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DECISION NOS. 2018-EMA-043(b), 2018-EMA-044(b) and 2018-EMA-045(b) [Group File: 2018-EMA-G03]

In the matter of three appeals under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	Canadian National Railway Company Canadian Pacific Railway Company BNSF Railway Company	**APPELLANTS**
AND:	Delegate of the Director, *Environmental Management Act*	**RESPONDENT**
AND:	Attorney General of British Columbia	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Darrell LeHouillier, Chair	
DATE:	Conducted by way of written submissions concluding on August 30, 2019	

APPEARING:

For the Appellants:	
Canadian National Railway Company	Nicholas Hughes, Counsel
Canadian Pacific Railway Company	Nicholas Hughes, Counsel
BNSF Railway Company	R.R.E. DeFilippe, Counsel
For the Respondent and the Third Party:	Micah B. Rankin, Counsel Ashley A. Caron, Counsel

APPLICATION FOR CONFIDENTIALITY ORDER

[1] On September 28, 2018, the Director, Environmental Emergency Program, Ministry of Environment and Climate Change Strategy (the "Ministry"), issued Spill Response Information Orders (collectively, the "Orders") to Canadian National

Railway Company ("CN"), Canadian Pacific Railway Company ("CP"), and BNSF Railway Company ("BNSF")[1].

[2] The Orders were issued under Division 2.1 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). They compel each of the railway companies to provide information to the Director about their respective transportation of crude oil (by volume and route) through the province for the years 2018 to 2020 in accordance with a schedule set out in the Orders.

[3] CN, CP and BNSF each appealed the Order issued to it. Pursuant to the Environmental Appeal Board's Rule 12, the Board determined that the appeals should be heard together. The appeals raise questions about the constitutional validity of the Orders, and whether complying with the Orders may compromise railway security.

[4] The appeals are scheduled to be heard at an oral hearing commencing on September 16, 2019. Oral hearings are generally open to the public.

[5] On August 21, 2019, the Appellants CN and CP (the "Applicants") asked the Board to receive some documentary evidence and testimony at the oral hearing to the exclusion of the public. This decision addresses that application.

BACKGROUND

General

[6] The Applicants are federally regulated railways. BNSF is a U.S. rail carrier which is federally regulated in Canada; it operates approximately 30 kilometres of track in the Lower Mainland.

[7] In Canada, federally regulated railways are subject to a safety and transportation of dangerous goods regime embodied in the *Canada Transport Act*, the *Railway Safety Act*, and the *Transportation of Dangerous Goods Act, 1992*, and the regulations and Protective Directions issued under those statutes.

[8] In October of 2017, the government of BC brought into force new spill preparedness, response, and recovery requirements. These requirements are set out in Division 2.1 of the *Act* and in a new regulation made under the *Act*: the *Spill Preparedness, Response and Recovery Regulation*, B.C. Reg. 185/2017 (the "*Regulation*"). The requirements apply to a "regulated person", which is defined to include a person in possession, charge or control of crude oil and bitumen transported by railway in a quantity of 10,000 litres or more.[2] The Appellants meet this definition.

[9] One of the new requirements in the *Act* appears in section 91.11(5). Under that section, a director may order a regulated person to produce a variety of information, including a copy of the regulated person's spill contingency plan,

[1] Previously known as Burlington Northern Santa Fe, LLC.

[2] Division 2.1 of Part 7 of the *Act* titled "Spill Preparedness, Response and Recovery" was brought into force on October 30, 2017 by OIC 392/17. The substances transported by railway that are regulated under this Division, are set out in section 2 of the *Regulation* and in Column 2 of the Schedule to the *Regulation.*

information related to operations or activities of its business, and information about substances transported by the regulated person.

The Orders

[10] On September 28, 2018, the Director issued the Orders pursuant to section 91.11(5) of the *Act*, "… to enhance spill preparedness and response in the province."

[11] The Orders require the Appellants to provide shipment information related to crude oil and diluted bitumen. The Appellants were to provide the number of railcars shipping those substances and the volumes being shipped, week by week, route by route and in British Columbia overall, from 2018 to 2020. The Appellants were also to provide electronic maps displaying all railways currently transporting crude oil or diluted bitumen in British Columbia. Points at which shipments bearing those products enter or exit British Columbia were to be indicated in a prescribed fashion. Facilities from which shipments bearing those products originate, or at which shipments bearing those products terminate, were also to be indicated in a prescribed fashion, with onloading/offloading volumes of crude oil and diluted bitumen indicated.

[12] Under the Orders, the Appellants must submit the information by specified dates each year. Results of non-compliance, including fines and/or imprisonment, are described in the Orders.

[13] The Orders state that the Ministry "plans to publish, at regular intervals, reports on crude oil transport in British Columbia, similar to the Washington State Department of Ecology's *Crude Oil Movement by Rail and Pipeline Quarterly Report*." The Orders further state that the railway companies will be given at least 14 days prior written notice of the Ministry's intent to publish the regulatory documents, and that it will not publish any information that could not be disclosed if it were subject to a request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

The Appeals

[14] On October 19, 2018, the Appellants filed separate Notices of Appeal with identical grounds for appeal. They all note that the dissemination of information regarding the shipment of dangerous goods by rail, including crude oil and bitumen, is regulated under Protective Direction No. 36 ("PD 36"), issued by the Federal Minister of Transport on April 28, 2016 under section 32 of the federal *Transportation of Dangerous Goods Act, 1992*. The Appellants provided the Board with a copy of PD 36.

[15] PD 36 mandates that federally regulated railways provide specified information to a designated Emergency Planning Official within the province respecting the transportation of dangerous goods through that province. It also provides that generalized information respecting the transportation of dangerous goods be made available to the public, but specific volumes and routes could be provided only to the relevant Emergency Planning Official, and, even then, only if

that official is registered in the federal Canadian Transport Emergency Centre. The official must also provide an undertaking to keep the information confidential and to ensure that those who receive the information keep it confidential, to the maximum extent permitted by law. This direction replaced a previous direction issued in 2013 (PD 32), which contained similar confidentiality provisions.

[16] The Appellants argue that the Director lacked the constitutional jurisdiction to issue the Orders because:

- The sections of the *Act* and *Regulation* used in making the Orders are beyond the scope of the province's legislative authority under sections 92(13) and 92(16) of the *Constitution Act, 1867*;
- those sections are constitutionally inapplicable to federal railways (i.e., the Appellants) because those sections would seek to regulate and manage federally regulated railway operations;
- those sections are constitutionally inoperable because compliance with the Orders would conflict with and abrogate the purpose and intent of the confidentiality provisions contained in PD 36; and
- even if the Orders are constitutionally valid, the Appellants cannot comply with certain disclosure requirements contained in the Orders.

[17] Before appealing the Orders, the Appellants offered to provide the information sought in the Orders on a voluntary basis if the Ministry agreed to accept the information in accordance with the strict confidentiality requirements set out in PD 36. The following day, the Appellants appealed the Orders, and applied for a stay pending the Board's decision on the merits of the appeals. On December 3, 2018, the Board granted the Appellants' applications for a stay of the Orders (Decision Nos. 2018-EMA-043(a), 044(a), and 045(a)).

The Applicants' Application for a Confidentiality Order

[18] On August 16, 2019, the Applicants provided their Statement of Points, which lists the four witnesses they intend to call at the appeal hearing and an index of documents they intend to introduce as evidence at the hearing. The index of documents is divided into two categories: the "Non-confidential Documents", totaling 63 documents; and, the "Confidential Documents", totaling 21 documents, of which two are Association of American Railroads ("AAR") Security Working Committee documents, 18 are CN Police documents, and one is a Railway Association of Canada ("RAC") document.

[19] Also on August 16, 2019, the Applicants advised that they would be applying for an order sealing the Confidential Documents from public access pursuant to section 41 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*").

[20] On August 21, 2019, the Applicants filed their application, requesting that some of their evidence (the "Security-related Evidence") be received to the exclusion of the public. The Director and the Attorney General of British Columbia (collectively, the "Respondents") provided submissions opposing the application, as

discussed below. In their August 30, 2019, reply submissions, the Appellants clarified that the Security-related Evidence consists of:

- paragraphs 9, 10, 15 – 22, 26 – 31, and exhibit A of affidavit #1 of Lori Kennedy, CP's Director of Regulatory Affairs (the "Confidential Paragraphs");
- any evidence given by Ms. Kennedy in cross-examination at the appeal hearing;
- all evidence given at the appeal hearing by Brandon Myers, Assistant Chief of Police, Emergency Preparedness, Regulatory and Intelligence, CN Police; and
- the documents in the Appellants' index of Confidential Documents.

[21] The Applicants provided the Respondents with copies of the documents included in the Security-related Evidence, with counsel's undertaking to treat the documents as confidential and return them to the Applicants if the Board denies the application.

[22] The Applicants agreed to provide the Board with the Confidential Documents for the purposes of deciding this application if the Board so requested, but the Board did not. In support of their application, the Applicants provided affidavit evidence summarizing the Security-related Evidence. This is not unusual. For example, in one of the Supreme Court of Canada decisions on confidentiality orders discussed below, the Court did not have copies of the subject documents, but had affidavit evidence summarizing the documents (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*]). The Respondents raised no concerns about the relevance or security-related nature of the Confidential Documents and the Board considered the summary of the documents at issue to be sufficient for the purposes of deciding this application.

[23] The Respondents filed a joint submission opposing the application. BNSF supported the application, without substantive comment.

ISSUE

[24] The issue arising from this application is whether the Panel should grant the Applicants' application for a confidentiality order with respect to the Security-related Evidence.

RELEVANT LEGISLATION AND CASE LAW

[25] Section 41 of the *ATA* applies to the Board under section 93.1 of the *Act*. Section 41(1) of the *ATA* provides that oral hearings are open to the public, although section 41(2) of the *ATA* allows the Board to receive documentary evidence or testimony at a hearing to the exclusion of the public. The Board may do so if it is more desirable to avoid disclosure of that information than it is to ensure that hearings be open to the public, or if it is not practical to hold a hearing that is open to the public. Section 41 states as follows:

Hearings open to public

41 (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

DISCUSSION AND ANALYSIS

Summary of the Applicants' application and supporting evidence

[26] The Applicants advise that the Security-related Evidence describes:

- the governmental and non-governmental sources from which the Applicants receive threat information and other intelligence;
- the manner in which the Applicants assess security threats;
- the Applicants' security practices;
- specific examples of historical and extant threats to the Applicants' operations, especially regarding trains carrying crude oil or diluted bitumen; and
- the effect that disclosure of oil routes and volumes would have on the Applicants' security practices and operations.

[27] The Applicants' submissions provide further details as to why each document and particular witness' testimony included in the Security-related Evidence should be received at the hearing to the exclusion of the public. In support of those submissions, Ms. Kennedy and Mr. Myers provided affidavits explaining the nature of the Security-related Evidence, and why it should be kept confidential.

[28] Among other things, Ms. Kennedy and Mr. Myers explain that some of the Confidential Documents (e.g., the Railway Security Memorandum of Understanding) are subject to confidentiality agreements with third parties. Most of the other Confidential Documents originate from either regulatory agencies (e.g., Transport Canada, the Transportation Safety Board, the US Department of Transportation, and the Federal Railroad Administration) or law enforcement and intelligence agencies (e.g., the Federal Bureau of Investigation ("FBI"), the Transportation Safety Administration, the Royal Canadian Mounted Police ("RCMP"), the US Department of Homeland Security, and private intelligence agencies). Most of the

Confidential Documents are marked “For Official Use Only” to indicate that public disclosure of the information “would reasonably be expected to cause a foreseeable harm to an interest protected by one or more of the FOIA [Freedom of Information Act] exemptions 2 through 9”, according to US Department of Defence Manual Number 52000.01, volume 4, which addresses “Controlled Unclassified Information”.

[29] In sum, all of the Confidential Documents were created by a regulatory, law enforcement, or intelligence agency. All were either marked confidential, created as part of a confidential submission or intelligence-sharing process, or pertain to either general intelligence information or railway security.

[30] Ms. Kennedy explains that the identified paragraphs in her affidavit #1 contain confidential information about railway security planning and response which, if made public, would undermine the prevention, mitigation and response efforts to which they refer. For example, those paragraphs include information about classified briefings, CP’s information sources for security information and intelligence, details of a confidential security plan prepared by the AAR’s Security Working Committee, and information about security vulnerabilities that may be created or exacerbated by the Orders. Exhibit A to her affidavit is the Railway Security Memorandum of Understanding, a confidential agreement between Transport Canada and the RAC, which addresses topics including railway security planning, threat assessment, incident reporting, and intelligence sharing. She attests that any testimony she gives under cross-examination on her affidavit #1 could breach confidences with third parties or reveal classified information pertaining to railway security that cannot be made public. She advises that she will be unable to testify if this evidence is not sealed.

[31] Mr. Myers explains that, in his role as Assistant Chief of the CN Police, he oversees the CN Police Network Security and Intelligence Unit (the “CN Police NSIU”), which continuously monitors and assesses extant and potential threats to CN’s operations across North America. According to Mr. Myers, the CN Police NSIU receives information from regulatory agencies and intelligence agencies that cannot be disclosed publicly without undermining CN’s information advantage over potential terrorists, saboteurs, and disruptors. The CN Police NSIU also conducts risk assessments that are confidential. At the appeal hearing, Mr. Myers expects to give evidence about CN’s process for gathering and analyzing intelligence, CN’s relationships with agencies that provide much of CN’s security-related information, CN’s process for assessing extant and potential risks to the CN network, intelligence about the risks of moving crude oil by rail, and CN’s historical practices for the disclosure and publication of information about routing trains carrying oil. He advises that he will be unable to testify if this evidence is not sealed as public disclosure of this information would compromise the CN Police NSIU’s ability to identify, assess, and mitigate threats to CN.

[32] The Applicants submit that the Security-related Evidence is relevant to the appeals, is necessary for the Applicants’ to properly make their cases in the appeals, and will assist the Board in understanding the detrimental effect to railway security of the Orders.

[33] The Applicants submit that section 41(2)(a) of the *ATA* contains the legal test for deciding the application, allowing it to receive information to the exclusion of the public if the Board is of the opinion that "the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public". They submit that this statutory test applies to a broader range of interests than the common law test established in *Sierra Club*, in that the former does not require that there be a public interest component implicated, while the latter has no such restriction. The Applicants argue that, regardless, the principles in *Sierra Club* provide guidance.

[34] The Applicants maintain that the Board should grant the confidentiality order to protect: the public interest in safety and security; the Applicants' operations; and the Applicants' rights to put forth their best case in their appeals. The Applicants maintain that without a confidentiality order, they cannot rely on the Security-related Evidence, because producing it in a public hearing would risk harm to railway security the very harm that is caused by the Orders.

Summary of the Respondents' submissions

[35] The Respondents agree that the Board has the jurisdiction to grant the requested order, but they disagree with the Applicants about the substantive and procedural requirements governing the exercise of that discretion. The Respondents' arguments against granting the application are summarized as follows:

- the Applicants' interpretation of section 41 of the *ATA* is incorrect and the relevant test is found in the common law;
- the Applicants have not followed common law procedural conventions requiring notice of the application to third parties whose rights and interests may be affected, such as the media;
- the evidentiary foundation of the application is inadequate, especially given the constitutional matters at issue in this case;
- the Applicants' substantive arguments focus on their narrow interest, to the detriment of the broader public interest in freedom of expression protected in section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), including freedom of the press and other media communication;
- the public interest in holding an open hearing is arguably heightened by the constitutional nature of the proceedings;
- the timing of the application prejudices the Respondents and, by extension, the Board in its fact-finding processes; and
- the Security-related Evidence includes expert opinion evidence that is not compliant with the Board's Rules for advance notice of expert evidence.

[36] The Respondents submit that the Supreme Court of Canada stated at paragraph 37 of *Sierra Club* that the test in *Dagenais v. Canadian Broadcasting*

Corp., [1994] 3 S.C.R. 835 [*Dagenais*], and later modified by *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*], applies to non-criminal proceedings:

> Although that case [*Dagenais*] dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

[37] The Respondents submit that the BC Human Rights Tribunal has consistently applied the *Dagenais-Mentuck* test and that this is the appropriate test to use in addressing the application. It is summarized in *Sierra Club* at paragraph 45:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> [Underlining added]

[38] Regarding the first branch of the *Sierra Club* test, the Respondents submit that the Applicants are commercial enterprises pursuing their economic self-interest, and are not public agencies pursuing public safety and security. Also, while the Applicants assert risks to railway security, the evidence does not establish any actual risks, only potential and speculative ones. Furthermore, while the Applicants rely on confidentiality agreements with third parties, they provided no evidence from those parties. The Respondents argue that the affidavits in support of the application describes the Security-related Evidence so generally that it is impossible to evaluate the Applicants' claims about security threats. The Respondent argues the evidence does not permit "a finding of potential harm or injury to a recognized legal interest": *Mentuck*, at para 34. Furthermore, the Applicants seek an "all-or-nothing" order sealing the Security-related Evidence.

[39] Regarding the second branch of the test, the Respondents argue that the Applicants have not factored any balancing of the public interest, yet the public interest is heightened in this case because the Applicants seek to strike down sections of environmental protection legislation on constitutional grounds.

[40] In addition, the Respondents maintain that the Applicants should be required to give notice of their application to the bodies that provided confidential information to the Applicants, such as Transport Canada and law enforcement

agencies. The Respondents also assert that the Applicants should have notified the media, whose freedom of expression may be restricted if the application is granted, especially given that the appeals raise questions of constitutional law. In support of that argument, the Respondents rely on *Dagenais* and other judicial decisions including *Duteil v. British Columbia Nurses' Union*, 2018 BCSC 1976 [*Duteil*], at paragraphs 21 – 24, in which the Court held that "it would do a disservice to the open court principle to decide the merits of the Union's application [for a sealing order] without notice to the media." However, the Respondents argue that the appeal hearing should not be delayed even if the Applicants are required to notify third parties of the application, because a delay would prejudice the Respondents.

[41] The Respondents also argue that the Security-related Evidence includes opinion evidence that must be given by a qualified expert, yet the Applicants failed to comply with the Board's Rule 25 that requires delivery of a written statement or report by an expert at least 84 days before an oral hearing. The Respondents submit that the late timing of the application has impaired their ability to respond. The Respondents advise that if the application is granted, they will likely seek leave to produce expert reports in response to the Security-related Evidence, but they would need to obtain consent from the Applicants (and possibly third parties) to share that evidence with experts. The Respondents submit that if the Board grants the application, they should be given leave to apply for "such relief as is necessary to limit any prejudice caused by the timing" of the Applicants' application.

Summary of the Applicants' reply submissions

[42] In reply, the Applicants submit that section 41 of the *ATA* provides the scope of the Board's authority to issue a confidentiality order; the *Dagenais-Mentuck* framework is inapplicable because it applies to publication bans in criminal proceedings. The Applicants argue that the *Sierra Club* test, which modified the *Dagenais-Mentuck* framework and governs confidentiality orders in civil cases before the courts, is more relevant here. The Applicants maintain that no tribunals governed by section 41 of the *ATA* have ever applied the *Dagenais-Mentuck* framework, and section 41 does not apply to the BC Human Rights Tribunal.

[43] The Applicants note that both the BC Utilities Commission and the Oil and Gas Appeal Tribunal are subject to sections 41 and 42 of the *ATA*. The Utilities Commission has held that the *Sierra Club* test provides "helpful guidance for applying the broad test set out in the ATA", but the Utilities Commission's authority to issue confidentiality orders is defined by sections 41 and 42 of the *ATA*: *British Columbia Pensioners' and Seniors' Organization, Re*, 2015 CarswellBC 1997 (BC Utilities Commission), at p. 5. In deciding an application for a confidentiality order, the Oil and Gas Appeal Tribunal referred to sections 41 and 42 of the *ATA*, but did not refer to any case law: *Marilyn Gross v. Oil and Gas Commission*, Decision Nos. 2011-OGA-006(b) & 2011-OGA-007(b), March 22, 2012, at paragraphs 113 – 117.

[44] The Applicants submit that, based on the guidance provided by the *Sierra Club* test, a confidentiality order is necessary in this case to protect important public and private interests, and the benefits of such an order outweighs the harm.

[45] Turning to the first branch of the *Sierra Club* test, the Applicants submit that a confidentiality order would prevent risk to several "important interests" including the security of the Applicants' railway networks, the efficacy of the Applicants' intelligence-gathering and security regimes, national and international efforts by regulators and railways to keep trains safe, and the general safety of the public.

[46] Specifically, the Applicants submit that the Security-related Evidence was obtained in confidence and with the expectation that it would not be disclosed. This information is confidential to the Applicants themselves, and no evidence from third parties is required to establish the risks associated with their disclosure. Moreover, the Applicants maintain that they cannot be more detailed in describing the Security-related Evidence without actually disclosing the information itself, which would undermine the interests that the confidentiality order would protect. The Security-related Evidence is information about threats facing railways, and the railways' efforts to counter those threats, including details about the Applicants' relationships with regulatory and intelligence agencies, and documents received from those agencies. It includes intelligence briefs prepared by those agencies, a railway network risk and threat assessment prepared by the CN Police NSIU, a confidential industry-wide security plan, information about security vulnerabilities in the Applicants' networks, a confidential memorandum of understanding regarding railway safety and security, and the railways' process for evaluating and assessing extant threats. Even without considering the public interest in railway safety and security, "important commercial interests" may meet the "important interest" threshold if the information was "accumulated with a reasonable expectation of it being kept confidential": *Sierra Club*, at paragraph 60.

[47] In addition, the Applicants submit that their interests in protecting railway operations from sabotage and interference are aligned with the public interest in maintaining the safety and security of railways that move through communities. The Applicants note that the CN Police is a law enforcement agency that pursues public safety and security, and members of the CN Police are appointed as police constables under the *Railway Safety Act*.

[48] The Applicants argue that, although the right to fully argue their appeals is only one of several interests that would be served by a confidentiality order, the Court held at paragraphs 70 – 73 of *Sierra Club* that the primary interest promoted by the confidentiality order in that case was the "public interest in the right of a civil litigant to present its case".

[49] Turning to the second branch of the *Sierra Club* test, the Applicants submit that both section 41 of the *ATA* and the *Sierra Club* test contemplate a balancing of the interests that would be affected by a confidentiality order, and the Board is well able to balance the interests at stake in this case. Notice to the media is not specified under section 41 of the *ATA*, and no tribunal in BC has ever required such notice. At common law, this type of notice is usually associated with criminal cases and publication bans, and even then, is discretionary. In addition, the Applicants maintain that they are not seeking to "strike down" legislation on constitutional grounds. Rather, they have challenged the Orders based on the constitutional validity, operability, and applicability of certain sections of the *Act*. The Board has no jurisdiction to strike down legislation, the Applicants note.

[50] Finally, the Applicants submit that the Security-related Evidence is not expert opinion evidence; it is factual evidence about railway security information, the sources and nature of that information, and what steps the Applicants take based on that information. The Applicants assert that Ms. Kennedy and Mr. Myers are well-positioned to provide evidence about those matters.

The Panel's findings

[51] The parties disagreed as to whether notice of this application should have been provided to other interested parties, including those with reasonable expectations of the confidentiality of the Confidential Documents and the media. I will first address the question of whether the Applicants needed to provide notice of this application to others, starting with the media.

[52] I find that notifying the media or other potentially interested parties who are not parties or participants in this appeal is not a prerequisite to deciding the present application. Although there are fundamental values at stake in an application under section 41 of the *ATA*, including the principle that appeal hearings are presumed to be open to the public, there is no requirement in section 41 - or any other section of the *ATA* - to provide advance notice to the media or other parties before deciding such an application. If the Legislature had intended that to be the case, it could have said so in the *ATA*, but it did not.

[53] Moreover, when deciding to exercise its discretion under section 41(2)(a), the Board is required to take into account "the principle that hearings be open to the public", which may include the interests of the media or third parties in having access to evidence tendered at the hearing. The Board's careful consideration of the factors specified in section 41(2)(a) can take into account these public interests. This principle is the same as exists for the courts, whose careful consideration of the appropriate common law test can allow it to consider an application for a publication ban even without notice to other parties involved in the case. This was discussed in paragraph 48 of *Vancouver Sun (Re)*, [2004] 2 SCR 332. Furthermore, as discussed in paragraph 82 of that same decision, media participation may "… undermine the proper administration of justice …" in a proceeding, as here, where there is an application for a confidentiality order within weeks of the scheduled start date for an oral hearing, which neither party wishes to delay.

[54] While the Respondents relied on *Duteil* in support of their position, that case is distinguishable from this application. In this case, there is urgency to the present application. Requiring notice to the media or other third parties would risk delaying the appeal hearing scheduled to begin on September 16, 2019, which neither the Appellants nor the Respondents wish to do. In *Duteil*, the Court held that media notification should be given before deciding an application for a publication ban on affidavit evidence. The Court specifically noted there was "no urgency" to the application, as a summary trial on the merits was three months away from the initial hearing of the application for a publication ban and there was time to provide media notification before re-hearing the application.

[55] Having concluded that the Applicants did not need to provide notice of this application to the media, I turn to notice requirements for other third parties that may be affected by the application.

[56] The Applicants have taken the position that they will be prejudiced from making certain arguments and providing certain evidence in the absence of a confidentiality order from the Board. The details of their agreements with third parties were not made available to me. It is the role of the Applicants to ensure that they honour their agreements to the extent of their obligations and to obtain any required permissions from other bodies when presenting confidential evidence in the context of this hearing.

[57] The Applicants seem to be mindful of these obligations. The nature of the appeal overall is to safeguard those confidentiality agreements, among other interests. The Applicants have been mindful of not providing unnecessary information in the course of this application and none of the documents asserted to be confidential have been disclosed, other than under legal undertakings as described previously. The list of Confidential Documents was disclosed before this application was brought.

[58] Additionally, an August 22, 2019 letter from the Respondents' counsel states that their understanding was that "the Appellants are seeking written authorization from Transport Canada" with respect to documents included in the Security-related Evidence that were generated by Transport Canada. The Panel expects that, even if a confidentiality order is granted, it would be up to the Applicants to seek permission from third party sources of confidential documents before disclosing those documents to the Respondents and the Board, given that those documents were shared with the Applicants in confidence. It is not the role of the Board to ensure that evidence presented does not violate agreements between one party and other parties not involved in the appeal; the Applicants in this case bear the burden and the risk of doing so, with respect to the Confidential Documents. As argued by the Applicants, direct evidence is not needed from those other parties, given the affidavit evidence provided in support of the application, which described the confidentiality agreements surrounding the creation and/or dissemination of the Confidential Documents.

[59] Having decided that notice did not need to be provided to other potentially interested parties, I turn to the merits of the application.

[60] A confidentiality order is an exception to the general proposition established in section 41 of the *ATA* that the Board's hearings will be open to the public. Such an exemption should be granted only in the exceptional circumstances captured by sections 41(2)(a) and 42 of the *ATA* and, in those situations, to the minimum possible extent required in the circumstances. This mirrors some of the considerations set forth in *Sierra Club*.

[61] Section 41(2) of the *ATA* is relevant here, because it allows the Board to receive evidence to the exclusion of the public. Section 42 allows the Board to receive evidence to the exclusion of a party or an intervener (or participant, to use the Board's terminology). The order sought in this case would prevent public access

to the Security-related Evidence, but would allow the other parties in the appeal (and the Board) access to that evidence. As a result, it is section 41(2) that applies.

[62] Section 41(2) of the *ATA* describes a two-part test. First, the Board must determine whether "the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public". This is similar to the weighing of interests required by the test described in *Sierra Club*. The *Sierra Club* test provides helpful guidance when applying section 41(2)(a) of the *ATA*, particularly in cases such as this that involve constitutional questions.

[63] In *Sierra Club*, there is a two-part test that must be met before a publication ban may be ordered by a court. First, the ban must be necessary to prevent a serious risk to the administration of justice because reasonably alternative measures will not prevent that risk. In addressing the first component of the test, the Court stated that a publication ban should only be issued where evidence shows a serious risk. Additionally, the "administration of justice" should be carefully interpreted to not allow the concealment of excessive amounts of information. Finally, there must be no reasonable alternatives to the ban and the ban must be restricted as far as possible while still allowing it to satisfy its objectives.

[64] The second part of the test in *Sierra Club* is the balancing of the benefits of the ban against the harms caused by the ban. As noted in *Sierra Club*, the harm in publication bans includes negative effects on the freedom of expression and the principle of having open and accessible court proceedings. These concerns are captured by the first part of the test in section 41(2)(a) of the *ATA*, as they are intrinsic to "… the principle that hearings be open to the public."

[65] In *Sierra Club*, an applicant sought a publication ban to satisfy confidentiality obligations that arose by contractual obligations, where third parties had a reasonable expectation that the information would remain confidential. The Court noted that, if the ban were not granted, the applicant could not present confidential documents as evidence, affecting its right to a fair trial. Related to this right are public and judicial interests in seeking the truth in a case and achieving a just result in civil proceedings. Significantly, at paragraph 55 of *Sierra Club*, the Court noted that an "important commercial interest" could be considered when deciding whether to impose a publication ban when it includes or relates to a public interest in confidentiality.

[66] Applying section 41(2)(a) of the *ATA*, I find the analysis in *Sierra Club* to be persuasive. As in that case, preventing public disclosure of the Security-related Evidence, at least with respect to the documents, would further important commercial interests of the Applicants, including those that relate to and engage important public interests. There are public interests in upholding the confidentiality of documents provided through inter-governmental and inter-agency cooperation. In this case, this includes cooperation between regulatory, law enforcement, and intelligence agencies. This is particularly so where, as here, the inter-governmental and inter-agency cooperation is aimed at safeguarding important transportation infrastructure from a variety of threats, and where the cooperation is provided and is effective, at least in part, because of an expectation that the shared information will remain confidential.

[67] Furthermore, the Applicants' commercial interests in keeping the documents included in the Security-related Evidence confidential appear to overlap with the public interest in preventing disclosure of this evidence to persons who might use it to threaten the safety and security of railways transporting dangerous materials, such as crude oil. The risk of damage to the railway does not only threaten the Applicants' commercial interests, but also public safety, the environment, and important transportation infrastructure within British Columbia.

[68] Additionally, as in *Sierra Club*, without a confidentiality order from the Board the Applicants would be unable to present evidence. This would impact their rights to procedural fairness and the public interests in having an administrative decision-maker base decisions on all relevant evidence, and in achieving a just result in administrative proceedings.

[69] Given the nature of the public interests at issue, it is not necessary for me to address the Applicants' argument that the test in section 41(2) of the *ATA* is broader than the common law standard described in *Sierra Club*. On the facts of this case, the interests of the Applicants are shared, to a large degree, with public interests.

[70] These conclusions are based on my understanding of the Confidential Documents and Confidential Paragraphs. In particular, based on the Applicants' affidavit evidence in support of the applications, I find that the Confidential Documents and Confidential Paragraphs include information about threats facing railways owned by the Applicants, and their efforts to counter those threats. They include intelligence briefs prepared by regulatory agencies and intelligence agencies (from both Canada and the US), a railway network risk and threat assessment prepared by the CN Police NSIU, a confidential railway industry security plan, information about security vulnerabilities in the Applicants' railway networks, a confidential memorandum of understanding regarding railway safety and security, and the Applicants' process for evaluating and assessing threats to their networks.

[71] I have relied on the affidavit evidence provided in support of the application, when considering what is contained in the Confidential Documents and the Confidential Paragraphs. The Respondents have had access to the Confidential Documents and the Confidential Paragraphs. The Respondents have not disputed the descriptions put forward by the Applicants as to the contents of those documents. As such, there is no dispute in the evidence before me as to the nature of the information contained in the Confidential Documents and the Confidential Paragraphs. Similarly, the Respondents have not challenged the relevance of the evidence contained in the Confidential Documents and the Confidential Paragraphs.

[72] Having discussed the interests that would be supported by a confidentiality order, I turn to the interests that would suffer because of one.

[73] The confidentiality order sought in this case would prevent public access to, and scrutiny of, the Security-related Evidence. This would deviate from the principle of open judicial (and quasi-judicial) proceedings and, as noted at paragraph 23 of *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, "The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*) [of the *Charter*]." However, any resulting infringement of the public's freedom

of expression guaranteed in section 2(b) of the *Charter* would be only partial. It important to consider that the requested order would only cover a portion of the Applicants' evidence, including a portion of Ms. Kennedy's evidence. The Applicants do not seek to restrict public access to 63 Non-confidential Documents that they intend to introduce at the hearing, or the testimony of their other two witnesses, including their expert witness. Thus, the requested confidentiality order would only have a limited effect on the public's freedom of expression and the open court principle.

[74] In addition, the Respondents have not indicated how the public may actually benefit from access to the Security-related Evidence, beyond general comments about the public interest in an open hearing process, which I have discussed above.

[75] Significantly, as stated in paragraph 74 of the Board's decision on the Appellants' stay application, high level maps of the railway locations, and high level information about the dangerous goods transported by rail in the province and the percentage of the shipments that are crude oil is public information on either the railway companies' websites or on other websites. As the Board found with respect to the Director in its decision on the stay application, I similarly find that the public already has access to sufficient information to "get the full picture of what substances are being moved where in the province."

[76] Based on the foregoing, I conclude that the important interests of the Applicants and the public would be protected by preventing public access to the Confidential Documents and Confidential Paragraphs, and that these interests outweigh the public interest in access to that evidence in the appeal process. Keeping this evidence confidential to the Board and the parties will protect important interests of the Applicants and the public, including the fair administration of the appeal process, with minimal harm to the public interest in open appeal hearings.

[77] Having reached this conclusion, I wish to address the extent of this order. Based on my understanding of the Confidential Documents, it does not seem possible to make certain portions of the documents public, such as a reacted version, because the documents themselves are either subject to a confidentiality agreement with third parties, or were disclosed to the Applicants by third parties with the expectation that the Applicants would keep the information confidential. There is not severable, confidential information within the Confidential Documents; rather, the whole of those documents have an associated public interest in confidentiality. The Respondents have not argued that there is any redaction or other mechanism by which a confidentiality order could be lessened in scope, and no such mechanism is apparent to me.

[78] The Confidential Paragraphs are the security-related information within Ms. Kennedy's evidence that can be severed from the rest. The Respondent did not indicate that any of the Confidential Paragraphs did not relate to the security-related matters described by the Applicants. Accordingly, the Confidential Paragraphs seem to be of minimized scope.

[79] It is out of a concern for not issuing a confidentiality order of undue scope that I am limiting my findings to the Confidential Documents and Confidential

Paragraphs. I am not in the best position to determine whether the oral testimony that will be given by Ms. Kennedy in cross-examination, and Mr. Myers in direct and cross-examination, should be subject to a confidentiality order. The Panel conducting the appeal hearing will be in the best position to make such determinations. They will have the benefit of receiving and reviewing the available evidence, including the contents of the Confidential Documents and Confidential Paragraphs, and should be free to make those determinations.

[80] I encourage the Applicants and Respondents to communicate as between themselves to determine whether there are any agreed facts or admissions that might reduce the amount of testimony and the need for any further applications for confidentiality orders. I note that Ms. Kennedy's evidence in direct has been provided already in the form of an affidavit, and there may be an opportunity to reduce or eliminate the need for further applications for confidentiality orders.

[81] Finally, while the Respondents argued they were prejudiced by the timing of the application, the Applicants provided the Respondents' counsel with copies of the Confidential Documents and Confidential Paragraphs on August 16, 2019. On August 20, 2019, counsel for the Respondents raised concerns about the receipt of documents generated by Transport Canada, and advised that he had deleted all of the documents. On August 21, 2019, the Applicants re-sent the documents, absent the Transport Canada documents. Also, on August 21, 2019, counsel for the Respondents received the application for the confidentiality order, which includes summaries of the evidence that Ms. Kennedy and Mr. Myers intend to provide at the appeal hearing. Thus, the Respondents have had almost four weeks to review that information and prepare responses to it, before the scheduled start date for the oral hearing. In these circumstances, the desirability of having the Security-related Evidence be available to the Board outweighs any prejudice arising from the timing of the application and disclosure of the documents to the Respondents.

[82] While the Respondents requested leave to apply for "such relief as is necessary to limit any prejudice caused by the timing" of the application, it is unclear to me what the relief being sought might be. This request may turn on the Respondents' view that some or all of the Security-related Evidence constitutes expert evidence provided with insufficient notice to the Respondents under the Board's Rules. I wish to emphasize that I have made no finding on that question or the admissibility of the Security-related Evidence generally. I leave it to the Respondents to raise any such concerns with the Panel presiding over the oral hearing and to that Panel to address those concerns. Regardless, the Respondents remain free to apply for any relief they wish to, and to have a response based on the nature of the application(s), the applicable facts and legal/administrative frameworks for deciding that/those application(s).

[83] I also leave it with the Panel presiding over the oral hearing to determine how best to deal with any procedural issues arising from this order. In particular, the Panel may need to consider how to maintain the confidentiality of the Confidential Documents and Confidential Paragraphs during the course of any testimony referencing those documents, and any submissions related to those documents. I expect the Applicants and Respondents to assist the Panel in

minimizing, to the degree they are able, the amount of the hearing process that will be closed to the public.

DECISIONS

[84] I have considered all of the submissions and arguments made by the parties, whether or not they have been specifically referenced in this decision.

[85] For the reasons provided above, the application for a confidentiality order under section 41 of the *ATA* is granted with respect to the Confidential Documents and Confidential Paragraphs. A copy of Ms. Kennedy's affidavit #1, with the Confidential Paragraphs redacted, will form part of the public record.

[86] The Appellants are at liberty to apply to the hearing panel for a confidentiality order under section 41 of the *ATA* with respect to the oral testimony of Ms. Kennedy and Mr. Myers.

[87] Accordingly, the application is granted, in part.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

September 10, 2019