Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 24-06

March 21, 2024

Halifax Regional Municipality

Summary: The applicant requested records showing legal costs incurred by Halifax Regional Municipality (municipality) for negotiations of collective agreements for Halifax Regional Police and Halifax Regional Fire & Emergency. In response, the municipality withheld all records under s. 476 (solicitor-client privilege) and s. 477 (financial or economic interests) of *Part XX* of the *Municipal Government Act*. The Commissioner finds that all but the bottom-line totals of the invoices of legal services rendered to the municipality and records of fees paid to an arbitrator can be withheld. She recommends disclosure of all records of the fees paid to the arbitrator as well as the bottom-line totals of the invoices of legal services provided to the municipality.

INTRODUCTION:

[1] The applicant asked for records from Halifax Regional Municipality (municipality). Specifically, the applicant asked the municipality for records of all direct and indirect costs incurred from negotiations of collective agreements for Halifax Regional Police (HRP) and Halifax Regional Fire & Emergency (HRFE) for the 2015, 2016 and 2017 fiscal years.

[2] The responsive records consist of 213 pages of invoices of legal services rendered to the municipality, including records of fees paid to an arbitrator.

[3] The municipality responded to the applicant with a decision to withhold all responsive records in full pursuant to two exemptions set out in *Part XX* of the *Municipal Government Act* (*MGA*): s. 476 (solicitor-client privilege) and s. 477 (financial or economic interests).

[4] The applicant objected to the municipality's decision to withhold all the records. As the matter was not able to resolve informally, it proceeded to this review report.

ISSUES:

[5] There are two issues under review:

1. Was the municipality authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?

2. Was the municipality authorized to refuse access to information under s. 477 of the *MGA* because disclosure could reasonably be expected to harm the financial or economic interests of the municipality?

DISCUSSION:

Burden of proof

[6] Under s. 498(1) of the *MGA*, the municipality bears the burden of proving that the applicant has no right of access to a record or part of a record.

1. Was the municipality authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?

[7] The municipality relied on s. 476 to withhold all information of the costs it incurred from negotiations of collective agreements for HRP and HRFE. For the reasons described below, I find that s. 476 was appropriately applied to withhold all the information except records of the fees paid to an arbitrator and the bottom-line totals of the invoices of legal services rendered to the municipality. Bottom-line totals of the invoices only capture the entire amount of fees on a given invoice. They do not specify the breakdown of fees, only the total amount on a given invoice.

[8] Section 476 of the *MGA* states:

> **Solicitor-client privilege**
> 476 The responsible officer may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[9] The exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege.[1]

[10] The municipality did not specify whether the records were severed under legal advice privilege or litigation privilege. Rather, the municipality argued that legal billing information is presumed to be privileged as part of the solicitor-client relationship, citing the Supreme Court of Canada judgment of *Maranda v. Richer*.[2]

[11] In *Maranda v. Richer*, the Royal Canadian Mounted Police conducted what was found to be an improperly executed search of a lawyer's office. The search was undertaken in an attempt to find information about a lawyer's client who was suspected of money laundering and drug trafficking. The search warrant included all documents relating to fees and disbursements billed to or paid by the client. The Supreme Court of Canada said that in executing a search warrant on a lawyer's office, the Crown must be cautious to prevent any infringement on solicitor-client privilege so that the privilege remains as close to absolute as possible. The Supreme Court of Canada concluded that information about legal fees is presumptively privileged:

> While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by

[1] *NS Review Report 21-10, Department of Justice (Re)*, 2021 NSOIPC 10 (CanLII), at para. 6.
[2] *Maranda v. Richer*, 2003 SCC 67 (CanLII).

> which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.[3]

[12] Although *Maranda v. Richer* was decided in the context of a challenge to a search warrant issued in a criminal investigation, the Supreme Court of Canada has established that the principle of presumptive privilege can be engaged in any context.[4] As a result, other jurisdictions have adopted the legal principle set out in *Maranda v. Richer* to determine if information from an access to information related matter is presumptively protected by privilege.[5]

Is there a presumption of privilege for the responsive records?

Invoices of legal services

[13] As mentioned above, the Supreme Court of Canada has held that legal invoices are presumptively subject to solicitor-client privilege because they reflect work done for the client and can reveal privileged information about the solicitor-client relationship. Consequently, because the billing information came out of the solicitor-client relationship and what transpired within it,[6] I agree with the municipality that the invoices of legal services rendered to the municipality are presumptively privileged.

Records of fees paid to an arbitrator

[14] In contrast, records of fees paid to an arbitrator are not presumptively privileged because the arbitrator was not providing legal advice to the municipality. The records do not contain any communications or legal advice between a solicitor and a client. The municipality did not dispute this but did argue that invoices of arbitrator services should be withheld because they were previously provided to the applicant through a different process, outside of the *FOIPOP* regime.

[15] Whether or not they were previously shared with the applicant in a different process than through a request under *FOIPOP*, the records of fees paid to an arbitrator are nonetheless relevant to the applicant's request and must be included in the responsive records.

[16] Because these records were previously provided to the applicant, it is not necessary for me to assess whether they could be withheld under s. 476 or s. 477. I find that these records cannot be withheld.

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[3] *Maranda v. Richer*, 2003 SCC 67 (CanLII), at para. 33.
[4] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII), at para. 19.
[5] See for example *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII), at para. 50; and *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner),* 2005 CanLII 6045 (ON CA), at para. 11.
[6] *Maranda v. Richer*, 2003 SCC 67 (CanLII), at para. 33.

Can the presumption of privilege be rebutted?

[17] Having found the legal invoices are presumptively privileged, the next step is to determine whether there is sufficient evidence to rebut the presumption.

Burden of proof to rebut privilege

[18] The municipality argued that the burden of proof is on the applicant to rebut the presumption of privilege attached to the legal services invoices. The municipality relied on a decision from the Ontario Court of Appeal which concluded that the requester has the onus to rebut the presumption.[7]

[19] It is well established among Canadian courts and different information and privacy commissioners' offices that the person attempting to displace solicitor-client privilege bears the burden to provide evidence.[8] This burden has an appropriately high threshold.[9] However, in *Ontario (Ministry of the Attorney General) v. Mitchinson*, it was found that it was also "open to the court to rebut the presumption".[10] Moreover, in *NL Review Report A-2020-027*, Commissioner Harvey noted that in many cases it would be an unfair burden for applicants to rebut the presumption that legal invoices are covered by solicitor-client privilege.[11] In addition, it has been established in other jurisdictions that the principle set forth in *Maranda v. Richer* can be upheld and applied without solely placing, in every case, an evidentiary burden, or a requirement to make submissions, on an applicant:

> [112] Further, the principle set forth in *Maranda* can be upheld and applied without placing, in every case, an evidentiary burden, or a requirement to make submissions, on an access applicant. So long as the test is properly applied – privilege is presumed; and there is no possibility that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged information – then it may be possible to reach a conclusion that the documents are not privileged.
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> [113] If the Commissioner could not take the nature and context of the information into account in determining if a claim of privilege should be upheld, the Commissioner would be deprived of material evidence. The nature and context of records and information will almost always have evidentiary value when considering claims of privilege. This is particularly so where the access applicant has a limited ability to put forward other evidence regarding the records or information. There is nothing in the *Act*, or the relevant jurisprudence, which precludes the Commissioner from considering this important evidence for the purpose of determining whether privilege has been properly claimed.[12]

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[7] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), at para. 11.
[8] *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII), at para. 61.
[9] *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII), at para. 83.
[10] *Ontario (Ministry of the Attorney General) v. Mitchinson*, 2004 CanLII 13070 (ON SCDC), at para. 47.
[11] *NL Report A-2020-027, Memorial University (Re)*, 2020 CanLII 99825 (NL IPC), at para. 16.
[12] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII), at paras. 112-113.

[20] In light of my oversight role, I find that I am permitted to look at relevant circumstances and canvass case law to see if there is any reason the presumption should be rebutted.[13]

[21] The Ontario Court of Appeal has recognized that the presumption of privilege will be rebutted "…if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege."[14] It said:

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.[15]

Is there a reasonable possibility that disclosure of legal invoices paid will directly or indirectly reveal any communications protected by privilege?

[22] Several factors have been found relevant when assessing whether disclosure of legal invoices could reveal privileged information. These factors include: the nature of the legal matters to which the fee information applies; the stage of the litigation (if any); the applicant's involvement in the legal matters; and the nature of the billing information.[16]

[23] The legal invoices in this matter are standard and include information such as the law firm name, dates, itemized descriptions of the work undertaken, names of legal counsel who performed the work, the time spent by legal counsel on that work, itemized costs for each item of work completed, costs of disbursements and the total fee for the work done during the period covered by the invoice.

[24] I agree with the municipality that it is reasonably possible that the information found in the legal invoices except for the bottom-line totals of the invoices could directly or indirectly reveal communications protected by privilege.

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[13] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII), at para. 113. See also *NL Report A-2020-027, Memorial University (Re)*, 2020 CanLII 99825 (NL IPC), at para. 16.
[14] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), at para. 9.
[15] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), at para. 12.
[16] *BC Order F19-47*, *British Columbia (Attorney General) (Re)*, 2019 BCIPC 53 (CanLII), at para. 18.

[25] In contrast, I do not agree with the municipality that there is a reasonable possibility that disclosure of the bottom-line totals of the invoices of legal fees will directly or indirectly reveal communications protected by privilege. While I acknowledge the bottom-line totals of the invoices could reveal some things (like the case was or was not hard fought), they would not reveal solicitor-client privileged communications. When a lawyer submits an invoice, they do so as a supplier of a service. The lawyer's relationship with the client is one of creditor to debtor. As a result, the amount owing takes on an identity distinct from the service itself. Thus, it is not appropriate to grant it the same sort of protection given to the details of the legal services provided to the municipality.[17]

[26] In this case, I can see no reasonable possibility that any solicitor-client communications could be revealed to anyone with only the bottom-line totals of the invoices.

Could an assiduous reader, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[27] The municipality argued that the applicant in this case is the "ultimate" assiduous reader because of their knowledge of this matter. The municipality argued that because of its relationship with the applicant, even the disclosure of total billing amounts could be used to deduce communications protected by solicitor-client privilege.

[28] The municipality's argument was that because the applicant is an assiduous reader, they could combine the total costs with other information known to them and deduce solicitor-client privileged communications, specifically the municipality's tactics with regard to the collective agreement negotiations requirements. However, the municipality simply asserted this. It did not provide any explanation or examples on how this could occur.

[29] I acknowledge that the applicant would be considered an assiduous reader. However, the only thing that the assiduous reader could glean from the information would be a total amount of public funds spent by the municipality for the negotiation process for the collective agreements.[18]

[30] In support of this, there have been decisions of other courts and information and privacy commissioners' offices that have also concluded the bottom-line totals of the invoices, without any additional information, would not reveal solicitor-client communications:

- In *Gault Estate v. Gault Estate*, the Alberta Court of Appeal held that an estate must disclose its gross amount of legal fees in the context of ongoing estate litigation.[19]

[17] *Maranda v. Richer*, 2003 SCC 67 (CanLII), at para. 49.
[18] *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045, at para. 13. See also *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* 2007 CanLII 65615 (ON SCDC), at para. 25. See also, *Gault Estate v Gault Estate*, 2016 ABCA 208 (CanLII), at para. 23.
[19] *Gault Estate v Gault Estate*, 2016 ABCA 208 (CanLII), at para. 23

- In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner),* the court upheld two orders of the former Ontario Information and Privacy Commissioner which required disclosure of legal fees.[20]
- In *BC Order F23-81*, the former British Columbia Information and Privacy Commissioner determined that the aggregate sum of legal fees could not be withheld under solicitor-client privilege because there was no reasonable possibility that disclosure could reveal privileged communications.[21]

[31] Accordingly, I do not accept that the evidence before me establishes that the bottom-line totals of each invoice, without other information such as the nature of the work done, dates or firm names, together with any information available in the public realm, could be used by the applicant in a manner that would reveal legally privileged information.[22]

[32] I find that the bottom-line totals of the invoices in this case are considered neutral information such that the presumption of privilege is rebutted. Therefore, the bottom-line totals of the invoices on the records should be disclosed.

2. Was the municipality authorized to refuse access to information under s. 477 of the *MGA* because disclosure could reasonably be expected to harm the financial or economic interests of the municipality?

[33] The municipality also withheld all bottom-line totals of the invoices pursuant to s. 477 of the *MGA*. For the reasons provided below, I find that s. 477 does not apply to the withheld information.

[34] As a reminder, I have found that the details found in the legal invoices except for the bottom-line totals of the invoices should be withheld under s. 476. I have also found that the receipts of fees paid to an arbitrator cannot be withheld. As such, this portion of the report addresses only the bottom-line totals of the invoices of the legal services rendered to the municipality.

[35] To rely on s. 477(1), the municipality must establish that disclosure of the withheld information could reasonably be expected to harm the financial or economic interests of the municipality, another municipality, the Government of the Province, or the ability of the Government of the Province to manage the economy. Section 477 provides that such harm may arise from the non-exhaustive list of enumerated circumstances set out in ss. 477(1)(a) to (e). The municipality relied on s. 477(e) to withhold the bottom-line totals of the invoices:

> 477 (1) The responsible officer may refuse to disclose to an applicant information, the disclosure of which, could reasonably be expected to harm the financial or economic interests of the municipality, another municipality or the Government of the Province or the ability of the Government of the

[20] *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC), at para. 27.
[21] *BC Order F23-81*, *Summerland (District) (Re)*, 2023 CanLII 90546 (BC IPC), at para. 42.
[22] *Ontario Order MO-4332*, *Puslinch (Township) (Re)*, 2023 CanLII 14910 (ON IPC), at para. 35.

> Province to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
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> …
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> (e) information about negotiations carried on by or for the municipality or another municipality or the Government of the Province.

[36] Pursuant to s. 477(1)(e) of the *MGA*, information about negotiations would be information that might be collected or compiled for the purpose of negotiations, might be used in negotiations, or that might, if disclosed, affect negotiations. It does not necessarily need to be about negotiations. Information about negotiations includes analysis, methodology, options or strategies in relation to negotiations.[23]

[37] Harms-based exemptions require a reasoned assessment of the future risk of harm. The leading case in Canada[24] on the appropriate interpretation of the reasonable expectation of harms test found in access to information laws determined that access statutes mark a middle ground between that which is probable and that which is merely possible. A municipality must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.

[38] The municipality provided the following evidence to demonstrate that there is well beyond a possibility of harm to the financial and/or economic interest of the Government of Nova Scotia if the information is disclosed:

> …it is the Municipality's position that the release of information in the records, including total amounts and relative amounts, would reveal information about negotiation strategies, such as the extent and depth of preparation and the work of legal counsel, that would be detrimental to the Municipality on an ongoing basis. It is the Municipality's position that there is a reasonable expectation of financial harm to the Municipality that is more than a mere possibility if this information is released, through an impact on negotiation positions in the next round of collective bargaining…the Municipality and the Applicant have an ongoing relationship… and it is because of this distinguishing feature that there is a reasonable expectation of financial harm to the Municipality. Information about these negotiations will provide… insight into the Municipality's negotiation strategy for use in future collective bargaining. […] Interest Arbitration addresses issues such as wage increases and as such, the release of these records could have compounding and long-lasting impacts on the Municipality's finances: the Municipality's financial interest is significant.

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[23] *BC Order 02-56*, *Architectural Institute of British Columbia, Re*, 2002 CanLII 42493 BC IPC, at paras. 43-44. See also *NS Review Report 19-04*, *Halifax Regional Municipality (Re)*, 2019 NSOIPC 5 (CanLII), at para. 33.

[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII), at para. 54. The OIPC has relied on this test in a number of previous decisions including *NS Review Report 18-02, Department of Community Services (Re),* 2018 NSOIPC 2 (CanLII), at para. 28. The former British Columbia Commissioner referred to this as a "reasoned assessment of the future risk of harm" in *Order F08-22, Fraser Health Authority (Re),* 2008 CanLII 70316 (BC IPC), at para. 44.

[39] Aside from the above assertion, the municipality did not provide any specific arguments or evidence to establish how release of the bottom-line totals of the invoices could have compounding and long-lasting impacts on the municipality's negotiations. Simply stating that harm could arise is well below the threshold needed for the exemption to apply.[25]

[40] There is nothing directly referencing options, strategies or methodology in relation to negotiations. I suppose one might say that the costs would reveal efforts of the municipality during its negotiations, but it would not provide insight into the municipality's negotiation strategy for use in future collective bargaining.

[41] Without invoice details, specific date ranges, descriptions, pricing breakdowns, cover letters and other communications, invoice totals tend to be viewed as neutral in that on their own they do not enable an assiduous reader to deduce privileged information.[26]

[42] Where there is consideration of the municipality's financial interest, this interest does not trump the interest of the public.

[43] In *Brockville (City) v. Information and Privacy Commissioner*, the Ontario Superior Court of Justice agreed with the decision of the Information and Privacy Commissioner and recommended release of expenses incurred from negotiations, conciliation and arbitration that resulted in the 2009-2010 and 2011-2012 collective agreements between the city of Brockville and the Brockville Professional Fire Fighters Association.[27] In making this finding, the Court relied on *Ontario (Ministry of Community and Social Services) v. Doe,* which states:

> Excluding records that are created by government institutions in the course of discharge of public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act. The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the Act….[28]

[44] Access to information and protection of privacy laws in Nova Scotia are deliberately more generous compared to other provinces and territories.[29] One of the main purposes of *Part XX* the *MGA*, found in s. 462(a), is to ensure that municipalities are fully accountable to the public. It is with this in mind that expenditure of public funds is a consideration in favour of transparency of government operations.[30] Withholding records of costs incurred by municipalities could have the effect of shielding it from public accountability, which is an effect that is contrary to the

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[25] *NS Review Report 22-13*, *Nova Scotia (Public Works) (Re)*, 2022 NSOIPC 13 (CanLII), at para. 37.
[26] *NS Review Report 21-09*, *Department of Health and Wellness (Re)*, 2021 NSOIPC 9 (CanLII), at para. 15.
[27] *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII). See also *Brockville (City) (Re)*, 2018 CanLII 94816 (ON IPC), paras. 57-58.
[28] *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII), at para. 39.
[29] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII), at para. 57.
[30] *Nova Scotia (Department of Economic Development) (Re)*, 2000 CanLII 8501 (NS FOIPOP),

purpose of *Part XX* of the *MGA*. Nothing is more central to the goals of accountability and transparency than the right to information about how municipalities are spending public money.[31]

[45] I find that disclosure of the bottom-line totals of the invoices could not reasonably be expected to harm the municipality's financial or economic interests under s. 477 of the *MGA*. Therefore, the bottom-line totals of the invoices cannot be withheld under this section.

FINDINGS & RECOMMENDATIONS:

[46] I find that:

1. Records of fees paid to an arbitrator cannot be withheld.
2. Excluding records of fees paid to an arbitrator, s. 476 of the *MGA* applies to all but the bottom-line totals of the invoices on the remainder of the responsive records.
3. Section 477 of the *MGA* does not apply to the withheld information.

[47] I recommend that the municipality:

1. Disclose to the applicant all records that detail the fees paid to an arbitrator within 45 days of the date of this review report.
2. Disclose to the applicant the bottom-line totals of the invoices of legal services rendered to the municipality within 45 days of the date of this review report.
3. Continue to withhold all but the bottom-line totals of the invoices of legal services rendered to the municipality.

March 21, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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[31] *NS Review Report 21-08, Wolfville (Town) (Re)*, 2021 NSOIPC 8 (CanLII), at para. 27.