision unreasonable, and remitted the grievance for redetermination in accordance with prescriptive directions regarding the meaning to be attributed to the relevant provisions in the RCMP's Manuals. The Federal Court found that the Adjudicator's decision was unreasonable for several reasons.

46 First, the Federal Court held that the Adjudicator unreasonably placed the onus on the respondent to demonstrate that the impugned payment violated the applicable legislation or policies. The Federal Court found that it was rather the RCMP that bore the burden of clearly explaining to members how the relevant policies operated.

47 Second, the Federal Court held that the Adjudicator's contextual interpretation of "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual was unreasonable as the Adjudicator failed to consider and reconcile articles 6.1.1 and 6.2.2 of that same chapter, which used the term "base substantive salary". The absence of the word "base" in section 7.1 was a matter that, according to the Federal Court, the Adjudicator was required to address as the provisions, when read together, more reasonably support a conclusion opposite to the one reached by the Adjudicator.

48 Third, the Federal Court held that the Adjudicator unreasonably relied on a dictionary definition of the term "substantive" and failed to consider what that term means in the context of the public service and statutes governing the RCMP, where the term "substantive" denotes a member's permanent, as opposed to a temporary, position.

49 Fourth, the Federal Court found the Adjudicator's interpretation unreasonable as it results in an unfair disparity of treatment, that was especially troubling for members who died and who could not elect to use their accrued annual leave and were thus were denied the opportunity of electing to be paid service pay on the annual leave.

50 Finally, the Federal Court held that the RCMP had failed in its duty to inform members that they would not be paid service pay if they elected the lump sum payout option and this failure meant that the grievance had to be allowed.

51 The Federal Court accordingly set aside the Adjudicator's decision and remitted the respondent's grievance to the Level II Adjudicator, with a direction at paragraph 70 that the Adjudicator was:

> [...] to declare that the term 'substantive salary' in section 7.1 of Chapter 19.1 of the [National Compensation Manual] or [Administration Manual] includes the accumulated service pay allowance, based on the permanent position rather than any temporary position of the member payable on the date of member's death or discharge.

V. Issues

52 With this background in mind, I turn now to the various arguments made by the parties.

53 Both agree that the applicable standard of review is reasonableness. They also concur that the approach to be taken by this Court on appeal of a judicial review decision of the Federal

Court is as set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.) (*Agraira*). They more specifically agree that *Agraira* remains undisturbed by the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (S.C.C.) (*Vavilov*), where that Court set out a somewhat revamped paradigm for review of administrative decisions.

54 In accordance with *Agraira*, an appellate court in an application for judicial review is required to step into the shoes of the court below and determine whether it selected the appropriate standard of review and whether it applied that standard correctly. Thus, in effect, on appeal, the appellate court is required to re-conduct the judicial review analysis.

55 The parties part company on how the Federal Court applied the reasonableness analysis.

56 The appellant asserts that the Federal Court was far too interventionist and, in effect, engaged in correctness as opposed to reasonableness review, which is inappropriate as the Supreme Court of Canada recently underscored in *Vavilov* at paragraph 83.

57 The appellant more specifically submits that the Adjudicator's decision is reasonable because it offers a logically coherent and reasonable interpretation of the relevant provisions in the RCMP's Manuals. The appellant says in this regard that the Adjudicator reasonably (and indeed correctly) determined that service pay was an "allowance" due to its being listed as an example of an "allowance" in the definition of "compensation" contained in the National Compensation Manual. And, as "salary" is defined in that same Manual as including "pay", but as excluding "allowances", it was open to the Adjudicator to conclude that service pay does not form part of salary and therefore is not to be paid out under section 7.1 of chapter 19.1 of the Administration Manual.

58 The appellant continues by submitting that, in the absence of a definition of "substantive" in either Manual, it was reasonable for the Adjudicator to look to dictionary definitions and that the dictionary meaning selected by the Adjudicator is reasonable and provides support for her conclusion.

59 The appellant further contends that there is nothing unfair in the manner in which the RCMP approached these issues as those who elect to take their accrued annual leave may be called in to work and thus are entitled to service pay whereas those who elect to be paid a lump sum, or who die while in service, are not so available. Likewise, according to the appellant, there is nothing untoward in those who have borrowed leave credits and who leave the Force before earning them not being required to repay their service pay under section 7.2.2 of chapter 19.1 of the Administration Manual as such individuals were on call and thus entitled to service pay when they took time off before they earned the entitlement to vacation pay. In short, according to the appellant, service pay in all instances is tied to being in service and on call.

60 Finally, the appellant says that the Adjudicator's reliance on the articles 6.1.1 and 6.2.2 in chapter 19.1 of the Administration Manual was reasonable as similar treatment is afforded to commissioned officers who take payouts of their accrued leave. The appellant adds that it was not necessary for the Adjudicator to have commented on the use of the term "base substantive salary" in these paragraphs.

61 The respondent, on the other hand, asserts that the Adjudicator's decision was unreasonable, although for somewhat different reasons from those offered by the Federal Court.

62 According to the respondent, the Supreme Court of Canada in *Vavilov* has invited a more invasive approach to reasonableness review than has previously been applied, directing that such review should be "robust" *(Vavilov* at paragraphs 12-13, 67, 72). The respondent further says that the Supreme Court in *Vavilov* outlines two ways in which a decision, for which reasons are offered by the administrative decision-maker, might be unreasonable. As the majority of the Supreme Court noted at paragraph 101 of *Vavilov*, on one hand, there might be "a failure of rationality internal to the reasoning process". On the other hand, the decision might be "in some respect untenable in light of the relevant factual and legal constraints that bear on it".

63 The respondent says that the Adjudicator's decision in the instant case runs afoul of the second of the two as it ignores the relevant case law and interpretive principles that the Adjudicator was bound to apply. On the latter point, the respondent asserts that principles of contractual interpretation are akin to rules of statutory interpretation and submits that, in *Vavilov*, at paragraph 120, the Supreme Court of Canada directs reviewing courts to determine whether the administrative decision-maker's interpretation is "consistent with the text, context and purpose of the provision". The respondent also points to paragraph 111 in *Vavilov*, where the Supreme Court stated that, "[w]here a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship". From the foregoing, the respondent says that this Court, in reviewing the Adjudicator's decision post-*Vavilov*, must determine whether she appropriately applied the relevant rules of contractual interpretation in considering the meaning of section 7.1 of chapter 19.1 of the RCMP's Administration Manual. This, in effect, invites us to engage in something akin to correctness review.

64 The respondent submits that the Adjudicator did not appropriately apply the relevant rules of contractual interpretation for several reasons.

65 First, according to the respondent, the Adjudicator failed to follow the applicable case law and ignored the relevant context in turning to dictionary definitions for the term "substantive". The respondent submits that, under a proper interpretation, the term "substantive" means merely the salary applicable to a member's full-time position and that the term is irrelevant to the inquiry concerning whether the term "salary" as used in section 7.1 includes service pay.

66 Second, according to the respondent, the Adjudicator failed to apply the rule against redundancy. The respondent says that such rule required the Adjudicator to look to the difference in wording between articles 6.1.1 and 6.2.2 versus section 7.1 of chapter 19.1 of the Administration Manual. The respondent further submits that the absence of the word "base" in section 7.1 meant that "substantive salary" for payout purposes is something other than a former member's base substantive salary, *i.e.*, it must include his or her base salary plus service pay.

67 Third, the respondent says that the Adjudicator failed to apply the rule of contractual interpretation that mandates that a more specific provision should take precedence over a more general one. Had this rule been applied, according to the respondent, the Adjudicator would have been required to find that the definition of "allowance" in the National Compensation Manual governed how that term is defined, not the mention of what may constitute an allowance in the definition of "compensation" in the National Compensation Manual. And, the definition of "allowance", according to the respondent, makes it clear that service pay cannot be an allowance as service pay is unrelated to the duties that a member performs and is instead solely based on length of service. Because it is not an allowance, according to the respondent, service pay must be viewed as being included in salary. The respondent also notes the inclusion of an additional provision in section 2.8.7.1.4.3 of the National Compensation Manual, inserted after his retirement, which provides that service pay does not form part of salary. The respondent argues that the absence of such a provision in the Manuals at the times relevant to his grievance favours his interpretation of the provisions then in force.

68 Fourth, the respondent says that the Adjudicator erred in failing to consider the principle of *contra proferentem*, which would require the Adjudicator to resolve any ambiguity in the RCMP's policies in favour of the respondent as the RCMP unilaterally promulgated the policies.

69 Fifth, the respondent says that the Adjudicator failed to consider the interpretive principle that provides that an interpretation that leads to absurdities or unfair results should be avoided. The respondent contends that the Adjudicator's interpretation leads to two absurdities or inequities. First, it is unfair that deceased members cannot ever be paid service pay on their accumulated leave credits as they cannot opt to take their unused vacation credits in time off. Second, it is absurd to think that members who borrow leave credits and cease employment before they have earned the entitlement to the leave would not be required to pay back both the service pay and leave credits they were not entitled to receive. Under section 7.2 of chapter 19.1 of the RCMP's Administration Manual, the RCMP is entitled to recover "unearned annual leave credits [...] calculated at the member's substantive salary on the date of discharge". The respondent contends that the terms "substantive salary" must be given the same meaning in sections 7.1 and 7.2 and that the Adjudicator's interpretation leads to an absurd result of allowing discharged members to keep a windfall.

70 Finally, the respondent contends that, under an appropriate application of the relevant interpretive principles, there can be only one outcome, namely, that the respondent was entitled to service pay on his accumulated leave payout. The respondent therefore asks that the appeal be dismissed.

71 As noted, the respondent, who was not represented by counsel at either level of the adjudication, advanced some, but not all, of the foregoing arguments that his counsel made to this Court. More particularly, the respondent made submissions regarding the impact of the definition of "allowance" in force at the date of his retirement in the National Compensation Manual in the materials he filed with the Level I Adjudicator. He submitted that under that definition "service pay" was not an "allowance" and therefore was not excluded from the definition of "salary" or "substantive salary". He also noted that the subsequent amendment to the provisions, mentioned above, was not in force when his release became effective. These submissions were put before the Level II Adjudicator, who proceeded on a *de novo* basis, and who had before her all the materials that were before the Level I Adjudicator as well as the additional submissions made at Level II.

72 As is more fully explained below, I conclude that the fact that the Level II Adjudicator did not consider these arguments renders her decision unreasonable under the principles recently enunciated by the Supreme Court of Canada in *Vavilov*.

VI. Analysis

73 In *Vavilov*, the Supreme Court undertook a certain recalibration of the law concerning the judicial review of the substantive merits of administrative decision-making. It is necessary in this appeal to consider only three issues arising from *Vavilov*, namely: whether the decision mandates the more invasive form of review the respondent urges; second, whether the Adjudicator's failure to consider some of the respondent's arguments renders the Adjudicator's decision unreasonable, and, finally, what remedy is appropriate.

A. Does Vavilov mandate the type of more invasive review the respondent urges?

74 While the Supreme Court's decision in *Vavilov* may well require more invasive review than had previously been required by some of the previous jurisprudence, it does not require this Court to engage in what in effect amounts to correctness review in the way the respondent urges. In my view, the respondent's reliance on the Supreme Court's characterization of reasonableness review as being "robust" for the assertion that henceforth such review requires reviewing courts to consider if administrative decision-makers have correctly interpreted employer policies is misplaced.

75 When the majority of the Supreme Court utilized the term "robust" in paragraphs 12 and 13 of its reasons, it did not use the term in isolation. The majority rather indicated that

reasonableness review is *both* appropriately deferential to administrative decisions *and* robust. The latter comment was offered to address the concern expressed by some of the interveners before the Court that reasonableness review results in lesser justice for those whose rights are governed by administrative regimes. The majority of the Court put the matter this way at paragraphs 11 to 15 of the reasons:

> [11] [...] The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". [...]
>
> [12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
>
> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.
>
> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that **the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place**.

[emphasis added]

76 The foregoing, as well as the comments made by the majority in subsequent paragraphs of the reasons in *Vavilov*, make it clear that the Supreme Court has not mandated a wholesale jettisoning of deference in the way the respondent submits and has not abandoned the notion that grievance adjudicators are entitled to considerable deference in respect of their contractual interpretations. Far from it.

77 For example, at paragraph 75 of *Vavilov*, the majority wrote:

> [75] We pause to note that our colleagues' approach [*i.e.*, Justices Abella and Karakatsanis in their concurring reasons] to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. [...]

78 The majority continued in similar vein at paragraph 83 of *Vavilov*:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. **Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.** The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> [emphasis added]

79 In fact, the Supreme Court emphasized that where the evidence before an administrative decision-maker permits a number of outcomes, the administrative decision-maker draws upon expertise, such as knowledge, experience and familiarity with the dynamic of labour relations,

and there is relatively little in the way of constraining legislative language, the administrative decision-maker will have a large permissible space for acceptable decision-making: see *Vavilov* at paragraphs 31, 111-114 and 125-126. Many decisions by labour adjudicators, including the one here, will fall into this category.

80 It therefore follows that it is not for this Court to re-conduct the interpretation of the relevant provisions in the RCMP's Administration and National Compensation Manuals based on the arguments advanced to us regarding how those provisions ought to be interpreted. Thus, the issue is not how the Manuals should be interpreted but, rather, whether the interpretation offered by the Adjudicator was reasonable. Accordingly, our focus must be on the Adjudicator's decision, which is to be considered in light of the relevant factors outlined in *Vavilov*.

81 Depending on the context, those may include the content of relevant statutes governing the decision and decision-maker, the relevant common law, international law, the evidence before the decision-maker, the submissions made to the decision-maker, relevant administrative precedents and the impact of the decision on the individual.

82 Contrary to what the respondent asserts, I do not read the Supreme Court's invocation of relevant common law principles and statutory provisions in *Vavilov* as an open invitation to a reviewing court to re-conduct the required contractual analysis based upon arguments that were not even advanced to the administrative decision-maker, especially where, as here, the contractual provisions at issue are ambiguous. Re-conducting the contractual analysis is delving into the merits of the decision, something that Parliament has given to the Adjudicator, not this Court, which is restricted to only a review function: *Vavilov* at paragraph 83.

83 On one hand, the definitions of "salary" and "compensation" contained in the National Compensation Manual support the Adjudicator's interpretation. On the other hand, the definition of "allowance" contained in the National Compensation Manual and articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual lead to an opposite conclusion as do the other arguments advanced by the respondent before this Court.

84 It is simply not open to this Court, in the context of reasonableness review of a decision such as this, to decide on the meaning to be given to these provisions, particularly in the absence of any previously-decided case law interpreting these provisions. Were we to do so, we would be engaging in correctness review and departing from firmly-established precedent that recognizes that grievance arbitrators are entitled to considerable deference in their contractual interpretations (see, for example *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 26 N.R. 341 (S.C.C.) at pp. 235-236; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079, 226 N.R. 319 (S.C.C.) at paras. 26-29; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at para. 68; *Gillis v. Canada (Attorney General)*, 2007 FCA 112, 361 N.R. 301 (F.C.A.) at paras. 24-30; *Administration de pilotage des Laurentides c. Pilotes du Saint-Laurent*

Central Inc., 2018 FCA 117, 299 A.C.W.S. (3d) 235 (F.C.A.) at para. 45). Indeed, the majority in *Vavilov*, itself, citing from that Court's earlier decision in *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.) at para. 113 of the majority reasons, recognized that grievance arbitrators are not "necessarily [...] required to apply equitable and common law principles in the same manner as courts for their decisions to be reasonable".

85 Thus, as opposed to adopting the approach urged by the respondent before us, we must instead assess whether the interpretation offered by the Adjudicator was reasonable in light of those of the factors listed in *Vavilov* that pertain in the instant case.

B. Does the Adjudicator's failure to consider some of the respondent's arguments render the Adjudicator's decision unreasonable?

86 Key among these factors is the degree to which the Adjudicator's decision responds to arguments made to her. In *Vavilov*, the Supreme Court heightened the role an administrative decision-maker's reasons play in reasonableness review and held that a decision-maker's failure to address key arguments of the parties may often render a decision unreasonable. The majority wrote as follows at paragraphs 127-128:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, **a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it**. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [emphasis added]

87 Earlier in its reasons, the majority stated that the failure to address a key issue raised by the parties, where it is impossible from the record to ascertain how the decision-maker might have decided that issue, is sufficient to render an administrative decision unreasonable. The majority wrote as follows at paragraphs 96-98 of *Vavilov*:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record**, they contain a fundamental gap** or reveal that the decision is based on an unreasonable chain of analysis**, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision**. **Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome:** *Delta Air Lines*, at paras. 26-28. **To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.**
>
> [97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn ....
>
> [98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue:

> paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. **Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility**.
>
> [emphasis added]

88 Here, as noted, the respondent raised the implications of the definition of "allowance" in the National Compensation Manual and the subsequent amendment to the relevant provisions in his submissions that were placed before the Adjudicators. He argued that the definition of "allowance" in force at the times relevant to his grievance did not include service pay and therefore asserted that service pay was included in "substantive salary" payable under section 7.1 of chapter 19.1 of the Administration Manual, thereby entitling him to the payment he sought. He also noted the need for the subsequent amendment to relevant provisions. Neither the Level I nor the Level II Adjudicator addressed these arguments in their decisions.

89 Moreover, and crucially, the Level II Adjudicator premised her decision in large part on the conclusion that service pay is an "allowance" and therefore excluded from "salary" and "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual. A key point in her chain of reasoning was the determination that service pay is an allowance, based on its mention as an allowance in the "compensation" definition. However, in reaching this conclusion she failed to address the "allowance" definition, highlighted by the respondent, which leads to an opposite conclusion. She also failed to consider the need for the clarifying amendment to the provisions made after the respondent's retirement from the Force, which highlight the ambiguity inherent in these provisions and the need to reconcile the definition of "allowance" with that of "salary". There

is therefore a meaningful gap in the Level II Adjudicator's reasons as these arguments wholly undercut her chain of analysis.

90 This is not an instance of a decision-maker simply deciding not to address an argument of limited or no consequence: an analysis of this matter was key and may well have resulted in a favourable interpretation for the respondent under the Adjudicator's own reasoning. This is what makes the failure to address the issue important - the respondent's unaddressed arguments undercut one of the essential building blocks in the Adjudicator's chain of analysis.

91 In my view, the Adjudicator's failure to grapple with the foregoing arguments advanced by the respondent in the circumstances of the present case "call[s] into question whether the decision maker was actually alert and sensitive to [these particular issues]" (*Vavilov* at paragraph 128). The failure of the Level II Adjudicator to address these issues therefore, in my view, renders her decision unreasonable as, to use the wording of the majority of the Supreme Court of Canada in *Vavilov*, it constitutes a "fundamental gap" in the reasons as the issues' determination could well have led to an opposite conclusion and, given the wording in the relevant policies, there is no way to infer from the rest of the Adjudicator's reasons or from the record how the Adjudicator would have reconciled the conflicting provisions in the RCMP's National Compensation and Administration Manuals. Thus, I believe that the failure to address these arguments, as mandated by *Vavilov*, means that the Adjudicator's decision must be set aside.

92 I have had the opportunity to read the reasons of my colleague, Boivin J.A., in draft and, with respect, disagree that the impact of a failure to address an argument made to an administrative decision-maker turns only on the vigour and clarity with which that argument was made to the decision-maker. Rather, it seems to me that an equally important consideration must be the relevance of the argument to the outcome reached by the administrative decision-maker. This is especially so where, as here, a party is not represented by counsel before the decision-maker and therefore lacks the ability to make legal arguments in as crisp a fashion as a lawyer would.

93 Thus, for me, in determining whether the failure to address an argument renders a decision unreasonable, it is as much the relevance and potential merit of an unaddressed argument as the way it was made that is relevant.

94 Indeed, the majority in *Vavilov*, at paragraph 128, after making the comments my colleague refers to in paragraph 11 of his draft reasons, noted that "a decision maker's failure to meaningfully grapple with key issues *or* central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (emphasis added).

95 In drawing a distinction between key issues and central arguments, I read this passage as indicating that it is *both* the relevance and potential merit of the unaddressed argument *as well as* the force and clarity with which unaddressed arguments were made to the administrative

decision-maker that may mean that the failure to address them renders an administrative decision unreasonable.

96 Here, counsel for the respondent made the unaddressed arguments more clearly to the Court than they were made by his client to the Adjudicators. This is not surprising. The fact remains, though, that these arguments were advanced, were made in a clear enough fashion to the Adjudicators so as to be understandable and wholly contradict the Level II Adjudicator's reasoning.

97 Contrary to the views of Boivin J.A., the Level II Adjudicator's consideration of the meaning to be given to the term "substantive" and consideration of dictionary definitions of that term are entirely irrelevant to the issues the Adjudicator was called upon to decide. The term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was held by this Court in *Sinclair* and *Dupuis* (cited at paragraph, 32, above). Given this, the term "substantive" can have no other reasonable meaning and has no bearing whatsoever on whether the salary attributable to a retiring RCMP member's substantive position includes service pay or not. All the term "substantive" means in the context of the relevant provisions in the RCMP Manuals is that the salary to be paid out on retirement is that applicable to the retiring member's permanent or substantive position. This leaves unanswered the question that was the crux of the issue before the Adjudicator, namely, whether salary for such position includes service pay or not.

98 Central to this key issue are the questions the Adjudicator failed to grapple with, namely, how you go about reconciling the conflicting definitions in the Manuals of "salary" and "allowance", one of which would include service pay in substantive salary, and the other of which would not. The failure to grapple with this conflict - which was raised by the respondent - renders the Level II Adjudicator's decision unreasonable. In short, it is simply not open to a reviewing court, post-*Vavilov*, to uphold an administrative decision where the decision-maker fails to grapple with a key issue raised by a party where, as here, such issue required determination and the record provides no guidance on how that issue would have been settled by the decision-maker.

99 It therefore follows that the Adjudicator's decision must be set aside.

C. What remedy is appropriate?

100 Which brings me to the issue of remedy.

101 For much the same reasons as it is inappropriate for this Court to uphold the Adjudicator's decision in light of the ambiguity contained in the Manuals, it is similarly inappropriate for this Court to issue directions on how the Manuals are to be interpreted. Contrary to the approach taken by the Federal Court, I am of the view that there is not a single way in which the relevant provisions can be read because they are inherently ambiguous. The issue of their interpretation must therefore be remitted to an adjudicator for reconsideration.

102 Although the RCMP's internal grievance procedure has been amended in the time since this grievance was heard, section 68 of the *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18 provides that the former grievance process applies to any grievance presented prior to November 28, 2014. Therefore, the grievance may be remitted to a Level II Adjudicator for redetermination.

103 While conceding that redetermination is usually the appropriate remedy in a successful judicial review application - and that the Supreme Court of Canada endorsed this as the typical approach in *Vavilov* - the respondent nonetheless submits that this is an exceptional situation and that the delay that has transpired since the grievance was filed should lead this Court to exercise its discretion and instead settle how the Manuals are to be interpreted.

104 I decline to do so for three reasons. First, the threshold for declining to remit an issue to an administrative decision-maker where there is an issue to be resolved is high, as this Court noted in *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55, 444 N.R. 93 (F.C.A.) and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) at paras. 14-17. Such threshold has not been reached in this case.

105 Second, while there has been considerable delay in the determination of these issues in the RCMP's grievance process, this Court can ensure there is limited unnecessary additional delay by placing a time limit on the redetermination. I would accordingly afford the Level II Adjudicator, to whom the grievance is remitted, 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada within which to render a decision on the redetermination.

106 Finally, to a certain extent, *Vavilov* has altered how judicial review is to be conducted through its greater emphasis on the importance of reasons. In light of this, it is best to allow a Level II Adjudicator an opportunity to re-examine these issues, this time through the lens that reasons must adequately address all key issues, as mandated by *Vavilov*.

107 Given the additional issues raised by counsel for the respondent before this Court and their potential impact on the outcome of the grievance, all the key arguments advanced by the respondent, as reflected in these reasons, should be addressed by the Adjudicator in the redetermination decision. In addressing them, it may be that the Adjudicator need not say much, as *Vavilov* emphasized at paragraphs 91-98, and 127-128. However, failure to address these issues at all would render the decision liable to being set aside a second time, under the principles in *Vavilov*. As some of these arguments were not previously made before the Adjudicator, the parties should be afforded the opportunity to make additional submissions to the Level II Adjudicator to whom the grievance is remitted, the timing and length of which I leave to the Adjudicator to determine.

108 Finally, as to the issue of costs, they should follow the event. As the respondent was largely successful in this appeal, he should be awarded costs. The parties concurred that, if the Court were to award the respondent his costs, they should be fixed in the all-inclusive amount of $4,700.00. I concur that this amount is appropriate and thus would so award.

VII. Proposed Disposition

109 In conclusion, I would substitute the Attorney General of Canada as the appellant in this appeal. I would also allow this appeal in part, set aside the judgment of the Federal Court, and, rendering the decision that it ought to have made, would allow the respondent's application for judicial review and remit the respondent's grievance to a Level II Adjudicator for redetermination, in accordance with the reasons of this Court, on the basis that the redetermination decision must be rendered within 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada. As I would find the respondent to have been largely successful in this appeal, I would grant him costs in the all-inclusive agreed-upon amount of $4,700.00.

Appeal allowed.

2005 FC 712, 2005 CF 712
Federal Court

Cooke v. Canada (Correctional Service)

2005 CarswellNat 1366, 2005 CarswellNat 3485, 2005 FC 712, 2005 CF 712, [2005] F.C.J. No. 886, 139 A.C.W.S. (3d) 527, 274 F.T.R. 44 (Eng.)

David William Cooke, Applicant and Correctional Services of Canada, Respondent

Phelan J.

Heard: April 5, 2005
Judgment: May 17, 2005
Docket: T-924-04

Counsel: Mr. David William Cooke, for himself
Ms Jessica Harris, for Respondent

***Phelan J.*:**

Introduction

1 Mr. Cooke seeks judicial review of a decision of the Canadian Human Rights Commission (Commission) which dismissed his complaint that Correction Services Canada discriminated against him on the basis of his "disability" (extreme sensibility to smoke) and his religion (sometimes referred to as "born-again Christian").

2 Mr Cooke's challenge to the Commission's decision is based on the alleged inadequacy of the investigation of this complaint. The essential inadequacy alleged is that the investigator did not interview at least two (2) key witnesses and a possible third witness.

3 In support of his judicial review, Mr Cooke filed a lengthy affidavit to establish the inadequacy of the investigation and its conclusions. The Respondent challenges the admissibility of much of the affidavit because, it says, the exhibits attached were not before the actual decision-maker.

Background

4 Mr Cooke was employed by the Respondent, as a Corrections Officer since 1994. He developed a hypersensitivity to second hand smoke. He became a born-again Christian in late 1998, which, resulted in him placing more emphasis on religious observance then had been the case previously.

5 In early 2002, Mr Cooke filed a complaint with the Commission alleging that the Respondent had discriminated against him, contrary to section 7 of the *Canadian Human Rights Act* (Act). More particularly he alleged that his disability and his religious practices had not been accommodated.

6 He alleged that his sick leave, due to his disability, had been used against him in his performance assessment. He also alleged that some sick leave was denied to him because the Respondent did not accept that he was disabled. He further alleged that various requests for leave to permit attendance at certain religious observances had not been accommodated by the Respondent.

7 The Respondent maintained that it accommodated his smoke difficulties as best it could and within the provisions of the *Non-Smoker Health Act*; that Mr Cooke had been uncooperative, in identifying breaches of employer's non-smoking policy and even to the extent of refusing an opportunity to work in a smoke-free building.

8 There was conflicting evidence as to the reasons for and extent of sick leave taken. However the Commission's investigator found that the Respondent had tried to accommodate Mr. Cooke's needs and to enforce its non-smoking policy. The investigator also found that Mr Cooke was denied promotion because of his sick leave usage, not because of his disabilities - apparently accepting the Respondent's contention that there was excessive incidents of sick leave.

9 While the Applicant complained that he was denied accommodation for religious observance, the Respondent confirmed that in a period of 18 months, Mr Cooke made 22 requests for leave for religious observance, of which 16 were approved. Of the 6 requests not granted, one was cancelled due to illness, in two instances insufficient notice was provided and three others fell at peak vacation time and could not be reasonably accommodated.

10 On this issue the investigator concluded that there had been no discrimination; that the requests for religious observance leave did not appear to be connected to religious holidays *per se* but the Respondent still attempted to accommodate Mr Cook's religious needs.

11 Following the investigator's report recommending dismissal of the complaint, Mr Cooke filed a detailed reply with the Commission challenging virtually every adverse aspect of the report, laying considerable stress on the investigator's failure to contact two of Mr Cooke's witnesses - members of the union which had formerly represented certain employees of the Respondent.

12 The Commission accepted the investigator's recommendation and dismissed the complaint.

13 In the Notice of Application for Judicial Review, under Rule 317, Mr Cooke requested that the Commission provide certified copies of:

All documents and files submitted by David Cooke (complainant) and Correction Services Canada and a copy of the C.H.R.C. Report and signatory to the decision.

14 In Mr Cooke's affidavit in support of the judicial review, it is clear that he was challenging the adequacy of the investigation upon which the Commission's decision was based.

15 Despite the scope of Mr Cooke's request, the Commission certified only the material which was before the actual decision-maker when it made the decision. That material consisted of the complaint, the Investigator's Report, the Summary of Complaint and Respondent's Defence, two letters from Correction Canada, and a Chronology.

16 The Commission did not file an objection under Rule 318(2) objecting to the provision of the material requested by Mr Cooke.

Analysis

Preliminary Objection

17 The Respondent seeks to strike out paragraphs 7 to 24 and exhibits referred to in those paragraphs of the Applicant's affidavit filed in support of the judicial review.

18 The principal grounds for striking are that the materials were not before the individual decision-maker at the time of rendering of the decision. The materials said to have been before that decision-maker when it made its decision are described in paragraph 15.

19 The Applicant says that the materials in paragraphs 7 - 19 were provided to the investigator; the materials in paragraph 20 - 24 were materials related to the post-investigation period.

20 The Respondent's preliminary objection is dismissed. The Respondent takes too narrow a view of the application of the principle that on a judicial review the only materials which should be before the Court are those which were before the actual decision-maker. The decision-maker is not the specific individual who decided the case but the tribunal itself. In this case those materials in the hands of the investigator are materials in the hands of the Commission itself and, therefore are materials "before" the Commission or as phrased in Rule 317 "...material relevant ... that is in the possession of a tribunal....".

21 To adopt the Respondent's position would frustrate the purpose of Rule 317 to ensure that all relevant materials is available on a judicial review. It would interfere with an applicant's right to pursue a challenge to a decision based not only on what the specific tribunal considered but on what it ought to have considered. A tribunal is or should be the repository of all relevant materials and must disclose not only the material it considered but also the relevant material it had in its possession.

22 I reject any suggestion made by the Respondent that an applicant must use such indirect means as the *Access to Information Act* to secure materials in a tribunal's possession where the tribunal had failed to meet its obligations under Rule 318(1).

23 Since the material which is "relevant to an application" is material which may affect the decision that this Court may make; and, in this instance the Applicant clearly attacked the adequacy of the investigation, the material requested by the Applicant under Rule317 should have been provided to him. (*Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93 (Fed. C.A.)).

24 There is no basis for the Respondent's challenge to paragraph's 7-19 of the Applicant's affidavit. With respect to the post-investigation material, since it may be relevant to the Court's decision it was also proper to include it in the Applicant's affidavit. Therefore all this evidence forms part of the record before this Court.

Challenge to Decision

25 The Applicant's complaint about the investigation is based on (a) the insufficiency of the evidence before the Commission because two witnesses were not interviewed; (b) the lack of thoroughness of the investigation for the same reason; (c) the failure of the Commission to give reasons for not interviewing those two witnesses. The underlying complaint or common theme is that the investigator failed to interview two witnesses.

26 In *Tahmourpour v. Canada (Solicitor General)*, [2005] F.C.J. No. 543 (F.C.A.), the Court of Appeal confirmed that the leading case in respect to the issues raised is *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (Fed. T.D.) in which Nadon J. (as he then was) held that an investigation may lack the legally required degree of thoroughness if, for example, the investigator had "failed to investigate obviously crucial evidence".

27 The Applicant has failed to satisfy me that the failure to interview his two witnesses constituted such a serious failure. The Court accords an investigator a considerable degree of latitude in determining how an investigation should be conducted.

28 The two witnesses would corroborate the Applicant's complaint without adding new evidence. However the issue in the complaint is not the credibility of the Applicant so mush as whether the Warden of the correctional institution provided reasonable accommodation to the Applicant's circumstances. The Applicant has not shown that these witnesses would be able to assist on this central issue.

29 A third possible witness was identified as one who should or could have been interviewed. However that witness' possible availability post-dates the investigation and cannot form a basis for attacking the thoroughness of the investigation.

30 With respect to the sufficiency of the evidence before the Commission, the Applicant was able to submit all of his arguments in respect of each paragraph of the investigator's report. The Applicant raised the issue of failure to interview witnesses and dealt with all issues raised by the investigation. Therefore the Applicant has no basis for this ground that the Commission was not aware of the insufficiency of the evidentiary basis or at least his argument to this effect.

31 With respect to the thoroughness of the investigation, since this ground is based on the failure to interview witnesses, for reasons already provided, this ground cannot succeed.

32 With respect to the failure to give reasons for not interviewing the witnesses, there is no obligation to provide such an explanation. These are sufficient reasons given in respect to the substantive decision to dismiss the complaint. The Commission (more particularly neither the investigator nor the particular panel of the Commission) need supply reasons for each step taken or not taken in any investigation.

Conclusion

33 This application for judicial review will be dismissed with costs.

Application dismissed.

2002 SKCA 129
Saskatchewan Court of Appeal

Doust v. Schatz

2002 CarswellSask 770, 2002 SKCA 129, [2002] S.J. No. 674, [2003] W.D.F.L. 76, 118 A.C.W.S. (3d) 852, 227 Sask. R. 1, 287 W.A.C. 1, 32 R.F.L. (5th) 317

WAYNE JOHN SCHATZ (APPELLANT / RESPONDENT) and CAROL ANN DOUST (RESPONDENT / PETITIONER)

Bayda C.J.S., Tallis, Jackson JJ.A.

Heard: September 12, 2002
Judgment: November 26, 2002
Docket: 462

Proceedings: reversing in part (2001), 2001 SKQB 548, 2001 CarswellSask 790 (Sask. Q.B.)

Counsel: *Joanne C. Moser*, for Appellant
W. Timothy Stodalka, for Respondent

***Tallis J.A.*:**

I

1 In this appeal and cross appeal the parties take issue with the valuation, division and distribution of matrimonial property under a Queen's Bench judgment delivered on December 17, 2001. As well, Ms. Doust challenges the denial of spousal maintenance and the order "expunging" any arrears of maintenance payable under a pretrial interim order. These issues arise in the context of an eighteen-year common law relationship during which time the couple ran a farming operation which primarily focussed on the production and sale of Pregnant Mare's Urine (PMU).

2 Speaking generally, the judgment under review grants the appellant (Mr. Schatz) ownership and sole control of the farm and business and obliges him to pay the respondent (Ms. Doust) $126,475.71, being the balance of her 2 share, as fixed by the trial judge. Under the judgment Ms. Doust is denied maintenance and the arrears under the interim maintenance order under *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2 are "expunged".

3 Although the parties separated in July of 1998 and her petition was launched on October 30, 1998, Ms. Doust has received no share of the farm property and no payment has been made on the judgment in her favor.

4 Matters are further complicated by Mr. Schatz's moving of farming operations and particularly the PMU operations to Manitoba where he operates under a limited company with his present spouse as the other shareholder. Apart from the farm land in Saskatchewan which is in the joint names of the parties to this appeal, all the matrimonial property that vested in Mr. Schatz under the judgment has now been removed to Manitoba. More will be said about this aspect later in these reasons but it is important to note that Mr. Schatz has now shifted his ground and asks that the farm land in Saskatchewan be sold with the proceeds to be paid into Court with payment of outstanding debts against the land be first paid out. These debts have been mounting with interest running on the mortgages registered against this land. [1]

5 At trial Ms. Doust pressed for an order directing sale of the assets with equal distribution but Mr. Schatz submitted "that all of the assets, and liabilities, be left with him, except for the [one] quarter section of land which should be sold". [2] This approach was essentially adopted by the learned trial judge.

II

6 Before outlining the issues, we observe that the trial judge fixed 1998 as the appropriate valuation date. This no doubt flows from the parties' separation date of July 26, 1998 and the subsequent issue of the petition for relief on October 30, 1998.

7 The principal issues argued on this appeal and cross appeal may be paraphrased as follows:

(1) whether the trial judge erred in finding that the parties owned 32 mares at the date of valuation?

(2) whether the trial judge erred in his valuation of the mares?

(3) whether the trial judge erred in his valuation of the PMU business?

(4) whether the trial judge erred in his calculations and method of implementation of the equalization?

(5) whether the trial judge erred in dismissing Ms. Doust's claim for spousal maintenance, both ongoing and arrears?

(6) whether this appeal calls for a special order with respect to costs?

8 As well, there are various subsidiary issues or matters that will be addressed in the context of these principal issues.

III

Background

9 The parties began their eighteen-year common law relationship in 1980, when they were both in their early twenties. Ms. Doust has her Grade XII and Mr. Schatz has his Grade IX. During their "marriage" they purchased farm land in Saskatchewan and focussed primarily on the production and sale of Pregnant Mare's Urine (PMU) under contract to Ayerst. The operation was a typical joint spousal operation with both working diligently at building and maintaining a successful business venture. Although the contract with Ayerst was in the name of Mr. Schatz alone, the trial judge found that the PMU business was part of their joint property along with the farm land, livestock and chattels used in the business. On the evidence one is driven to the clear conclusion that Mr. Schatz held the contract as trustee for their joint benefit.

10 Although Ms. Doust sometimes worked off the farm, her income from such employment was used for their joint benefit.

11 During their marriage they borrowed a significant sum from Ms. Doust's mother and this loan is reflected in one of the mortgages registered against the farm land in their joint names.

12 In an agreed statement of facts the parties stipulated the value of the farm land to be $186,300.00.[3] The improvements included a barn adapted to the stabling of mares for the production of PMU.

13 After their separation on July 26, 1998, Ms. Doust left their farm home and was not allowed to return to the farm premises. Under the terms of a Queen's Bench Order issued on December 7, 1998, Mr. Schatz was ordered to provide Ms. Doust with a specified number of personal effects with a direction that he make arrangements with designated third parties to attend at the farm premises to pick up these effects for delivery to Ms. Doust. As well, the order provided for interim spousal support of $400.00 per month under s. 5 of *The Family Maintenance Act, 1997* with the same to commence on December 1, 1998.[4]

14 This action went to trial on November 26, 27 and 28, 2001. *The Family Property Act*, S.S. 1997, c. F-6.3, as amended by S.S. 2001, c. 51 (*Act*) which was enacted on July 1, 2001, abolished, in large part, the distinctions between marriages and long term common law relationships with respect to "family property". As a result, the statutory considerations found in the *Act* now apply to actions involving common law partners.

15 The formal judgment which issued following delivery of written reasons on December 17, 2001 reads in material part: [5]

> 1. The distributive share due to the Petitioner is determined to be $126,475.71 and Judgment is given to the Petitioner for that amount, payable no later than June 30, 2002. Execution on the Judgment shall not issue without further order.
>
> 2. Judgment interest shall accrue after June 30, 2002.
>
> 3. All debts are to be assumed by the Respondent and he must save the Petitioner harmless from any claim.
>
> 4. The Respondent shall give security for the performance of his obligations under these orders in the form of a specific security agreement covering his shares in the B & W Schatz Ranch Ltd., the delivery of his shares (as a pledge) as security, executed transfer, in registerable form, of his interest in titles to the land, and a general security agreement. No steps may be taken to realize on these securities without further order.
>
> 5. The Respondent is restrained from disposing of or encumbering the assets, without the Petitioner's consent, or without further order.
>
> 6. Upon payment to the Petitioner and upon appropriate assurance from creditors, she shall execute registerable transfers of title to the land and quit claims, as necessary. Title to the land, PMU business, 32 mares, four stallions, four foals, and chattels (except for the few chattels in the Petitioner's possession) thereupon shall vest in the Respondent free and clear of any claim by the Petitioner, as shall the NISA accounts of $6,725.90 in the Respondent's control. The Petitioner thereupon shall be entitled to retain possession and control, as well as ownership, free and clear of any claim by the Respondent, of the NISA accounts of $8,395.37 in the Petitioner's control, and of the following assets:

(i) 1997 tax credit paid by the Respondent	$4,050.00
(ii) the few chattels and motorcycle sales proceeds in the Respondent's possession	$2,160.00
(iii) RRSP adjusted for tax	$40,577.48
(iv) Pension adjusted for tax	$1,960.00
Total	$48,747.48
ADD:	
Excess of Petitioner's NISA accounts, over the Respondent's NISA accounts	$834.76
Total residual value to the petitioner	$49,582.24
Added to her distributive share of equity owing to her by the Respondent	$126,475.71
TOTAL: 1/2 Equity	$176,057.95

7. In the event of default in any obligation by the Respondent under this Judgment, the Petitioner may apply, without notice to the Respondent, for an order for sale of the assets, realization on security, or otherwise, as the petitioner may be advised.

8. Spousal maintenance is declined.

9. The arrears of maintenance under the interim order are expunged.

10. Leave is granted to counsel to speak to costs.

16 The mathematical calculation of the distributive share in paragraph 32 of the reasons for judgment is reproduced for convenience: [6]

[32] I make the following orders:

1) I determine the distributive share due to the petitioner to be $126,475.71, as follows:

Description of Assets		
Land		$186,900.00
PMU Business		150,765.72
32 Mares		38,400.00
4 Stallions		11,641.00
4 Foals		1,200.00
Chattels		55,225.00
NISA Accounts		15,121.27
RRSP: $57,967.83—Less 30% tax contingency		—40,577.48
Pension: $2,800.00—Less 30% tax contingency		—1,960.00
TOTAL		**$501,790.47**

Description of Debts		
Madeline Doust	$47,000.00	
ACS (secured)	47,759.13	
GST	4,000.00	
	4,050.02—	
1997 Income Tax Liability:—Petitioner—Respondent	2,469.47	
GMAC (finance 1994 GMC 2 ton)	7,574.27	
Farm improvement loan	25,519.83	
Louis loan to date of application	10,081.63	
Prorated land taxes to application date	420.21	
Sask Power	800.00	
TOTAL		**$149,674.56**

Equity		
		$352,115.91
Petitioner's 1/2 share of equity		$176,057.95
Less: **Adjustments** in favour of respondent—-1997 tax liability of the petitioner paid by the respondent	$4,050.00	
-the few chattels and motorcycle sales proceeds in the petitioner's possession	2,160.00	
-credit to equalize NISA accounts	834.76	

-RRSP remaining with petitioner, after tax contingency	40,577.48	
-Pension remaining with petitioner, after tax contingency	1,960.00	
Total Adjustments		-49,582.24
Distributive share of equity owing to petitioner by respondent		**$126,475.71**

17 After Ms. Doust left the farm, Mr. Schatz retained exclusive control of the family property with no share of income paid to Ms. Doust. Under the terms of the interim support order she was to be paid $400.00 per month. During the period from December 1, 1998 to the date of judgment (December 17, 2001) she should have received a total of $14,800.00. Mr. Schatz only paid $8,400.00 C he unilaterally terminated payments when Ms. Doust married her present spouse.

18 In the meantime it is common ground that Mr. Schatz has moved the entire PMU operation to Manitoba. He appears to take the position that in post-trial motions in chambers before this Court, he obtained the permission of a judge of this Court to do so. An examination of the orders of Gerwing J.A. on March 13, 2002, Jackson J.A. on May 8, 2002 and Vancise J.A. on June 6, 2002 does not support this position. The major components of the PMU operation, which includes all horses, farm machinery, fodder, PMU bulk tank, hopper bin and watering system, have been moved. Although the barn has not been moved to Manitoba, Mr. Schatz has removed the steel stalls from the barn and taken them to Manitoba. This is significant because this component of the barn was included in Mr. Holstein's overall valuation of the farm land and improvements C a valuation that was accepted by the parties for the purposes of the trial.

19 Since his departure to Manitoba, Mr. Schatz has rented out the farm home and yard to tenants for a monthly rental of $400.00 per month.

20 With this background we turn to the principal issues argued on this appeal.

IV

Whether the trial judge erred in finding that the parties owned 32 mares on the date of valuation?

Whether the trial judge erred in his valuation of the mares?

21 There was conflicting testimony on the number of mares at the time of separation. Ms. Doust testified that there were 32 mares in addition to stallions and foals. In this litigation the number of stallions and foals is not in issue. Mr. Schatz testified that there were only 19 mares. The trial judge specifically accepted Ms. Doust's testimony on this point and referred to the fact that Mr. Schatz had "recently destroyed documents which would have definitely determined the question". [7]

22 Ms. Doust, who played an active role in their business affairs, testified that she made it a point to count the number of mares on hand when she left. We refer to the following portion of her testimony: [8]

> Q So then how many grade mares are you saying you owned in 1998?
>
> A Well, there was 32 mares when I left. I have no records of this. I know there was 32 mares because I counted them. I have an idea of the three pastures that they were in, and how many were in each pasture. I may not be exact, but when I left I went out there and I counted the mares. I wrote down everything. I wrote down how many mares I counted. I wrote down things from the house. I wrote down everything, because I knew when all of this would come around, I wouldn't remember some of this stuff, so I have no proof but I just know what I saw.

23 In asking this Court to reverse this finding of fact, counsel for Mr. Schatz contends that the trial judge failed to adequately weigh and consider the contents of earlier 1996 and 1997 records which by Mr. Schatz's calculations suggest there were only 19 mares. Learned counsel also contends that the trial judge misunderstood one of the earlier transactions which contributed to the alleged error.

24 At trial Mr. Schatz, when confronted with questions about the production of relevant records, blamed Ms. Doust for failing to produce documentation of her own on this issue. He also blamed his former solicitor for the loss of relevant records pertaining to this very issue.

25 With respect to Ms. Doust his complaint has a hollow ring to it. She testified that she was required to and did prepare annual health records on each mare for review by Ayerst. [9] She prepared detailed spread sheets which listed the mare's name, the barn stall assigned to that mare, the stallion that she was bred to, the date of the foal's birth and the date of sale, if sold. [10]

26 These documents which were left at the farm were never produced by Mr. Schatz. Ms. Doust was not allowed on the farm premises after their separation so it would be impossible for her to produce them. These documents were not included in the order of December 7, 1998 which provided for delivery of specific personal effects to her.

27 The integrity of the administration of justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law: see for example *Livesey v. Jenkins* (1984), [1985] 1 All E.R. 106 (U.K. H.L.), *Ewing v. Ewing* (1987), 56 Sask. R. 260 (Sask. C.A.), *Ewing v. Ewing* (1987), 56 Sask. R. 263 (Sask. C.A.), *Vagi v. Peters* (1989), [1990] 2 W.W.R. 170 (Sask. C.A.), *R. v. Foster* (1982), 17 Sask. R. 37 (Sask. C.A.) and *Rozen v. Rozen*, [2002] B.C.J. No. 2192 (B.C. C.A.). A party is under a duty to preserve

what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.

28 Given the nature of the controversy over the number of mares at the relevant time, Mr. Schatz with his length of experience in the PMU business clearly understood the importance of preserving relevant records for use on discovery and at trial. In this case his failure to preserve and produce the relevant records hampered the trial process. A great deal of time was spent in the examination and cross examination of the parties with respect to this issue.

29 The question whether the intentional spoliation of evidence is a separate tort is not before us in this litigation: see *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 188 D.L.R. (4th) 577 (Ont. C.A.). It is open to a trial judge to impose sanctions or draw an adverse inference from such conduct. In this case it was clearly open to the trial judge to take this conduct into account when considering matters of reliability, credibility and costs.

30 We now examine Mr. Schatz's attempt to blame his former solicitor for loss and destruction of relevant records. [11] Faced with a continuing challenge on appeal to the trial judge's finding of 32 mares, learned counsel for Ms. Doust sought leave to adduce fresh evidence by affidavit from the former solicitor for Mr. Schatz. This testimony emphatically refutes the suggestion that he lost the records in his office. He makes it clear that the records in question were not delivered to him. In his affidavit, his former solicitor makes it clear that he stressed the importance of records relevant to this issue and specifically asked for all relevant records so that they could be disclosed and produced as required under the discovery process. On appeal, no attempt was made to refute this testimony.

31 Given the testimony of Mr. Schatz at trial we cannot give effect to any claim of solicitor client privilege with respect to this affidavit evidence. This leaves the question whether the fresh evidence should be admitted under the test articulated in controlling authorities. In *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409 (S.C.C.) the Supreme Court of Canada reaffirmed the test articulated in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at 775 and held that this test was applicable to civil actions.

32 In *Palmer* the Court set out the test at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*. [[1964] S.C.R. 484.]
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

33 In this case the first three criteria are met so the essential question turns on the fourth requirement.

34 We conclude that this evidence supports the trial judge's adverse finding with respect to Mr. Schatz's testimony. Furthermore, we are all of the view that his finding must stand without this fresh evidence, so strictly speaking it would not, in our view, have affected the result. But this aspect of the case has broader implications for the Court where Mr. Schatz has deliberately set out to deceive the Court. It may also be relevant when considering the relief that should be granted on this appeal. In the circumstances the evidence should be admitted on the principle articulated in *Harper v. Harper* (1979), [1980] 1 S.C.R. 2 (S.C.C.). In that case fresh evidence was admitted to demonstrate that Mr. Harper had endeavored to deceive the Court, including the Supreme Court of Canada as to the nature and extent of his assets in the family property action. Laskin C.J. speaking for the Court at p. 5 stated:

> The new evidence sought to be adduced would not have involved any change in the cause of action, but bespoke a failure of candour by the respondent in order to take advantage of the appellant if he could. No Court can condone attempts to mislead it; ...

35 The trial judge's finding with respect to 32 mares must stand. The attack on that finding is devoid of merit.

Value of mares

36 The trial judge fixed the value of these 32 mares at $1,200.00 per head for a total of $38,400.00. Once again the trial process was hampered by lack of records which would have recorded the sale price of mares that were sold and the purchase price of any that were acquired. However, the learned trial judge did have evidence before him to weigh and consider on this aspect of the case. This includes cross examination of Mr. Schatz in which he indicated that the average price for mares in 1992 was $1,200.00 each. [12] He went on to say that they were cheaper in 1992 than "today".

37 The trial judge attributed a value to each mare that was on the conservative side. This approach enured to Mr. Schatz's benefit.

38 We sustain the value of $38,400.00 placed on these mares.

V

Whether the trial judge erred in his valuation of the PMU business?

39 In his testimony Mr. Schatz disputed Ms. Doust's entitlement to an equal interest in the PMU business. [13] However, the principle of equal distribution of its value was finally conceded by counsel for Mr. Schatz in his submission following trial. [14] His initial position was untenable given his own testimony and the trial judge's findings on the whole of the evidence. The following passages in the reasons illustrate the relevant background to this issue: [15]

> ***PMU BUSINESS***
>
> [5] In 1992 as well, the parties started a pregnant mare urine operation in order to produce and supply estrogen to Ayerst, which has exclusive control of the trade in estrogen from PMU production. They acquired mares for urine production, by purchase, as well as by lease without fee (the owner receiving the benefit of feeding over winter, and ownership of any foal born to the leased mare). They maintained a single joint bank account for all income, including sales of estrogen. The petitioner contributed her salary earned from her part-time off-farm office employment. They filed separate individual tax returns, equally dividing the PMU income and other farm income, and treated all expenses in the same fashion. They paid their income tax bills from the joint account, as they did with other farm and personal expenses.
>
> [6] The PMU operation was the principal business of the parties, and horses are central to that business. They traded in mares and foals, but maintained four stallions with only occasional replacement. They had a core group of 20 mares, more or less, although in 1996, when they declared bankruptcy, they owned 30 mares. The number of mares needed each fall, at the start of the PMU production season, varied from year to year as was necessary to fulfill the quota of grams of estrogen set by Ayerst. In effect, the quota determined the size of the herd, which was adjusted by trade in the mares, or by lease. The quota was only in effect for one season, from the fall until the spring, at which time the mares are put to pasture. The next season would see a different quota set by Ayerst, with a resultant adjustment necessary in the herd. Income from the PMU operation also fluctuated, as did the expenses, but the parties were locked into some expenses which could not be easily reduced, and reduction in quota often brought financial hardship.
>
> [7] The PMU contract was made between Ayerst and the respondent, with little or no input from him. Ayerst also unilaterally set the quota of estrogen, and the price, each season. . . .
>
> . . .
>
> [15] The contract, albeit in the respondent's name, is part of the business which was operated by the parties and owned equally by them. They each contributed labour to the business,

> the petitioner contributed her employment income, they split profits equally, and received all income and paid all expenses out of their joint account. In effect, they operated the business in all aspects as equal partners. If the contract is not a business asset owned by them equally, it is family property and its value is equally distributed between the parties pursuant to s. 21 of *The Family Property Act*, S.S. 1997, c. F-6.3. The value of the PMU contract in 1998, $150,765.72, is subject to equal distribution between the petitioner and the respondent.

40 At trial each party called an expert witness with respect to the value of the PMU business. Each of these witnesses primarily focused on the value of the PMU contract with Ayerst since this was one of the main components of the farm business. The joint effort of the parties established and maintained their reputation and goodwill with Ayerst as a reliable producer and supplier of PMU. The fact that the contract was renewed each year is a testament to their joint efforts.

41 Mr. Wirth, C.A., who testified on behalf of Ms. Doust, valued the PMU business contract at $354,724.00 using the income approach, and $321,885.00 using the resale approach.

42 Ms. Watson, C.A., who testified on behalf of Mr. Schatz, valued the PMU business contract at $109,800.00 on the cash flow approach, and $90,060.00 to $129,825.00 on the resale approach.

43 By way of cross appeal, Ms. Doust sought an increase in valuation based on the expert testimony of Mr. Wirth. On the other hand, Mr. Schatz sought a reduction in the valuation of the trial judge based on the evidence of his expert Ms. Watson and vigorously contended that a separate valuation of the mares, independent of the PMU contract, constituted an error in the approach of the trial judge.

44 Mr. Schatz contended before this Court that this approach results in "double counting" or double compensation in favor of Ms. Doust because the mares should be treated as an essential component of the PMU contract. Accordingly, he argued that the value of these mares should at least be deducted from the value of the PMU business rather than a free standing asset subject to distribution.

45 The learned trial judge rejected the income approach to the valuation and determined that a resale approach was the preferable course. This is made clear in the following passages: [16]

> [10] One expert witness was called by each party concerning the value of the PMU business. They agree that the contract has value, but they disagree upon the amount. Mr. Wirth, C.A., for the petitioner, values the contract at $354,724.00 based on the income approach, and $321,885.00 based on the resale approach. Ms. Watson, C.A., for the respondent, values the contract at $109,800.00 based on the cash flow approach, and $90,060.00 to $129,825.00 based on the resale approach. These opinions are helpful.

[11] In the resale approach to valuation, which I prefer, each expert uses 7153 grams of estrogen, the quota in effect in the fall of 1998, as the basis of quantity. Mr. Wirth uses the value of $45.00 per gram which, he explains, is "more conservative" than the charity auction by Ayerst in April 2000 when 40 lots of 50 grams were sold for amounts ranging from $50.00 to $70.00 per gram. Ms. Watson uses the "trading value" of estrogen in 1998 for prices between $20.00 and $25.00 per gram. I determine that the material time for valuation is 1998, and accordingly I accept Ms. Watson's range of valuation, at that time, of the "total" contract of $143,060.00 ($20.00 per gram for 7153 grams) to $178,825.00 ($25.00 per gram for 7153 grams). I determine the value of the "total" contract in 1998 was $160,942.50, the average of $22.50 per gram based on the agreed quantity of 7153 grams. Ms. Watson has reduced the "total" contract valuation by the cost to acquire the additional mares in order to produce 7153 grams of estrogen. There is no issue that 70 mares are required in order to produce 7153 grams, I determine that the parties owned 32 mares in 1998. Therefore, 38 additional mares were required to meet the production quota of estrogen in 1998. But I would not attribute any capital cost to acquire these additional mares, since the respondent's evidence was that 38 additional mares can be easily leased: "One guy brings 16-17 mares each year". However, I do allow a deduction for the cost of feed and care for 38 leased mares. In 1998, the cost of feed and vet bills was $18,747.00, or, $267.81 per mare (based on 70 mares without allowance for cost of feed and vet bills for the four stallions). On that basis, the cost to keep the 38 additional leased mares was $10,176.78, which is an equitable and fair deduction to the value of the "total" contract. In the result, I determine the value of the PMU business in 1998 was $150,765.72.

[12] I am not satisfied that any deduction should be applied for tax, since the evidence is insufficient to prove that tax will impact in the circumstances. Rather, the evidence of Ms. Watson, on behalf of the respondent, which I accept, is that a sale of the PMU business would not attract tax since it would fall under the $500,000.00 capital gains exemption in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Moreover, the position of the respondent, regarding the question of a reduction in the value of the PMU business by reason of tax contingency, is tenuous at best. Since July of 1999, the PMU business has been operated through B & W Schatz Ranch Ltd., a corporation owned and controlled by the respondent and his spouse. Ayerst "switched" the contract from the respondent to the corporation, at the respondent's request, without the consent of the petitioner. In my view, it would be inequitable to permit the respondent any benefit of the reduction in the value of the PMU business for a potential tax liability upon its disposition, when he has previously arranged transfer of the contract to his corporation.

[13] I do not accept the income approach to valuation of the PMU business because the evidence does not show the necessary experience in the industry in order to rely upon this approach. Moreover, there are many negative contingencies in the contract, including variable quotas, uncertainty regarding income and expenses, the prohibition of sale or assignment

without Ayerst's consent, risk of diseases, higher costs to comply with more stringent codes for animal welfare, and the unilateral right of Ayerst to terminate the contract without cause on certain notice. Those contingencies directly impact upon the income approach to valuation. Fluctuating prices and high costs, some of which cannot be reduced, as well as the poor general economic climate in rural Saskatchewan, further militate against the income approach to valuation.

46 We find no need to quote or paraphrase the expert evidence in detail. The learned trial judge considered all the evidence and an examination of the record does not demonstrate any error in his assessment of that evidence. In the circumstances we cannot say that the trial judge's approach was inappropriate. The evaluation of the evidence and determining a valuation for an asset such as this component of the farm business is not one that lends itself to pure mathematical calculation.

47 The trial judge was in a similar position to a court assessing pecuniary damages where the injured party is self employed. In *Engel v. Kam-Ppelle Holdings Ltd.*, [1993] 1 S.C.R. 306 (S.C.C.), one of the principal issues was whether the trial judge's calculations, based on the after-tax cost of replacement labour was an acceptable method of assessing the pecuniary damages. This decision was reversed on appeal [(1990), 81 Sask. R. 153 (Sask. C.A.)] with this Court rejecting the replacement costs approach. On further appeal, the Supreme Court of Canada [1993 CarswellSask 296 (S.C.C.)], restored the trial judge's award holding that the appropriate method of calculation depends on the circumstances of each case. Since there was nothing in the evidence to suggest that the approach adopted was inappropriate or unreasonable, the Court of Appeal was not entitled to intervene. In the circumstances we are not entitled to substitute our view of the expert testimony and possibly come to a different conclusion: see for example *Kolibab v. Tenneco Canada Inc.* (1999), [2000] 1 W.W.R. 590 (Sask. C.A.).

48 In our opinion the principle articulated by the Supreme Court of Canada is apposite. In this case the trial judge's approach was reasonable in the circumstances, and it could even be characterized as somewhat conservative when tested against the ranges in the expert testimony.

49 For the purposes of a distribution order under the *Act*, the trial judge valued the PMU business at $150,765.72. Mr. Schatz contends that the value of the mares should be deducted from this sum because the mares are so linked to the PMU business that they must be considered part of it. We reject this contention because the trial judge was reasonably entitled to value the various components of the business as he did. If a global approach had been taken and the PMU business valued as including all chattels, equipment and livestock (mares, stallions and foals) the value would have been significantly higher. We find no error in treating the mares as a separate component of the operation. The contract could be fulfilled with either "rented" mares or mares owned by the parties.

50 Throughout the valuation process the trial judge took a conservative approach which enured to the benefit of Mr. Schatz. This approach applied not only to the PMU business but also the valuation of the mares.

51 Accordingly we find no merit in Mr. Schatz's attack on the valuation of the PMU business and for reasons stated earlier we decline to give effect to Ms. Doust's contention that the value of the PMU business should be substantially increased.

VI

Whether the trial judge erred in calculating the value of pensions, RRSP's and NISA accounts.

52 Ms. Doust concedes that the tax adjustment for her pension and RRSP account was credited twice. The correct numbers were set out in paragraph 13 of the Agreed Statement of Facts. [17] This mathematical error should have been corrected by bringing it to the attention of the trial judge before issuance of the formal judgment roll.

53 Counsel have now settled and approved of several corrections in the joint stipulation which reads: [18]

> 1. The Learned Trial Judge erred in his calculation of the Respondent's, Carol Ann Doust, RRSP value. The value that should be included for Carol Ann Doust's RRSP is $57,967.83. This is the amount of her RRSP net of any impact of taxation.
>
> 2. The Learned Trial Judge erred in his calculation of the Respondent's, Carol Ann Doust, pension value. The value that should be included for Carol Ann Doust's pension is $2,800.00. This is the amount of her pension net of any impact of taxation.
>
> 3. The parties each had monies in NISA Fund 1 and NISA Fund 2. The parties agree that the NISA Fund 1 is a non-taxable asset, and the NISA Fund 2 is a taxable asset, similar in nature to an RRSP. As such, the parties agree that the following values should be utilized with respect to their NISA funds:
>
> > (a) The Appellant, Wayne John Schatz, has a NISA Fund 1 in the amount of $3,038.53. That fund is non-taxable and that is the figure that should be utilized in the calculations;
> >
> > (b) The Respondent, Carol Ann Doust, has a NISA Fund 1 in the amount of $3,815.65. That fund is non-taxable and that is the figure that should be utilized in the calculations;

(c) The Appellant, Wayne John Schatz, has a NISA Fund 2 which, when discounted by 30% for the impact of taxation, amounts to $2,581.16. That is the figure that should be utilized in the calculations; and

(d) The Respondent, Carol Ann Doust, has a NISA Fund 2 which, when discounted by 30% for the impact of taxation, amounts to $3,205.80. That is the figure that should be utilized in the calculations.

54 Counsel further agree in their joint stipulation that the summaries on pages 15 and 16 of the reasons for judgment should be varied to read: [19]

Description of Assets	
Land	$186,900.00
PMU Business	150,765.72
32 Mares	38,400.00
4 Stallions	11,641.00
4 Foals	1,200.00
Chattels	55,225.00
NISA Accounts	12,641.14
RRSP	57,967.83
Pension	2,800.00
TOTAL	**$517,540.69**

Description of Debts		
Madeline Doust	$47,000.00	
ACS (secured)	47,759.13	
GST	4,000.00	
	— 4,050.02—	
1997 Income Tax Liability:—Petitioner:—Respondent:	2,469.47	
GMAC (finance 1994 GMC 1/2 ton)	7,574.27	
Farm improvement loan	25,519.83	
Louis loan to date of application	10,081.63	
Prorated land taxes to application date	420.21	
Sask Power	800.00	
TOTAL		**$149,674.56**

Equity		$367,866.13
Petitioner's 1/2 share of equity		$183,933.06
Less: **Adjustments** in favour of Respondent—-1997 tax liability of the Petitioner paid by the Respondent	$4,050.00	
-the few chattels and motorcycle sales proceeds in the Petitioner's possession	2,160.00	
-NISA accounts, after tax contingency	7,021.45	
-RRSP remaining with Petitioner, after tax contingency	57,967.83	
-Pension remaining with Petitioner, after tax contingency	2,800.00	
Total Adjustments		73,999.28

Distributive share of equity owing to Petitioner by Respondent	**$109,933.78**

55 Accordingly, the judgment sum in paragraph 1 of the judgment roll (paragraph 3 of the reasons) now reads $109,933.78.

Did the trial judge err in the method of implementation of the order for distribution of family assets?

56 The trial was conducted on the footing that any judgment would provide for an equal division of all property acquired by the parties during their 18-year "common law" marriage. Ms. Doust shifted her position on appeal, contending that she should be compensated for the fact that since their separation in July 1998, Mr. Schatz has retained all the benefits and income from their land and business. Apart from the personal effects she ultimately obtained by court order, and her pension and RRSP accounts, she has not received any share of their property. Furthermore, the judgment directed that no interest was payable until after June 30, 2002. In order to give effect to her request for relief, she asks that the Court now consider an equitable adjustment based on the principles articulated in *Russell v. Russell* (1999), 180 Sask. R. 196 (Sask. C.A.).

57 Mr. Schatz opposes unequal division because it was not pleaded or argued at trial. He also contends that it would be unfair because he assumed the business debts. There is no merit in this point because these debts were taken into account when determining the net asset value available for distribution.

58 We agree that it would be unfair at this stage to alter the course of litigation that proceeded on the clear understanding of "equal" division. However, the obvious injustice arising from the situation that exists must be rectified in one way or another. In our opinion Ms. Doust's legitimate concerns can more properly be considered when dealing with her cross appeal for maintenance.

59 Accordingly, we reject Ms. Doust's request for an additional equitable adjustment of $29,453.00 resulting from Mr. Schatz's exclusive use of the joint property since July 1998.

60 We now turn to implementation of the distribution order. This is complicated by Mr. Schatz's removal of the PMU business and significant other joint assets to Manitoba. Ms. Doust has a well-founded concern C she has received no payment since their separation in July 1998 and accordingly has been deprived of the opportunity to use or invest her capital in the farming venture she carries on with her present spouse. Although Ms. Doust resides in the same general area as the land and barn is located, Mr. Schatz refused her request to use any of the land in her present farming operations. The material on the post-trial motions indicates continuing hostility on the part of Mr. Schatz. He has been convicted of assault on Ms. Doust's present spouse.

61 At trial she asked for sale of the assets with the proceeds being divided. It is difficult to understand the denial of this reasonable request in light of Mr. Schatz's testimony at trial that he planned to move to Manitoba. [20] In the meantime interest has been accruing on the farm mortgage. Proceedings are under way which may jeopardize the value of the real property in Saskatchewan.

62 In her initial written argument, Ms. Doust asked for *in specie* distribution but in oral argument her counsel took a pragmatic view and advised that there was little point in pursuing that avenue.

63 The question of payment of the judgment is now of paramount importance given the removal of many of the assets to Manitoba. Cases such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) illustrate the importance of recovery of such judgments. The situation is further complicated because the PMU business is now operated in Manitoba by B & W Schatz Ranch Ltd. C a private company controlled by Mr. Schatz and his spouse Blanche McGregor. On the face of it Mr. Schatz is disregarding the spirit of the trial judge's order in paragraph 32 of his reasons. This provision reads:

> **6)** The respondent is restrained from disposing of or encumbering the assets, without the petitioner's consent, or without further order.

64 Before addressing the question of appropriate relief we find it convenient to deal with the maintenance issue.

Whether the trial judge erred in dismissing Ms. Doust's claim for spousal maintenance, both ongoing and arrears?

65 Ms. Doust in her cross appeal claims payment of the "expunged" arrears and ongoing maintenance. Under the terms of the interim order she was to be paid $400.00 per month. The arrears at trial were $6,400.00. We find no reasonable basis for eliminating these arrears. Mr. Schatz had retained full control of all their capital assets and enjoyed the full benefits from the PMU business. She clearly suffered an economic disadvantage from the unavailability of her fair share. We find that the considerations articulated by Jackson J.A. in *Russell v. Russell*, *supra*, at paragraph 123 to be apposite. The record discloses that Ms. Doust's income in the years following their separation has been modest. The interim maintenance award of $400.00 per month probably erred on the conservative side. The same considerations apply with respect to ongoing spousal maintenance C at least, in the circumstances of this case, until she receives her distributive share. This approach goes some way to rectify the obvious injustice arising from Mr. Schatz's control and use of the joint assets for more than four years.

66 Accordingly, the cross appeal is allowed with respect to maintenance. There will be an order for payment of the arrears of $6,400.00, together with an order for payment of maintenance of

$400.00 per month from December 2001 (the month of judgment) until payment of her distributive share under the judgment.

Relief

67 Subject to the correction of mathematical errors as outline in paragraphs 53 and 54 of these reasons, we dismiss the appeal and vary the judgment amount in paragraph 1 of the judgment roll to $109,933.78.

68 With respect to the cross appeal, the claim for maintenance is allowed until payment of the judgment as provided in paragraph 66 of these reasons.

69 If the judgment is not paid within 30 days we remit the matter to Queen's Bench for appropriate directions with respect to sale of the assets. Ms. Doust will have leave to apply for an order adding B & W Schatz Ranch Ltd. and Blanche McGregor as parties to the proceedings in accordance with s. 28(5) of the *Act*. This may be necessary for recovery purposes since Mr. Schatz and the private corporation operating the business may very well be viewed as trustees of the PMU contract for the benefit of both Ms. Doust and Mr. Schatz until the terms of the judgment are satisfied.

70 We observe that the costs of the trial are to be determined by the trial judge.[21] The trial judge can properly take into account Mr. Schatz's attempt to deceive the Court with respect to relevant records.

71 Pending payment of this judgment the provisions of paragraph 2 of the oral reasons of Vancise J.A. remain in full effect unless vacated by consent of the parties or an order of a judge of this Court.

Cost of Appeal

72 Ms. Doust is entitled to her costs of appeal. The only additional question is whether Mr. Schatz's conduct with respect to non-production and destruction of relevant records should be visited with an additional penalty in costs. Had Mr. Schatz made proper disclosure prior to trial, a major issue over the number of mares would not have engaged much time. His attempt to blame his former solicitor constitutes a deliberate attempt to mislead the Court. In such circumstances this type of conduct is deserving of a rebuke in costs: see for example *Ewing v. Ewing*, *supra*, and *Rozen v. Rozen*, *supra*.

73 We direct that costs be taxed on 22 times Column V.

74 Leave is reserved to apply for further directions if necessary.

Order accordingly.

Footnotes

1 Appeal Book Volume II, pp. 476a-481a and pp. 498a-504a.

2 Appeal Book Volume I, pp. 50a and 51a; 2001 SKQB 548 (Sask. Q.B.) at paras. 29-31.

3 Agreed Statement of Facts, Appeal Book Volume II, p. 697a, para. 2 and 3 and Holstein appraisal, Appeal Book Volume II, p. 418a.

4 Appeal Book Volume I, pp. 28a and 29a.

5 Appeal Book Volume I, pp. 34a-36a.

6 Appeal Book Volume I, pp. 51a and 52a; 2001 SKQB 548 (Sask. Q.B.).

7 Appeal Book Volume I, p. 43a; 2001 SKQB 548 (Sask. Q.B.) at para. 14.

8 Appeal Book Volume III, p. 163, lines 14-26.

9 Appeal Book Volume III, p. 107.

10 Appeal Book, Volume II, pp. 68 and 69.

11 Appeal Book Volume III, pp. 260-62 and pp. 324-29.

12 Appeal Book Volume III, p. 388, lines 20-26.

13 Appeal Book Volume III, pp. 318 *et seq*.

14 Appeal Book Volume I, p. 37a; 2001 SKQB 548 (Sask. Q.B.) at para. 1.

15 Appeal Book Volume I, p. 37a; 2001 SKQB 548 (Sask. Q.B.) at paras. 5, 6, 7 and 15.

16 Appeal Book Volume I, pp. 41a-43a; 2001 SKQB 548 (Sask. Q.B.) at paras. 10-13.

17 Appeal Book Volume II, p. 698a.

18 Agreement Between Counsel as to Variation of The Trial Judge's Decision dated November 18, 2002.

19 Schedule "A" to Agreement Between Counsel as to Variation of The Trial Judge's Decision dated November 18, 2002.

20 Appeal Book Volume III, p. 303, lines 6-8.

21 Appeal Book Volume I, p. 55a; 2001 SKQB 548 (Sask. Q.B.) at para. 38.

A "CENTURY" OVERDUE: REVISITING THE DOCTRINE OF SPOLIATION IN THE AGE OF ELECTRONIC DOCUMENTS

GIDEON CHRISTIAN*

Spoliation in the context of civil litigation occurs when a party intentionally destroys, mutilates, alters, or conceals evidence, typically documents, that are relevant to litigation. Spoliation has become easier than ever with the advent and rise of electronically stored information. This article gives a brief overview of the history of spoliation and criteria required to trigger the need to preserve documents relevant to litigation. Following this overview, the article identifies the issues with the current remedies for spoliation in Canada and points to the advances the United States has made to address this pressing issue. The article concludes with recommendations for further research into spoliation in Canada.

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I. INTRODUCTION

Parties and prospective parties in civil litigation have a common law duty to take reasonable steps to preserve evidence relevant to a pending or reasonably anticipated litigation.[1] A breach of this common law duty may result in spoliation. Spoliation in the context of civil litigation occurs when a party intentionally destroys, mutilates, alters, or conceals evidence, usually documents, relevant to litigation.[2] The act of spoliation is a breach of the duty to preserve such evidence. In Canada, the common law doctrine of spoliation was developed by the Supreme Court of Canada in 1896 to address the destruction of relevant

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1 The duty to preserve evidence relevant to litigation also arises from the inherent power of the court to impose sanctions on a party who knowingly alters or destroys evidence relevant to an action. See A Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court" (2011) 79:5 Fordham L Rev 2005 at 2006–2007.

2 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "spoliation."

evidence in civil proceedings, and its adverse impact on the administration of justice.[3] For over a century, this common law doctrine with its flaws has continued to be applied by the courts. It is now even applied to types of documents not contemplated when the rule was crafted (for example, electronic documents).

Spoliation of documentary evidence may take various forms. Before the advent of the digital age and its consequential widespread use of electronic media in the storage of documentary information, spoliation of documentary evidence usually took the form of destruction of the document itself — for example, by shredding, burning, or discarding. Where the volume of the paper is large, more effort would be required to successfully perpetrate the act of spoliation. However, with the advent and rise of electronically stored information, spoliation became relatively easier than ever. With the mere press of some keyboard buttons, a library-size folder of electronic documents can be successfully spoliated in a matter of seconds.

Spoliation in civil litigation is becoming (and should be) a matter of interest to civil litigators. One of the consequences of the COVID-19 pandemic was a sudden surge in migration to the virtual work environment. For many businesses, this transition will be permanent.[4] Hence, more than ever before, evidence of our work or business interactions, discussions, and transactions will exist in electronic form. We are generating (and will continue to generate) more electronic documents than ever, and some of these documents will become the subject of discovery in future litigation arising from present transactions. The ease with which electronic documents can be destroyed or mutilated resulting in lack of discoverability in future litigation is a proper subject matter for legal discussion in the context of civil litigation. Canadian courts will, more than ever before, be called upon to address this novel issue. Canadian jurisprudence in this area is not only sparse, but outdated and out of tune with the modern realities of the digital age.

The doctrine of spoliation in Canada, as it is today, was developed by the Supreme Court over a century ago, at a time when documentary evidence in litigation existed predominantly in paper form. Expectedly, the application of a doctrine designed in the paper age to a digital era will pose some challenges. Hence, this article revisits this common law doctrine to identify the proper approach to its application to electronic documents, the limit of the doctrine in addressing issues relating to the destruction of potentially relevant electronic documents in litigation — especially, in the area of sanctions/remedies for spoliation. The article will conclude with recommendations for possible statutory codifications (in line with the United States jurisdiction) which will address the identified limits of the common law doctrine in addressing the modern realities of spoliation in the digital age.

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3 *St. Louis v The Queen*, [1896] 25 SCR 649 [*St. Louis*]. The destruction of evidence relevant to an existing or contemplated judicial proceeding with the intent to pervert or defeat the course of justice may also give rise to criminal charges such as obstruction of justice under section 139 of the *Criminal Code*, RSC 1985, c C-46. However, this article deals with destruction of evidence in a civil, not criminal context.

4 Bryan Robinson, "Remote Work Is Here To Stay And Will Increase Into 2023, Experts Say" (1 February 2022), online: <www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/?sh=39ef779f20a6>.

II. SPOLIATION: A HISTORICAL CONTEXT

The origin of the doctrine of spoliation can be traced back to Ancient Rome, where an obligation was imposed on businessmen to preserve their business records or *Codex* for a specified period. Failure to preserve such records would result in the application of the maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer) in the event of litigation.[5] If the plaintiff was the spoliator, the claim was ordinarily dismissed, and the plaintiff was found guilty of fraud.[6]

The application of the doctrine soon spread to other jurisdictions outside the Roman courts. Perhaps the United States jurisdiction represents a rigid application of the doctrine in a fashion somewhat similar to the approach by the Roman courts. There are cases where the American courts applied the maxim by either striking the claim,[7] disallowing expert reports,[8] disallowing testimony of the spoliating party's witnesses,[9] or awarding historic monetary sanctions against the spoliating party.[10] The English courts adopted a fairly conservative approach to the application of the doctrine, interpreting it to mean that intentional destruction of evidence relevant to litigation raises a strong presumption that, if the evidence were available, it would be unfavourable or not helpful to the spoliator.[11]

Canadian courts closely followed the English Court's application of the doctrine. The leading jurisprudence in Canada is the 1869 decision of the Supreme Court of Canada in *St. Louis*.[12] In *St. Louis*, a contractor was engaged by the Crown to execute some construction projects. Following the completion of the work, the contractor's employees, as part of the company's routine operation, destroyed documents relating to the time sheet and pay records of the projects. A dispute subsequently arose over the balance due on the construction projects. The contractor brought an action in the Exchequer Court for the balance it alleged. Invoking the doctrine, the Court dismissed the case. The Exchequer Court adopted the rigid Roman interpretation of the maxim holding that the deliberate destruction of the documents was designed to cover up a fraud. The Court surprisingly reached this conclusion even though the documents were destroyed as part of the company's routine business operation before the dispute arose. On appeal, this decision was unanimously overturned by the Supreme Court of Canada, which expressed the view that the Exchequer Court decision overstretched the consequences of the maxim.

The Supreme Court of Canada further held that the destruction of the evidence in *St. Louis*, even though it was done intentionally (as it was not accidental) and prior to litigation, was not a case of spoliation, as it was done in the regular course of business when no

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5 *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 at para 15 [*McDougall*].
6 *St. Louis*, *supra* note 3 at 667–68, per Girouard J .
7 *Metropolitan Dade County v Bermudez*, 648 So (2d) 197 (Fla 1st Dist Ct App 1994); *New Hampshire Ins Co v Royal Ins Co*, 559 So (2d) 102 (Fla 4th Dist Ct App 1990); *Iverson v Xpert Tune, Inc*, 553 So (2d) 82 (Ala Sup Ct 1989); *Manzano v Southern Md Hosp, Inc*, 347 Md 17 at 29–30 (Md Ct App 1997); *Gath v M/A-Com, Inc*, 440 Mass 482 (Mass Sup Jud Ct 2003).
8 *United States v Philip Morris USA, Inc*, 327 F Supp (2d) 1 (DC Cir 2003) [*Philip Morris*].
9 *Ibid*.
10 *Ibid*, where the Court awarded $2.75 million in damages against the spoliating party.
11 *Armory v Delamirie*, [1722] EWHC KB J94; *The Ophelia*, [1916] 2 AC 206 (PC), cited in *McDougall*, *supra* note 5 at para 15.
12 *Supra* note 3.

litigation was reasonably anticipated. Thus, the Supreme Court interpreted the doctrine of spoliation to mean that intentional destruction of evidence carries a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it.[13] In the absence of clear evidence of fraud, the Supreme Court would not go as far as the Roman Court in imputing any motive of fraud. As evidenced below, this has remained the position in Canada for over a century, and provincial and territorial courts in Canada have similarly adopted this position in their interpretation of the doctrine.[14]

III. PAPER VERSUS ELECTRONIC DOCUMENTS: DISTINCTION WITH AND WITHOUT A DIFFERENCE

Although physically distinct in form, the law considers paper and electronic documents to be similar in many ways. They have equal status in civil proceedings — where relevant and admissible, either paper or electronic document could be used to prove a fact in issue. In this context, the rules of civil procedure and evidence do not give preference or priority to any, nor do they attach greater weight to any merely because of their format. The definitions of document (or record) in our rules of court, civil procedure, and rules of evidence, have evolved to include both paper and electronic documents.[15] Additionally, a party's discovery obligation in a civil proceeding applies to all relevant and material information,[16] hence, it is irrelevant whether the information exists in paper or electronic format. In *Linnen v. A.H. Robins*,[17] the Massachusetts Superior Court made an important pronouncement to this effect:

> A discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet…. [T]here is nothing about the technological aspects involved which renders documents stored in an electronic media "undiscoverable."[18]

Notwithstanding their similarities, paper and electronic documents differ in many ways. In terms of format, paper documents exist in tangible form, while electronic documents exist in an intangible form. Unlike paper documents, electronic documents are only readable with the aid of an electronic or mechanical device. While paper documents exist in just one format — paper, in the case of electronic documents, the digital format in which the document exists may differ (for example, PDF, JPEG, TIFF, Word document, and so on). This difference in format between paper and electronic documents is particularly important in terms of their destructibility or spoliation. When a paper document is shredded or set on fire, recoverability is practically impossible. This is not the case with electronic documents, which are more persistent even in the face of destructibility. Deleting an electronic document from an electronic drive or storage media does not (without more) permanently destroy or erase the document from the drive.[19] Such a document may still be accessible or recoverable where the

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13 *Ibid* at 652–65, per Taschereau J.

14 *McDougall*, *supra* note 5; *Stamatopoulos v The Regional Municipality of Durham*, 2019 ONSC 603;

15 *Alberta Rules of Court*, AR 124/2010, Appendix [*Alberta ROC*]; *Strength of Two Buffalo Dale v Canada*, 2020 ONSC 2926 at para 8.

16 *Alberta ROC*, *ibid*, r 5.2(1).

17 1999 Mass Super LEXIS 240 (Super Ct 1999) at 8.

18 *Ibid*.

19 Michele CS Lange & Kristin M Nimsger, *Electronic Evidence and Discovery: What Every Lawyer Should Know* (Chicago: ABA, 2004) at 6. Such recovery though may require the services of a skilled computer forensic expert.

storage space previously occupied by the "deleted" document has not been overwritten by the file allocation table (FAT).[20] The document, however, may be permanently destroyed from the storage device if the spoliator utilizes a software designed for that purpose. Notwithstanding the persistent nature of electronic documents, destruction of a larger volume of electronic documents can be achieved with much ease when compared to a similar volume of paper documents, which may require more resources and effort to accomplish the same task.

Another distinction between paper and electronic documents lies in the ease of reproduction and storage.[21] Electronic documents can be more easily replicated than paper documents, and larger volumes of electronic documents can be stored in more locations requiring far less space than paper documents. A library volume of electronic documents can be stored in a tiny flash drive, or even in the ubiquitous cloud.[22] The ability to store a greater volume of electronic documents in extremely smaller space (compared to paper documents) makes them more easily susceptible to spoliation than paper documents.

Electronic documents contain "metadata," which also makes them fundamentally different from paper documents. Metadata is "data about data."[23] It provides unique information about the document which is not necessarily evident on the face of it. Metadata would usually differ depending on the type of electronic document. Metadata of a Word document, for example, may contain information about the filename, the dates the document was created and modified, names of the creator and editors of the document, the person who last accessed the document, and more. In the case of electronic mail (email), the metadata would include the entire route of the email as it travelled through the internet from the sender to the current recipient. This information is not normally available in paper documents. The concept of metadata is important in the spoliation discussion because spoliation could also take the form of alteration or destruction of the metadata in an electronic document. For example, converting an electronic document from its native format to a hard (printed) copy would effectively destroy the metadata in the original document.[24]

Furthermore, the difference between paper and electronic documents is also important in the context of trying to determine whether the destruction of a document was intentional, or whether it was done in the normal course of business operations.[25] It might be easier to establish intentional destruction in the case of paper documents, as it will require some physical activity on the part of the spoliator to effect the destruction. This might be more complicated in the case of electronic documents, where the system could be set to overwrite the information in the storage medium or automatically delete information that has outlived

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20 *Ibid*.

21 *Ibid*.

22 *Ibid*.

23 *Ibid*.

24 *Harry Weiss, Inc v Moskowitz*, 106 AD (3d) 668 (NY Sup Ct App Div 1st Dept 2013) at 670. In *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 2007 US Dist LEXIS 2650 at *5–*6 (EDNY Dist Ct 2007), at the discovery stage of the litigation, the plaintiffs printed out the document and then scanned the printed document thus destroying all metadata from the files. The Court stated that documents which exist in electronically searchable form "should not be produced in a form that removes or significantly degrades this [metadata] feature." *Ibid* at 14.

25 Robert A Weninger, "Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom" (2012) 61:3 Cath U L Rev 775 at 786.

its retention period. Thus, the similarities and dissimilarities between paper and electronic documents are important considerations in seeking to apply a doctrine developed in the age of paper documents to an era of electronically stored information.

IV. THE RISE AND RISE OF ELECTRONICALLY STORED INFORMATION

It has been estimated that more than 90 percent of documents today exist in electronic form.[26] Electronic documents are currently being created and replicated in volumes that outpace and outnumber paper documents.[27] In many cases, paper documents are now conveniently being replaced by electronic documents.[28] The COVID-19 pandemic, which forced a global shutdown of in-person offices and relocation to virtual offices, has also resulted in the proliferation of electronic information. The migration to a virtual work environment continues to reduce the need for and production of paper documents, replacing them with a greater volume of electronic documents. Additionally, the decreasing cost of electronic document storage is further increasing the electronic document surge.[29]

A typical laptop today has a hard drive of about two hundred gigabytes — a capacity to hold about 13 million pages of word documents. Cloud storage is providing even bigger storage capacity at a fraction of the cost in previous years. The incentives any individual or business has in keeping or storing documents in paper form is now disappearing. Another factor responsible for the increasing surge of electronic documents is the ease with which they can be created and replicated. The same email could be conveniently sent to thousands of persons on a listserv at the fraction of time and cost it would take to create and send a paper version of the same correspondence to the same number of people. Recipients of the email could also forward the same as well as any accompanying attachment to others, thus creating an endless labyrinth of electronic documents. The volume of electronic documents is further compounded by the fact that most organizations do keep backups.[30]

The proliferation of electronic documents as well as the ease with which such documents can be destroyed or spoliated is of particular importance in civil litigation. Aside from the fact that such proliferation results in an increased cost of discovery, the ease with which the documents could be destroyed has an adverse impact on the administration of justice. While the doctrine of spoliation was developed to deal with the latter situation, this article takes the position that the proliferation of electronic documents requires that we fine-tune the existing

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26 "The Difference between Electronic and Paper Documents," online: *George Washington University* <www2.seas.gwu.edu/~shmuel/WORK/Differences/The%20Difference%20between%20Electronic%20and%20Paper %20Documents.html>.

27 Lange & Nimsger, *supra* note 19 at 6.

28 For example, while the volume of email sent daily continues to rise, the reverse seems to be the case with postal mail. A Canada Post Report noted that in 2014, the Crown corporation delivered 1.4 billion fewer pieces of mail than it did in 2006. The Report noted that in 2014, the volume of mail processed by Canada Post fell by about 5 percent compared to the previous year. This was also similar to the decline in preceding years. See Canada, Canada Post, *Annual Report 2014* (Ottawa: Canada Post, 2014) at 38, online (pdf): <www.canadapost-postescanada.ca/cpc/en/our-company/about-us/financial-reports/annual-reports/archive-annual-reports.page>.

29 Max Burkhalter, "The Cost Savings of Cloud Computing" (4 May 2021), online: <www.perle.com/articles/the-cost-savings-of-cloud-computing-40191237.shtml>.

30 Dan Pinnington, "Why Electronic Documents are Different," *LAWPRO Magazine* (September 2005), online (pdf): <www.practicepro.ca/2005/09/why-electronic-documents-are-different/>.

doctrine, as well as develop new rules to adequately address new issues and challenges that have risen since the development of the doctrine, to bring it in-line with the realities of the digital age. Predictably, the world will continue to witness the proliferation of electronically stored information in various formats. Thus, it is important to have rules that deal with the current as well as future realities arising from the increasing generation of potentially relevant electronic documents in civil litigation.

V. DETERMINATION OF SPOLIATION

Jurisprudence on spoliation seems to take the position that the primary step in finding spoliation is to establish the existence of a duty to preserve the document allegedly spoliated.[31] It has been noted that a finding of spoliation is "contingent upon the determination that a litigant had the duty to preserve the documents in question" at the time they were destroyed.[32] However, documents in the possession or control of a party may also qualify as property — in which case the party has a general right to retain or destroy it at will. Thus, it is important to show that, at the time the alleged spoliator destroyed the document(s), they did so in breach of an existing duty to preserve such property.

A party's obligation to preserve documents could be evidenced from: (1) an overriding statutory or regulatory requirement to preserve certain documents, usually for a fixed period;[33] (2) a voluntary assumption of the duty to preserve certain documents, for example, a corporation's internal document retention policy or by contract; or (3) the long-standing common law duty to preserve relevant documents when litigation has commenced or is reasonably anticipated.[34] The preservation obligation in the context of litigation has been described as a "duty to preserve information because one knows or should know that it is relevant to future litigation."[35] Thus, where a relevant document was destroyed in breach of the duty to preserve, it becomes less relevant that the party was exercising their general property right when they destroyed the document. Rather, the act becomes even more relevant to the allegation of spoliation.

Proof of spoliation starts with establishing the existence of a duty to preserve. Two important factors are essential in making that determination. First, it must be shown that the duty has been triggered, and second, the scope of the duty can be ascertained.[36]

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31 *St. Louis*, *supra* note 3; *Zubulake v UBS Warburg LLC*, 220 FRD 212 at 216 (SDNY Dist Ct 2003) [*Zubulake IV*].

32 Michael R Nelson & Mark H Rosenberg, "A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery" (2006) 12:4 Rich JL & Tech 1 at 6.

33 Some statutory or regulatory requirements obligate the retention of electronic documents for a particular period of time. In the absence of any pending or anticipated litigation, the party is at liberty to destroy the document following the expiration of that period of time. See e.g. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 37.

34 The common law duty to preserve supersedes any shorter regulatory requirement or document retention policy in the sense that, where litigation is reasonably anticipated, even if the statutory or corporate retention period has expired, the party is not at liberty to destroy the documents. In fact, the party in such situation has a common law obligation to continue the preservation of the relevant documents in view of the litigation or anticipated litigation. In the US case of *Zubulake IV*, *supra* note 31 at 218, the Court noted that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."

35 For a discussion in the US context, see Spencer, *supra* note 1 at 2007.

36 *Zubulake IV*, *supra* note 31 at 216.

A. TRIGGER OF DUTY TO PRESERVE

As noted above, the duty to preserve documents could be imposed by statute — in most cases for regulatory purposes — or voluntarily assumed by a corporation as part of its corporate document retention policy or by contract. In the context of litigation, the common law duty is the superseding standard for establishing if and when the duty to preserve is triggered. This is because a regulatory or voluntarily imposed duty to preserve is triggered when the document is created and dies at the expiration of the regulatory or voluntarily imposed timeline. At common law, the duty is triggered when litigation is commenced, as well as when a party "reasonably anticipates litigation,"[37] or "should have known that the evidence may be relevant to future litigation."[38] Once triggered at common law, the duty continues to exist even after the expiration of any regulatory or voluntarily imposed duty to preserve.

The trigger of the duty at common law could be express or implied. The duty could be objectively triggered when litigation is commenced or realistically threatened by a potential litigant. This is more certainly the case where a party is served with a preservation notice.[39] The party served with such notice must preserve the documents relevant to the litigation or anticipated litigation within the period specified in the notice, or within a reasonable time frame. This may entail (in the case of a corporation) issuing a legal hold on data/record custodians.[40] In even more objective cases, the court may expressly make a preservation order directed at one or more of the parties.

The duty to preserve might be impliedly triggered when a party reasonably anticipates litigation. Determining when a party reasonably anticipates litigation is subjective and dependent upon the facts of each case. It may arise from the occurrence of an incident that may reasonably be anticipated to result in litigation. For example, an automobile accident resulting in serious bodily harm could reasonably be anticipated to result in personal injury litigation. Thus, even in the absence of, or prior to service of a preservation notice, the nature of the incident would reasonably trigger a duty on a prospective party in possession of vital evidence relating to the incident (such as video footage) to preserve the evidence for at least within the statutory limitation period.

B. SCOPE OF DUTY TO PRESERVE

It is important to determine or identify the documents that could reasonably be anticipated to be relevant to the commenced or anticipated litigation. This determination is important because, even where the duty to preserve is triggered, it would not be reasonable to expect

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37 *Univ of Montreal Pension Plan v Banc of Am Sec*, 685 F Supp (2d) 456 at 466 (SDNY Dist Ct 2010).

38 *Fujitsu Ltd v Fed Express Corp*, 247 F (3d) 423 at 436 (2d Cir 2001).

39 A preservation notice, sometimes referred to as a legal hold notice, is a notice requiring a legal person to preserve specific information, documents, or records in their possession or control and relevant to a claim against it. The purpose is to ensure that the information, documents, or records are available for discovery.

40 The legal hold informs the record custodians of existing or impending litigation and requests they take steps to preserve records or documents relevant to the litigation.

a party to preserve every conceivable document in its possession.[41] This would be burdensome, unreasonable, and costly. It has been noted that the "duty to preserve potentially discoverable information does not require a party to keep every scrap of paper" in its possession or control.[42] That notwithstanding, parties need to make a reasonable determination of the scope of the duty. For the party in possession of the documents, determining the scope of the duty is important because failure to do so may result in a breach of the duty and hence, a finding of spoliation. It is also important for the party sending a preservation notice to the opposing party (a trigger) to indicate the documents likely covered by the notice (scope); otherwise, while the duty to preserve may arise (technically), the receiving party may not preserve all the documents the opposing party may want them to preserve either because they do not know what will be sought later on, or they are unsure what documents might be relevant to the yet-to-be-commenced litigation.

As vital as the scope of the duty to preserve appears to be, there is no clear-cut rule for making that determination. Even the mere sending or receipt of a preservation notice specifying the scope of the duty to preserve does not necessarily imply that the receiving party is bound by the scope indicated in the notice, especially where the notice is (and sometimes could be) unreasonably broad and may appear to be a fishing expedition.

A guide to the determination of the appropriate scope of the duty to preserve can often be found in the applicable Rules of Court or Rules of Civil Procedure relating to discovery.[43] The scope of the duty to preserve is related to discovery obligations — that is, the obligation to disclose all documents or records relevant to the litigation through the discovery process. Hence, the scope of the duty to preserve could be interpreted in this context to extend to all potentially *relevant* documents (or records).[44] In essence, the scope of the duty to preserve is identical to the scope of a party's discovery obligations in civil litigation. Where a clear duty to preserve has been triggered and the scope of the duty is reasonably ascertainable, failure to comply with the duty may result in spoliation, giving rise to legal consequences on the part of the spoliating party.

VI. THE CANADIAN APPROACH TO DETERMINATION OF SPOLIATION

In Canada, the current approach to the determination of spoliation is still guided by the Supreme Court of Canada jurisprudence dating back to the 1896 decision in *St. Louis*.[45] It is concerning that the rule currently applicable to the determination of spoliation of electronic documents in Canada was crafted over a century ago — at a time when electronic documents

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41 In *Zubulake IV*, *supra* note 31 at 217, Judge Scheindlin queried: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.'"

42 *In re Old Banc One S'holders Secs Litig*, 2005 WL 3372783 at 4 (NDIll Dist Ct 2005).

43 For Alberta, see e.g. *Alberta ROC*, *supra* note 15, r 5.2(1); Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30. See also *Federal Courts Rules*, SOR/98-106, r 222.

44 In the *Alberta ROC*, *ibid*, a record or information is deemed to be relevant (and material) if it "could reasonably be expected (a) to significantly help determine one or more of the issues raised in the pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings." See *Alberta ROC*, *ibid*, r 5.2(1). In the *Federal Courts Rules*, a document is relevant "if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case." See *Federal Courts Rules*, *ibid*, r 222(2).

45 *Supra* note 3.

or records had neither been invented nor conceived. Also, the concept of document has since evolved beyond what was reasonably contemplated by the Supreme Court at the time it developed the doctrine.

The documents destroyed in *St. Louis* were paper accounting records relevant to a dispute that subsequently arose between the parties. The documents, if available, would have been admissible at trial. But the documents were destroyed as part of the appellant's routine business operation, at a time when no litigation had commenced or was reasonably anticipated. The Supreme Court of Canada declined to make any finding of spoliation. While the Supreme Court did not go into a detailed analysis of the requirement of the duty to preserve the documents, the fact that the documents were destroyed by the appellant in the normal course of its business operation, and at a time when no litigation was anticipated, seems to negate any duty to preserve the documents at the time they were destroyed. In the absence of that duty, it was practically impossible to prove spoliation. In this regard, *St. Louis* seems to support the principle that the absence of a duty to preserve a document or record makes it more difficult to establish spoliation.[46] The fact that the documents were destroyed in the normal course of the business operation when no litigation was anticipated also goes further to negate the Exchequer Court's finding (which was overturned by the Supreme Court on appeal) that the alleged spoliator acted fraudulently in destroying the documents.[47]

Decisions by provincial courts in Canada have also added to the body of growing jurisprudence on spoliation in Canada. While aligning with the Supreme Court of Canada's position in *St. Louis*, the Alberta Court of Appeal in *McDougall* noted that the destruction of evidence may amount to spoliation where the destruction occurred in circumstances giving rise to a reasonable inference that the evidence was destroyed to affect the outcome of litigation.[48] The appellants, in that case, had lost their house to fire. The fire was allegedly caused by a faulty drill manufactured by the respondent. The respondent was informed of its possible liability for the fire, but it took no immediate steps to inspect the drill or the house. After the fire department and an expert hired by the appellants completed their investigations, the appellants demolished the house and began reconstruction. The drill, which was alleged to have started the fire, was destroyed by the expert during the investigation. The respondents sought to have the action struck based on spoliation, including the destruction of the drill during the investigation and demolition of the house. The Court of Appeal noted that Canadian law on spoliation entails *intentional* destruction of relevant evidence when litigation was existing or pending.[49]

In the *McDougall* case, litigation was reasonably anticipated at the time the house and the drill were destroyed by the appellants. The case, however, did not provide much guidance

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46 *Ibid*.

47 It is important to note that the destruction of the documents in *St. Louis*, *ibid*, while intentional, was not made with the intent to deprive the opposing party in a litigation access to the documents. Thus, "intention" in the definition of spoliation should be interpreted to mean the intent to keep the document away from access by opposing party.

48 *McDougall*, *supra* note 5 at 18.

49 Though it noted that even in the case of unintentional destruction of evidence (which is not spoliation in Canadian law), the court could exercise its inherent jurisdiction to prevent abuse of process (or address prejudice to the opposing party) by granting the appropriate remedy. *Ibid* at 25.

on spoliation as it relates to the specific facts of the case. For example, while the fact that an insured home was destroyed by fire could give rise to reasonable anticipation of litigation, would it be reasonable to expect the homeowner or its insurer to continue to preserve the razed home as evidence in anticipation of litigation, and for how long? If they decide to tear down the building preparatory to reconstruction, as was the case here, would that amount to a breach of their common law duty to preserve evidence in anticipation of litigation? The Court of Appeal did not weigh in on these issues; rather, it hurriedly sent the case back to the Trial Court to decide on spoliation. However, what is evident from the facts in this case is that the duty to preserve evidence in anticipation of litigation should be reasonable and not rigid. This would also apply to the determination of spoliation in the context of electronic documents. It may not be reasonable to impose a rigid duty to preserve electronic documents on a party if doing so may bring the party's routine business operation to a standstill. What should be required of a party is an obligation to take reasonable steps to preserve documents relevant to litigation.[50]

The case of *Commonwealth Marketing Group Ltd v. The Manitoba Securities Commission* is one of the few Canadian cases on spoliation of electronic documents.[51] The plaintiff in *Commonwealth Marketing* commenced a civil action against the Commission for its conduct in investigating the plaintiff. Acting on the advice of its investigator, the Commission destroyed secret tape recordings of undercover conversations with the plaintiff's employees. The Court of Queen's Bench of Manitoba ruled that the destruction of the tape by the Commission was a breach of its duty to preserve the evidence. The Court linked the parties' preservation obligation to their obligations in the Rules of the Court. It noted that while the preservation obligation is not expressly stated in the Rules of the Court, "it is implicit in them and basic to our legal system that all litigants have an obligation to preserve all evidence and documents in their possession or control touching on matters that they know or ought reasonably know are in issue in their case."[52] Suffice it to say that the obligation set forth here is very similar, if not identical, to the common law duty noted earlier.

Justice Copeland in *Stamatopoulos v. The Regional Municipality of Durham*[53] summarized the requirement for proof of spoliation thus:

> [T]o prove spoliation, a party must prove: (i) that relevant evidence was destroyed; (ii) that legal proceedings existed or were pending; and (iii) that the destruction was an *intentional* act indicative of fraud or *intent to suppress the truth*.[54]

While a finding of a duty to preserve is vital to proof of spoliation, equally important is the element of intent. The current state of the law in Canada suggests that spoliation can only occur where there is *intentional* destruction of evidence. It is submitted that the *intention* here is not just about the act of willful or deliberate destruction or alteration of the document, but most importantly, it relates to a state of mind indicative of a *mala fides* desire to prevent the

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50 For more on reasonable expectations of preservation, see *Mastracci v 1882877 Ontario Inc*, 2019 ONSC 3038 at paras 61–63.
51 2008 MBQB 319 [*Commonwealth Marketing*].
52 *Ibid* at para 1.
53 2019 ONSC 603.
54 *Ibid* at para 606 [emphasis added].

use of the document in litigation, to suppress the truth, and hence, impact the outcome of the litigation. In the *St. Louis* case, the Supreme Court of Canada in reversing the trial judge's finding of spoliation noted that "the evidence did not warrant the finding that the documents had been destroyed with a *fraudulent intent*."[55] Similarly, in *McDougall,* the Alberta Court of Appeal unequivocally stated that "unintentional destruction of evidence is not spoliation."[56] It went further to state that *St. Louis* stands for the proposition that

> [s]poliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has *intentionally* destroyed evidence relevant to ongoing or contemplated litigation in circumstances where *a reasonable inference can be drawn that the evidence was destroyed to affect the litigation*.[57]

The inference will shift the burden to the alleged spoliator to show that the destruction was not aimed at defeating the end of justice or affecting the outcome of the litigation. In *McDougall*, it appears that the drill was destroyed by the investigator in the course of the investigation, which required disassembling the components. Also, the house in that case was destroyed by the owner for the purpose of reconstruction. Thus, it appears that the destruction of the evidence here, though intentional (in the sense that it was not negligent or accidental), was not to prevent the use of the evidence in litigation or defeat the end of justice. In *Tarling v. Tarling*, the defendant beneficiary abruptly wiped out the testator's computer hard drive shortly after the testator's death.[58] While the formatting of the hard drive here was "intentional," the Ontario Superior Court concluded from the facts of the case that it was not done to destroy relevant evidence. Thus, this article takes the position that the intention required for the purpose of establishing spoliation is a state of mind (during the course of destruction or alteration of the documents) aimed at impacting an existing or anticipated litigation.[59]

VII. SANCTIONS AND REMEDIES FOR SPOLIATION

One area where the century-old spoliation rule in Canada has proved inadequate and hence, warranting necessary change, relates to the inadequate remedy or sanction for spoliation provided under the rule. The proper administration of justice is premised on the fair adjudication of disputes between litigants. This is dependent (among other things) on the parties disclosing relevant evidence in their possession or control as well as obtaining the same in the possession or control of the opposing parties.[60] Destruction of documents relevant to litigation impacts the fair administration of justice. The main difference between intentional and unintentional destruction of documents relevant to litigation in Canadian law is that, while the former *may* amount to spoliation, the latter will not. That notwithstanding, the two share something in common, they may attract sanctions or remedies by the court, and where the intentional destruction was aimed at depriving the opposing party of the use of the

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55 *St. Louis*, *supra* note 3 at 649 [emphasis added].
56 *McDougall*, *supra* note 5 at para 25.
57 *Ibid* at para 18 [emphasis added].
58 2008 CanLII 38264 (Ont Sup Ct).
59 See also *Dawes v Jajcaj*, 1999 BCCA 237; leave to appeal denied, [1999] SCCA No 347 (SCC). In *Dyk v Protec Automotive Repairs* (1997), 151 DLR (4th) 374 (BCSC), the Court noted that even though the evidence in that case was intentionally destroyed by a testing expert, there was no spoliation as the destruction was not the result of bad faith or *intention* to suppress the truth.
60 Maria Perez Crist, "Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information" (2006) 58:1 SCL Rev 7 at 44.

relevant documents in litigation (hence spoliation), the act will generally attract greater sanction/remedy.

There are various sanctions and remedies available to the court in established cases of destruction of documents relevant to litigation. In Canadian law, these sanctions and remedies arise from common law (for example, the doctrine of spoliation) as well as from the inherent power of the court to prevent abuse of process and to ensure proper administration of justice. In the exercise of its inherent power, the court may impose a sanction or order a remedy to address the misconduct by a party or any prejudice suffered by the innocent party as a result of the misconduct.[61] These sanctions or remedies include adverse inference, striking out a statement of claim or defence, exclusion of evidence, cost, or monetary award.[62] The most severe of the sanctions are usually applied in cases of spoliation involving bad faith or egregious misconduct.[63] For example, in *iTrade Finance Inc. v Webworx Inc*., the defendant deliberately used anti-forensic software to erase documents in its laptop while a court order to preserve evidence was in effect.[64] The Ontario Superior Court of Justice granted an order striking the spoliator's statement of defence.

From a practical perspective, it is best to seek the extreme sanction of striking a claim or defence at the pretrial stage of the litigation. If successful, it terminates the litigation and saves the party the cost of trial. However, caselaw has shown the reluctance by Canadian courts to impose this sanction at this stage.[65] In *McDougall*[66] and *Commonwealth Marketing*,[67] the Courts were very reluctant to grant this remedy at the pretrial stage because the Courts reasoned that the spoliation issue is best left for trial. In *McDougall*, the chamber judge had struck the plaintiff's claim because of alleged spoliation by the plaintiff, but the Alberta Court of Appeal reversed the decision. The Court gave the following reason for reversing the chamber judge's decision:

> As a general rule, determining whether spoliation has occurred, and what relief should follow, if any, is a matter best left to the trial judge who can consider all of the surrounding facts. While the court always has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so where a plaintiff has lost or destroyed evidence, unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, and the prejudice is so obviously profound that it prevents the innocent party from mounting a defence. These conditions are not close to being met in this case.[68]

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61 *Alberta ROC*, *supra* note 15, r 5.3.

62 *Western Tank & Lining Ltd v Skrobutan*, 2006 MBQB 205 at paras 21–23; *Dreco Energy Services Ltd v Wenzel*, 2006 ABQB 356 at para 52. See also the US case of *Lester v Allied Concrete Co*, 2011 WL 9688369 (Va Cir Ct) (Trial Order). In *Philip Morris*, *supra* note 8, the US Court used a combination of witness exclusion and monetary award.

63 Courts are usually vested with power under their rules or Rules of Civil Procedures to dismiss an action or strike a pleading where the party is in breach of rules relating to discovery for example, spoliation. For example, Rule 30.08(2)(b) of the Ontario *Rules of Civil Procedure* provides that where a party fails to produce documents for inspection or comply with the order of the court, the court may "dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant." See Ontario, *Rules of Civil Procedure*, *supra* note 43, r 30.08(2)(b).

64 [2005] 255 DLR (4th) 748 (Ont Sup Ct) [*iTrade*].

65 In *Cheung v Toyota Canada Inc*, 2003 CanLII 9439 (Ont Sup Ct); *Douglas v Inglis Ltd* (2000), 45 CPC (4th) 381 (Ont Sup Ct), the Court acknowledged that in particularly egregious circumstances a pretrial remedy might be available for spoliation up to and including dismissal of the claim.

66 *McDougall*, *supra* note 5.

67 *Commonwealth Marketing*, *supra* note 51.

68 *McDougall*, *supra* note 5 at para 4.

Thus, from the Court's reasoning above, dismissal is an appropriate pretrial sanction for spoliation where there is clear evidence to show that the act was deliberately perpetrated to adversely impact the outcome of the litigation, and the act was so profound that it affected the ability of the other party to pursue its claim or defend the claim against it. Where these conditions are not evident, then the court may resort to some other remedy short of dismissal or default judgment. Some US courts, like the Canadian courts, apply this sanction in the most severe cases of spoliation involving bad faith and willful misconduct. In some cases, the court has granted full or partial default judgment,[69] while in others, it struck the statements of claim or defence.[70] Some US courts, like their Canadian counterparts, are also of the view that granting this extreme remedy should be reserved for trial except in the most egregious of cases.[71]

Let us now turn to the most problematic aspect of the Canadian law on spoliation. Based on the current state of Canadian jurisprudence, the only sanction or remedy for spoliation under the common law doctrine is the imposition of a rebuttable presumption (in favour of the adverse party) that the evidence destroyed would have been unfavourable to the spoliator.[72] The principle behind this adverse inference is based on common sense reasoning that a party is more likely to destroy evidence that is detrimental to its case than evidence that is favourable to it.[73] The common law doctrine of spoliation does not fully address issues relating to the destruction of relevant evidence in litigation. A rebuttable presumption against the spoliator may not always be an adequate remedy to the victim or adequate sanction to the spoliator.

There are situations where the common law rebuttable presumption may not be an adequate remedy to address the prejudice caused by the spoliator. For example, in cases of egregious, bad faith spoliation as evident in *iTrade*, the common law remedy would have been grossly unjust considering the circumstances of that case.[74] Although the courts may resort to their inherent authority in cases where the common law remedy is inadequate, the increasing generation of electronic documents, the dynamic nature of the documents, as well as the ease with which spoliation of electronic documents can be perpetrated, warrant the need for specific statutory provisions to address this novel area of spoliation. The Canadian legal system can (and should) no longer continue to rely on an over a century-old rule to seek to address a problem that was never contemplated at the time the rule was crafted. Going further, this article will consider the US approach to addressing this issue, as well as its implication for a possible reform of the Canadian civil litigation system.

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69 *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc*, 2005 WL 674885 (Fla Cir Ct 2005). In *Daynight, LLC v Mobilight, Inc*, 248 P (3d) 1010 at 1012 (Utah Ct App 2011) [*Daynight*], the Court of Appeals of Utah confirmed a lower Court's entry of default judgment against a third-party defendant who destroyed evidence contained in a laptop by running over the laptop with a vehicle. The Court noted the conduct unquestionably demonstrated bad faith and a disregard for the judicial process.

70 *In re Kmart Corp*, 371 BR 823 (NDIll ED Bankr 2007) at 39.

71 *Ibid*.

72 *St. Louis*, *supra* note 3 at 652.

73 Lauren R Nichols, "Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery" (2011) 99:4 Ky LJ 881 at 885.

74 *iTrade*, *supra* note 64. See also *Daynight*, *supra* note 69.

VIII. THE US APPROACH

As noted above, the common law adverse inference against a spoliator does not provide an adequate remedy in many cases of spoliation. Although the court may resort to its inherent power where the common law remedy is inadequate, the fact is that such discretionary power could result in uncertainty and similar cases of spoliation being treated differently by different courts. The proliferation of electronic documents, the cost of their preservation, and the ease of their destructibility give rise to the need for certainty in this area. This is especially the case for data custodians who may need to assess the legal risks associated with their data preservation efforts.

Efforts to address the uncertainty surrounding sanctions and remedies for the destruction of electronic documents resulted in changes to the US *Federal Rules of Civil Procedure* in 2015.[75] Unlike Canada, the US *FRCP* has rules *specifically* dealing with sanctions or remedies for the destruction of electronically stored information relevant in civil proceedings. The change in the US jurisdiction started with the 2006 *FRCP* 37(f), which restrained the court, absent exceptional circumstances, from imposing sanctions for loss of electronically stored information relevant to litigation where the loss occurred "as a result of the routine, good-faith operation of an electronic information system."[76] This was followed by another amendment to the *FRCP* 37(f) in 2015. The 2015 amendment provided some greater clarity on judicial sanctions for the destruction or loss of electronically stored information relevant to litigation in situations where a party fails to take reasonable steps to preserve the document, and the document cannot be recovered.[77] The 2015 *FRCP* 37(e) provides:

> (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > (A) presume that the lost information was unfavorable to the party;
> > >
> > > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > (C) dismiss the action or enter a default judgment.

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75 2015 Fed R Civ P [*FRCP*].
76 2006 Fed R Civ P, r 37(f).
77 *FRCP*, *supra* note 75, r 37(e).

The 2015 *FRCP* 37(e) provides two different approaches to the determination of appropriate remedies for the loss of electronic documents relevant to litigation. Before the application of any of the approaches though, three things must be established: first, the lost electronic documents "should have been preserved in the anticipation or conduct of litigation."[78] This implies the presence of a duty to preserve the documents. Rule 37(e) does not create a new duty to preserve, rather it codifies the common law rule. Second, the documents must have been lost because "a party failed to take reasonable steps to preserve it."[79] It appears that the scope of Rule 37(e) is broad to cover cases of intentional and unintentional destruction or loss of relevant documents. Finally, it must be shown that the lost electronic documents "cannot be restored or replaced through additional discovery."[80] Loss of the documents will not invoke the application of Rule 37(e) if the documents are recoverable using the appropriate technological tool or skill.[81]

Where the three factors above have been established, the court is required to use one of the two approaches in Rule 37(e) (1) and (2) to determine the appropriate remedy for the loss of the relevant electronic documents. First, if the loss of the documents resulted in prejudice to the party, the remedy is limited to those "necessary to cure the prejudice" and nothing more.[82] While the rule here does not provide any specific remedy, it clearly sets out the objective to which the remedy must seek to achieve. Taking this objective and the circumstances of each case into consideration, the court is guided by its discretion to craft the appropriate remedy. Thus, Rule 37(e)(1) deals with cases of unintentional destruction or loss of relevant documents. This fact emerges from a reading of Rule 37(e)(2), which specifically requires proof of intent as a condition for the imposition of the sanctions outlined therein.

Rule 37(e)(1) provides less extreme remedies for good faith (unintentional) destruction of relevant documents such as destruction arising from the implementation of routine document retention/deletion policies.[83] The remedies here are less extreme and limited because the court cannot apply the sanctions outlined in Rule 37(e)(2) (adverse inference and default judgment) to cases falling under Rule 37(e)(1). As discussed below, the former deals with more serious cases than those contemplated in the latter.

The second approach to the determination of remedies for the destruction of relevant electronic documents in the US *FRCP* is found in Rule 37(e)(2). This rule specifically deals with *intentional* destruction of electronic documents relevant to litigation with the specific "intent to deprive another party of the information's use in the litigation."[84] This is the US equivalent of the Canadian concept of spoliation. Thus, the rule requires a finding of "the

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78 *Ibid*.
79 *Ibid*.
80 *Ibid*.
81 This should take into consideration the concept of proportionality — the cost of recovering the document should be proportional to its relative importance in proof of or defence of the litigation. Hence, a document should not be deemed to be recoverable if the cost of recovery exceeds the claim in the litigation.
82 *FRCP*, *supra* note 75, r 37(e)(1).
83 Agnieszka McPeak, "Self-Destruct Apps: Spoliation by Design?" (2017) 51:3 Akron L Rev 749 at 757–58.
84 *FRCP*, *supra* note 75, r 37(e)(2).

intent to deprive another party of the information's use in the litigation."[85] On finding such intent, the court may draw an adverse inference or instruct the jury (in the case of a jury trial) that it may or must draw the adverse inference.[86] Another remedy available to the court in these circumstances would be to dismiss the action or enter a default judgment in favour of the victim of the spoliation.[87]

Rule 37(e)(2) introduced a uniform standard for the imposition of sanctions for spoliation in the US federal courts.[88] The imposition of an adverse inference only in cases of intentional destruction of relevant documents in Rule 37(e)(2), and not in Rule 37(e)(1), is somewhat in line with the Supreme Court of Canada jurisprudence in *St. Louis*, which limits that particular sanction to cases of destruction with intent (that is, spoliation).

It is instructive to note that, unlike Rule 37(e)(1), Rule 37(e)(2) does not require proof or finding of prejudice. The presence of prejudice is subsumed by the requirement of intent to deprive. A finding that the party destroyed a document with the intent to deprive the other party of its use in litigation is indicative that the document was not favourable to the party who destroyed it, and also supportive of a presumption that the loss of that document was prejudicial to the victim. The intent to deprive arises from the spoliator's view that the document is adverse to its case or beneficial to the opponent. Hence, the deprivation of the use of the document results in prejudice to the other party.

A finding of intentional spoliation does not necessarily imply that the court must apply any of the sanctions in Rule 37(e)(2). This is evident from the use of the permissive word "may" in Rule 37(e)(2). While flexibility is important in crafting sanctions that fit the act of the spoliator, the provision in Rule 37(e)(2) provides a standard guide for crafting such sanctions in the US federal courts. Suffice it to say that Rule 37(e) generally does provide a guide for the determination of appropriate sanctions in relation to destruction of electronic documents relevant to litigation.[89] This helps create some measure of certainty.

IX. CONCLUSION

Over a century after the doctrine of spoliation was developed by the Supreme Court of Canada, the doctrine is overdue for a reform that will bring it in line with the modern realities of the digital age. The meaning and concept of document have evolved beyond what was reasonably contemplated by the courts at the time the doctrine was developed. Additionally, the dynamic nature of an electronic document, its proliferation, and the ease of destruction necessitates a revisiting of the doctrine. Of greater concern is the sanction provided for spoliation under this common law doctrine. The lone sanction of adverse inference is not a one-size-fits-all. In cases where the spoliated document is tangentially relevant to the

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85 *Ibid*. This is in line with my previous discussion of the concept of "intention" in the Canadian spoliation jurisprudence.

86 *Ibid*, r 37(e)(2)(B).

87 *Ibid*, r 37(e)(2)(C).

88 Jeffrey A Parness, "Presuit Civil Protective Orders on Discovery" (2021) 38:2 Ga St U L Rev 455 at 464.

89 Alexander Nourse Gross, "A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?" (2015) 2015:2 Colum Bus L Rev 705 at 739.

litigation, the sanction might be overkill. In other cases of egregious, bad faith spoliation, this sanction might be inadequate to address the situation.

While countries like the US have taken steps to address these problems by making necessary changes to their *FRCP* to specifically deal with the destruction of electronically stored information, Canada has remained stuck in its century-old rule in *St. Louis*. It is high time for Canada to move beyond the common law doctrine in *St. Louis*. In the light of technological advancements, especially in electronic documents, our rules of court and rules of civil procedure at the federal, as well as provincial and territorial levels, need urgent reform to provide for flexible sanctions and remedies to address the destruction of electronic documents relevant to litigation. Such reform should provide flexible rules and principles to guide the courts in determining the appropriate remedies or sanctions to address cases of intentional and unintentional destruction of electronic documents relevant to litigation, taking into consideration the circumstances of each case. The approach in the US *FRCP* discussed in this article is a starting point for such reform.

In conclusion, it is important to highlight other issues related to spoliation which, while not addressed in this article, are of important consideration in any reform of Canadian law on spoliation. First, whether the increasing generation of electronic documents and the ease with which this type of document can be destroyed, thus adversely impacting a party's ability to litigate its case, should give rise to the recognition of spoliation as a distinct type of tort in Canada. The second issue relates to the increasing development and use of ephemeral (short-lived or self-destructing) messaging technology.[90] This is technology designed to send electronic messages which automatically self-destruct or self-delete after being read or viewed by the recipient or after a short amount of time.[91] In situations where such technology is used in the normal course of business (for example, in a corporate environment), would the continued use of the technology when litigation is pending or reasonably anticipated amount to spoliation if it results in destruction of electronic documents relevant to litigation?[92] These are some novel issues related to spoliation that are outside the scope of this article.

90 Examples of ephemeral messaging apps include Snapchat, Telegram, Confide, Wickr, and so on.

91 Gideon Christian, "Burn After Reading: The Challenge of eDiscovery in Self-Destruct Messaging Environment" (8 January 2020), online (blog): <ediscoverylaw.ca/facebook/burn-after-reading-the-challenge-of-ediscovery-in-self-destruct-messaging-environment/>.

92 A prominent litigation relating to the use of self-destructing messaging technology was the case of *Waymo LLC v Uber Technologies, Inc*, No 3:17-cv-00939 (NDCal Dist Ct, 2017). However, the case was settled out of court effectively foreclosing any judicial ruling on the issue.

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Noting that the proportionality principle is reflected in many of the provinces' rules of court, the Court confirmed that proportionality can act as a touchstone for access to civil justice. Relying on a decision of the Newfoundland Court of Appeal,[47] the Court stated that even where the proportionality principle is not codified, rules of court that involve discretion include the underlying principle of proportionality, taking into account the appropriateness of the procedure, costs and impact on the litigation, and its timeliness, given the nature and complexity of the litigation.

Most provinces have summary litigation procedures where the amount at issue is less than a specified threshold ranging from $15,000 to $200,000, depending on the province. For example, in Manitoba, Rule 20A of the Court of Queen's Bench Rules[48] modifies ordinary litigation procedures for certain actions to require the Court to consider what is reasonable where the amount at issue warrants a summary judgment or trial. Rule 20A limits the times when actions subject to this Rule may be brought and modifies the generally broad scope of discoverable documents. In particular, "relevant document" means only those documents referred to in the party's pleading, the documents to which the party intends to refer at trial, and all documents in the party's control or possession that could be used to prove or disprove a material fact at trial.

Principle 3. **As soon as litigation or investigation is anticipated, parties must consider their obligation to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.**

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47. *Szeto*, *supra* note 21, cited at *Hryniak*, *supra* note 20 at para 31.

48. *Manitoba Rules;* see also *Ontario Rules*, r 76 presenting a Simplified Procedure applicable to most civil actions involving less than $100,000.

Comment 3.a. Scope of Preservation Obligation

A party's obligation to preserve potentially relevant evidence will vary across jurisdictions and proceedings. Parties should understand their obligations with respect to the preservation/nonspoliation of evidence, including ESI.[49]

In common law jurisdictions the obligation to preserve data arises as soon as litigation is contemplated or threatened, but when that point is reached is a fact-by-fact determination. If an organization receives threats of litigation on a daily basis, having to preserve all data every time a letter is received would effectively mean that the organization could never delete any documents. When this obligation arises is a legal question to be carefully considered in each case.

Due to volume, complexity, format, location, and other factors, the possible relevance of collections of ESI or individual electronic files may be difficult to assess in the early stages of a dispute. Even where such an assessment is technically possible, it may involve disproportionate cost and effort. In such circumstances, it may be more reasonable to expect a party to first make a good-faith assessment of where (in what locations; on what equipment) its relevant ESI is most likely to be found and then, with the benefit of this assessment, take appropriate steps to preserve those sources in advance of a determination of whether or not to collect data. Organizations and, in particular, IT departments often maintain a data map,[50] which could be a

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49. The obligations to preserve relevant evidence for use in litigation are distinct from any regulatory or statutory obligations to maintain records. For example, various federal and provincial business corporations acts prescribe statutory requirements for record keeping. Records management and obligations to meet regulatory and statutory record keeping are outside the scope of *The Sedona Canada Principles Addressing Electronic Discovery*.

50. Data map: A document or visual representation that records the physical or network location and format of an organization's data. Information

useful starting point for this exercise. In the absence of such, a data map can be created with the aid of an organization's IT department.

The general obligation to preserve evidence extends to ESI but must be balanced against the party's right to continue to manage its electronic information in an economically reasonable manner. This includes routinely overwriting electronic information in appropriate cases. It is unreasonable to expect organizations to take every conceivable step to preserve all ESI that may be potentially relevant.

Comment 3.b. Preparation for Electronic Discovery Reduces Cost and Risk: Information Governance and Litigation Readiness

The costs of discovery of ESI can be best controlled if steps are taken to prepare computer systems and users of these systems for the demands of litigation or investigation in advance. Information governance[51] is growing in importance beyond just the realm of eDiscovery, implicating virtually all operations of an organization. To reflect the importance of information governance and its "downstream" effects in an eDiscovery engagement, the Electronic Discovery Reference Model (EDRM)

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about the data can include where the data is stored, physically and virtually, in what format it is stored, backup procedures in place, how the electronically stored information moves and is used throughout the organization, information about accessibility of the electronically stored information retention and lifecycle management practices and policies, and identity of records custodians. See "Sedona Conference Glossary," *supra* note 1 at 263.

51. Information Governance: The comprehensive, interdisciplinary framework of policies, procedures, and controls used by mature organizations to maximize the value of an organization's information while minimizing associated risks by incorporating the requirements of: (1) eDiscovery, (2) records and in-formation management, and (3) privacy/security, into the process of making decisions about information. See *ibid* at 322.

incorporated information governance into its diagram in 2007[52] and has also developed an Information Governance Reference Model.[53]

The possibility that a party will have to demonstrate that it used defensible methods in the handling of ESI and that it maintained proper chains of custody makes effective information governance practices all the more important. The integrity of electronic records begins with the integrity of the records management systems in which they were created and maintained.

With a view to litigation readiness, larger organizations should consider establishing an eDiscovery response team, with representation from key stakeholders, including legal, business unit leaders, IT, records/information governance, human resources, corporate security, and perhaps external eDiscovery consultants/service providers. Smaller organizations can similarly prepare for litigation by establishing and maintaining solid information governance policies.

The steps to be taken to ensure compliance with best practices and to control costs include defining orderly procedures and policies for preserving and producing potentially relevant

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52. EDRM, EDRM Diagram Elements, online: EDRM <https://edrm.net/resources/frameworks-and-standards/edrm-model/edrm-diagram-elements/>.

53. The Information Governance Reference Model (IGRM) is more than an expansion of this one cell in the EDRM. See EDRM, Information Governance Reference Model (IGRM), online: EDRM. "The IGRM Project does NOT aim to solely build out the Information Management node of the EDRM framework. It will be extensible in numerous directions, such as records management, compliance and IT infrastructure." Principles and protocols about ESI and evidence have been published by various bodies across Canada, including the Canadian Judicial Council, the Canadian General Standards Board, the Competition Bureau and various provinces. The Sedona Canada Working Group favors continuing efforts to reach consensus on principles, protocols, and best practices in information governance and eDiscovery.

ESI, and establishing processes to identify, locate, preserve, retrieve, assess, review, and produce data. A records retention policy should provide guidelines for the routine retention and destruction of ESI as well as paper records, and account for necessary modifications to those guidelines in the event of litigation. Data maps tracking how individuals interface with various network systems should also be created and maintained.

Having a records management system that provides a map of where all data is stored and how much data is in each location, and having an understanding of how difficult it is to access, process, and search those documents (e.g., whether the sources contain structured or unstructured data[54]) will enable a party to present a more accurate picture of the cost and burden to the court when refusing further discovery requests, or when applying for orders shifting costs to the receiving party in appropriate cases. It also mitigates the risk of failing to preserve or produce evidence from computer systems, thereby reducing the potential for sanctions. Costs can also be controlled through careful and cooperative discovery planning.

In *Siemens*, the defendant's corporate records retention policy was considered inadequate and resulted in an order requiring further recovery attempts. The Court stated that "[o]bviously a company is entitled to establish whatever e-mail retention policies it wishes in order to minimize server use and cost. However, in a project such as this, which obviously carries over a lengthy period of time, such a policy can potentially create serious problems."[55]

54. Structured data is a standardized format for providing information about a page and classifying the page content, online <https://developers.google.com/search/docs/guides/intro-structured-data>.

55. *Siemens*, *supra* note 18 at paras 135–38.

Comment 3.c. Response Regarding Litigation Preservation

Parties should take reasonable and good-faith steps to meet their obligations to preserve information relevant to the issues in an action.[56] As noted above, in common law jurisdictions, the preservation obligation arises as soon as litigation is contemplated or threatened.[57] Owing to the dynamic nature of ESI, any delay increases the risk of relevant evidence being lost and

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56. *Doust v Schatz*, 2002 SKCA 129 (CanLII) [*Doust*] at para 27:

"The integrity of the administration of justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law: see e.g. *Livesey v Jenkins*, reflex, [1985] 1 All E.R. 106 (H.L.), *Ewing v Ewing (No. 1)* (1987), 1987 CanLII 4889 (SK CA), 56 Sask. R. 260, *Ewing v Ewing (No. 2)* (1987), 1987 CanLII 4865 (SK CA), 56 Sask. R. 263 (C.A.), *Vagi v Peters,* reflex, [1990] 2 W.W.R. 170, *R. v Foster and Walton*-Ball (1982), 1982 CanLII 2522 (SK CA), 17 Sask. R. 37 (C.A.) and *Rozen v Rozen,* 2002 BCCA 537 (CanLII), [2002] B.C.J. No. 2192 (Q.L.). A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial."

57. See *Culligan Canada Ltd. v Fettes*, 2009 SKQB 343 (CanLII) (reversed on other grounds): "As soon as litigation was threatened in this dispute, all parties became obligated to take reasonable and good faith steps to preserve and disclose relevant electronically stored documents." In *Johnstone v Vincor International Inc.*, 2011 ONSC 6005, a defendant was on notice that a legal action had been started but chose to rely on a technicality regarding service and failed to follow its own policies in place to deal with situations of this nature when it knew that it had record retention policies in place that would possibly lead to the loss of important and relevant documents. The Court noted that as retention policies and preservation plans serve two different purposes, organizations may need to act promptly at the outset of possible litigation to suspend automatic electronic file destruction policies in order to preserve evidence.

subsequent claims of spoliation.[58] A proactive preservation plan will ensure a party can respond meaningfully and quickly to discovery requests or court orders.

In Nova Scotia, Rule 16 of the *Civil Procedure Rules* specifically outlines preservation requirements and refers to the obligations established by law to preserve evidence before or after a proceeding is started.[59]

The scope of what is to be preserved and the steps considered reasonable may vary widely, depending upon the nature of the claims and information at issue.[60] The courts have ordered

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58. On the issue of intentional spoliation of evidence as a separate tort, see *North American Road Ltd. v Hitachi Construction*, 2005 ABQB 847 at paras 16–17 (CanLII); *Spasic Estate v Imperial Tobacco Ltd., et al*, 2000 CanLII 17170 [*Spasic*]. On the issue of the appropriate relief in connection with negligent spoliation, see *McDougall v Black & Decker Canada Inc.*, 2008 ABCA 353 (CanLII) [*McDougall*].

59.Nova Scotia *Civil Procedure Rules*, r 16,01: (1) This Rule prescribes duties for preservation of relevant electronic information, which may be expanded or limited by agreement or order.

(2) This Rule also prescribes duties of disclosure of relevant electronic information and provides for fulfilling those duties . . .

16.02:

(1) This Rule 16.02 provides for preservation of relevant electronic information after a proceeding is started, and it supplements the obligations established by law to preserve evidence before or after a proceeding is started.

16.14:

(1) A judge may give directions for disclosure of relevant electronic information, and the directions prevail over other provisions in this Rule 16.

(2) The default Rules are not a guide for directions.

(3) A judge may limit preservation or disclosure in an action only to the extent the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

60. In contrast to the extensive case law and commentary in the United States, the law regarding preservation of electronic documents in Canada is

more targeted preservation.[61] That said, parties that repeatedly have to deal with preservation issues should consider what steps they can take to avoid having to repeat steps in the future.

Comment 3.d. Response Regarding Investigation Preservation

In the context of an investigation, the duty to preserve documents may or may not be triggered, depending on whether the investigation relates to events or allegations that give rise to a reasonable anticipation of litigation. This is true whether the investigation is internal or external. Where the duty to preserve is triggered, organizations must take reasonable steps to preserve potentially relevant ESI.

> *Illustration i.* A corporate investigation is undertaken in relation to allegations that a senior member of the

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still developing. Not surprisingly, several Canadian courts have looked to the U.S. for guidance in defining the scope of the duty to preserve, though U.S. law is more demanding than in Canada in notable respects. The decisions from the Southern District of New York in *Zubulake v UBS Warburg LLC*, 220 FRD 212, 217 (S.D.N.Y. 2003) (WL) and *Pension Committee of the University of Montreal Pension Plan v Banc of America Secs., LLC, et al*, No 05 Civ 9016 (SAS), 2010 WL 184312 (S.D.N.Y. 2010) provide guidance regarding the scope of the duty to preserve electronic documents and the consequences of a failure to preserve documents that fall within that duty. At paragraph 7 of the former, the Court commented as follows on the scope of the duty to preserve:

> "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation."

61. *Drywall Acoustic, Lathing and Insulation, Local 675 Pension Fund (Trustees) v SNC Lavalin Group Inc.*, 2014 ONSC 660 [*Drywall Acoustic*] at paras 111-112.

Recent Updates to the Third Edition of the Sedona Canada Principles on eDiscovery

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1 Introduction

Since the publication of the First Edition in 2008, The Sedona Canada Principles Addressing Electronic Discovery (the "*Sedona Canada Principles*" or "*Principles"*) have served as an authoritative source of guidance in electronic discovery for Canadian legal practitioners. The Principles have continued to advance with the release of the Third Edition of the *Sedona Canada Principles* in January 2022. The Third Edition has updated commentary, illustrations, and case law to address the ever-increasing digital world that Canadian legal practitioners operate within. This latest edition can be found on the Sedona Conference Website here, along with numerous other publications relating to the advanced study of law and policy in the areas of antitrust law, complex litigation, property rights, and data security and privacy law. This article highlights a few of the major updates to the *Principles,* such as the interplay between ediscovery and developing privacy regimes in Canada, the role of information governance in facilitating ediscovery, and the emergence of new technologies that can be leveraged in the discovery process.

2 Changes Regarding Privilege and Privacy

Traditionally, keyword and domain searching have been used to identify privileged and confidential information and to prevent sensitive documents from being produced. However, searching for words and phrases to identify privileged or private records often

results in casting a wide net, yet returns both over- and under-inclusive results. Absent an in-depth knowledge of the litigation matter, keyword lists simply cannot be drafted to identify all and exclusively privileged content. The *Sedona Canada Principles* have been updated to encourage parties to go beyond keyword searches for the identification of privileged or confidential information, and to encourage more innovative approaches such as concept clustering and technology-assisted review. These types of analytics can combine both unsupervised and supervised learning techniques to predict the likelihood that a document contains privileged or confidential subject matter. Leveraging these technologies can greatly reduce the time and cost of electronic discovery for parties.

In addition to encouraging the use of analytics for identifying confidential information, the Third Edition of *The Principles* provides an updated commentary on navigating national and international privacy regimes. Privacy concerns are increasingly important considerations because they may affect the discovery process in both the public and private sectors. For example, the Third Edition of the *Principles* provides details on the General Data Protection Regulation ("**GDPR**") that became applicable to members of the European Union ("**EU**") in 2018. This regulation seeks to harmonize data privacy laws by imposing privacy protection requirements for personal information both within and flowing out of the EU. The GDPR and other international privacy regimes can have a significant effect on the disclosure of documents in Canadian litigation, especially when dealing with multinational organizations or cross-border matters.

The *Principles* also touch on the prevalence of social media content and ephemeral messaging, including a discussion about whether such information should be considered private and referencing new case law. Canadian courts require parties to put forth strong cases showing that the probative value of the information found on a party's social media page justifies the invasion of privacy and the burden of production. Ephemeral messaging is technology that allows users to send *temporary* text messages, pictures, or other electronic communications over the internet, which self-delete after the message is viewed by the recipient. The *Principles* highlight emerging

case law and discuss whether the privacy interests in such messages are different from other social media content.

3 The Role of Information Governance to Facilitate Ediscovery

In a world where data generation is increasing at a rapid pace, well-implemented information governance and records management policies are becoming critical to organizations' risk management efforts. These policies help facilitate discovery by ensuring organizations know where their data is, how to identify and classify their data, and how to access it. The updated *Principles* discuss the need for well managed data retention policies to ensure that necessary discovery records are "reasonably accessible" and that irrelevant records are disposed of in accordance with defensible disposition plans and applicable laws.

The *Principles* also provide new case law on the challenges of restoring backup media specifically for the purposes of litigation. Canadian courts have held that the burden, cost, and delay of the production must be balanced against the probability of yielding unique information that is valuable to the determination of the issues.

Finally, the *Principles* address the increasingly common practice of organizations sharing ESI with third-party cloud-based repositories. The Third Edition provides best practices for organizations contracting with third parties, including how to comply with obligations to preserve and collect ESI for litigation as well as the unique jurisdictional challenges relating to where cloud-based repositories host their data.

4 The Emergence and Application of New Technologies

The *Principles* have been updated to address the use of developing technologies. They encourage parties to assess, embrace, and apply these emerging technologies to reduce time and costs in ediscovery. Electronic processes discussed in the *Principles* include the ability to run searches on concepts, to apply auto-redactions, and to group, identify and tag collections of duplicates or near duplicates. These processes can significantly increase accuracy and efficiency while reducing cost.

The Third Edition maintains that the best practice for the document review phase remains utilizing a combination of manual review along with appropriate technology. Regardless of the specific tools used, parties should have a minimum understanding of the tools they use and how to appropriately apply technology, workflows, and expertise to arrive at a defensible process. Ultimately, where parties have legal counsel, they must ensure that legal judgment and a carefully vetted methodology are adopted, and that the results of the process are validated. The reliability and defensibility of the entire ediscovery process is dependent on a combination of the intelligent application of appropriate tools and the process that is designed and implemented.

5 Societal Considerations and Conclusion

Although the changes highlighted above are of a technical nature, the Third Edition of the *Principles* also strives to make updates that reflect developing societal values. The references to “native” records in the *Principles* have been changed to “original data files”. This change was made in response to sensitivities raised by Canada’s Indigenous communities and the confusion surrounding references to particular records being “native”. In the spirit of reconciliation that is ongoing in Canada, the *Principles* have updated this terminology to reflect efforts towards equity and inclusion within the legal profession.

The global pandemic has had a profound impact on the way people work and consequently, on how data is created and utilized. In 2022, the Third Edition of the *Principles* help guide ediscovery practitioners through a variety of emerging data types and technologies. The *Principles* are a collective effort by the Sedona Canada Working Group to incorporate best practices that take into consideration the fast paced and evolving digital world. While this article summarized some of the larger amendments, there is a wealth of new knowledge within the Third Edition of the *Sedona Canada Principles* that can help improve the discovery process for all parties involved.