Federal Court of Appeal | Cour d'appel fédérale

Date: 20210210

Dockets: A-429-19 (lead file)
A-57-19
A-428-19
A-430-19
A-433-19

Citation: 2021 FCA 26

CORAM: **NADON J.A.**
WEBB J.A.
LEBLANC J.A.

Docket: A-429-19

BETWEEN:

HEILTSUK HORIZON MARITIME SERVICES LTD. and HORIZON MARITIME SERVICES LTD.

Applicants

and

ATLANTIC TOWING LIMITED and THE ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-57-19

AND BETWEEN:

HEILTSUK HORIZON MARITIME SERVICES LTD. and HORIZON MARITIME SERVICES LTD.

Applicants

and

ATLANTIC TOWING LIMITED and
THE ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-428-19

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ATLANTIC TOWING LIMITED

Applicant

and

HEILSTUK HORIZON MARITIME SERVICES LTD.,
HORIZON MARITIME SERVICES LTD., and
ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-430-19

AND BETWEEN:

HEILTSUK HORIZON MARITIME SERVICES LTD. and
HORIZON MARITIME SERVICES LTD.

Applicants

and

ATLANTIC TOWING LIMITED and
THE ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-433-19

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**HEILTSUK HORIZON MARITIME SERVICES LTD.,
HORIZON MARITIME SERVICES LTD. and
ATLANTIC TOWING LIMITED**

Respondents

Heard by online video conference hosted by the registry on December 2 and 3, 2020.

Judgment delivered at Ottawa, Ontario, on February 10, 2020.

PUBLIC REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

LEBLANC J.A.

I. Introduction

[1] This Court is seized of a number of judicial review applications – five in total – brought pursuant to paragraph 28(1)(*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in relation to three decisions of the Canadian International Trade Tribunal (the Tribunal), one dated January 2, 2019 and the other two dated October 18, 2019. Those decisions disposed of complaints arising from a government procurement process, bearing No. F7017-160056/C, held in 2018 for the provision

of two emergency towing vessels for Canadian Coast Guard (CCG) operations on the British Columbia coastline (the Solicitation).

[2] The Solicitation, conducted by Public Works and Government Services Canada (PWGSC) on behalf of the CCG, was initiated by way of a Request for Proposal (the RFP). It attracted nine (9) bids, including those of Heiltsuk Horizon Services Limited/Horizon Maritime Services Ltd. (Heiltsuk Horizon), a partnership between British Columbia's Heiltsuk Nation and a Canadian marine and offshore company, and of Atlantic Towing Limited (Atlantic). Atlantic ended up the top-ranked bidder and was awarded the contract contemplated by the Solicitation, a three-year contract worth 67 million dollars. Heiltsuk Horizon ranked last.

[3] Heiltsuk Horizon, which filed four complaints with the Tribunal in connection with the Solicitation, as permitted by the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (the Act), claims that the vessels bid by Atlantic do not exert the minimum pulling or towing power measure required by the RFP's mandatory requirement No. 12 (MR 12) and that Atlantic's bid is therefore non-compliant. It asserts that the Tribunal's decisions are fatally flawed in that the Tribunal recommended, on each occasion, that all bids be re-evaluated, despite Atlantic's bid's alleged non-compliance. Heiltsuk Horizon claims that the only reasonable outcome in these circumstances was to declare Atlantic's bid non-compliant, exclude that bid from any further consideration, and terminate the contract awarded to Atlantic. Moreover, being of the view that it is now the only compliant bidder, Heiltsuk Horizon asserts that it should have been awarded a new contract. Heiltsuk Horizon also takes issue with the Tribunal's dismissal of its allegation that PWGSC favoured Atlantic in conducting the Solicitation.

[4] For its part, Atlantic, with the support of the Attorney General of Canada (the Attorney General), takes issue with the Tribunal's second and third decisions, which, except for the costs award, are identical. Both Atlantic and the Attorney General claim that the Tribunal exceeded its oversight jurisdiction over federal government procurement by imposing, in these two decisions, an interpretation of MR 12 that has no basis in the RFP, thereby impermissibly altering the RFP's mandatory requirements. They also claim that the Tribunal further exceeded its jurisdiction by failing to accord deference to the evaluators' re-evaluation of MR 12, by failing to adequately consider the steps taken by those evaluators in assessing compliance with said requirement, and by misapprehending the relevant evidence. In addition, they both submit that Heiltsuk Horizon engaged in an abuse of process by failing to disclose to the Tribunal, and to the Court, evidence regarding the decommissioning and dismantling of the vessels it proposed in its bid (the New Evidence). Atlantic and the Attorney General claim that the New Evidence, had it been properly disclosed to the Tribunal, would have affected the outcome of the proceedings.

[5] All five judicial review applications related to this matter were heard together. The application in Court file A-57-19 concerns Heiltsuk Horizon's challenge to the Tribunal's first decision (Decision I). Those in Court files A-429-19 and A-430-19 relate to Heiltsuk Horizon's challenge to the Tribunal's second and third decisions, which, as indicated previously, are identical and will be referred to in these reasons as Decision II. The remaining two applications in Court files A-428-19 and A-433-19 were brought by Atlantic and the Attorney General, respectively, and also challenge Decision II.

[6] For the reasons that follow, I propose that Heiltsuk Horizon's applications be dismissed and that Atlantic and the Attorney General's be granted. This set of reasons will dispose of all five applications and will be filed in each of the above-mentioned Court files.

II. The Solicitation

[7] The Solicitation was launched in response to Canada's Ocean Protection Plan, which was made public in November 2016 and designed to improve marine safety. Consistent with that plan, the Solicitation's objective was to increase the CCG's capacity to conduct rescue-towing operations involving large vessels and container ships off Canada's West Coast. It was preceded by two requests for information (Solicitation Nos. F7017-160056/A and F7017-160056/B) (RFI A and RFI B) aimed at obtaining industry and prospective bidders' feedback regarding (i) the profile and features of the towing vessels that would be needed to increase that capacity, and (ii) the draft solicitation documents. The feedback received by PWGSC with respect to the first point contributed to the development of the baseline requirements of the sought-after vessels.

[8] On February 5, 2018, following these consultations, the RFP was released with an initial closing date of March 20, 2018 (Solicitation No. F7017-160056/C). It provides for 26 mandatory technical criteria (i.e. mandatory requirements) and 27 point-rated technical requirements (i.e. rated requirements).

[9] The mandatory technical requirement at issue in these proceedings, MR 12, requires the bidders' proposed vessels to "exert a minimum continuous bollard pull of no less than 120

tonnes when all required engine driven consumers (shaft generators, etc.) are taken into account." According to the RFP's assessment methodology, bidders needed to "provide a certificate of compliance (independently verified) or bollard test output data (in accordance with MSC/Circ 884 section 11.1) less than 10 years old" in order to satisfy this requirement (Amendment No. 008 to the RFP, Modification No. 34, Consolidated Record, Vol. 2, Tab 20 at pp. 01589-01590 (Amendment No. 008)).

[10] Following the release of the RFP, PWGSC held a prospective bidders' conference that provided an opportunity to ask questions – and suggest amendments to – the RFP (Confidential Affidavit of Henri Legros sworn August 30, 2019, Confidential Tribunal Record – Consolidated Record, Vol. 3, Tab 142 at pp. 12835-12836, para. 15 (the Confidential August 2019 Legros Affidavit)). Following that conference, a total of fourteen amendments were made and the bid closing date was extended to April 13, 2018.

[11] One of the amendments made to the RFP concerned the assessment methodology for MR 12 (Amendment No. 008). Pursuant to Amendment No. 008, it became possible for the bidders to prove their compliance with MR 12 through the provision of a bollard pull certificate or, alternatively, through specified bollard pull calculations. This depended on the age of the proposed vessel (more or less than 10 years old) and on whether a certificate could be produced for that vessel. The amended assessment methodology reads as follows:

> The Bidder must provide a certificate of compliance (independently verified) or bollard test output data (in accordance with MSC/Circ 884 section 11.1) less than 10 years old that demonstrates a minimum continuous bollard pull of no less than

> 120 tonnes when all required engine driven consumers (shaft generators, etc.) are taken into account.
>
> As per "Noble Denton Marine Services - Certification for Towing Vessel Approvability (DNVGL-SE0122), edition March, 2017", in instances where a certificate of continuous bollard pull, less than 10 years old cannot be produced, then for tugs less than 10 years old, bollard pull may be estimated as 1 tonne/100 (certified) BHP of the main engines and for tugs over 10 years old, with a bollard pull certificate greater than 10 years old, Bollard Pull may be accepted as the greater of:
>
> — the certified value reduced by 1% per year of age since the BP test, or
>
> — 1 tonne/100 (certified) BHP of the main engines reduced by 1% per year of age greater than 10.
>
> (Amendment No. 008, Consolidated Record, Vol. 2, Tab 20 at pp. 01589-01590)

[12] All bidders produced independently verified bollard pull certificates in support of their bids. The certificates for Atlantic's proposed vessels, the Atlantic Eagle and the Atlantic Raven, were issued in 2013 by Det Norske Veritas (DNV), one of seven classification societies permitted by the government of Canada to perform statutorily mandated inspections of large commercial vessels. DNV conducts bollard pull testing in accordance with industry-accepted guidelines established by the International Maritime Organization. All vessels bid in the context of the Solicitation were found to be compliant with MR 12.

[13] On May 24, 2018, PWGSC determined Atlantic to be the top-ranked responsive bidder. As required by article 4.5(a) of the RFP (as amended by Amendment No. 002), Atlantic's proposed vessels underwent a Vessel Confirmation Assessment (VCA). The aim of the VCA requirement is to allow Canada to verify whether the vessels proposed by the top-ranked responsive bidder (in this case, Atlantic) do in fact possess the features, functionalities and

capabilities described in the RFP or the bid, and thereby satisfy the requirements of the Solicitation.

[14] Upon learning that Atlantic's proposed vessels had undergone a VCA, Heiltsuk Horizon submitted a written objection to PWGSC. In its objection, Heiltsuk Horizon asserted that Atlantic's proposed vessels lacked the propulsion power required to satisfy MR 12, namely a minimum 120-tonne bollard pull. It also conveyed its concerns about apparent bias on the part of PWGSC in favour of Atlantic's bid.

[15] On August 9, 2018, PWGSC awarded the contract for the provision of emergency towing vessels to Atlantic.

III. Heiltsuk Horizon's First Complaint

[16] Heiltsuk Horizon filed its first complaint with the Tribunal regarding the Solicitation a few days after the contract was awarded to Atlantic (the First Complaint). It alleged that although Atlantic's vessels had been certified to have a bollard pull exceeding 120 tonnes, the vessels' real bollard pull was significantly lower when all required engine driven consumers were accounted for per MR 12. It also alleged that PWGSC had shown bias by engaging in closed consultations with Atlantic well before Canada's Ocean Protection Plan had even been announced in November 2016 and by structuring the Solicitation to advantage Atlantic.

[17] As a remedy, Heiltsuk Horizon sought from the Tribunal that Atlantic's contract be terminated and that Heiltsuk Horizon be awarded the contract instead. In the alternative, it sought compensation for lost profits or lost opportunity as well as reimbursement of both its bid preparation and complaint costs.

[18] On August 23, 2018, the Tribunal accepted the First Complaint for inquiry. In response to that complaint, PWGSC filed a Government Institution Report (the First GIR), claiming that Heiltsuk Horizon's complaint had no merit. In particular, PWGSC submitted that it was reasonable on the part of the evaluators to accept the bollard pull certificates produced by Atlantic since they had been independently verified, were less than 10 years old, and demonstrated that the two proposed vessels had a bollard pull well beyond the minimum set out in MR 12. PWGSC further submitted that the use of bollard pull certificates was a standard practice in the industry and that the standard bollard pull testing procedure required that "all auxiliary equipment such as pumps, generators and other equipment which are driven from the main engine(s) or propeller shaft(s) in normal operation of the vessel" be connected during the test and, therefore, that all required engine driven consumers be taken into account (First GIR, Consolidated Record, Vol. 2, Tab 34 at p. 01995, paras. 29-30).

[19] PWGSC also claimed that Heiltsuk Horizon's calculations, purportedly demonstrating that Atlantic's proposed vessels had a pulling power far below the minimum set out in MR 12 when all required engine driven consumers are taken into account, were based on erroneous assumptions.

[20] Finally, PWGSC denied that it had worked in private with Atlantic, noting that Heiltsuk Horizon's allegations of bias were based exclusively on an informal August 2018 LinkedIn post (the social media post). That social media post was authored by one of Atlantic's employees to congratulate Atlantic's team for "more than two years" of hard work on the Solicitation (First GIR, Consolidated Record at p. 02001, paras. 50-51). According to PWGSC, the social media post simply alluded to the approximate time period that had elapsed between RFI A, issued in November 2016, and contract award in August 2018. The release of RFI A, which preceded the Solicitation, marked the beginning of any consultations between PWGSC and industry members, including Heiltsuk Horizon and Atlantic.

[21] On September 27, 2018, Heiltsuk Horizon made a request for production of documents to the Tribunal, claiming that there were "significant gaps" in the documentation provided by PWGSC with the First GIR (Letter from Marc McLaren-Caux, counsel to Horizon Maritime Services, to the Tribunal (27 September 2018), Consolidated Record, Vol. 2, Tab 41 at p. 02218). On October 11, 2018, the Tribunal granted that request in part and ordered PWGSC to produce, among other documents, Atlantic's complete bid and the evaluators' individual and collective notes on that bid's evaluation. These were provided to Heiltsuk Horizon on October 17, 2018.

[22] A week later, that is on October 24, 2018, Atlantic, having been granted intervener status by the Tribunal, filed a response to the First Complaint. This response was filed together with affidavit evidence from Mr. Gilles Gagnon, Atlantic's Vice-President and General Manager, and Mr. Dan Vyselaar, its Director of Technology and Development. Mr. Gagnon addressed, for the

most part, the bollard pull tests Atlantic's two vessels had undergone, DNV's testing protocol, and Heiltsuk Horizon's bias allegations (see Affidavit of Gilles Gagnon sworn October 2, 2018 (with exhibits), Consolidated Record, Vol. 2, Tab 57 at pp. 02310-02358). Mr. Vyselaar testified about Atlantic's vessels' capabilities, noting that those vessels are equipped with two auxiliary power generators operating independently of the main propulsion engines and providing additional sources of power to the vessels (see Affidavit of Dan Vyselaar sworn November 26, 2018 (with exhibits), Consolidated Record, Vol. 2, Tab 57 at pp. 02666-02728 (the Vyselaar Affidavit)).

[23] According to Mr. Vyselaar, it is therefore "completely normal for these vessels to operate with no required engine driven consumers, as they have other generating capability to power all electrical power consumers on the ship during normal operations," which means that "there are no 'required engine driven consumers' to be deducted" from either the Atlantic Eagle or the Atlantic Raven (Vyselaar Affidavit, Consolidated Record at pp. 02667-02669, paras. 4-9). Mr. Vyselaar then took issue with Heiltsuk Horizon's assertion that the bollard pull certificates provided by Atlantic were deficient, claiming that this assertion was based on two fundamental erroneous assumptions: (i) that the shaft generators are the only sources of electric power on board the vessels, making them required engine driven consumers; and (ii) that according to MR 12, absolute full power is to be expended on all of the vessels' capabilities simultaneously (Vyselaar Affidavit, Consolidated Record at p. 02670, paras. 13-17).

[24] Heiltsuk Horizon responded to the First GIR and to Atlantic's submissions on November 13, 2018. In support of its responding submissions, Heiltsuk Horizon filed the affidavit of

Horizon Maritime Services Ltd.'s Chief Executive Officer, Mr. Sean Leet. In his affidavit, Mr. Leet opined that MR 12 requires the bidders to demonstrate "a minimum ***effective*** bollard pull, that accounts for the negative effect of engine driven consumers, including shaft generators, on propulsion power and bollard pull, which are critically important to normal, emergency towing operations" (Affidavit of Sean Leet sworn November 13, 2018, Consolidated Record, Vol. 2, Tab. 64 at p. 02426, para. 4 (the Leet Affidavit)) (emphasis in original). He concluded that the bollard pull certificates provided by Atlantic did not satisfy MR 12 because there was no evidence on those certificates that any allowance had been made to account "for the draw of power by the shaft generators that would be required to power winches, thrusters and other heavy consumers under normal, emergency towing operations" (Leet Affidavit, Consolidated Record at p. 02429, para. 17). Had this been done, he added, the actual propulsion engine power of the vessels would have been noted as lower than the total engine power (Leet Affidavit, Consolidated Record at p. 02429, para. 18). Mr. Leet further claimed that these deficiencies in Atlantic's certificates were confirmed by DNV in an email to him dated November 8, 2018.

[25] On November 26, 2018, PWGSC and Atlantic filed further submissions, as permitted by the Tribunal, on the issue of MR 12 compliance. These were filed together with the affidavit evidence of Mr. Henri Legros, a CCG Project Manager designated as the Solicitation's "Technical Authority". Mr. Legros affirmed that the language of MR 12 had been "specifically designed so that the bidders whose vessels had an independently verified certificate that was less than ten years old were not required to go through the significant undertaking and expense of undertaking a new bollard pull test and then providing test output data to demonstrate compliance with the requirement." MR 12 requires that bidders provide either a certificate or test

output data, not both (Confidential Affidavit of Henri Legros sworn November 26, 2018, Consolidated Record, Vol. 2, Tab. 71 at p. 02610, para. 9 (the Confidential November 2018 Legros Affidavit)).

[26] The next day, that is on November 27, 2018, Heiltsuk Horizon replied to these additional submissions. It claimed that Atlantic had failed to demonstrate, on the face of its bid, that its vessels could exert a continuous bollard pull of 120 tonnes when all engine driven consumers required in emergency towing operations are taken into account, as required by MR 12. Heiltsuk Horizon further claimed that Atlantic even conceded that no engine driven consumers had been taken into account when DNV conducted the bollard pull testing of its two vessels, contrary to that requirement. It also contended that Atlantic's reference to the auxiliary generators on board each of its vessels was not included in its bids and therefore should not be considered by the Tribunal. Finally, Heiltsuk Horizon characterized as "nonsensical" PWGSC's reliance on the testing authorities in determining compliance with MR 12.

[27] In support of its reply submissions, Heiltsuk Horizon produced before the Tribunal the affidavits of two Chief Engineers, Mr. John Trainor and Mr. Dustin Boyd, and of a Master Mariner, Mr. Adam Myers. These affidavits were submitted by Heiltsuk Horizon with a view to assisting the Tribunal in its assessment of whether PWGSC had erred in concluding that the bollard pull certificates provided by Atlantic satisfied MR 12 and whether the evidence and submissions provided by PWGSC and Atlantic in their response to the First Complaint were "credible and/or valid". The three deponents opined that these two questions should be answered in the negative.

IV. Decision I

[28] On January 2, 2019, the Tribunal determined that the First Complaint was valid in part (Tribunal File No. PR-2018-023). It recommended that PWGSC re-evaluate MR 12 for all of the bids received prior to bid closing. The Tribunal further recommended that the contract remain with Atlantic until the completion of the re-evaluation and that it be terminated should that re-evaluation result in a top-ranked responsive bidder other than Atlantic. The contract would then be awarded to that top-ranked bidder.

[29] Should Heiltsuk Horizon become the new top-ranked responsive bidder as a result of the re-evaluation, the Tribunal recommended that PWGSC compensate Heiltsuk Horizon for any profit it would have earned between the moment of contract award to Atlantic and the date of a new contract award to Heiltsuk Horizon. If, however, PWGSC were to consider termination of the contract with Atlantic to be unfeasible for operational reasons, Heiltsuk Horizon should be compensated for lost profits (Decision I at paras. 99-100).

[30] The Tribunal issued its statement of reasons on January 7, 2019. It determined that it was unreasonable for PWGSC to conclude that Atlantic's bid, on its face, satisfied MR 12 for essentially two reasons:

a. On their face, neither of Atlantic's bollard pull certificates noted deductions for engine driven consumers, a fact not disputed by Atlantic, which contended that

there was no need for such deductions given the presence of auxiliary generators on both of its bid vessels;

b. one of the evaluators had chosen to concur with the rest of the evaluation team, "*tak[ing] it for granted*" that Atlantic's bid was compliant with MR 12 despite the fact that there was no explicit demonstration of compliance on the face of the certificates (Decision I at paras. 60-62; emphasis in original).

[31] While the Tribunal acknowledged that it owes deference to the expertise of the evaluation team "as the standard of reasonableness requires," it found "no evidence that the evaluation team applied itself to consider the issue raised in the one member's handwritten note, i.e. that [Atlantic's] bid, on its face, did not address the engine-driven consumer requirement." The Tribunal added that assumptions during a procurement evaluation process are "not a means by which PWGSC can provide justification, transparency and intelligibility within a decision-making process." Therefore, in the Tribunal's view, PWGSC could not simply rely on the certifying body – DNV – to determine which power-driven consumers needed to be accounted for in assessing compliance with MR 12. This is because DNV had conducted bollard pull testing on Atlantic's vessels in 2013, long before the Solicitation. DNV would not – and could not – have had any reference point to use with respect to the technical requirements of the 2018 RFP (Decision I at paras. 64, 67-68; internal quotation marks omitted).

[32] As for Heiltsuk Horizon's allegations of bias, the Tribunal found these to be without merit. It began by noting that it generally "presumes the good faith and honesty both of the

bidders and of the public servants mandated to evaluate their bid," and that there must be some evidentiary basis in support of an allegation of bias. The Tribunal then determined that the evidence supporting Heiltsuk Horizon's claim of bias – a single social media post authored by one of Atlantic's employees – neither had the requisite probative value, nor sufficed to support such a claim (Decision I at paras. 74-76; internal quotation marks omitted). The Tribunal was not satisfied either that Heiltsuk Horizon had presented evidence substantiating its claim that the terms of the RFP, particularly the maximum vessel age requirement (MR 18), were structured in a manner to favor Atlantic's bid or exclude other bids. The maximum vessel age requirement had been broadened from 15 years in RFI B, issued in July 2017, to 20 years in the RFP. The Tribunal accepted PWGSC's explanation that that change had been made to increase rather than decrease competition (Decision I at paras. 77-78).

[33] Both Heiltsuk Horizon and Atlantic challenged Decision I. Heiltsuk Horizon claims that the Tribunal fatally erred by recommending that *all* bids be re-evaluated, despite having concluded that Atlantic's bid was non-compliant (Court file A-57-19). It takes issue as well with the dismissal of its allegations of bias, claiming that the Tribunal breached its duty of procedural fairness in refusing to order the production of any documents relevant to those allegations.

[34] Heiltsuk Horizon also took initial steps to obtain an interim order enjoining PWGSC from carrying out the re-evaluation recommended by the Tribunal pending the outcome of its judicial review application. However, Heiltsuk Horizon did not follow through with its pursuit of such relief.

[35] For its part, Atlantic challenged Decision I (Court file A-55-19) on the basis that the Tribunal improperly and unreasonably applied an interpretation of MR 12 that is inconsistent with how the evaluators and the bidders understood said requirement. Atlantic claimed that the Tribunal should have disposed of Heiltsuk Horizon's First Complaint by dismissing it in its entirety.

[36] Atlantic discontinued its application for judicial review of Decision I in September 2019. In the present proceedings, it claims it did so because any issue arising from Decision I became moot when the re-evaluation recommended therein was undertaken and completed. For the same reason, it contends that Heiltsuk Horizon's challenge to Decision I is also moot and should therefore not be entertained by this Court.

V. The re-evaluation and subsequent complaints

[37] On January 22, 2019, PWGSC advised the Tribunal that it intended to implement Decision I to the greatest extent possible and that the re-evaluation would be conducted in accordance with the Tribunal's recommendations as well as with the terms of the RFP. A Bid Evaluation Plan was developed for these purposes and a five-member re-evaluation team of independent evaluators, totalling 89 years of experience in the marine sector, was put together. None of the members had been part of the first evaluation team.

[38] On May 27, 2019, PWGSC issued a report on the results of the re-evaluation (see Bid Re-Evaluation Results for MR 12 Only, Confidential Tribunal Record – Consolidated Record, Vol.

3, Tab 139 at pp. 12583-12596 (the Re-Evaluation Report)). The report concluded that all bids, including Atlantic's, were compliant with MR 12. That meant that the contract had been properly awarded to Atlantic.

[39] In particular, the Re-Evaluation Report indicates that the members of the re-evaluation team were asked to confirm their understanding of "required" in the phrase "when all required engine driven consumers (shaft generators, etc.) are taken into account." The evaluators achieved consensus that "required" means "those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected in the Classification Society Bollard Pull testing procedure" (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at p. 12589).

[40] The Re-Evaluation Report also indicates that the evaluators were asked to provide their views on how, as noted on Atlantic's bollard pull certificates, the engine power could be equal to the propulsion engine power given that the required engine driven consumers had been connected during the bollard pull test in accordance with DNV's testing procedures. The evaluators noted that "significant consumers such as shaft generators would not be required during the Bollard Pull test and that those consumers such as communication equipment, radar, lights machinery ventilation fans would use minimal power that would be supplied by alternate sources of power." In the case of Atlantic's vessels, they noted that the bid's specifications "indicated the availability of auxiliary generators that would provide this functionality" (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at p. 12590).

[41] The results of the re-evaluation gave rise to three new complaints on the part of Heiltsuk Horizon. On June 7, 2019, Heiltsuk Horizon submitted that PWGSC had unreasonably re-evaluated the compliance of Atlantic's bid with MR 12 by wilfully ignoring the Tribunal's determination in Decision I and had therefore essentially performed the same evaluation that the Tribunal had previously found to be unreasonable. It also complained that PWGSC had necessarily engaged in impermissible bid repair in order to support its finding that Atlantic was still compliant with MR 12 (the Second Complaint).

[42] On June 11, 2019, the Tribunal accepted the Second Complaint for inquiry and on July 16, 2019, PWGSC provided its response to that complaint (the Second GIR). PWGSC claimed in the Second GIR that Heiltsuk Horizon's allegations as to flaws in the re-evaluation process were based on a misinterpretation of the Tribunal's findings in Decision I. In Heiltsuk Horizon's reading of Decision I, the Tribunal had found Atlantic's bid to be non-compliant with MR 12. Such an interpretation precluded an outcome whereby Atlantic could emerge as the top-ranked responsive bidder upon re-evaluation. In contrast, PWGSC contended that the Tribunal's primary concern in Decision I was one of process; there were no substantive findings pertaining to compliance. In PWGSC's view, the Tribunal was mainly concerned that the evaluators had relied on an assumption based on the documents provided in Atlantic's bid instead of applying themselves to determine whether the information contained therein supported a conclusion of compliance (Second GIR, Consolidated Record, Vol. 2, Tab. 98 at pp. 02975-02976, paras. 52-55).

[43] PWGSC also took issue with Heiltsuk Horizon's allegations that it had impermissibly engaged in bid repair, underscoring the fact that no information or documentation had been requested by PWGSC, the CCG, or the re-evaluation team from Atlantic during the re-evaluation process. Nor had Atlantic provided any such information or documentation for the purposes of the re-evaluation (Second GIR, Consolidated Record at p. 02977, paras. 61-62).

[44] The Second GIR was filed together with affidavit evidence from Mr. Legros, who had assumed the role of Technical Evaluation Team Leader (TETL) for the re-evaluation.

[45] On July 30, 2019, Heiltsuk Horizon, based on the information disclosed in the Second GIR and "out of an abundance of caution," filed its third complaint. It alleged this time that PWGSC had not only failed to correctly re-evaluate the compliance of Atlantic's bid with MR 12 and the relevant assessment methodology, but that it had also failed to correctly evaluate *all* of the bids (the Third Complaint). Moreover, Heiltsuk Horizon argued that the evaluators' reliance on the classification societies' bollard pull testing rules and procedures amounted to impermissible bid repair.

[46] The Tribunal accepted the Third Complaint for inquiry. On September 3, 2019, PWGSC filed its response, asking the Tribunal to deny this latest complaint as being untimely, subsumed in the allegations of the Second Complaint and therefore redundant, and without merit (the Third GIR). It contended that the re-evaluation had been conducted in accordance with a plain reading, common sense, and reasonable interpretation of MR 12, and that this interpretation was entitled to deference. Moreover, PWGSC asserted that the interpretation advanced by Heiltsuk Horizon

would require the evaluators to determine in their discretion which engine driven consumers are "required" for emergency towing operations, thereby undermining the very purpose of allowing bidders to submit bollard pull certificates to demonstrate compliance with MR 12 (Third GIR, Confidential Tribunal Record – Consolidated Record, Vol. 3, Tab 142 at pp. 12813, 12817, 12820, paras. 24, 25, 39, 49-50).

[47] PWGSC also claimed that it was reasonable to allow the re-evaluation team to rely on the classification societies' internationally recognized bollard pull testing rules and procedures. This is because bollard pull testing is conducted in accordance with those rules and procedures, which are incorporated into the certificates either by express reference or necessary implication (Third GIR, Confidential Tribunal Record – Consolidated Record at pp. 12822-12824, paras. 58-59). As a result, such reliance could not be considered impermissible bid repair.

[48] On September 17, 2019, Heiltsuk Horizon filed its fourth complaint in respect of the Solicitation "out of an abundance of caution." It contended that all the vessels bid in response to the Solicitation, except its own, were non-compliant with MR 12. However, the Tribunal, being of the view that this latest complaint raised essentially the same facts and issues as the Third Complaint, declined to conduct an inquiry.

VI. Decision II

[49] The Second and Third Complaints were determined by the Tribunal on October 18, 2019. That panel was differently constituted from the panel that had heard the First Complaint. A

single statement of reasons for both matters (Tribunal File Nos. PR-2019-020 and PR-2019-025) was issued on November 1, 2018.

[50] The Tribunal found these two complaints to be valid in part and recommended a second re-evaluation of all of the bids with respect to their compliance with MR 12. In particular, it found that the re-evaluation undertaken by PWGSC as a result of Decision I proceeded from an incorrect interpretation of MR 12 and therefore remained unreasonable. The Tribunal held that a "crucial component" of Decision I was the finding that "required engine driven consumers" in MR 12 signifies "the power-driven consumers required for normal operations of emergency towing vessels" (Decision II at para. 54, citing Decision I at para. 64; internal quotation marks omitted). This standard, according to the Tribunal, ensures that these vessels will have "adequate power to tow a vessel in distress, in order to ensure marine safety and protect British Columbia's coastline" (Decision II at para. 56).

[51] The Tribunal concluded that the re-evaluation team had ignored this critical direction from the Tribunal in Decision I by interpreting "required engine driven consumers" to mean "those consumers that are required to operate safely at sea and for the purpose of the Bollard Pull test as reflected by the Classification Society Bollard Pull testing procedure." According to the Tribunal, the evaluators had thereby improperly relied on the bid vessels' bollard pull certificates "without taking the further step of considering which engine-driven consumers would be required for emergency towing operations and making the according deductions from the certified bollard pull" (Decision II at para. 57; internal quotation marks omitted).

[52] In its discussion on remedy, the Tribunal noted Heiltsuk Horizon's claim that "there [was] more than enough information to conclude that all bids were improperly evaluated." However, the Tribunal held that it was beyond its expertise and role to determine the compliance of each bid and that this task, given its highly technical and factual nature, should be left to the evaluators (Decision II at paras. 66-68; internal quotation marks omitted).

[53] Moreover, the Tribunal stated that "it may not be possible to conduct a proper re-evaluation of MR 12 without seeking additional information from bidders." The Tribunal noted that the RFP allows evaluators "to seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation and verify any information provided by bidders through independent research, use of any government resources or by contacting third parties." It went on to expressly allow evaluators "to request clarification and supplementary information from bidders regarding their compliance with MR 12" (Decision II at para. 69; internal quotation marks omitted).

[54] The Tribunal then outlined some of the parameters that should guide the new evaluation:

> [70] For clarity, this new re-evaluation will allow evaluators to rely on bollard pull certificates *as a starting point*, but it will require that evaluators assess deductions for all engine-driven consumers required in emergency towing operations. This means evaluators are required to use their expertise to assess bids as to which consumers are engine-driven, which are required for emergency towing operations, and how much each required consumer would deduct from the certified bollard pull. These factors must be assessed on a vessel-by-vessel basis, taking into account the specific design of the power supply of each vessel and whether the vessel relies on engine-driven consumers at all. Evaluators must ensure that a vessel would have a *functional* bollard pull of at least 120 tonnes, even during an emergency towing operation when power may be drawn away from the engine to power other consumers.

> [71] For further clarity, evaluators are not necessarily required to account for every single consumer that could possibly draw power from the engine at a given time. However, evaluators are required to use their expertise to determine which engine driven consumers of a particular vessel are necessary "'for normal operations' of emergency towing vessels". This means that evaluators must expressly consider the sea conditions that would be present in normal emergency towing operations in the geographical area where the vessels will be patrolling. The Tribunal leaves the specifics of these conditions to the expertise of the evaluators, but notes Heiltsuk Horizon's suggestion that this may include cross currents, high winds, rough seas or confined or busy navigational corridors, requiring continuous and simultaneous use of winches, thrusters, dynamic positioning systems and/or other auxiliary equipment. [Footnotes omitted; emphasis in original.]

[55] Both Heiltsuk Horizon and Atlantic challenge Decision II, as does the Attorney General. They all contend, for different reasons, that Decision II is unreasonable.

[56] Heiltsuk Horizon claims that the Tribunal committed the same errors as in Decision I and that it further erred in permitting all bidders to engage in bid repair by allowing them to supply new information on MR 12 compliance more than two years after bid closing. It asks that Decision II be remanded with directions from this Court that Atlantic's bid be disqualified, that the contract awarded to Atlantic be terminated, and that the remaining bids be re-evaluated for compliance with MR 12 based only on the information submitted at bid closing.

[57] Atlantic and the Attorney General both claim that Decision II should be set aside on the grounds that the Tribunal:

a. exceeded its oversight jurisdiction over federal government procurement by imposing an interpretation of MR 12 that has no basis in the RFP, thereby modifying one of the Solicitation's mandatory requirements;

b. failed to accord deference to the evaluators; and

c. failed to adequately consider the steps the evaluators took in re-assessing the bidders' compliance with MR 12.

[58] As indicated at the outset of these reasons, both Atlantic and the Attorney General invite this Court to dismiss all three of Heiltsuk Horizon's judicial review applications on the basis that Heiltsuk Horizon engaged in an abuse of process by failing to disclose material facts to the Tribunal and this Court. These material facts are found in the New Evidence filed by Atlantic and the Attorney General in the present proceedings.

[59] In response to the written submissions of Atlantic and the Attorney General, Heiltsuk Horizon contends that since those parties did not challenge Decision I, they are estopped from re-arguing the proper interpretation of MR 12 and of the corresponding assessment methodology in the context of judicial review proceedings brought against Decision II.

VII. Issues and standard of review

[60] A total of thirteen Memoranda of Fact and Law have been filed in this matter, each proposing its own formulation of the points to be determined. In my view, the key questions are the following:

a. Is Heiltsuk Horizon's challenge to Decision I moot, and if not, is the Tribunal's remedial determination that Atlantic's bid be included in the recommended re-evaluation reasonable?

b. If that remedial determination is reasonable, should this Court nonetheless interfere with Decision I on the basis of the Tribunal's dismissal of Heiltsuk Horizon's allegations of bias and its refusal to order production of the documents requested in relation to these allegations?

c. Assuming Heiltsuk Horizon's challenge to Decision I fails, is Decision II reasonable?

d. What is the effect, if any, of the non-disclosure of the facts revealed by the New Evidence on these proceedings?

[61] With the exception of the issue regarding the Tribunal's document production order, which Heiltsuk Horizon characterizes as a matter of procedural fairness, it is not disputed that the standard of review applicable to the present case is reasonableness. Indeed, it is well settled that this standard applies to the review of the Tribunal's findings in matters relating to any aspect of a government procurement process (*Kileel Developments Ltd. v. Canada (Attorney General)*, 2020 FCA 163, [2020] F.C.J. No. 967 (QL/Lexis) at paras. 17 and 20).

[62] There is no dispute either that the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), clarified how this Court is to conduct reasonableness review in this matter. The Court must determine whether the Tribunal's reasoning, in the decisions at issue, is internally coherent and justified in light of the relevant legal and factual constraints (*Vavilov* at para. 101). This means, among other things, that deference is owed to the Tribunal's findings given the specialized nature of its functions in this area (*Defence Construction (1951) Limited v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47 at para. 20; *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16, [2015] F.C.J. No. 45 (QL/Lexis) (*Saskatchewan Polytechnic*) at para. 6). This also means that it is beyond the Court's role to substitute its judgment for that of the Tribunal or that of the evaluators (*Saskatchewan Polytechnic* at para. 6).

[63] That said, it is open to the Court to intervene if the Tribunal's reasoning lacks internal coherence and is not defensible in respect of the facts and the law. This will be the case when, for instance, the decision maker fundamentally misapprehended or failed to account for the evidence before it (*Vavilov* at para. 126).

[64] As for the issue of document production, the Attorney General submits that it is not one of procedural fairness attracting the standard of correctness. Rather, the Attorney General submits, this is an issue that involves the exercise of the Tribunal's discretion in the interpretation and application of its governing statutes and regulations. Here, the relevant regulation is the *Canadian International Trade Tribunal Rules*, SOR/91-499 (the CITT Rules).

The Tribunal's discretionary decisions in this area enjoy a presumption that the standard of reasonableness applies.

[65] For reasons outlined further below, I agree with Heiltsuk Horizon that this is a matter of procedural fairness attracting correctness review. That being said, the Court's analysis must be informed by the discretion possessed by the Tribunal in its choice of procedure. The question of what documents a government institution must produce in the context of a procurement inquiry is, in my view, a procedural matter that falls within the Tribunal's discretion.

VIII. The applicable regulatory framework

[66] The Tribunal's oversight jurisdiction over procurement issues is set out in sections 30.1 to 30.19 of the Act and in the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 (the Regulations). It may be summarized as follows:

a. Pursuant to section 30.11 of the Act, a potential supplier may file a complaint with the Tribunal regarding "any aspect of the procurement process that relates to a designated contract," that is a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution or a contract designated by regulations.

b. Once satisfied that the complaint meets the requirements of subsection 30.11(2) of the Act, the Tribunal must decide, as required by section 30.13 of the Act,

whether or not to conduct an inquiry into the complaint. If it decides to conduct such an inquiry, the Tribunal gives notice to the complainant, the relevant government institution, and the interested parties who each have an opportunity to make representations. The Tribunal can hold a hearing as part of its inquiry, but is not required to do so. It is also empowered to order the government institution to postpone the awarding of the contract until it determines the validity of the complaint.

c. Pursuant to section 30.14 of the Act, the Tribunal's inquiry is limited to the subject-matter of the complaint and the complaint's validity is to be determined "on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed." The Tribunal must also determine, pursuant to section 11 of the Regulations, whether the procurement at issue was conducted in accordance with the requirements set out in the applicable trade agreements.

d. At the conclusion of the inquiry, the Tribunal must issue findings and recommendations. If the complaint is found to be valid, the Tribunal, under subsection 30.15(2) of the Act, "may recommend such remedy as it considers appropriate," including any one or more of the remedies listed in that provision, that is:

(a) that a new solicitation for the designated contract be issued;

(b) that the bids be re-evaluated;

(c) that the designated contract be terminated;

(d) that the designated contract be awarded to the complainant; or

(e) that the complainant be compensated by an amount specified by the Tribunal.

[67] Subsection 30.15(3) of the Act outlines the considerations the Tribunal must take into account in recommending an appropriate remedy. This provision reads as follows:

30.15 …	**30.15** …
(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including	**(3)** Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants :
(*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;	***a*)** la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;
(*b*) the degree to which the complainant and all other interested parties were prejudiced;	***b*)** l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;
(*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;	***c*)** l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;
(*d*) whether the parties acted in good faith; and	***d*)** la bonne foi des parties;
(*e*) the extent to which the contract was performed.	***e*)** le degré d'exécution du contrat.

[68] According to section 30.18 of the Act, after receiving the Tribunal's recommendations, the affected government institution "shall, subject to the regulations, implement the recommendations to the greatest extent possible" and report on the progress of said implementations. It remains open, however, to the government institution not to implement the recommendation in full. In such a case, it must set out the reasons for not doing so.

[69] As this Court has previously held, there are four purposes underlying the regulatory regime regarding federal government procurement. These purposes, which "must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies" (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at para. 23 (*Almon*)), are:

> (1) *Fairness to competitors in the procurement system*. A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.
>
> (2) *Ensuring competition among bidders*. When bidders are placed on a level playing field and compete, it is more likely that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. Competition also gives taxpayers value for the taxes they pay.
>
> (3) *Efficiency*. This speaks directly to the government getting good quality goods and services at minimum expense. This also speaks to the need for a procurement system to run in a timely, practical manner without causing unnecessary expense.
>
> (4) *Integrity*. A procurement process with integrity increases participants' confidence in the procurement system and enhance[s] their participation in it. This increases the probability that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. A procurement process with integrity also gives taxpayers value for the taxes they pay.

[70] Finally, it is well established that the Tribunal owes deference to evaluators. As this Court has noted, the Tribunal's role in evaluating procurement proposals "is to decide if the evaluation is supported by a reasonable explanation, not to step into the shoes of the evaluators and reassess the unsuccessful proposal" (*Saskatchewan Polytechnic* at para. 7). This Court has also made it clear that contract termination is not an automatic remedy even when a non-compliant bidder has been improperly awarded a contract (*Seprotech Systems Inc. v. Peacock Inc*., 2003 FCA 71, 300 N.R. 277 at para. 43; *Bergevin v. Canada (International Development Agency)*, 2009 FCA 18, 385 N.R. 188 at para. 29 (*Bergevin*)).

IX. Analysis

A. *Is Heiltsuk Horizon's challenge to Decision I moot, and if not, is the Tribunal's remedial determination that Atlantic's bid be included in the recommended re-evaluation reasonable?*

(1) Mootness

[71] Atlantic objects to Heiltsuk Horizon's challenge to Decision I on the ground that it has been rendered moot by the completion of the re-evaluation of the bids' compliance with MR 12. It underscores the fact that Heiltsuk Horizon took no steps to stay the re-evaluation, which has been completed, challenged by Heiltsuk Horizon, and subject to a determination by the Tribunal.

[72] Seeking to quash a decision that has already been fulfilled, Atlantic submits, is the very definition of moot as there is no longer a tangible dispute for the Court to consider. Any ruling

from this Court on Decision I would therefore serve no useful purpose. Atlantic claims that this is precisely why it discontinued its own application for judicial review of that decision.

[73] Atlantic further contends that permitting Heiltsuk Horizon's challenge to Decision I to continue would be an abuse of process since this would allow Heiltsuk Horizon to maintain multiple proceedings on the same issues, thereby increasing the risks of inconsistent findings.

[74] Determining whether a court should decline to hear a dispute, based on the mootness doctrine, requires a two-step analysis (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (*Borowski*)). The question in the first step is whether the required tangible and concrete dispute – or sub-stratum of the litigation – between the parties has disappeared. In other words, the court must determine whether there is still a "live controversy" between them. If there is no longer a "live controversy" between the parties, the second step of the analysis is triggered. At that step, it is incumbent upon the court to decide if it should exercise its discretion to hear the case despite the fact that there is no longer a live controversy between the parties (*Borowski* at 353).

[75] Here, I am not satisfied that Heiltsuk Horizon's challenge to Decision I has been rendered moot by the completion of the first re-evaluation. In particular, I am not prepared to say that a judgment of this Court regarding the reasonableness of that decision would serve no useful purpose. Heiltsuk Horizon's contention is that Atlantic's bid was non-compliant with the requirements of MR 12 and was therefore improperly included in the re-evaluation

recommended by the Tribunal. This was Heiltsuk Horizon's position in its application for judicial review of Decision I and remains so in its subsequent challenges to the re-evaluation.

[76] If Heiltsuk Horizon's application for judicial review of Decision I were to succeed, this would significantly affect the outcome of the challenges to Decision II as Atlantic's bid would then be taken out of the equation entirely. Moreover, the challenges to both decisions are closely intertwined as Decision II cannot be accurately understood without first properly characterizing the Tribunal's determinations on MR 12 compliance in Decision I. In sum, the inclusion of Atlantic's bid in the re-evaluation resulting from that decision was, and continues to be, a point of controversy between the parties. In other words, it remains very much part of the sub-stratum of this multilayered litigation and is not defeated by the doctrine of mootness.

[77] As for the risk of inconsistent findings, I see no such risk in the present context as all the applications for judicial review relating to the Solicitation were heard together by the same panel.

(2) The Tribunal's remedial determination

[78] Heiltsuk Horizon contends that having been found non-compliant with MR 12, Atlantic's bid should have been disqualified and excluded from any further evaluation. Moreover, Atlantic's contract with PWGSC should have been terminated. Hence, in permitting Atlantic's bid to be re-evaluated and allowing the contract to remain with Atlantic until the completion of the re-evaluation, the Tribunal unreasonably refused to exercise its jurisdiction and thereby

committed an error that requires the intervention of this Court. In particular, Heiltsuk Horizon contends that allowing Atlantic's bid to be re-evaluated in such a context ran contrary to this Court's decision in *Bergevin*, which held that a non-compliant bid should not be submitted for re-evaluation.

[79] In contrast, Atlantic and the Attorney General argue that the Tribunal, in Decision I, was solely concerned with the evaluation process and made no finding on the compliance of Atlantic's bid with MR 12. I agree.

[80] While Decision I did speak to the interpretation of MR 12, the Tribunal specifically grounded the impugned recommendation in a deficiency in the evaluation process. The Tribunal observed that the bollard pull certificates provided by Atlantic, on their face, did not note deductions for engine driven consumers. This finding was largely influenced by the fact that one evaluator, in a handwritten note, expressly assumed that "all engine-driven consumers were considered even though this was not stated on [Atlantic]'s certificates" (Decision I at paras. 60-61). The Tribunal emphasized that this evaluator "*[took] it for granted* that [Atlantic]'s bid was compliant with MR 12" despite no demonstration of compliance on the face of the certificates (Decision I at para. 62; emphasis in original).

[81] The Tribunal questioned the basis of that assumption. There is no indication in the record as to why that evaluator had assumed that the bollard pull certificates accounted for all consumers. For example, the evaluator did not indicate that they had consulted the DNV Rules or relied on their own professional experience in making that assumption. The evaluation team's

failure to address said assumption appears to be the main reason why the Tribunal found that the evaluation team did not "apply" itself in assessing Atlantic's compliance with MR 12, notwithstanding the Tribunal's recognition of the deference owed to the evaluators' expertise (Decision I at para. 68).

[82] As the Tribunal noted in its discussion on remedy:

> [85] In this case, the trade agreements were breached when PWGSC unreasonably concluded that [Atlantic]'s bid was compliant with MR 12. As indicated above, the Tribunal finds that the evaluation team did not apply itself when considering how ATL's bollard pull certificates demonstrated that "all required engine driven consumers were taken into account", especially in light of the fact that it was not clear on the face of the certificates or in ATL's bid, as acknowledged in the notes of one member of the evaluation team. In short, the evaluation team took it for granted, or assumed, that ATL's certificates demonstrated compliance.
>
> [86] The Tribunal looked at dictionary definitions of the word "application" to consider whether the evaluation team reasonably "applied themselves" when evaluating ATL's bid. The *Merriam-Webster* dictionary defines application as "an act of applying: . . . (c) assiduous attention . . . ". In turn, it defines "assiduous" as "showing great care, attention and effort: marked by careful unremitting attention . . .". Put into the context of this case, the evaluation team did none of these things by *assuming* that "all required engine driven consumers were taken into account."
>
> [87] As discussed above, it was clear on the face of the terms of the RFP and Amendment No. 008 that in order to satisfy the requirements of MR 12, bidders had to demonstrate that their vessels exerted a minimum continuous bollard pull of no less than 120 tonnes *when all required engine driven consumers (shaft generators, etc.) are taken into account*. In applying the stated assessment methodologies for MR 12, it was incumbent on the evaluators to ensure that the requirements of MR 12 were satisfied. That did not occur in this case, as the evaluators did not apply the full extent of the stated requirements in MR 12 during the evaluation process. [Italics in original; underlining added.]

[83] Insofar as the impugned recommendation is grounded in the Tribunal's finding that the evaluation team had failed to apply itself, its reasoning and recommendation follow a clear line

of analysis. In the Tribunal's eyes, the evaluation team's failure to apply itself made it impossible to conclude that the team had brought to bear its expertise on the question of whether Atlantic's bid met the requirements of MR 12. Stated otherwise, the Tribunal was primarily concerned with process in Decision I, not bid-compliance. This, in my view, best explains how the Tribunal arrived at its recommendation.

[84] For the Tribunal, the evaluation team's unexplained assumption tainted not only the evaluation of Atlantic's bid but potentially that of all other bids submitted in response to the Solicitation as well. This assumption affected "the integrity and efficiency of the procurement process as a whole" (Decision I at para. 89).

[85] In light of this finding, it was open to the Tribunal to recommend a re-evaluation of all bids. As noted by the Supreme Court in *Vavilov*, "the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" (*Vavilov* at para. 102). The key point is that the impugned recommendation must be supported by "an internally coherent and rational chain of analysis" and "justified in relation of the facts and law that constrain the decision maker" (*Vavilov* at para. 85). I am satisfied that these requirements have been met.

[86] As indicated previously, the Tribunal did speak, though in a somewhat limited fashion, to the interpretation of MR 12. The Tribunal noted that, on its face, MR 12 required "a demonstration of the minimum bollard pull, taking into account all required power-driven consumers for a particular vessel" (Decision I at para. 64). With respect to the meaning of

"required" in MR 12, the Tribunal was of the view that the parties' submissions and evidence indicated a "common understanding" that it refers to the power-driven consumers required "for the normal operations" of emergency towing vessels (Decision I at para. 64). At the same time, the Tribunal acknowledged that MR 12 "did not specify a list of power-driven consumers that had to be considered and deducted from the rated bollard pull" but held that this was "beside the point" given that all required engine driven consumers were, under MR 12, to be taken into account in establishing a vessel's minimum bollard pull (Decision I at para. 64).

[87] However, those statements cannot be divorced from the context in which they were made. The Tribunal made them while underscoring the importance for the evaluators to make sure, rather than merely assume, that Atlantic's certificates reflect the vessels' bollard pull when all required power-driven consumers are accounted for. Given that those certificates had been obtained prior to the issuance of the RFP, the Tribunal found that they "would not necessarily have been based on testing procedures for compliance with the stated criteria of MR 12" (Decision I at para. 63). It is in this particular context that the Tribunal rejected PWGSC's contention that the certifying bodies could be relied upon to determine what power-driven consumers were required for compliance with MR 12 because those bodies "would not (or could not) have had any reference point to use" (Decision I at para. 64). In the eyes of the Tribunal, these circumstances did not permit the evaluators to merely assume that all required power-driven consumers had been taken into account. More was expected from them since they had reference points provided by the RFP.

[88] Again, in my view, these findings demonstrate that the Tribunal was concerned with the evaluation process, not the compliance of Atlantic's bid *per se*. Nor was the Tribunal concerned, for that matter, with the meaning and scope of MR 12. This is further evidenced by the Tribunal's statement that it may have reached a different conclusion regarding the First Complaint had the evaluators been in a better position to "connect the dots" between Atlantic's response to MR 12, its bollard pull certificates, and the information otherwise available in Atlantic's bid regarding, in particular, the proposed vessels' auxiliary power generators (Decision I at para. 67). This signals that the Tribunal felt it was not in a position to make a ruling on Atlantic's compliance with MR 12.

[89] In sum, I agree with the Attorney General that Heiltsuk Horizon's challenge to Decision I is based on a misinterpretation of the Tribunal's determination. In other words, it is based on the erroneous premise that the Tribunal found Atlantic's bid non-compliant with MR 12.

[90] As noted by the Attorney General, there is a fundamental difference between a finding of unreasonableness in a technical evaluation and a finding of non-compliance. A finding of unreasonableness in a technical evaluation is a finding that the information provided by a bidder was not examined in a reasonable manner; this leaves open the possibility that a proper evaluation, based on the same information, could result in a finding of compliance. Such a scenario is expressly contemplated by paragraph 30.15(2)(*b*) of the Act, which empowers the Tribunal to recommend that bids be re-evaluated.

[91] By contrast, a finding of non-compliance is a finding that the information provided by a bidder was not sufficient to demonstrate compliance and that a re-evaluation could not produce an alternate result. In such a case, the Tribunal may, under paragraphs 30.15(2)(*c*), (*d*) or (*e*) of the Act, recommend that the designated contract be terminated, that it be awarded to the complainant, or that the complainant be compensated by an amount specified by the Tribunal.

[92] Here, the impugned recommendation recognizes that upon re-evaluation, the evaluation team would have the opportunity to re-assess the bids without making improper assumptions and that this could result in a finding of compliance. As I have indicated previously, this finding was justified in relation to the facts and law.

[93] This conclusion is not affected by this Court's decision in *Bergevin*, which I find of no assistance to Heiltsuk Horizon in the case at bar. *Bergevin* was concerned with the application of a provision of a Request for Summary Proposal (the Provision) aimed at providing guarantees regarding conflicts of interest and fairness in the procurement process. The Provision prevented any bidder from having an undue advantage on account of prior involvement in the implementation phase of the project. In particular, the Provision prohibited those with such prior involvement from participating in the request for proposals. This was the situation of the top-ranked bidder.

[94] At issue in *Bergevin* was the Tribunal's recommendation that all proposals, including that of the top-ranked bidder, be re-evaluated. The Court, noting that the Provision "was aimed specifically at situations such as the one that occurred in this case" (*Bergevin* at para. 21), held that the top-ranked bidder's proposal, being inadmissible, "should have been set aside from the

outset so that it could not be submitted for re-evaluation" (*Bergevin* at para. 34). It concluded that the most equitable remedy "would be to return the file to the Tribunal so that it may propose an appropriate remedy for the applicant that takes into account the fact that [the top-ranked bidder]'s proposal was inadmissible, the applicant's results from the proposal re-evaluation and the advisability of cancelling [the top-ranked bidder]'s contract given how far the work has progressed" (*Bergevin* at para. 36).

[95] I agree with the Attorney General that *Bergevin* is distinguishable. In the present case, there is no issue with respect to Atlantic's admissibility to participate in the Solicitation in the first place. There is no issue either regarding the Tribunal's authority to recommend the re-evaluation of a bid found to be non-compliant because there was no such finding on the part of the Tribunal.

[96] For all these reasons, I see no basis upon which this Court, on a reasonableness review, could interfere with the Tribunal's choice of remedy in Decision I.

B. *Should this Court interfere with Decision I on the basis of the Tribunal's dismissal of Heiltsuk Horizon's allegations of bias and its refusal to order production of the documents requested in relation to these allegations?*

[97] As indicated earlier in these reasons, Heiltsuk Horizon's allegations of bias are based on one social media post, made by an employee of Atlantic on or around August 11, 2018, and the amendment to MR 18, which increased the maximum vessel age requirement from 15 to 20 years. In the course of the inquiry relating to the First Complaint, Heiltsuk Horizon, claiming that the document disclosure conducted by PWGSC as part of the First GIR did not satisfy the

requirements of rule 103 of the CITT Rules, made a request for production of documents to the Tribunal. That request was made pursuant to rule 23.1 of the CITT Rules, which provides that a party to a proceeding before the Tribunal "may make a request to the Tribunal for a decision or order on any matter that arises in the course of a proceeding."

[98] Insofar as it related to its bias allegations, Heiltsuk Horizon's request for production of documents was itemized as follows:

> 4. The correspondence, memoranda and other documentation concerning the Government of Canada's identification of a need for the emergency towing capability that led to the first public announcement of this requirement on November 7, 2016;
>
> 5. The correspondence, memoranda and other documentation concerning the initial choice of the Government of Canada for MR-18, that the vessels should be no more than 15 years old at bid closing, and from stakeholders that this requirement should be changed to 20 years;
>
> 6. The correspondence, memoranda and other documentation relevant to the claim made at para. 17 of the GIR that "All questions and comments submitted during the solicitation period were submitted anonymously, and as a result, CCG was not aware of the source of the questions, and assessed all comments without knowledge of the identity of their author;"
>
> 7. The correspondence, memoranda and other documentation reflecting or concerning the deliberations and choice of the Government of Canada to change the requirement of MR-18 from 15 to 20 years, including the deliberations and choice not to assign any weighting or points to the age of the vessel; and
>
> 8. The correspondence, memoranda and other documentation between the winning bidder and the Government of Canada concerning this solicitation or the requirements of this solicitation generally, both prior to and after the official announcement was made of the anticipated requirement on November 7, 2016.

[99] On October 11, 2018, the Tribunal denied disclosure of the documents requested under items 4, 7, and 8 in full and of those requested under item 5 in part, on the basis that those documents were not necessary, not relevant, overly broad in the case of item 8, or would not assist it in determining whether the grounds of the First Complaint were valid. As for the documents requested under item 6, the Tribunal ordered their disclosure in full (see Letter from the Presiding Member to Counsel of Record (11 October 2018), Consolidated Record, Vol. 2, Tab 54 at pp. 02273-02275).

[100] Heiltsuk Horizon submits that the Tribunal erred and breached procedural fairness in denying it access to these documents as they were relevant to its allegations of bias and had, therefore, to be disclosed by virtue of paragraph 103(1)(*b*) of the CITT Rules, which provides that a Government Institution Report must include "all other documents that are relevant to the complaint."

[101] Heiltsuk Horizon further contends that this aspect of the Tribunal's decision goes against the scheme of procurement inquiries. While only a "reasonable indication" of a breach must be provided to commence a procurement inquiry, procurement inquiries are in themselves fact-finding processes. As such, information disclosed in a Government Institution Report can give rise to further evidentiary support to corroborate the grounds raised in a complaint.

[102] Finally, Heiltsuk Horizon asserts that to the extent that the Tribunal found its request for production of documents to be overbroad or disproportionate, it could easily have granted some lesser amount of disclosure, as it had done with certain items of its request.

[103] The Attorney General contests Heiltsuk Horizon's assertion that this aspect of its challenge to Decision I raises issues of procedural fairness. In particular, the Attorney General claims that the Tribunal's findings regarding Heiltsuk Horizon's bias allegations were made in consideration of the nature of these allegations, weighed against the nature and scope of the documentary disclosure Heiltsuk Horizon had requested. On this point, the Attorney General underscores the fact that Heiltsuk Horizon was given ample opportunity to make submissions and reply submissions on this issue.

[104] The Attorney General submits that this is rather a matter where an administrative tribunal is called upon to interpret its own statute or one that is closely connected to that tribunal. Here, the Tribunal was called upon to interpret the CITT Rules. The Attorney General further contends that decisions denying document production requests are of a discretionary nature and attract deference. In such a context, the standard of review applicable to that aspect of Decision I is presumed to be reasonableness.

[105] Subrule 103(1) of the CITT Rules reads as follows:

Government Institution Report	**Rapport de l'institution fédérale**
103 (1) Subject to subrule 107(5), the government institution must, not later than 25 days after the first working day following the receipt of a copy of the complaint referred to in rule 100, file with the Tribunal a report containing a copy of	**103 (1)** Sous réserve du paragraphe 107(5), l'institution fédérale dépose auprès du Tribunal, au plus tard vingt-cinq jours après le premier jour ouvrable suivant la réception de la copie de la plainte visée à l'article 100, un rapport comprenant une copie des documents suivants :

(*a*) the solicitation, including the specifications or portions of it that are relevant to the complaint;	***a*)** l'appel d'offres, y compris le devis ou les parties de celui-ci qui se rapportent à la plainte;
(*b*) all other documents that are relevant to the complaint;	***b*)** les autres documents pertinents;
(*c*) a statement that sets out all findings, actions and recommendations of the government institution and that responds fully to all allegations that are contained in the complaint; and	***c*)** un énoncé renfermant les conclusions, les mesures et les recommandations de l'institution fédérale ainsi qu'une réponse à chaque allégation contenue dans la plainte;
(*d*) any additional evidence or information that may be necessary to resolve the complaint.	***d*)** tout autre élément de preuve ou renseignement qui peut s'avérer nécessaire au règlement de la plainte.

[106] The Tribunal has consistently held that the government has "a significant duty of transparency" when it comes to the provision of documentary evidence (*Valcom Consulting Group Inc.*, CITT File No. PR-2016-056 at para. 42; *Pomerleau Inc.*, CITT File No. PR-2014-048 at para. 27). However, the Tribunal has also held that it "has the discretion to decide whether a request for the disclosure of specific information or materials by a party is warranted in the context of a particular inquiry" (*Vireo Network Inc.*, CITT File No. PR-2013-037 at para. 58 (*Vireo*)). For instance, unsubstantiated and speculative allegations of bad faith or bias will generally not provide a basis for a complainant to access documents in the possession of the government institution, nor will a disclosure request that amounts to a "'fishing expedition[]' for further possible grounds of complaint" (*Vireo* at para. 58; see also *Chamber of Shipping of British Columbia*, CITT File No. PR-2009-069 at para. 15; *Enterasys Networks of Canada Ltd.*, CITT File Nos. PR-2010-004 to PR-2010-006 at para. 70; and *Re Complaint Filed by EDS Canada Ltd.*, CITT File No. PR-2002-069 at 10).

[107] It is trite law that no deference is owed to administrative decision makers on matters raising procedural fairness concerns (see e.g. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 36 (*CP Railway*)). As this Court sated in *CP Railway*, "this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*CP Railway* at para. 54). Therefore, there can be no dispute that the standard of review applicable to the Tribunal's dismissal of Heiltsuk Horizon's allegations of bias is the standard of correctness.

[108] However, we are more concerned, here, with the validity of the Tribunal's disclosure order. According to Heiltsuk Horizon, the partial denial of the disclosure request deprived it of the ability to put forward and fully articulate its allegations of bias. This type of order is akin to decisions made by administrative decision makers in determining their own procedure, "including aspects that fall within the scope of procedural fairness" such as information disclosure. Absent statutory provisions to the contrary, administrative decision makers "enjoy considerable discretion" in making such decisions. The scope of this discretion will be dictated by "[c]ontext and circumstances" as will the determination of whether a breach of the duty of fairness occurred (*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170 at para. 37). As the Supreme Court of Canada held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, the content of procedural fairness in a given case is very much context-specific (at para. 21, citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682, 69 D.L.R. (4th) 489).

[109] Hence, although the standard of correctness applies to the review of procedural decisions, its application in any given case must be informed by the presence and scope of the administrative decision maker's discretion in its choice of procedure.

[110] Here, I see no reason to interfere with the Tribunal's disclosure order.

[111] While allegations of a breach of procedural fairness or of a reasonable apprehension of bias may warrant additional disclosure, they do "not allow a person to engage in a fishing expedition in the hopes of discovering some documents to establish the claim" (*Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, 2018 D.T.C. 5043 at para. 8). A fishing expedition has been defined by this Court as "a search by an empty-handed party looking for something to grasp onto" (*Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, 472 N.R. 109 at para. 38).

[112] I am satisfied that insofar as it relates to items 4, 5, 7 and 8, Heiltsuk Horizon's request for production of documents was an attempt "to engage in a fishing expedition in the hopes of discovering some documents to establish the claim." When this request was made, the part of the First Complaint relating to the MR 18 amendment was no longer at the forefront of said complaint; the Attorney General and Atlantic had at that point already convinced the Tribunal that the amendment disclosed no grounds for an allegation of bias. Heiltsuk Horizon's request for disclosure regarding MR 18 amounted to little more than an attempt to uncover evidence that could serve to establish an otherwise unsubstantiated allegation. The Tribunal correctly rejected it.

[113] With respect to the request for production of documents prompted by the social media post, I am also satisfied that it was well within the Tribunal's discretion in determining its own procedure to dismiss that request. Moreover, that decision was appropriate in light of the context, nature, and content of the communication. As noted by the Tribunal, the social media post refers to the timeframe of approximately two years between the release of RFI A in November 2016 and the contract award in August 2018 (Decision I at para. 76). As was the case for the allegation relating to the MR 18 amendment, item 8 of Heiltsuk Horizon's request for production of documents was yet another attempt to uncover evidence that could serve to establish an otherwise unsubstantiated allegation. I find that the Tribunal correctly rejected it as well.

[114] Although it is not strictly necessary to rule on the correctness of its findings regarding the allegations of bias *per se*, I am of the view that the Tribunal did provide persuasive justifications for dismissing those allegations. As it explains at paragraphs 76 to 78 of Decision I:

> [76] In regard to the social media post, the Tribunal notes that there was nothing incriminating in the language used by the employee of ATL. Social media posts are made for public consumption and the language used is very rarely precise. In this case, the Tribunal finds that the post simply refers, in general terms, to the timeframe of approximately two years between the release of RFI A and the contract award. As PWGSC noted in the GIR, any and all consultations with industry members, including Heiltsuk Horizon and ATL, began with the release of RFI A on November 17, 2016. There is simply no evidence on the record to suggest otherwise. Furthermore, the Tribunal does not consider a single social media post to be sufficient evidence, or to have the requisite probative value, to support a finding such as the one requested by Heiltsuk Horizon.
>
> [77] Turning to the issue of MR 18, when dealing with similar complaints about allegedly biased technical requirements, the Tribunal has found that a government institution is entitled to define its legitimate operational requirements and to reflect them in the technical requirements of the solicitation, as long as these are reasonable, i.e. not impossible to meet. In addition, a complainant bears the onus to present positive evidence that the government institution structured the terms of the RFP, such as technical requirements or specifications, with the purpose or

> effect of favouring (or excluding) a particular supplier (or suppliers). In this case, Heiltsuk Horizon did not meet its burden.
>
> [78] Heiltsuk Horizon did not present the Tribunal with evidence that the terms of the RFP were structured in such a way that they reasonably appeared to favour ATL's bid or exclude other potential suppliers. PWGSC acknowledged that it received recommendations regarding vessel age from ATL and another potential bidder. It used those recommendations and a review of existing literature to broaden the maximum vessel age requirement MR 18 from 15 years in RFI B to 20 years in the RFP, thereby allowing for greater competition as opposed to lessening it. Evidence indicates that three of the nine bids received put forward vessels over 15 years old. [Footnotes omitted.]

[115] In light of the above, the Tribunal correctly found no reasonable apprehension of bias.

[116] I agree that, on its own, the social media post does not provide an adequate factual foundation for Heiltsuk Horizon's allegation that PWGSC engaged in prior or private consultations with Atlantic regarding the Solicitation. That allegation, persuasively denied by PWGSC and Atlantic, is simply unsubstantiated.

[117] With respect to Heiltsuk Horizon's allegation that the amendment to MR 18 unduly favoured Atlantic, the Tribunal correctly found this to be without merit. In addition to Atlantic, another potential bidder had recommended that the maximum vessel age be increased. It was therefore open to the Tribunal, on the basis of the record before it, to hold that this amendment was made to increase rather than decrease competition. This finding is supported by the fact that not only Atlantic but two other bidders had also put forward vessels over 15 years old.

[118] I am satisfied that PWGSC's decision to increase the maximum vessel age aligned with one of the four purposes underlying the regulatory regime concerning federal government procurement, namely that aimed at ensuring competition among bidders.

[119] Therefore, I see no basis to interfere with the Tribunal's findings regarding Heiltsuk Horizon's allegations of bias, including the Tribunal's disclosure order that preceded those findings.

[120] For all these reasons, I would dismiss Heiltsuk Horizon's application for judicial review in file A-57-19.

[121] This requires addressing the reasonableness of Decision II.

C. *Is Decision II reasonable?*

(1) The parties' positions

[122] All parties dispute the reasonableness of Decision II. Heiltsuk Horizon claims that the Tribunal committed the same error as in Decision I by permitting Atlantic's bid to be re-evaluated despite ample evidence in the record that speaks to the bid's non-compliance. It also contends that Decision II should be set aside because the Tribunal, in recommending a new re-evaluation, explicitly permitted bidders to engage in bid repair by allowing them to supply new information on MR 12 compliance more than two years after bid closing.

[123] For their part, Atlantic and the Attorney General claim that this Court should intervene in Decision II because the Tribunal exceeded its oversight jurisdiction over federal government procurement by imposing an interpretation of MR 12 that has no basis in the RFP. They also contend that the Tribunal unreasonably failed to accord deference to the evaluators and adequately consider the steps they took in re-assessing the bidders' compliance with MR 12.

[124] Heiltsuk Horizon opposes Atlantic and the Attorney General's challenge to Decision II. It submits that the Court should not interfere with the Tribunal's finding that the re-evaluation performed by the new team of evaluators was unreasonable. This is because the new evaluation team ignored the language of MR 12, as interpreted in Decision I, thereby committing the same error as the previous team. In particular, the new team assumed that "all required engine driven consumers" were actually accounted for during the testing of Atlantic's vessels' minimum bollard pull despite the vessels' bollard pull certificates, on their face, indicating the opposite. Moreover, Heiltsuk Horizon claims that because Atlantic and the Attorney General did not challenge Decision I, they are now estopped from re-arguing the proper interpretation of MR 12 and the corresponding assessment methodology.

(2) The Tribunal's interpretation of MR 12 is unreasonable

[125] For the ensuing reasons, I agree with Atlantic and the Attorney General that Decision II is unreasonable. In particular, I find that the Tribunal improperly interpreted MR 12 and its assessment methodology, thereby impermissibly altering the terms of the RFP. The Tribunal then proceeded to assess the reasonableness of the re-evaluation against this improper interpretation.

In so doing, the Tribunal failed to consider the steps taken by the evaluators in re-assessing the bidders' compliance with MR 12. All of this, in my view, fatally undermines the Tribunal's finding that the re-assessment of the bids' compliance with MR 12 was unreasonable.

[126] As previously mentioned, the Tribunal recommended in Decision I that all bids be re-evaluated. It did so on the basis that the evaluation team had inappropriately assumed that Atlantic's bollard pull certificates demonstrated compliance with MR 12. Since those certificates pre-dated the issuance of the RFP and did not show, on their face, that the required engine driven consumers had been accounted for, the Tribunal found that compliance with this requirement could not be assumed, as assumptions are not a proper means of assessing compliance in a procurement process. As a result, the Tribunal held that it was incumbent upon the evaluation team to "apply itself when considering how [Atlantic]'s bollard pull certificates demonstrated that all required engine driven consumers were taken into account" (Decision I at para. 85; internal quotation marks omitted).

[127] Decision I was essentially concerned with the manner in which Atlantic's bid – and all other bids for that matter – had been evaluated. The re-evaluation was recommended in order to ensure that the bids' compliance with MR 12 would be evaluated without improper assumptions.

[128] This, in my view, is the extent of what can be drawn or inferred from Decision I regarding MR 12. However, in Decision II, a differently constituted panel went much further in interpreting MR 12 and its assessment methodology by overstretching the text of this

requirement and removing it from the context of its adoption. In doing so, the Tribunal opened the door to Atlantic and the Attorney General's challenges to that decision.

[129] In particular, the Tribunal introduced a concept of "functional" bollard pull which was to be measured against a number of criteria unstated in the text of MR 12. In addition, it reduced the role of bollard pull certificates to that of mere "starting points". As a result, the Tribunal distorted MR 12 to a point where, as the Attorney General rightfully points out, it bears little resemblance to what was published in the RFP.

[130] It may be helpful here to look once more to the Tribunal's directions on how, in its view, MR 12 ought to be assessed:

> [70] For clarity, this new re-evaluation will allow evaluators to rely on bollard pull certificates *as a starting point*, but it will require that evaluators assess deductions for all engine-driven consumers required in emergency towing operations. This means evaluators are required to use their expertise to assess bids as to which consumers are engine-driven, which are required for emergency towing operations, and how much each required consumer would deduct from the certified bollard pull. These factors must be assessed on a vessel-by-vessel basis, taking into account the specific design of the power supply of each vessel and whether the vessel relies on engine-driven consumers at all. Evaluators must ensure that a vessel would have a *functional* bollard pull of at least 120 tonnes, even during an emergency towing operation when power may be drawn away from the engine to power other consumers.
>
> [71] For further clarity, evaluators are not necessarily required to account for every single consumer that could possibly draw power from the engine at a given time. However, evaluators are required to use their expertise to determine which engine driven consumers of a particular vessel are necessary "'for normal operations' of emergency towing vessels". This means that evaluators must expressly consider the sea conditions that would be present in normal emergency towing operations in the geographical area where the vessels will be patrolling. The Tribunal leaves the specifics of these conditions to the expertise of the evaluators, but notes Heiltsuk Horizon's suggestion that this may include cross currents, high winds, rough seas or confined or busy navigational corridors,

> requiring continuous and simultaneous use of winches, thrusters, dynamic positioning systems and/or other auxiliary equipment. [Footnotes omitted; emphasis in original.]

[131] It is clear that the Tribunal adopted an interpretation of MR 12 that goes well beyond what the text of MR 12 and its assessment methodology provide for, and well beyond any reasonable reading of Decision I. This interpretation denotes, in my view, a serious misconstrual of that requirement's role in the RFP.

[132] It is important to note that MR 12 is just one mandatory requirement among others designed to assess the capability of the bid vessels. Other mandatory requirements in the RFP include those related to vessel speed; oil recovery capacity; load, reach and working radius of the deck crane; and endurance for continuous operation at sea. As noted by the Solicitation's Technical Authority, Mr. Legros, the requirement to demonstrate compliance with MR 12 was not intended to be overly onerous for bidders (Confidential August 2019 Legros Affidavit, Confidential Tribunal Record – Consolidated Record at p. 12833, para. 6). The purpose of a bollard pull test is to measure a vessel's ability to tow a vessel in distress (Confidential November 2018 Legros Affidavit, Consolidated Record at p. 02609, para. 5). This ability is measured under optimal conditions in order to achieve the best test results possible (e.g. strict wind limits, calm sea state, and frigid water temperatures) (Affidavit of John Trainor sworn November 27, 2018, Consolidated Record, Vol. 2, Tab 73 at p. 02749, para. 23). Bollard pull testing is not designed to provide a functional assessment of a vessel's towing capability in specified harsh conditions in a specified geographical location, as suggested by the Tribunal (Decision II at paras. 70-71). The Tribunal has misinterpreted this in improperly elevating bollard pull to a measure of a vessel's ability to handle real emergency situations.

[133] As appears from the evidence in the record, the CCG had conducted a study and received comprehensive feedback from the industry in determining a baseline bollard pull for the sought-after emergency towing vessels. It set "an objective requirement of holding an 11,000 TEU container ship, in position, in Beaufort 9 conditions (8m waves, 47 kt winds)" (Amendment No. 001 to RFI A, Consolidated Record, Vol. 2, Tab 20 at p. 00393). The Tribunal, in setting out its own list of factors that evaluators would have to consider in determining compliance with MR 12, did not demonstrate any consideration of this background information on how the CCG had arrived at the 120-tonne bollard pull requirement.

[134] Again, according to the evidence, MR 12's assessment methodology was drafted such that bidders who provided certificates did not also have to provide bollard pull test output data (Confidential November 2018 Legros Affidavit, Consolidated Record at p. 02610, para. 9). The Tribunal's interpretation of MR 12 in Decision II contradicts this in requiring additional bollard pull data to accompany bollard pull certificates. Moreover, the record indicates that there are no international regulations on the calculation of bollard pull reduction, only guidance from one organization that applies bollard pull reduction to the "anchor handling role of an [Anchor Handling Tug Supply] vessel and not to the towing role" (Confidential November 2018 Legros Affidavit, Consolidated Record at p. 02611, para. 13).

[135] In requiring that evaluators apply all sorts of reductions to bollard pull certificates, something not contemplated by Decision I, the Tribunal unreasonably misinterpreted the role of those certificates in the RFP. The Tribunal, in my view, essentially demanded that evaluators create new standards regarding bollard pull determinations with no basis in industry practice.

More problematically, these standards cannot be found in the RFP or read into it given the context of MR 12's adoption, as discussed above. I agree with Atlantic and the Attorney General that requiring PWGSC to take into consideration such undisclosed and unanticipated criteria would undermine the integrity and efficiency of the competitive procurement system.

[136] Put otherwise, the Tribunal's instructions to the evaluators in Decision II to treat the bollard pull certificates "*as a starting point*" and consider "sea conditions that would be present in normal emergency towing operations in the geographical area where the vessels will be patrolling" (Decision II at paras. 70-71; emphasis in original) deviate significantly from the clear wording of the RFP. When the role of MR 12 in the RFP is properly understood, there is no need for such supplementary conditions.

[137] As counsel for Atlantic emphasized in oral submissions, the RFP's mandatory requirements are evaluated on a pass/fail basis. The goal of the bollard pull requirement set out in MR 12 was to establish a baseline. I agree with counsel that the Tribunal reversed the logic of MR 12 by finding that the bollard pull figures stated on the bollard pull certificates should only be considered as "starting points" that would have to be reduced after accounting for factors such as weather conditions (Decision II at para. 70).

[138] Again, the language used in the RFP, in combination with the context surrounding its adoption, rather demonstrates that it was the other way around. The record clearly indicates that the CCG first took into consideration the types of conditions in which the vessels would operate and, with industry input, established a minimum mandatory bollard pull requirement of 120

tonnes. This is reflected, for example, in the RFI A process (see e.g. Amendment No. 001 to RFI A, Consolidated Record at pp. 00389-00435). In other words, there is simply no basis for the Tribunal's interpretation of MR 12 in Decision II.

[139] It seems to me that the Tribunal found the requirements set out in MR 12 to be somehow lacking. As a result, it felt compelled to supply missing details based on its own idea of a more robust bollard pull test, which requires evaluators to assess deductions for engine driven consumers based on factors such as sea conditions and geolocation.

[140] However, this is highly problematic. As noted by this Court in *Almon*, the Tribunal's jurisdiction is limited to examining "the government's adherence to the requirements, criteria and evaluation methods the government announced and the overall integrity and efficiency of the competitive procurement system" (*Almon* at para. 22; internal quotation marks omitted). It is not the Tribunal's role to rewrite the procurement criteria or evaluation methods. It was therefore unreasonable for the Tribunal to fill in what it likely perceived as gaps in the Solicitation's criteria. Applying hidden, unstated criteria renders the procurement process opaque and unfair. This runs counter to the purposes of the regulatory regime, which include applying "one set of transparent rules to all bidders" (*Almon* at para. 23). It would also be unreasonable and unfair to expect bidders involved in the procurement process to anticipate unstated criteria.

[141] Moreover, it seems the Tribunal was aware that such an interpretation of MR 12 may pose problems when it cautioned that "it may not be possible to conduct a proper evaluation of MR 12 without seeking additional information from bidders" (Decision II at para. 69). This, in

my view, is further evidence that the Tribunal impermissibly re-wrote MR 12 and its assessment methodology.

[142] In sum, I agree with Atlantic and the Attorney General that the Tribunal exceeded its oversight jurisdiction over federal government procurement by imposing an interpretation of MR 12 that has no basis in the RFP.

(3) Atlantic and the Attorney General are not estopped from challenging the Tribunal's interpretation of MR 12

[143] Heiltsuk Horizon argues that in Decision II, the Tribunal upheld and confirmed the Tribunal's interpretation of MR 12 in Decision I. As such, it claims that Atlantic and the Attorney General are estopped from challenging that interpretation since they did not seek judicial review of Decision I.

[144] With respect, Heiltsuk Horizon reads too much into Decision I. That decision did not introduce a concept of "functional" or "effective" bollard pull, the evaluation of which would require taking into account a number of criteria unstated in the text of MR 12. Again, the Tribunal's chief preoccupation in that decision was the manner in which the evaluators had assessed compliance with MR 12. There, the Tribunal was concerned with the fact that one evaluator had assumed that all required engine driven consumers had been taken into account in determining Atlantic's vessels' bollard pull. The Tribunal found this assumption problematic given that Atlantic's bollard pull certificates predated the issuance of the RFP and did not, on their face, indicate that those consumers had been taken into account.

[145] Moreover, the Tribunal in Decision I did not rule out that an adequate re-evaluation – one conducted without reliance on improper assumptions – might confirm Atlantic's compliance with MR 12. The Tribunal was aware, from Mr. Vyselaar's evidence, that Atlantic's certificates might have been sufficient as "there were no 'required engine driven consumers' that needed to be deducted because both of [Atlantic]'s vessels had auxiliary generators that power other consumers during normal operations" (Decision I at para. 58). Had Atlantic included information about how the auxiliary generators in its bid vessels factored into compliance with MR 12, the Tribunal observed that it might have reached a different conclusion regarding Heiltsuk Horizon's complaint (Decision I at paras. 66-67). This information, however, would not have been sufficient to satisfy the criteria set out by the Tribunal in Decision II. There is thus a direct contradiction between Decision I and Decision II.

[146] It is trite law that issue estoppel will operate when the following pre-conditions are met: (i) the same question has been decided; (ii) the judicial decision said to create the estoppel was final; and (iii) the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para. 25 (*Danyluk*)). However, these rules ought not to be mechanically applied; the most important consideration in deciding whether to apply issue estoppel "is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case" (*Danyluk* at para. 33). Therefore, even if the above three preconditions are met, a court can exercise its discretion and refuse to apply issue estoppel (*Danyluk* at paras. 33, 62).

[147] In the present case, the dispute between the parties centres on whether the first *Danyluk* precondition is met. The Supreme Court has adopted a stringent approach in determining whether the same question has been decided in a previous decision for the purposes of issue estoppel. As Chief Justice Dickson succinctly noted in *Angle v. M.N.R.*, [1975] 2 S.C.R 248 at 255, 47 D.L.R. (3d) 544, "[t]he question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings" and "[i]t will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." In *Danyluk*, Justice Binnie interpreted this to mean that "the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ('the questions') that were necessarily (even if not explicitly) determined in the earlier proceedings" (*Danyluk* at para. 24).

[148] As previously discussed, the Tribunal's statements on MR 12 in Decision I can, at most, be considered collateral or incidental findings. They provide context as to why the Tribunal found the evaluation team's assumption problematic; they do not directly factor into why the Tribunal recommended the remedy that it did as the deficiencies in the evaluation process were sufficient by themselves to warrant a re-evaluation. The point here is that the Tribunal did not rely on its interpretation of MR 12 in arriving at its recommendation, nor did it need to.

[149] The doctrine of issue estoppel does not, therefore, operate as a bar to Atlantic and the Attorney General's challenges to the Tribunal's interpretation of MR 12 in Decision II.

[150] I would have reached the same conclusion even if I had accepted Heiltsuk Horizon's contention that the interpretation given to MR 12 in Decision II is somehow anchored in the Tribunal's findings in Decision I and that all three pre-conditions of issue estoppel are met. As indicated previously, courts have the discretion to decide matters that would otherwise be barred by that doctrine. The most important factor to consider in exercising that discretion is the potential injustice, taking into account the entirety of the circumstances (*Danyluk* at para. 80).

[151] I believe that the totality of the circumstances at play in the present matter militate against applying the doctrine of issue estoppel, as I see no potential injustice in properly and fully addressing the interpretation of MR 12. This is so for essentially two reasons. First, the issue of the interpretation of MR 12 has been fully argued by all parties in their written and oral submissions to this Court. Second, determining the proper interpretation of MR 12 would not be inconsistent with the goals of finality and avoidance of relitigation promoted by the Supreme Court in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 (at para. 36). Given that the applications for judicial review of the two impugned decisions were heard together, this is the first – and only – time this Court has been seized of the question of how to interpret MR 12. Thus, at least as far as this Court is concerned, the parties are not truly relitigating the interpretation of that mandatory requirement.

[152] In my view, it is in the interest of justice that finality be brought to this issue. This is so given the multiplicity of proceedings the present dispute has generated thus far and the prospect of further proceedings before the Tribunal, and this Court, should the bids be evaluated a third time, as recommended by the Tribunal in Decision II.

[153] Hence, if I were to accept Heiltsuk Horizon's claim that Decision I provides the foundation for the Tribunal's position in Decision II that bollard pull certificates are starting points that should be supplemented by unstated criteria and deductions for engine driven consumers with a view to measuring the vessels' "functional" or "effective" bollard pull, I would find Decision I to be unreasonable. I would arrive at this conclusion in the same way that I arrived at the conclusion that Decision II is unreasonable.

[154] I would also arrive at this conclusion, for the reasons given above, if I were to accept, which I do not, that the Tribunal, in stating that the certifying bodies could not be relied upon to determine what power-driven consumers were required for compliance with MR 12 because those bodies would not (or could not) have had any reference point to use, meant that the bollard pull certificates issued by those bodies were to be treated as "starting points" requiring evaluators to assess compliance with MR 12 by applying all sorts of deductions to figures noted on the certificates, based on unstated factors. Such an interpretation of Decision I would be all the more problematic since the assessment methodology for MR 12 clearly contemplates that compliance with that requirement could be established by an independently verified bollard pull certificate less than 10 years old. This means that compliance could be validly established by providing a bollard pull certificate pre-dating the issuance of the RFP and that such a certificate would necessarily have been prepared without any reference point to the RFP. The terms of the RFP simply did not provide for two categories of certificates: those issued after the date of the RFP, with a reference point to use, and those issued prior to the date of the RFP, with no reference point to use.

[155] That said, and as discussed above, I disagree with Heiltsuk Horizon's characterization of Decision I and find that the first *Danyluk* precondition has not been satisfied. In other words, the fact that Decision I was not challenged by Atlantic or the Attorney General does not prevent the Court from considering the reasonableness of the Tribunal's interpretation of MR 12 in Decision II.

(4) The Tribunal's findings regarding the re-evaluation are fatally flawed

[156] Due to its misinterpretation of MR 12 and the related assessment methodology, the Tribunal failed to adequately appreciate the steps the evaluators had taken in re-assessing compliance with MR 12. This, in turn, resulted in a failure to show appropriate deference to the evaluation team's expertise.

[157] As the evidence shows, the re-evaluation team directly and adequately addressed the procedural deficiencies identified by the Tribunal in Decision I. In his capacity as the Solicitation's Technical Authority, Mr. Legros asked the re-evaluation team, which consisted of independent experts with a combined 89 years of industry experience, to confirm its understanding of the following points that had been at issue in Decision I with respect to Atlantic's bid: (i) whether the bollard pull certificates provided to establish compliance with MR 12 accounted for the <u>required</u> engine driven consumers; and (ii) how engine power could be equal to propulsion engine power (Confidential Affidavit of Henri Legros sworn July 16, 2019, Confidential Tribunal Record – Consolidated Record, Vol. 3, Tab 139 at pp. 12562-12563, paras. 25-26 (the Confidential July 2019 Legros Affidavit)).

[158] With respect to the first question, the consensus discussion is summarized as follows in the Re-Evaluation Report:

> Evaluators noted the following in their initial comments – The Bollard Pull certificates were issued by Det Norske Veritas (DNV), a recognized Classification society, in 2013 (less than 10 years old) and that they listed the Bollard Pull as 158T for the Atlantic Eagle and 162T for the Atlantic Raven. It was noted that some of the conditions from MSC Circ 884 were not fulfilled. It was also noted that during the individual evaluation, evaluators requested the DNV Bollard Pull testing procedures referred to on page 2 of the DNV certificates found in the bid. The DNV procedures, as found on the internet and included here under Appendix E confirmed that "all auxiliary equipment such as pumps, generators and other equipment, which are driven from the main engine(s) or propeller shaft(s) in normal operation of the vessel shall be connected during the test". The evaluators also noted the double asterisk (**) on the DNV certificate indicating that "The propulsion engine power is the sum of actual engine power driving propellers. (Combustion engines for mechanical propulsion deducted any PTO power, electrical motors on propulsion thruster, electrical motors for PTI, etc.)". The evaluators also noted that Classification society surveyors would have identified any deviation from the testing procedure on the certificate and would only conduct the test with the vessel in a safe condition to operate.
>
> The consensus discussion began with the issue of MSC Circ 884 requirements not being addressed in the DNV provided certificates. The TETL clarified that MSC Circ 884 requirements only applied to Bollard Pull output data if a Bollard Pull certificate (independently verified) was not submitted. In the case of Atlantic Towing's bid, a certificate was provided and therefore, the conditions listed in MSC Circ 884 were not required when a certificate was provided in the bid. For this reason, some of the evaluators' comments captured during the individual assessment refer to MSC Circ 884 rules and these comments were recognized as not being required during consensus. Note that this issue appeared in all bids.
>
> The TETL then asked evaluators to confirm their understanding of the word "required" in the Mandatory Requirement "…when all required engine driven consumers (shaft generators, etc) are taken into account.". On the basis of the knowledge and expertise of the evaluators, consensus was achieved in understanding "required" as meaning those consumers that are required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected by the Classification Society Bollard Pull testing procedure.
>
> On this basis, all evaluators confirmed that the Atlantic Towing bid met MR-12.
>
> (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at pp. 12589-12590)

[159] With respect to the second question, the consensus discussion is summarized as follows:

> The TETL further asked the evaluators to provide their view on how the engine power could be equal to the Propulsion Engine Power, as found on the certificate, given that required consumers were connected during the test. The evaluators noted that significant consumers such as shaft generators would not be required during the Bollard Pull test and that those consumers such as communication equipment, radar, lights machinery ventilation fans would use minimal power that would be supplied by alternate sources of power. In this instance, the Atlantic Towing bid's vessel specifications indicated the availability of auxiliary generators that would provide this functionality. It was also noted that the Bollard Pull is measured by an instrument (dynamometer) fitted between the eye of the tow line and the bollard giving a continuous read-out of the effective Bollard Pull. The Bollard Pull is not a calculation based on the listed Propulsion Engine Power. The TETL then suggested that we could seek further information from DNV on the specific Bollard Pull tests conducted on the Atlantic Towing vessels.
>
> (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at p. 12590)

[160] The above passages from the Re-Evaluation Report lend support for Mr. Legros's assessment, in response to the Third Complaint, of how the re-evaluation was conducted:

> I confirm, as I have done previously, the assiduous and careful evaluation of all bids with respect to MR-12 and the reasonable reliance on the certificates from DNV, following tests performed by DNV according to its Rules which were consistent with those of the [International Maritime Organization] and which required that all engine driven consumers used in normal operation of the vessel be connected during the test.
>
> (Confidential August 2019 Legros Affidavit, Confidential Tribunal Record – Consolidated Record at p. 12840, para. 28)

[161] In that same affidavit, Mr. Legros noted that subsections A504 and A505 of the DNV Rules, which are incorporated by reference into, for instance, Atlantic's bollard pull certificates, confirm that all engine driven consumers were accounted for during the bollard pull test

(Confidential August 2019 Legros Affidavit, Confidential Tribunal Record – Consolidated Record at pp. 12838, 12841, paras. 22, 30).

[162] In my view, the evidence suggests that the re-evaluation team directly addressed the problematic assumption that formed the crux of the Tribunal's concern in Decision I. In the case of Atlantic's bid, all individual evaluators provided sufficient written comments during both the individual evaluation and consensus discussion stages of the re-evaluation process (see Third GIR, Appendix "A" – Brief of Documents, Confidential Tribunal Record – Consolidated Record, Vol. 3, Tab 143 at pp. 13106-13150). Furthermore, the evaluators' notes reflect Mr. Legros' description of the re-evaluation process and the record shows that the team members consulted the relevant DNV rules and made their assessment of Atlantic's compliance with MR 12 based on their expert understanding of these rules (see Confidential July 2019 Legros Affidavit, Confidential Tribunal Record – Consolidated Record at pp. 12559-12561, paras. 14-21).

[163] The Tribunal acknowledged that it lacked the expertise to determine compliance with MR 12 and that "it will review a procurement process on a reasonableness standard, showing deference to the evaluators' expertise and making recommendations only when a decision is unreasonable" (Decision II at para. 47). However, in substituting its own interpretation of MR 12 for that of the evaluators, the Tribunal failed to abide by this principle. As discussed above, the re-evaluation team arrived at a consensus and interpreted "required engine driven consumers" along the lines of how those are considered by classification societies such as DNV. Indeed, the language of MR 12's assessment methodology suggests that MR 12 was informed by industry

standards. I am simply not convinced that the evaluators failed to apply their expertise and experience to the task or ignored the language of MR 12.

(5) There is no basis for Heiltsuk Horizon's allegations of informational deficiencies and instances of non-compliance

[164] Heiltsuk Horizon's claim that the new team of evaluators observed, but ignored, a "wide range of informational deficiencies or instances of blatant non-compliance" has no merit.

[165] In particular, Heiltsuk Horizon faults the evaluators for allegedly assuming that engine driven consumers were accounted for in the bids' bollard pull certificates despite unequivocal statements on the face of the certificates that engine driven consumers had not been connected or accounted for during the tests. It alleges that though the evaluators observed these informational deficiencies in most bids, they allowed them to go ignored on the sole basis that the classification societies' testing rules stipulated that all required engine driven consumers had to be engaged during bollard pull testing and that no deviations from this stipulation were noted on any of the certificates.

[166] At the core of Heiltsuk Horizon's contention is the belief that bollard pull certificates alone are sufficient to establish compliance with MR 12 only where the proposed vessels, such as its own, do not feature engine driven consumers such as shaft generators. Where such consumers are present, the certificates, according to Heiltsuk Horizon, must explicitly demonstrate that all such engine driven consumers were taken into account at the time of the bollard pull tests. The

end result, following Heiltsuk Horizon's logic, is that all bids should have been disqualified by the new team of evaluators, except its own.

[167] This claim cannot succeed for a number of reasons.

[168] First, there is nothing on the face of the certificates to support the allegation that the classification societies did not follow their rules in conducting the bollard pull tests. The main evidence cited by Heiltsuk Horizon in support of this contention relates to Atlantic's bid. Heiltsuk Horizon asserts that if the DNV rules had been followed, the propulsion power figures stated on Atlantic's certificates would have been significantly lower than the stated total power of the proposed vessels' engines when running at their maximum continuous rating. However, this argument fails to take into account the presence of auxiliary generators on Atlantic's vessels. It is the presence of these generators which explains, as we have seen, why Atlantic's certificates indicate propulsion engine power as being equal to the vessel engine power during bollard pull testing.

[169] Second, there is nothing to suggest that the evaluators failed to achieve consensus on the interpretation of MR 12 or made improper assumptions with respect to Atlantic's bid. The Re-Evaluation Report clearly notes that all of the evaluators agreed during the consensus discussion that "required" means "those consumers required to operate the vessel safely at sea and for the purpose of the Bollard Pull test as reflected by the Classification Society Bollard Pull testing procedure" (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at pp. 12589-12590). This interpretation is reflected in almost all of the evaluators' individual notes

from the consensus discussion. In these notes, the evaluators indicated that they were satisfied engine driven consumers had been taken into account as required by the classification societies' rules.

[170] Heiltsuk Horizon draws its allegation of "informational deficiencies" from questions that evaluators raised at the individual assessment stage of the re-evaluation of the different bids. It should be noted that those questions were raised prior to the consensus discussion stage. The consensus discussion allowed for "clarifications required to ensure all evaluators had a similar approach and a common understanding of the requirement being assessed" (Re-Evaluation Report, Confidential Tribunal Record – Consolidated Record at pp. 12589-12590).

[171] With respect to Atlantic's bid in particular, DNV rule A505(5) states as follows: "All auxiliary equipment such as pumps, generators and other equipment which are driven from the main engine(s) or propeller shaft(s) in normal operation of the vessel should be connected during the test" (emphasis added). This provision is identical to section 5 of Appendix A to the International Maritime Organization (IMO)'s MSC/Circ.884. The clear language of rule A505(5) undermines, at least in the case of Atlantic's bid, Heiltsuk Horizon's assertion that MR 12 requires "that the certificates demonstrate, on their face, that the subject vessels' shaft generators and any other engine driven consumers required for emergency towing operations were engaged at the time of testing" (Heiltsuk Horizon Respondent's Memorandum of Fact and Law in A-429-19 at para. 101; emphasis added). Absent anything to suggest that "engaged" means something more than "connected", there is no basis for the claim that DNV bollard pull certificates must explicitly state that the engine driven consumers were "engaged" during the test.

[172] There is no indication on Atlantic's certificates that engine driven consumers were not connected when its vessels underwent bollard pull testing by DNV. If engine driven consumers had not been connected during bollard pull testing, this would have been noted on the certificates as the test procedure set out in rule A505 "should be adhered to and possible deviations shall be recorded in the Bollard Pull Certificate." The evaluators noted no such deviation.

[173] I am therefore satisfied that the evaluators, contrary to Heiltsuk Horizon's contention, did achieve consensus with respect to MR 12 and made no improper assumptions in re-assessing Atlantic's bid's compliance with that mandatory requirement.

(6) Conclusion

[174] For all these reasons, I find that the Tribunal committed a reviewable error both in interpreting MR 12 and the related assessment methodology and in finding that the re-evaluation performed by the new team of evaluators was unreasonable.

[175] In light of this conclusion, there is no need to address the reasonableness of the Tribunal's recommendation that a further re-evaluation of all bid vessels be conducted. By the same token, it is unnecessary to address whether the Tribunal, in making said recommendation, permitted bidders to engage in bid repair.

D. *What is the effect, if any, of the non-disclosure of the facts revealed by the New Evidence on these proceedings?*

[176] The New Evidence reveals that one of Heiltsuk Horizon's bid vessels was decommissioned and dismantled prior to the re-evaluation recommended in Decision I and that the other was decommissioned and dismantled before the Tribunal rendered Decision II. Atlantic claims that these facts and the circumstances surrounding them call into question not only Heiltsuk Horizon's ability to perform the contract it seeks, but also Heiltsuk Horizon's ability to submit a bid in the first place.

[177] Atlantic, therefore, asks the Court to dismiss Heiltsuk Horizon's three judicial review applications either on the ground that the facts revealed by the New Evidence deprived it of standing or on the ground that failure to disclose these facts to the Tribunal, and the Court, amounts to an abuse of process warranting dismissal.

[178] Given the conclusions I have reached on the merits of all five judicial review applications regarding the present matter, it is not necessary, in my view, to also determine whether this Court, in the exercise of its discretion, should dismiss Heiltsuk Horizon's applications for judicial review on the basis of these contentions.

[179] That said, Atlantic seeks a costs award on a solicitor-client scale based on Heiltsuk Horizon's failure to be forthcoming and disclose the facts revealed by the New Evidence. It claims that Heiltsuk Horizon took no steps, once these facts were revealed, to correct the record or otherwise acknowledge or remedy its alleged wrongdoing. Atlantic underscores the fact that

Heiltsuk Horizon was given the opportunity to do so in the proceedings before this Court as appears from the case management order issued on July 21, 2020.

[180] Atlantic contends that the concealment, by a party to a proceeding, of material evidence to its own benefit constitutes reprehensible, scandalous and outrageous misconduct warranting a solicitor-client costs award. Heiltsuk Horizon responds that the New Evidence is wholly irrelevant and can therefore have no effect on the present proceedings. It claims that despite the decommissioning of its proposed vessels, it remained, at all material times, ready, willing and able to deliver two vessels with characteristics satisfying the RFP's requirements, and remains so to this day. According to Heiltsuk Horizon, this is well within the RFP's terms and conditions which, it submits, allow for bid vessels to be substituted.

[181] I note that the Attorney General also seeks its costs in these proceedings but does not do so on a solicitor-client basis.

[182] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, provides that the Court has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." As a general rule, costs follow the event in that they are awarded to the successful party. There are no reasons, in this case, to depart from that general rule. On the other hand, an award of costs on a solicitor-client basis will only occur on rare occasions, for example when a party has displayed "reprehensible, scandalous or outrageous conduct" (*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453 at para. 67, citing *Young v. Young*, [1993] 4 S.C.R. 3 at 134, 108 D.L.R. (4th) 193).

[183] In assessing Heiltsuk Horizon's impugned conduct, only its conduct in this Court is relevant; in other words, Atlantic's contentions regarding Heiltsuk Horizon's conduct before the Tribunal are irrelevant (see *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, 409 D.L.R. (4th) 751 at para. 64).

[184] Although Heiltsuk Horizon could have been more forthcoming in this Court regarding the issues raised by the New Evidence, I am not satisfied that its conduct can be characterized as "reprehensible, scandalous or outrageous". Heiltsuk Horizon explained at the hearing that it had made a strategic choice not to file reply evidence with respect to the New Evidence based on its understanding that vessel substitution was permitted by the RFP.

[185] Whether this view is supported by the terms of the RFP need not be decided here in light of my findings on the merits of all five applications for judicial review, which seal the fate of Heiltsuk Horizon's four complaints filed with the Tribunal in connection with the Solicitation.

[186] In sum, I see no reason to award costs to Atlantic on a solicitor-client basis.

E. *Proposed disposition*

[187] I would dismiss Heiltsuk Horizon's applications for judicial review in files A-57-19, A-429-19, and A-430-19, and would grant Atlantic and the Attorney General's applications for judicial review in files A-428-19 and A-433-19, respectively. As a result, I would set aside the Tribunal's decisions rendered on October 18, 2019 in files PR-2019-020 and PR-2019-025, and

remit the matter to the Tribunal in order for it to dispose of the Second and Third Complaints in accordance with these reasons.

[188] Costs are awarded to Atlantic and the Attorney General in file A-57-19. Costs are also awarded to Atlantic and the Attorney General in files A-428-19, A-429-19, A-430-19, and A-433-19, with files A-429-19 and A-430-19 being treated as a single file.

"René LeBlanc"
J.A.

"I agree
M. Nadon J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-429-19 (lead file), A-57-19, A-428-19, A-430-19 AND A-433-19
DOCKET:	A-429-19
STYLE OF CAUSE:	HEILTSUK HORIZON MARITIME SERVICES LTD. v. ATLANTIC TOWING LIMITED *et al.*
AND DOCKET:	A-57-19
STYLE OF CAUSE:	HEILTSUK HORIZON MARITIME SERVICES LTD. *et al.* v. ATLANTIC TOWING LIMITED *et al.*
AND DOCKET:	A-428-19
STYLE OF CAUSE:	ATLANTIC TOWING LIMITED v. HEILSTUK HORIZON MARITIME SERVICES LTD. *et al.*
AND DOCKET:	A-430-19
STYLE OF CAUSE:	HEILTSUK HORIZON MARITIME SERVICES LTD. v. ATLANTIC TOWING LIMITED *et al.*
AND DOCKET:	A-433-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. HEILTSUK HORIZON MARITIME SERVICES LTD. *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY

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CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	FEBRUARY 10, 2021

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