

Federal Court



Cour fédérale

Date: 20260528

Docket: T-3758-25

Citation: 2026 FC 692

Ottawa, Ontario, May 28, 2026

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JTI-MACDONALD CORP

Applicant

and

**ATTORNEY GENERAL OF CANADA
AND
MINISTER OF HEALTH**

Respondents

REASONS AND ORDER

[1] The Applicant in the judicial review application, JTI-Macdonald Corp., is one of Canada's oldest tobacco companies. *Regulations* which affect the Applicant were adopted pursuant to s.42.1 of the *Tobacco and Vaping Products Act*, S.C. 1997, c.13 [TVPA]. The Applicant is challenging on judicial review the *Tobacco Charges Regulations*, SOR/2025-80 [Regulations] as well as the legislation authorizing the *Regulations*. The challenge is based on constitutional and administrative law grounds.

[2] The Motion under consideration comes before this Court pursuant to rule 369 in order to challenge the Respondents' objection to the scope of the request for material pursuant to rule 317 of the *Federal Courts Rules*, SOR/98-106 [FCR]. The Respondents object to the transmission of materials that were not before the decision maker, that is the Minister of Mental Health and Addictions, when she authorized the *Tobacco Charges Regulations*.

[3] In its Notice of Application for judicial review, the Applicant alleges that:

- a) sections 42.1 to 42.16 and 46.1 of the TVPA are *ultra vires* Parliament's legislative authority under the *Constitution Act, 1867*;
- b) the *Tobacco Charges Regulations* are also *ultra vires* Parliament's legislative authority;
- c) subsidiarily the *Regulations* are *ultra vires* s. 42.1 of the TVPA.
- d) if the *Regulations* are not quashed in their entirety, at least the definitions of "annual charges", "annual cost base" and "designated manufacturers" (in s.1) and sections 2,3,5 and 7 of the *Regulations* should be quashed.

[4] The Notice of Application is date-stamped September 29, 2025. The Certified Tribunal Record [CTR] was transmitted, pursuant to rule 318, on December 3, 2025, in response to the Applicant's request in accordance with the rule 317, which contains its own parameters as to what is to be included in the CTR:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office

written request, identifying the material requested.

une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

The Attorney General noted that he objected to some information included in the bundle on three bases:

- a) Confidences of the King's Privy Council;
- b) Solicitor-client privilege;
- c) Scope of the request: in the view of counsel, "the Applicant's request for documents seeks material beyond what was before the Minister when she made the decision and is, in effect, more in the nature of discovery".

[5] In these early stages of this litigation, the Applicant brings a motion in order to compel the disclosure of more material than what is already part of the CTR. The Motion is not concerned with the redactions made in the CTR on account of Cabinet Confidences and the solicitor-client privilege.

[6] I reproduce the list of 12 documents included in the CTR. The list comes from the Applicant's Written Representations:

- a. Memorandum to the Minister of Mental Health and Addictions [sic] and Association [sic] Minister of Health – Tobacco Cost Recovery Framework Proposal (redacted in part) (July 12, 2024)

- b. Appendix A of Memorandum to the Minister of Mental Health and Addictions [sic] and Association [sic] Minister of Health – Tobacco Cost Recovery Framework Proposal (July 12, 2024)
- c. Deck - What We Heard (redacted in part) (January 2025)
- d. Memorandum to the Minister of Mental Health and Addictions [sic] and Association [sic] Minister of Health – Approval of the Tobacco Charges Regulations for Publication in the Canada Gazette, Part II (redacted in part) (March 3, 2025)
- e. Appendix A – Regulatory Impact Analysis Statement Cover Page – Signed (March 3, 2025)
- f. Appendix B – Regulatory Impact Analysis Statement – Tobacco Charges Regulations (English) (March 3, 2025)
- g. Appendix B – Résumé de l'étude d'impact de la réglementation – Règlement sur redevances payer sur tabac (français) (March 3, 2025)
- h. Appendix C – Tobacco Charges Regulations – Blue Stamped and Signed (March 3, 2025)
- i. Appendix D – Letter of Transmittal – Signed (March 3, 2025)
- j. Appendix E – Communications Plan – Implementation of the Tobacco Charges Regulations (English) (March 3, 2025)
- k. Appendix E – Plan de communication – Mise en œuvre du Règlement sur les redevances à payer sur le tabac (français) (March 3, 2025)
- l. Appendix F - Request for Insertion Form for the Canada Gazette, Part II

[7] In the end, the issue concerns the scope of rule 317 of the FCR.

I. The Regulations

[8] The *TVPA* was amended in 2024 for the purpose of adding provisions which allow for a cost recovery framework. A new part V.01 was passed, with the *Regulations* making power found in new s.42.1:

Fees and Charges

Regulations by Minister

42.1 (1) The Minister may make regulations respecting fees or charges to be paid by manufacturers for the purpose of recovering the costs incurred by His Majesty in right of Canada in relation to the carrying out of the purpose of this Act, including regulations

- (a)** fixing the fees or charges or providing for the manner of calculating them;
- (b)** requiring manufacturers to submit to the Minister information for the calculation of the fees or charges and prescribing the information that manufacturers must submit as well as the form and manner in which and the time within which the information must be submitted;
- (c)** respecting the payment of the fees or charges, including the time and manner of payment;
- (d)** respecting, for the purposes of section 42.13, the information that the Minister must make available to the public, including
 - (i)** the name of each manufacturer who is required to pay the fees or charges,
 - (ii)** information relating to whether each manufacturer has paid the fees or charges,
 - (iii)** information relating to whether each manufacturer has submitted the information required under this Part, and
 - (iv)** information relating to the measures taken in respect of each manufacturer who has

Frais et redevances

Règlements ministériels

42.1 (1) Afin de recouvrer les frais exposés par Sa Majesté du chef du Canada et liés à la réalisation de l'objet de la présente loi, le ministre peut prendre des règlements concernant les frais et les redevances à payer par les fabricants, notamment des règlements :

- a)** fixant les frais et les redevances ou prévoyant leur mode de calcul;
- b)** exigeant des fabricants qu'ils transmettent au ministre des renseignements en vue du calcul des frais et des redevances et prévoyant les renseignements qu'ils doivent transmettre ainsi que les délais, la forme et les modalités à respecter à cet égard;
- c)** concernant le paiement des frais et des redevances, notamment en ce qui a trait aux délais et aux modalités à respecter à cet égard;
- d)** concernant, pour l'application de l'article 42.13, les renseignements que le ministre doit mettre à la disposition du public, notamment :
 - (i)** le nom des fabricants assujettis aux frais ou aux redevances,
 - (ii)** des renseignements concernant la question de savoir quels fabricants ont payé les frais et les redevances et lesquels ont omis de le faire,
 - (iii)** des renseignements concernant la question de savoir quels fabricants ont transmis au ministre les renseignements exigés sous le régime de la présente partie et lesquels ont omis de le faire,

failed to pay the fees or charges or submit the information required under this Part; and

(e) prescribing anything that by this Part is to be prescribed.

Consultation

(2) Before making regulations, the Minister must consult with any persons or entities that the Minister considers to be interested in the matter.

(iv) des renseignements concernant les mesures prises à l'égard de chacun des fabricants qui ont omis de payer les frais ou les redevances ou de transmettre les renseignements exigés sous le régime de la présente partie;

e) prévoyant toute autre mesure réglementaire prévue par la présente partie.

Consultations

(2) Avant de prendre le règlement, le ministre consulte les personnes ou entités qu'il estime intéressées en l'occurrence.

The *TVPA* regulates tobacco and vaping products, their manufacture, sale, labelling and promotion in view of the health hazard caused by these products.

[9] The Regulatory Impact Analysis Statement, reproduced in the Applicant's Motion record at p. 151 [RIAS], announced the cost recovery framework. Once the legislation was adopted to create the power to pass regulations, the process was started, resulting in the *Regulations* challenged in this judicial review.

[10] The purpose of the *Regulations* is to recover from "designated manufacturers" of tobacco products a portion of costs incurred by the federal government in relation to the carrying out of the purpose of the *TVPA*, which is to support the overall tobacco control objectives. The RIAS refers specifically to ss.4(2) of the *TVPA*:

(1) protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

- (2) protect the health of young persons by restricting access to tobacco products;
- (3) prevent the public from being deceived or misled with respect to the health hazards of using tobacco products; and
- (4) enhance public awareness of the health hazards of using tobacco products.

The *Regulations* were to fix the “fees or charges” to be incurred by the “designated manufacturers”, as well as how they are to be calculated. The *Regulations* are also to require manufacturers to supply information for the calculation of the said fees or charges.

[11] The idea is for the fees or charges to address the cost of activities undertaken by three agencies: the Department of Health, the Public Health Agency of Canada and Indigenous Services Canada. These entities may carry out various activities such as “compliance and enforcement activities, laboratory analysis, development and implementation of regulations, public education and awareness of the health hazards of tobacco use, supporting improved services and resources to help people quit smoking, and providing funding to First Nations, Inuit and Metis Nations to develop and implement approaches to reducing commercial tobacco use” (RIAS, AMR, p.154).

[12] In order to calculate the share of the annual cost base incurred by the federal agencies to be supported by the designated manufacturers, the *Regulations* create an obligation for these to submit information about their net sales revenues (as defined).

[13] I note that s.42.16 of the *TVPA* allows the Minister to prohibit the sale of tobacco products by a designated manufacturer who will fail to pay fees and charges due as per the scheme.

II. The Challenge

[14] The Applicant contests the constitutionality of the scheme, as well as its legality on administrative law grounds. It is said in the Notice of Application that ss.42.1 to 42.16 and s.46.1 of the *TVPA*, as well as the *Regulations* adopted pursuant to the *TVPA*, are *ultra vires* the authority Parliament has according to the *Constitution Act*, 1982. Subsidiarily, the *Regulations* are *ultra vires* the power given by Parliament to pass regulations in view of the scope of s.42.1 of the *TVPA*. At least, three terms defined in the *Regulations* deserve to be quashed because they lack precision.

[15] In order to substantiate its claim that the legislation and the regulations are *ultra vires*, the Applicant alleges that the industry already pays \$2.6 billion in excise duties imposed on tobacco products (2023-24), which should be enough to pay for the activities that are to become the annual cost base. The government levy is not a valid regulatory charge. To quote from paragraph 62 of the Notice of Application, “It is not sufficient that a regulatory charge be in relation to the same objectives as the regulatory scheme at issue, if it does not support the scheme itself”. The scheme as it exists does not create a fee or a charge; it is rather a tax, and a tax may only be levied by Parliament in view of s.53 of the *Constitution Act*, 1982. The Notice of Application continues and explains why the test developed to determine the validity of the fees or charges has

not been met in this case. It is not necessary for the purpose of this Motion to delve into the intricacies of the issue. That is for another day. At this stage, it suffices to gather an understanding of what this Application is truly about.

[16] In that same vein, the Applicant contends that the *Regulations* are unreasonable because they are inconsistent with the purpose of the *TVPA*, they exceed the regulation making authority, they violate the prohibition on vagueness and redelegation and they discriminate between manufacturers. The Notice of Application singles out the definition of “annual charge”, “annual cost base” and “designated manufacturer” as being defective.

[17] The Applicant considers the definition of “annual cost base” as being vague and leading to redelegation as more information will be needed to make the definition operational. It is argued that the costs incurred by the government are not known from the *Regulations*, such that “There is no way for the Applicant to calculate the charge in advance” (Notice of Application, para 112). The *Regulations* are devoid of criteria, formula or even process for determining the costs that will be included. The “annual cost base” is obviously the amount a portion of which is to be recovered from the designated manufacturers, one of which is evidently this Applicant. It is fundamental to the scheme, yet it will be determined outside of the *Regulations*. That, claims the Applicant, constitutes redelegation not authorized by the *Regulations*.

[18] Another constraint is, according to the Applicant, the common law rule against administrative discrimination. The discrimination is said to stem from the difference between

legal manufacturers, like the Applicant, and illegal manufacturers. Given that the costs incurred in enforcing the *TVPA* are likely to include costs generated by illegal manufacturers as well as legal manufacturers, the legal manufacturers will support a larger share of the annual cost base. Parliament has not authorized that distinction. The Applicant complains further about discrimination between participants in the tobacco industry in view of the exclusion of some participants: those who only package, label or distribute tobacco products (and thus do not manufacture the products) are not covered by the definition of “designated manufacturers”. That constitutes a distinction based on the supply chain or distribution model.

III. What is the Applicant Looking For?

[19] That takes us to what the Applicant argues it should be entitled to over and above what has already been disclosed by the Respondents in accordance with rule 317 of the FCR.

According to the rule itself, the material must be relevant to the application and it must be in the possession of the “tribunal”.

[20] The FCR define “tribunal” by reference to the definition of “federal board, commission or other tribunal”, found in the *Federal Courts Act*, RSC 1985, c F-7, which reads as follows:

“federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons

Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d’une prérogative royale, à l’exclusion de la Cour canadienne de l’impôt et ses juges et juges adjoints, d’un organisme constitué sous le régime d’une loi provinciale ou d’une personne ou d’un groupe de

appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act*, 1867; “office fédéral”

personnes nommées aux termes d’une loi provinciale ou de l’article 96 de la *Loi constitutionnelle* de 1867. (« federal board, commission or other tribunal »)

There is no doubt that the “tribunal” in the case at hand is the Minister.

[21] This Notice of Application presents in rather general terms what is sought in accordance with rule 317 which is over and above what has been disclosed. I reproduce the request made as part of the Notice of Application:

THE APPLICANT REQUESTS, pursuant to Rule 317, that the Minister sends to the Applicant and to the Registry a certified copy of the following material that is not in the possession of the Applicant but is in their possession:

1. Any and all materials prepared or reviewed by the Minister in making the *Regulations*, including communications, deliberations, drafts and final documents, for example those relating to:
 - a. The purpose and effects of the Amendments and the *Regulation*;
 - b. The federal tobacco-related programs and activities, including those that are part of the CTS;
 - c. The costs of federal tobacco-related programs and activities;
 - d. The costs of federal tobacco-related programs and activities that Health Canada intends to include, or contemplates including, in the annual cost base;
 - e. Any detailed breakdown of the investments made in CTS, including an accounting of which programs funding has been allocated to;
 - f. Any auditing and verification measures to verify that funding is used for CTS’s purposes;
 - g. Any assessment of the size of the tobacco illicit market;

- h. Any analysis of the impact of the *Regulations* on the illicit market; and
 - i. Any analysis or detailed breakdown of the estimated annualized value of the Charge (i.e., \$42,532,794).
- 2. All submissions made to Health Canada during the consultation.
 - 3. Notes of meetings held with stakeholders during the consultation.

[22] As can be readily seen, the list is broad indeed. The Respondents considered that the scope of the request did not comply with the requirements of rule 317 in that it goes beyond what was before the Minister when the decision was made: only the materials before the Minister when the *Tobacco Charges Regulations* were authorized are to be transmitted, and they were. The request made is in the nature of discovery, which is not the appropriate standard where the recourse is a judicial review application.

[23] The Applicant challenges in this Motion the objection made to its broad request:

- (a) it notes that the Respondents did not challenge relevance and possession, which means that the two conditions of rule 317 are met;
- (b) the Applicant does not accept that the requested material must have been before the Minister because that is said to be inapplicable to “constitutional grounds of review”;
- (c) other relevant materials were before the Minister. It is said that “The CTR includes documents approved and concurred with by the Minister, which refer to other documents or information that were considered in making the Tobacco Charges Regulations” (Notice of Motion, para 6(c)). Given that the documents sought are “discussed” in the material included in the CTR, they cannot be argued to constitute discovery;

(d) what is sought will ensure a meaningful judicial review.

[24] The Notice of Motion identifies broadly the types of documents which it claims are in the possession of the Minister and to which it is entitled:

- (a) the description of the activities targeted for cost recovery (with their breakdown);
- (b) “the specific costs included in the calculation of the estimated amounts listed in Table 1 of the RIAS” including the programs with which the costs are associated;
- (c) the business case for tobacco cost recovery as submitted to the Treasury Board Secretariat. Furthermore, the Applicant claims to have the right of access to documents confirming that the business case aligns with the *Directive on Charging and Special Financial Authorities*;
- (d) the submissions made by stakeholders (consultations conducted) and notes taken;
- (e) materials provided to Indigenous governments, organizations and communities during consultations;
- (f) the analysis of the price increase of tobacco products which is expected to result from cost recovery.

IV. Arguments and Comments

[25] From the material submitted to the Court, the challenge to the *Regulations* is based on questions of law. A government levy, to be constitutional, must meet some requirements at constitutional law. Otherwise, it is in pith and substance a tax that may be levied exclusively by

Parliament. The *TVPA* authorizes fees or charges, not a tax. The allegation includes that the scheme seeks to generate general revenues that exceed what is needed to cover costs.

[26] A second prong to the constitutional argument rests on the allegation that the scheme is to be sustained under the criminal law power conferred on Parliament through paragraph 91(27) of the *Constitution Act, 1867*, that is because the regulatory scheme must be adopted under a federal head of legislative power. It will be argued, claims the Applicant, that the regime created cannot fall under the criminal law power: in pith and substance, the *TVPA* and the *Regulations* under consideration involve the taking of property in order to fund government's tobacco-related activities in general. The Applicant asserts that the activities undertaken by the federal government, for which costs would be recovered, fall in the exclusive provincial heads of power. It is referred to property and civil rights (para 92 (13)), local matters (para 92 (16)) and "perhaps education" (s. 93), all heads of power found in the *Constitution Act, 1867*. It follows according to the Applicant that s. 42.1 of the *TVPA* and the *Regulations* passed are *ultra vires* Parliament.

[27] On the administrative law front, the allegation is that the *Regulations* under review are *ultra vires* the *TVPA*. As already reviewed earlier in these reasons, the allegations are that the *Regulations* are inconsistent with the purpose of the *TVPA* and they exceed the regulation-making authority. These appear to be traditional arguments concerning the *vires* of regulations. Moreover, there would be vagueness of the *Regulations* and redelegation, together with unjustifiable discrimination between participants in the tobacco industry.

[28] I will review in some detail the arguments put forth by the parties and offer some comments in an effort to elucidate some of the obvious deficiencies.

A. *The Applicant*

[29] In its Written Representations, the Applicant must establish what is needed to satisfy the requirements of rule 317 in view of its legal arguments about the constitutionality of the relevant provisions of the *TVPA* (including of course s.42.1) and the *Regulations* passed thereunder, and about the alleged administrative law deficiencies. The Court is not called upon to express a view concerning the arguments that will eventually be made on those two fronts. Rather, it must determine on the basis of the representations made whether the requirements of rule 317 are met, such that further disclosure is warranted.

[30] The Applicant insists that it is entitled to documents in the possession of the Minister. However, it does not put the proposition higher than the withholding of the material sought “would hinder the Court’s ability to conduct meaningful judicial review of the impugned provisions” (Written Representations, para 8). In fact, it claims an entitlement to “documents or information that are already discussed in the CTR” (Written Representations, para 12). As such, it is submitted that this is not in the nature of discovery.

[31] First, the Applicant contends that the Respondents are wrong to argue that the scope of its rule 317 request is too broad. Relevance and “in the possession” of the decision maker will suffice.

[32] Relevance is to be determined in relation to the grounds of review and the nature of the judicial review. Possession is not limited to what is in the hands of the decision maker but, rather, in cases where the Minister is the decision maker, that includes whatever is in the department for which the Minister is responsible. Thus, if in the possession of the department material is in the possession of the Minister.

[33] At any rate, claims the Applicant, a limited understanding of possession is not applicable to constitutional grounds of review. Although the Applicant seems to concede that “as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [tribunal]” (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, para 19), it tries to establish that what was not before the decision maker may still be put before the decision maker. Relying on *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, at para 118, it notes exceptions to the rule. However, the Applicant can only cite the exception, found throughout the Federal Court of Appeal case law, of cases where the issue is deprivation of procedural fairness as allowing for additions to the CTR going beyond what was effectively before the decision maker. The Applicant refers the Court to *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2025 FCA 82 where it is said that “extensive evidence was adduced with respect to the alleged infringement of several rights guaranteed under the Canadian Charter of Rights and Freedoms” (Written Representations, footnote 23). It is noteworthy that the reference is made to evidence “adduced”, and not what was part of the CTR. As we shall see, in that case upwards of 100 affiants are listed as having supplied evidence. That evidence was

completely outside the material that was before the decision maker in passing the impugned *Regulations* and was part of the CTR. Our issue here is limited to what may be ordered to be added to the CTR by the Respondents outside of what was already before the Minister.

[34] No indication is given as to what precisely the information the Applicant seeks be included in the CTR would be, and, more importantly, how specifically it would support its challenge. For instance, on the contention that the scheme is a disguised tax rather than a fee or a charge, the Applicant seems to want to know what the activities and programs will be whose costs are to be clawed back. The Applicant does not offer any comment or observation about the prematurity of obtaining that information or how it is to be utilized given the grounds that are advanced. Depending on how the litigation will develop, the Respondents may indeed have to justify their scheme by supplementing the record beyond what was before the Minister when she decided to go ahead with the *Regulations*. The constitutionality and the administrative law *vires* of the *Regulations* are not even alleged to have been considered by the Minister.

[35] It is contended that there was relevant material which was before the decision maker when she made the impugned *Regulations*. The Applicant does not say with precision what they are and the context in which they are named or referred to. In reality, the Applicant claims that documents were before the decision maker by reference. It is contended that some documents in the CTR refer to other documents or information. That would be enough in the eyes of the Applicant for these to be before the Minister. Reliance is put on *Cooke v Canada (Correctional Service)*, 2005 FC 712, at para 20. The Applicant duly notes that *Gray v Canada (Attorney*

General), 2019 FC 301 refers to *Cooke*. However, there is not much mileage that can be made out of *Cooke* as paragraph 119 of *Gray* attests:

[119] The Applicants’ view that the whole institution or government department should be regarded as the administrative decision-maker is not supported by the jurisprudence (*Ecology Action Centre Society v Canada (Attorney General)*, 2001 FCT 1164 at para 6, [2001] FCJ No 1588 (QL)). The Applicants’ reliance on *Cooke v Canada (Correctional Service)*, 2005 FC 712 at para 20, 274 FTR 44 [*Cooke*], where the Court stated that the decision-maker for the purpose of Rule 317 “is not the specific individual who decided the case but the tribunal itself”, is misplaced. In that case, the Court was addressing the issue of an investigator’s report and recommendation which was adopted by the Canadian Human Rights Commission and as such, the record before the investigator was part of the record of the decision-maker. I am not aware of any jurisprudence where *Cooke* has been relied on to support the view that the documents held by the whole institution are “before” the decision-maker.

[My emphasis.]

[36] In effect, this is simply a variation on a theme: the possession of the decision maker is extended to what is in the hands of the department. As a matter of fact that constitutes the conclusion of that section of the *factum* (para 37).

[37] The Applicant makes general statements about its request being “tailored” and the material sought being needed to ensure a meaningful judicial review. In support of the latter proposition, it seems to rely on one sentence taken from paragraph 14 of *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268; [2016] 3 FCR 19: “If the reviewing court does not have evidence of what the administrative decision maker has relied upon, the reviewing court may not be able to detect reviewable errors”. It should be noted that

once read in the context of paragraphs 13 and 14, the reference to “relied upon” is merely to “everything that was before the decision maker” (para 13). That does not seem to depart from the rule that what must be disclosed is that which was before the decision maker. I reproduce paragraph 13 which provides the needed context:

[13] Rule 317 reflects the reality today that the permissible grounds for judicial review are broader than they once were. It entitles the requesting party to receive everything that was before the decision maker at the time it made its decision and that the applicant does not have in its possession: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83, at paragraph 7. This allows parties “to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective” and “have the reviewing court [that is engaged in reasonableness review] consider the evidence presented to the tribunal in question”: *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74 (CanLII), 284 D.L.R. (4th) 268, at paragraph 24 (commenting on a rule similar to rule 317).

[My emphasis.]

An administrative decision that would be made without supporting evidence, or despite the evidence, would also be reviewed on the basis of its reasonableness.

[38] Next, the Written Representations seek to justify how material only referred to in the CTR, but not before the decision maker, should nevertheless be disclosed pursuant to rule 317.

[39] Thus, because the CTR refers to activities targeted for cost recovery, it is claimed that the making of the *Regulations* “required considering...the nature of such activities or programs in addition to their costs”. This analysis should be disclosed, as it can be assumed that it was before the Minister when she made the *Regulations* (Written Representations, para 48). Thus, it would

be accepted without proof that the Minister had before her, when she authorized the *Regulations*, the programs and activities and their cost. There is no indication either as to how such information may be relevant to the *vires* of the *Regulations*, as opposed to disagreeing with the merits of what programs and activities are to be eventually captured. To the same effect, the Applicant would want to know if the regulatory charge was developed in accordance with the Costing Guide of the Treasury Board Secretariat. No indication is given as to how being concordant with an instrument such as a costing guide has any relevancy on the *vires*.

[40] The Applicant also seeks the itemized calculation of the “annual cost base”. No information was published or disclosed in the CTR that would allow the Applicant to contest the estimation of the charge. What is more is that it is “assumed that such analysis was conducted and that it was part of the record when the Minister made the *Regulations*” (Written Representations, para 55). There is only the suggestion that “it might be more challenging for the Court” (Written Representations, para 56) to assess the constitutionality. No more than that general suggestion is offered, and the assumption is devoid of granularity or articulation.

[41] The same pattern repeats itself as the Applicant would want access to the business case submitted by the Department of Health to the Treasury Board Secretariat. Again, this is in connection, says the Applicant, with the activities targeted for cost recovery. It is asserted that confirmation “that the business case meets the requirements of the Directive on Charging should also be disclosed” (Written Representations, para 61). How that would assist the Court in adjudicating on the merits of the legal arguments remains unsaid.

[42] The CTR contains information summarizing the results of the consultations conducted in preparation for the *Regulations*. The Applicant asserts that the submissions and notes taken should have been disclosed: “Almost by definition, submissions made during consultation are meant to be presented and considered by the decision maker” (Written Representations, para 64). If one accepts that the results of consultations are of interest to a Minister, that would explain why a “deck” or the results of the consultations were included in the bundle presented to the Minister. There is not even an attempt at explaining the relevance of submissions and notes during consultations or how raw information like the submissions and notes would be before the decision maker. Surely a minister may seek copies of submissions. That is their prerogative. But here, there is nothing to even suggest that the Minister sought that information.

[43] The Applicant draws from the information before the Minister or the results of the consultations that “technical briefings and notices” were provided to indigenous governments, organizations and communities. That should be part of the CTR because that “could for example shed light on the activities related to Indigenous communities that are meant to be targeted for cost recovery” (Written Representations, para 67). It is stated that what is presented as a possibility, perhaps speculation, is relevant to constitutional and administrative law grounds. We do not know why. No more than a general statement of some connection between the charge and the regulatory scheme is offered as justification for claiming relevancy and material before the Minister, as opposed to that being merely a fishing expedition.

[44] Finally, the Applicant seeks the analysis of the price increase expected as a result of the cost recovery. It is conceded that the increase is expected to be low according to the Respondents. The Applicant appears to be concerned with the impact of the price increase would have on the illicit market for tobacco products. It states that “legal manufacturers who submit the annual statement required by the Regulations will bear the portion of the annual cost base...that are in fact caused by illicit tobacco use in Canada” (written representation, para 71). No explanation is offered as to how that could be relevant to the requirements for a valid regulatory charge. It appears that the true justification is the same as that already invoked. Given a reference in the CTR to potential price increases, those analyses are said to form part of the record in the possession of the Minister, if not in front of her.

B. *The Respondents*

[45] The Respondents rely on the recognized scope of the obligation under rule 317 for the view that the Applicant goes well beyond what it is entitled to in this case. It does not claim that the information sought was before the Minister, but rather that it should receive what may have been in the possession of the department. The issue is not what evidence the Applicant may wish to marshal in its legal challenge which extends beyond the CTR, but rather what can be produced as a result of the recognized scope of rule 317.

[46] Is described what was actually before the Minister, and is therefore included in the Certified Tribunal Record as per the requirement of rule 317:

- a) a memorandum from the Deputy Minister of Health Canada to receive approval to launch consultations on the cost recovery scheme allowed by new s. 42.1 of the *TVPA*. The consultation document was appended. An overview of the results of the consultations is also appended. The recommended approach is discussed, including the communication plan;
- b) a second memorandum is disclosed. It comes from the Associate Deputy Minister of Health. It recommends that the regulatory package (which is attached) be approved. Draft regulations are included, as well as the Regulatory Impact Analysis Statement.

The point of the matter is that this constitutes the material submitted for the Minister to approve the *Regulations*. The ministerial decision concurring with the regulatory package is in the form of the signature appearing on the second memorandum. The elements of the complete package put before the Minister are found at paragraph 6 of these Reasons and Order.

[47] The purpose of rule 317 is to put before the reviewing court the material that was before the decision maker; the aim is to facilitate the meaningful review of the decision. Reliance is put on *Access Copyright v Alberta (supra)*, at paragraphs 13 to 15. The Respondents refer to recent case law from the Federal Court of Appeal in contending that rule 317 is limited, subject to exceptions, to “material that was before the decision-maker when the decision was made” (*Chateau d’Ivoire Stores Inc. v Canada (Attorney General)*, 2023 FCA 100, para 12). Reference is also made to *Tsleil-Waututh Nation (supra)* at paragraphs 112-113. The Respondents note that the Court of Appeal in *Chateau d’Ivoire Stores* approved the following statement of law found in

1185740 Ontario Ltd. v Canada (Minister of National Revenue), 1998 CanLII 7910, when

Nadon J., then of this Court, wrote:

[11] It is therefore my view that, as the "Board" in this case is the Minister, Mr. Dhaliwal, the applicant is entitled only to those documents that were before the Minister when he made his decision. On the evidence before me, those documents were the memoranda of the Deputy Minister and the documents referred to in those memoranda. All of these documents have been provided to the applicant. Thus, the other documents of which the applicant seeks production under point A. do not fall within the purview of Rule 317(1).

[48] That same case stands for the proposition, say the Respondents, that the scope of rule 317 is solely for material before the decision maker. In that case, the issue was the prohibition of the sale of duty-free fuel at land border duty-free shops. An operator of such store sought disclosure of “copies of all decisions, records of meetings, briefing notes, analyses, correspondence within, to and from the Government of Canada” (taken from para 2 of *1185740 Ontario Ltd*; in fact, the list is even more extensive). That was refused. It follows that the material in possession of the Department is not that which is encompassed by rule 317. The *1185740 Ontario Ltd* case was not disturbed on this point on appeal (1999 CanLII 8774). The Respondents note that the Court of Appeal requires that attachments to a produced memorandum must be disclosed (para 6), but not documents not before the decision maker (para 5, citing *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455).

[49] The matter is further illustrated in the decision of this Court in *Chateau d’Ivoire Stores* (2022 FC 405). In that case, disclosure of material considered by the decision maker’s staff was sought. Pamel J., then of this Court, refused the disclosure of material relied upon in preparing

what was put before the decision maker. Citing *1185740 Ontario Ltd*, our Court found that it was that which was before the decision maker that ought to be disclosed pursuant to rule 317. As seen, that was left undisturbed on appeal.

[50] There are exceptions to the general rule that only that which is before the decision maker must be disclosed in accordance with rule 317. But the challenge to the constitutionality of provisions is not one such exception. In the words of the Respondents, that “principle has no support in the jurisprudence” (Respondents’ Written Representations, para 51).

[51] The Respondents acknowledge that constitutional challenges allow for the admissibility of broader evidence, but that does not extend to “producibility” under rule 317.

[52] The Applicant relied on *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2025 FCA 82. In that case, the issue was the promulgation of regulations concerning firearms. The broad production pursuant to rule 317 was in fact denied. In *Parker v Canada (Attorney General)*, 2021 FC 496, the Court’s Associate Chief Justice found that it was the Governor in Council which was the relevant tribunal. The applicant in the case was seeking material in possession of various departments, including the RCMP, the Governor in Council and the Attorney General. That was not accepted; only that which was put before the decision maker was produced, although the record eventually before the reviewing court was made much more extensive. That confirms, according to the Respondents, that admissibility and production under rule 317 cannot be confused (see *Parker v Canada (Attorney General)*, 2023 FC 1419, para 165). Rule 317 does not constitute a discovery process. Rule 317 is limited in scope. Those who

choose a judicial review application to challenge legislative instruments must abide by the rules which govern such applications.

[53] The Respondents characterize the attempt to go beyond what is permitted by rule 317 as a “fishing expedition”. The requests for documents are largely based on what the decision maker should have considered. There was no evidence offered in support of allegations or attempts at inferences. Assumptions, suggestions, conjectures or what might have been relevant to the decision do not meet the test under rule 317. The basis is not that the information sought may support a ground or argument. The Court of Appeal in *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245, was quite explicit that “attempts to conduct discovery of material to see whether a ground of judicial review might exist – the proverbial fishing expedition – also cannot be permitted... Attempts to use Rule 317 for a fishing expedition are common and the Court must never permit it” (para 15). In the view of the Respondents, the Applicant offered conjectures, not evidence, in their attempt to discover other information that might somehow assist: that constitutes a fishing expedition.

[54] Finally, the Respondents commented specifically on items raised by the Applicant as deserving of further disclosure:

- a) description of activities targeted for cost recovery: there is already a description in the material put before the Minister (presentation deck and the RIAS), as well as excluded activities. In essence, the attempt made by the Applicant is a variation on the same theme: whatever Health Canada may have produced is something the Applicant is entitled to

despite a complete lack of evidence it was before the Minister. The Minister is entitled to rely on summaries or analyses of staff;

- b) itemized calculations of the annual cost base: it is said that the Applicant seeks to receive the background work done by staff to reach the figure of \$42.53 million in annualized value of the annual cost base, as it appears in the RIAS. The Respondents contend that there is no suggestion that the Minister even considered any further the calculations in making the decision to adopt the *Regulations*, let alone that the calculations were before the decision maker;
- c) business case submitted to the Treasure Board Secretariat: simply because the memorandum to the Minister refers to the business case does not mean that it was before the Minister. Again, the Applicant seeks to gain access to material, even though there is no evidence whatsoever that the business case prepared by one agency to be submitted to another was before the decision maker whose focus was on the making of regulations;
- d) submissions and notes of meetings from public consultations: a summary of the results of consultations conducted as part of the development of the *Regulations* is part of the CTR as it was put before the Minister. But the submissions and notes were not. It is noted that the consultation process was not challenged in the Notice of Application. At its highest, the Applicant alleges that submissions were received on issues said to be relevant to grounds of review. That, say the Respondents, is a fishing expedition;
- e) technical briefings, notices and other materials provided to Indigenous governments, organizations and communities during consultations: the same rationale as (d), above, applies to briefings provided. This is part of the same fishing expedition;

- f) the analysis of the price increase of tobacco products expected as a result of the cost recovery: the Applicant has alleged that “If the Minister relied on analyses of potential price increases and of the impact on the illicit tobacco market...those analyses form part of the record”. Clearly that does not even consist in an allegation that such analyses were before the Minister. Casting a wide net to obtain whatever it can that might help its case; the Applicant conducts another fishing expedition.

[55] The Respondents rely on the case law from the Court of Appeal. That jurisprudence is unequivocal. In the end, the Respondents conclude that the motion attempts to go well beyond what is contemplated by rule 317. This constitutes a fishing expedition, something that is common and that the Court must never permit (*Canadian National Railway Company, supra*, para 15).

C. *Applicant’s Reply*

[56] The Applicant offered a long reply. I shall comment immediately on the additional submissions made therein.

[57] The Applicant focuses mainly on the contention that what it seeks is relevant to its constitutional challenge: the Respondents apply a formalistic interpretation of rule 317. Thus, relevance is broader when a constitutional issue is raised. Moreover, the notion of “before the decision maker” requires a contextual assessment when determining what is required and, in this case, the available evidence confirms that the Minister considered the information requested.

[58] Without citing authorities, the Applicant states that what is before the decision maker is a function of the relevance of the material sought (Reply, para 10). I note that the only case referred to, *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720, [2005] 3 FCR 555 at para 49, does not stand for that novel proposition. Our Court merely refers, based on *Canada (Human Rights Commission) v Pathak*, (*supra*), to relevance being “determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review”. The suggestion that relevance generates what was considered by the decision maker (which arguably constitutes circular reasoning) does not, if I understand the position taken by the Applicant, find support in *Gagliano*. That case did not depart from the understanding of what constitutes relevance under rule 317. Relevance and material in the possession of the tribunal are different concepts. Relevance is defined by the grounds of review but rule 317 also requires, according to the binding jurisprudence of the Court of Appeal, that the material be before the decision maker. *Gagliano* does not displace that jurisprudence.

[59] On the contention that the Respondents read rule 317 textually, the Applicant’s reply is to the effect that the text of a provision is the anchor (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para 24; *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21, at para 87). Possession is possession. It should be noted however that the Supreme Court never departs, in these cases as in more recent case law (*R. v Nguyen*, 2026 SCC 10) from the modern approach to statutory interpretation which calls for text, context and purpose to be factored in. As a

unanimous Supreme Court stated in *Nguyen*, “while the text is an important indicator of legislative intent, it is not in itself determinative of the meaning of a statutory provision...Even words that appear clear on their face may reveal a different meaning when viewed in their full context and in light of their purpose...This is a necessary and well-accepted feature of the modern approach..., which represented a departure from an analysis centred on whether text is plain or ambiguous towards a broader search for legislative meaning” (para 80; citation of authorities omitted). Textualism has not been revived. It is rather that the text of a provision continues to be fundamentally important.

[60] Although the Applicant rightfully concedes that rule 317 does not allow fishing expeditions, or to turn rule 317 into a discovery mechanism, it claims that its effort at being provided an array of documents because, it says, they are mentioned in the CTR, does not constitute a fishing expedition. It states that it does not seek to apply the discovery standard.

[61] It seems that the Applicant pleads that its interpretation of relevancy “would facilitate meaningful review of administrative decisions (including the making of regulations), including on constitutional grounds, it is clearly consistent with the Rule’s key purpose and *raison d’être*” (Reply, para 16). I have not found the explanation for that statement or authorities in support. Admissibility and producibility are not one and the same.

[62] The Applicant also argues that the notion of “before the decision maker” should receive a contextual assessment. It seeks to counter the Respondents’ argument that what is being attempted is the equivalent of discovery because no evidence is tendered to support inferences or

allegations, and the Applicant offers no more than conjectures concerning what the Minister may have considered.

[63] In response it seems that the Applicant relies somehow on the CTR: the Court should infer from the CTR (Reply, para 27). In effect, the Applicant contends that there is no evidentiary burden it must support because it meets its burden by demonstrating the (broadened) relevance of the categories of materials requested. To some extent, relevance drives what was before the Minister, as opposed to relevance and possession being different requirements. An attempt to discount the case law submitted by the Respondents (*Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66, para 8); *Maax Bath Inc. v Almag Aluminum Inc.*, 2009 FCA 204, para 15; *Mizrachi v Canada (Attorney General)*, 2025 FC 1308, para 39-40) is made to claim that no bald assertion is made. These cases reject attempts made by applicants through bald assertions to see if something can be found to support allegations of bias, or seek information with a noticeable lack of specificity, or request sweeping categories of documents. The Reply consists of stating that it has “identified only documents and categories of documents that are referred to in the CTR” (Reply, para 29).

[64] The Applicant disputes the Respondents’ reliance on *1185740 Ontario Ltd (supra)* for the view that only documents before the Minister are part of the CTR. Again, the Applicant appears to argue that the case (endorsed by the Court of Appeal) is about relevance. I fail to read the case in that fashion. In fact, Nadon J. makes clear that relevance and the material being before the decision maker are different features. We read at paragraph 7:

[7] With respect to the remaining documents, the Respondent objects on the grounds that these documents were not before the Minister when he made the impugned decision and that, in any event, they are not relevant. Rule 317(1) requires that the requested material be relevant to the application and that the material be in the possession of the tribunal whose order is the subject of the application.

[My emphasis.]

That makes the Court conclude as I have already noted earlier:

[11] It is therefore my view that, as the "Board" in this case is the Minister, Mr. Dhaliwal, the applicant is entitled only to those documents that were before the Minister when he made his decision. On the evidence before me, those documents were the memoranda of the Deputy Minister and the documents referred to in those memoranda. All of these documents have been provided to the applicant. Thus, the other documents of which the applicant seeks production under point A. do not fall within the purview of Rule 317(1).

Our Court refers to cases where it is the documents that have been used by the decision maker in its hearings, deliberations or decision that should be produced. Contrary to the Applicant's contention, the "use of documents" is not any document alluded to in the material which is before the decision maker. If the Minister were to have the material before her supplemented by asking for further documentation as she deliberates on the issues, that would in my view be producible under rule 317. Finding merely some reference to consultations conducted in the material before the Minister, for instance, does not turn submissions received by the Department into documents before the Minister. Conversely, the Court of Appeal decision in *1185740 Ontario Ltd* confirms that attachments to memoranda should be produced (FCA, para 6). There is no indication that this would be the case here.

[65] Another attempt at distinguishing authorities concerns our Court and the Court of Appeal decisions in *Château d'Ivoire Stores Inc.* (*supra*). The case involves rule 317, which applies to statutory appeals. The Court of Appeal agreed that the scope of disclosure is “generally limited to material that was before the decision maker when the decision was made” (para 12). The FCA agrees “with the Federal Court’s conclusion that the evidence in this case does not support any broader application of Rule 317” (para 13). The distinguishing feature advanced by the Applicant is that the Director of FINTRAC (the decision maker) is not comparable to the Minister. This constitutes a distinction without a difference. That does not explain why the findings do not apply, especially since the Court of Appeal refers specifically to 1185740 Ontario Ltd., a matter involving a Minister of the Crown, to support its finding “that a party requesting documents pursuant to rule 317 is entitled only to relevant material that was before the decision maker when the decision was made”.

[66] The Applicant seeks to defend its reliance on *Cooke v Canada (Correctional Services)*, 2005 FC 712, for its proposition that the work of staff is producible on judicial review. It will suffice, in my view, to refer to paragraph 119 of *Gray v Canada (Attorney General)*, 2019 FC 301 which is reproduced at paragraph 35 of these Reasons and Order. *Cooke* is limited, at best, to its particular circumstances, which are not replicated in the case at bar. Indeed, the Court of Appeal case law since 2005 appears to have gone in a different direction.

[67] Finally, the Applicant seeks to justify requesting specific categories of documents. There is not much new. As short summary of what is presented will suffice:

- (a) description of the activities targeted for cost recovery: given that the RIAS include the calculation of the “annual cost base”, the Court can reasonably draw an inference that the Minister had before her a description of the actual activities in question and their costs. It should also be inferred that the cost breakdown structure was considered by the Minister because the CTR refers to the Guide for Costing which requires a “cost breakdown structure”. How that can be relevant to constitutional and administrative law challenges in left unsaid, let alone how these could actually have been before the Minister as the Regulations were approved;
- (b) itemized calculation of the “annual cost base”: once again it is suggested that it can be inferred that the costs have been considered by the Minister because the RIAS publishes a calculation of the sum of activities. The same observations are applicable. How an inference can be drawn and how that information is relevant to the judicial review application remain unsaid;
- (c) business case submitted to the Treasury Board Secretariat: the inference sought is based on the existence of a business case and the *Regulations* would not have been possible without considering the business case’s contents. Not only there is no indication as to why the Minister would have “considered” what appear to be a bureaucratic exercise, but, once again, its relevance is asserted, never articulated or demonstrated;
- (d) consultations: the Applicant posits that it is entitled to submissions received and notes taken as part of the consultations, the results of which were before the Minister. How the submissions and notes are relevant to a constitutional challenge based on an argument that the charges are rather a tax and that the scheme cannot be supported by the head of

power found at s.91 (27) of the *Constitution Act, 1867* remains unarticulated. The same is even truer with respect to the administrative law grounds. It appears that the Applicant shows an interest in these because the results of the consultations, evidently of interest to a Minister who is asked to approve regulations, are presented to the responsible Minister. But what about submissions or even notes taken? These can perhaps be contemplated if the merits of the *Regulations* were in play. However, such is not the case. The same may be said of briefings given. Without an articulation, as opposed to stating relevancy, there is not even an arguable case that was mentioned by the Applicant. A probability of success may not be necessary, but at least a supportable argument should have been presented in the Reply;

- (e) analysis of the price increase of tobacco products expected as a result of the cost recovery: this time around, the Applicant states that the Regulatory Impact Analysis Statement “is akin to the Minister’s reasons for making the Regulations” (Reply, para 55). There is no support provided for that statement. The RIAS is rather an instrument to provide stakeholders with information on the regulations and their implementation. As the name implies, the impact that the *Regulations* are expected to have is presented. These are not reasons. Once again, the Applicant suggests that it can be inferred from the RIAS that the Minister considered the analysis which led to the conclusion. We are not informed as to how that inference is made. This statement is not supported by any authority either. It is as if the Applicant wished to contest that the price increase of tobacco products will be small. How that can be valuable in a constitutional challenge is

not disclosed. Similarly, one is hard pressed to understand even the relevance of that information for a challenge on administrative law grounds.

V. Analysis

[68] Having reviewed extensively the submissions of counsel, I find myself incapable to accept the arguments offered by the Applicant to gain access to that which was not before the Minister as she decided to go ahead with the *Regulations*. That should not be taken to mean that it is impossible for a case to be articulated for more extensive disclosure of information. But a case must be made out. Generalities will not suffice.

[69] For starters, there is no doubt that the scope of disclosure is limited, and the burden for broadening the scope rests with the Applicant. In *Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224, the Court of Appeal found as follows:

[21] It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

[My emphasis.]

The statement has been repeated often, including just recently in *Ford v Canada*, 2025 FCA 26. It seems that if an applicant wishes to receive more than has been disclosed in the CTR, an arguable case would have to be led. In *Canadian National Railway Company v Canada (Transportation Agency)* (*supra*), Stratas J.A states that if there is “an arguable case that the documents sought might well be relevant to the grounds or relief set out in the pleading, they should be disclosed” (para 17). But an arguable case is not a mere declaration.

[70] Furthermore, rule 317 is not the equivalent or akin to discovery. Its purpose is more modest. In *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257, the Court explains the principle underlying rule 317 thus:

[12] Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; certiorari means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision (*Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 FCR 19). The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.

It continues to be the record that was before the decision maker that is essential to the judicial review; it needs to be disclosed, as was done here. The point has been made vividly in a large number of Court of Appeal decisions, more recently one of which is *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41, where we read:

[17] In *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 at para. 21, this Court described the purpose of rule 317 as “to limit discovery to documents which were in the hands of the decision-maker when the decision was

made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner.” It went on to state that “[w]hen dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review.” This would be an impermissible “fishing expedition”: *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204 at para. 15.

[71] The controlling case is in my view the decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128. It provides the framework when one party seeks to expand the record before the reviewing court using rule 317. What are the function and limits of the rule 317 which provides for an applicant to obtain the evidence which was before the decision maker when the decision was made? What are the circumstances in which the reviewing court should order the production of more evidence?

[72] In the case at bar, the Applicant relies on rule 317 for its contention that it is entitled to material that it hopes will support its argument that the statutory instruments are *ultra vires*. It bases its argument on the existence of material that is relevant and in the general possession of the Minister as a Minister of the Crown, which it is claimed is in accordance with rule 317.

[73] The case law emanating from the Court of Appeal is consistent with the principle that it is the record which is before the decision maker when the decision is made that is accessible (*Château d'Ivoire Stores Inc. v Canada (Attorney General)*, 2023 FCA 100, paras 9 and 12). The Court of Appeal refers specifically to *1185740 Ontario Ltd. v Canada (Minister of National*

Revenue), 1998 CanLII 7910, affirmed on appeal at 1999 CanLII 8774. For ease of reference, I reproduce again paragraph 11 from our Court:

[11] It is therefore my view that, as the "Board" in this case is the Minister, Mr. Dhaliwal, the applicant is entitled only to those documents that were before the Minister when he made his decision. On the evidence before me, those documents were the memoranda of the Deputy Minister and the documents referred to in those memoranda. All of these documents have been provided to the applicant. Thus, the other documents of which the applicant seeks production under point A. do not fall within the purview of Rule 317(1).

In fact, the Court of Appeal in *1185740 Ontario Ltd* found further support in its ruling in *Pathak*:

[5] In *Canada (Human Rights Commission) v. Pathak*, 1995 CanLII 3591 (FCA), 1995 2 F.C. 455 (C.A.) this Court held that only documents which were actually before the Human Rights Commission in making its decision had to be produced. Other documents relied upon by the investigator did not have to be produced in the absence of evidence that the investigator had inaccurately summarized them. To much the same effect is the decision of this Court in *Quebec Ports Terminals v. Canada (Labour Relations Board)* 17 Admin. L.R. (2d) 16. I accept and follow these decisions.

[74] Exceptions to the rule according to which only the record before the decision maker is to be before the reviewing court have been recognized by the Court of Appeal. They fall in three categories which can be seen as being rather narrow. One is an affidavit to provide general background where that information might assist in understanding the issues that are relevant to the judicial review. Another one might be an affidavit to highlight the complete absence of evidence before the decision maker when the decision was made on some particular issue. The third one is concerned with procedural defects not found in the record, but that affect the procedural fairness of the proceedings before the decision maker as long that evidence was not available before the decision maker (see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263,

paras 20-26). The list of exceptions, what has been referred to as “exceptional evidence” in *Tsleil-Waututh Nation*, is not closed. The common law may well develop more exceptions to the rule that only that which was before the decision maker when the decision was made allows an applicant to the entitlement of the record before the decision maker.

[75] What must be understood is that rule 317 plays a limited role. Not only is there a limitation in that only the record before the decision maker (subject to “exceptional evidence” being admissible) is accessible, but the information must be relevant. These are two different requirements. Material that could be relevant in the hope of establishing its relevance only later is not material that is accessible under rule 317. That means that fishing expeditions are not allowed (*Ron W. Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175: “the Rule does not sanction fishing expeditions”, para 28). That is also in line with the principle that “Rule 317 does not in any way “serve the same purpose as documentary discovery in an action” (*Tsleil-Waututh Nation*, para 115). We are invited to keep separate and apart the concepts of admissibility and accessibility (para 117). The purpose of rule 317 consists in obtaining the tribunal’s record on judicial review. The reviewing court will have access to the same record as the original decision maker had in making a decision (*China Mobile Communications Group Co., Ltd. v Canada (Attorney General)*, 2023 FCA 202). Producibility is one thing. Admissibility of the evidence is governed by other provisions.

[76] As a reviewing court is invited to consider expanding disclosure requirements, it reads the grounds of review to obtain a realistic appreciation of what is the essential character of the application. *Tsleil-Waututh Nation* refers to *Canada (National Revenue) v JP Morgan Asset*

Management (Canada) Inc., 2013 FCA 250, [2014] 2 FCR 557. In gaining a realistic appreciation of the application made, the reviewing courts are warned against “Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort”. (para 49; in *JP Morgan Asset Management (Canada) Inc.*, the issue was whether the Federal Court had jurisdiction over an issue that was presented as allowing for a judicial review application, and not a matter for the Tax Court).

[77] There is a fundamental tension between rendering a judicial review meaningless and allowing a process of discovery in the guise of a disclosure motion. The choice of procedural vehicle counts. In *Canadian National Railway Company 2023 (supra)*, we read:

[15] Disclosure motions, whether within a judicial review or a statutory appeal, must be governed and abide by the foregoing principles. Non-disclosure that threatens the meaningfulness of judicial review, causes the immunization of administrative decision-making, or hinders or frustrates the prosecution and adjudication of a legitimate ground of review cannot be permitted. But attempts to conduct discovery of material to see whether a ground of judicial review might exist—the proverbial fishing expedition—also cannot be permitted: *Tsleil-Waututh Nation* at para. 115; *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15917 (F.C.T.D.) at para. 11; *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, 392 N.R. 219 at para. 15. Attempts to use Rule 317 for a fishing expedition are common and the Court must never permit it. In special circumstances, however, the Federal Court may convert an application to an action, which may include examinations for discovery: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.4(2); *Brake v. Canada (Attorney General)*, 2019 FCA 274, [2020] 2 F.C.R. 63; *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-25.

Thus, the Court must be careful to remain within the inherent limits of rule 317, yet it must be cognizant of the need to expand the scope without allowing fishing expeditions, which are common.

[78] The Notice of Application claims that sections 42.1 to 42.16 and 46.1 of the *TVPA* are unconstitutional as being in violation of the *Constitution Act, 1867*. They are *ultra vires* because the legislation and the *Regulations* do not meet the constitutional requirements of a valid regulating charge. They are a tax which has not been adopted pursuant to the *Constitution Act, 1867* (s.53).

[79] Furthermore, they exceed the federal legislative power. Here, the Applicant contends that the charge must be used to fund the administration and enforcement activities to be sustained under the criminal law power (s.91(27)).

[80] The Notice of Application also claims that the *Regulations* are *ultra vires* on administrative law grounds, making them unreasonable. They are said to be inconsistent with the purpose of the *TVPA*. Moreover, the *Regulations* are vague and imply redelegation. Finally, they discriminate between manufacturers. The point of the matter is not that the Court should offer an opinion as to the merits of the legal arguments the Applicant wishes to bring forward. Rather, it is for the Court to determine if a case has been made out for broader disclosure to be ordered without allowing for discovery. More precisely, given what is advanced as grounds of review,

has the Applicant articulated a case to justify obtaining the information sought? With respect, the Applicant has not discharged its burden.

[81] The Applicant chose to base its challenge on an application for judicial review, as opposed to other procedural vehicles. It thus relies on rule 317 which has its inherent limitations. The rule is that it is the information that was before the decision maker that is accessible pursuant to rule 317. That does mean that the only evidence admissible is that disclosed in accordance with rule 317. The rule is intended to ensure that the record as it was before the decision maker when the decision was made is before the reviewing court. An applicant and a respondent are specifically allowed to produce supporting affidavits and documentary exhibit (rules 306 and 307).

[82] The Applicant's Written Representations, as well as the Reply, seek to gain access to documents and information, an allusion or a reference to which is found in the Certified Tribunal Record. For ease of reference, I reproduce again the list:

- (a) description of the activities targeted for recovery, as outlined in Annex 2 of the Consultation Document – Proposed Tobacco Cost Recovery Framework and the RIAS;
- (b) the specific costs in the calculation of the estimated amounts which are listed in Table 1 of the RIAS;
- (c) the business case for cost recovery submitted to the Treasury Board of Canada Secretariat;

(d) “any document” which confirms that TBS agreed that the said business case aligns with the *Directive on Charging and Special Financial Authorities*;

[83] the submissions and notes of meetings in the context of consultations with stakeholders, together with technical briefings, notices and “other materials” provided during consultations to Indigenous governments, organizations, and communities;

(e) the analysis of the price increase of tobacco products expected as a result of the cost recovery.

[84] The arguments mustered by the Applicant for access to that information fall short of the mark. The first line of attack is that it suffices that the Minister be in possession of what is asked for. It is submitted that possession does not imply “in the hands of the decision maker”. The only authority cited for that proposition remains *Cooke v Canada (Correctional Services)*, 2005 FC 712, 274 FTR 44. In view of the binding jurisprudence of the Federal Court of Appeal which has emerged since 2005, *Cooke* should, at best, be understood in the very peculiar context of that case. I share the comment made by my colleague Madam Justice Kane in *Gray (supra)* where she said that “I am not aware of any jurisprudence where *Cooke* has been relied on to support the view that the documents held by the whole institution are “before” the decision-maker” (para 119).

[85] The Applicant submits that being before the decision maker is merely an element derived from relevancy. I cannot agree. Relevance does not drive what was before the decision maker. The tail does not wag the dog. That new proposition, not supported by any authority, is not

consonant with the case law. Relevancy and being before the decision maker are the two conditions required under rule 317.

[86] The Applicant suggests that material which was not before the decision maker may be obtained. It cited the case of *Tsleil-Waututh Nation*, at para 118. As a matter of fact, paragraph 118 does not support that proposition. It constitutes the explanation for what is stated at paragraph 117, that is that admissibility and accessibility must not be confused. It is possible on judicial review to put before the reviewing court material that was not before the decision maker. But that does not go to accessibility as we read at paragraph 117, “Not everything that is admissible can be obtained under Rule 317”. The expansion of the traditional scope of rule 317 disclosure to include what this Applicant is seeking must be found elsewhere.

[87] The Applicant also refers to *Canada (Public sector integrity commissioner) v Canada (Attorney general)*, 2014 FCA 270 at para 4. That case is not of any assistance to the Applicant. In it, the Court of Appeal merely applies the third exception (procedural fairness) to the general rule that material before the decision maker is that which should be considered on judicial review. Indeed, the Court states that the exceptions are well settled, the exception being in that case where there may be a breach of procedural fairness.

[88] The Applicant goes on to refer to *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, para 20. Once again, this case is of no assistance to the Applicant as the Court of Appeal asserts again that information

that was not before the decision maker may be made available to the extent that it qualifies under any of the recognized exceptions. Such is not the case here.

[89] Is also referred to the case of *Canadian National Railway Company v Louis Dreyfus Commodities Ltd*, 2016 FC 101, para 20. The case is held to support the proposition that everything that “should have been before the decision maker at the time the decision was made” is producible under rule 317 (para 26). *Louis Dreyfus* cannot be invoked. That is because the notion that what “should have been before the decision maker” is disavowed in *Tsleil-Waututh Nation*, at paragraph 118. One reads: “In *Dreyfus*, the Federal Court suggests that materials that should have been before the administrative decision maker are producible under Rule 317. In support of this, the Federal Court cites *Access Information Agency*, above and *Gagliano*, above. *Access Information Agency* nowhere says that materials that should have been before the administrative decision-maker are producible under Rule 317. And *Gagliano* is best construed as the rare case where exceptional evidence was admissible and happened to be in the possession of the administrative decision-maker”.

[90] The Applicant alludes in footnote 23 of its Written Representations to the case of *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2025 FCA 82, in support of the proposition that the record before the Federal Court would not be limited to the record before the Minister when the decision was made. The footnote declares that “extensive evidence was adduced with respect to the alleged infringement of several rights guaranteed under the Canadian Charter of Rights and Freedoms”.

[91] Three comments are in order. First, the reference to that case is of little assistance if the Applicant does not even attempt to connect the evidence in that case, which was extensive, to material that would have been adduced on the basis of rule 317. That was not done. There is no analysis to be found that could assist the Court in determining that the extensive evidence in the case concerned with the constitutionality of instruments comes as a result of the application of rule 317.

[92] Second, the case in the Federal Court of Appeal known as the *Canadian Coalition for Firearm Rights* was known as *Parker v Canada (Attorney General)*, in our Court. In *Parker v Canada (Attorney General)*, 2021 FC 496, the then Associate Chief Justice Gagné had to decide whether a long list of documents sought by the numerous applicants had to be disclosed pursuant to rule 317. The list is appended to the Order. In her decision, the Associate Chief Justice found that the relevant tribunal was the Governor in Council, and its Order was the Order in Council which promulgated the *Regulations*. It followed, she said, that the material relevant to the rule 317 motion was that described in a letter dated December 4, 2020, providing a description of what was alleged to constitute confidences of the Queen's Privy Council. It appears from the letter, which is reproduced at paragraph 8 of the Order, that the material in question was that which had been put before Cabinet. In other words, only that which was before the Governor in Council was to be considered under rule 317. Given that the Respondents had chosen not to submit the certificate under section 39 of the *Canada Evidence Act*, which has the effect of excluding from further consideration the documents properly described therein (*Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3), it is the common law which had to

find application. As a result, our Court ordered that the said material be submitted for the Court's review. One thing is for sure. The extensive material which was considered as part of the judicial review did not come from some allowed disclosure under rule 317. Moreover, that which was before the Governor in Council was what was properly considered pursuant to rule 317.

[93] So, thirdly, where did the extensive evidence come from? The Court in *Parker v Canada (Attorney General)*, 2023 FC 1419 says that "The extensive arguments and volumes of evidence lead to a long judgment" (para 12). The reasons for judgement run for 695 paragraphs. The Court notes that "The Applicants and the AGC have all provided a "mountain of evidence" ... in support of their respective positions" (para 10).

[94] The Court lists in Annex A of its reasons more than 100 affiants on behalf of the Applicants and eight for the Respondents. Furthermore, Annex B runs for 64 pages. It consists of selected evidence from the affidavits.

[95] What this case illustrates is that the evidence in support of positions does not need to come from reliance on rule 317. The reference by the Applicant to the *Canadian Coalition for Firearm Rights* demonstrates that the bulk of the evidence came from affidavits as provided for by rules 306 and 307. Admissibility, relevance and accessibility are not to be confused.

[96] In sum, the Applicant has failed in its attempt to use rule 317 *simpliciter*. What has been disclosed in accordance with rule 318 conforms with the requirements of rule 317. That which is

relevant to the challenge and was before the decision maker when the decision to go ahead with the *Regulations* was made is what was disclosed. The argument according to which the mere mention of some other document or information in the material before the decision maker is sufficient to bring about the disclosure of these cannot be accepted. None of the three exceptions to the rule applies in this case as, principally, the broadened disclosure where a breach of procedural fairness is alleged is not available (*Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201).

[97] It must be remembered that the disclosure under rule 317 is for the purpose of obtaining the record before the decision maker so that the reviewing court has the same access to the records that were before the decision maker when the decision under review was made. The possible mention of some information somewhere in a CTR is far removed from what was actually before the decision maker.

[98] The argument relies in large part on the proposition that the record includes the work product of civil servants who are acting under the Minister (Written Representations, para 34). The suggested limitation would be that the Applicant would have to show that “relevant material” was considered in the analysis the Minister relied upon in making regulations (Written Representations, para 35). Even accepting this proposition, that has simply not been shown with any measure of specificity. Speculation will not suffice.

[99] The only authority the Applicant refers to is *Cooke (supra)* and it claims to find support in *Gray (supra)*. With regards, I disagree. *Gray* discounts *Cooke* significantly, as we have seen; it rather considers *Cooke* an outlier. We read at the end of the paragraph 119 of *Gray* that “I am not aware of any jurisprudence where *Cooke* has been relied on to support the view that the documents held by the whole institution are “before” the decision-maker”. No authority was cited by the Applicant that could displace the finding in *Gray*. I have not found anything either that could support the Applicant’s conclusion. Indeed, it runs contrary to the case law since 2005.

[100] The Applicant sought to take *Cooke* further by suggesting that the RIAS could be the springboard to the notion that relevant material was considered where that material was considered in the analysis on which the Minister relied. That would be especially the case with material referred to in statements, reports or memoranda “adopted” by the Minister.

[101] The Regulatory Impact Analysis Statement [RIAS] is said to be a “commonly accepted source of reasons for [regulation-making] decision” (Written Representations, para 36). That statement actually goes beyond what was said in the decision. The quote is taken from *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210, [2023] 2 FCR 473. In fact, it is preferable to quote the paragraph from which the quoted words are taken:

[48] Reasonableness also requires that a reviewing court can discern a reasoned explanation of the decision. In this case, a reasoned explanation can be discerned from the Regulatory Impact Analysis Statement: modernization, as explained above. Statements such as these are a commonly accepted source of reasons behind decisions made by the Governor in Council: *Portnov*, at paragraph 34; *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, [2020] 3 F.C.R. 3; *Canada*

(Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha, 2014 FCA 56, [2015] 2 F.C.R. 1006.

As can be seen, when read in context, the proposition is simply that the RIAS can help to discern the reasoned explanation for the decision, especially where the decision maker is the Governor in Council. The reviewing court is instructed to look at the record before the decision maker to understand the decision which, often, allows it to uncover a clear rationale for the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, para 137). That does not open the door to gaining access to documents mentioned in the hope of discovering a gem of some sort. Once again, rule 317 serves a purpose different from discovery in other types of proceedings. With respect, the argument is not supported by any authority.

[102] In effect, the Applicant wants to use the RIAS (and other documents) mentioned in materials before the decision maker in the record before the decision maker to become the launching pad to equate those documents themselves with being before the decision maker, such that they are accessible in accordance with rule 317. With all due respect, *Cooke* and *Innovative Medicines Canada* do not support the attempt to broaden the class of documents covered by rule 317.

[103] There is no doubt that if there are documents that are “attached” to what was submitted to the Minister, they should be produced (*1185740 Ontario Ltd*, FCA, *supra*, para 6). But that is not what the Applicant pursues. It suffices, it argues, that a document would be mentioned, whatever the purpose, for the mentioned document to be covered under rule 317.

[104] My review of the specific documents requested in the Written Representations and the Applicant's Reply confirms that it suffices not that something be mentioned or listed somewhere in the CTR for rule 317 to kick in.

[105] I have been concerned throughout my review of this Motion about attempts at immunization of the decision to adopt the *Regulations (Canadian National Railway Company v Canada (Transportation Agency)*, 2023). Undue barriers to meaningful public scrutiny are to be averted. As the Court of Appeal says at paragraph 10, "If an administrative decision-maker improperly withholds the documents and information it relied upon for its decision, the spectre of immunization of decision-making arises". It is the improper withholding of what was relied upon that constitutes the prohibited immunization.

[106] I have already referred to *Tsleil-Waututh Nation* and *JP Morgan Asset Management (Canada) Inc. (supra)*, two cases which call on reviewing courts to obtain a realistic appreciation of the essential character of grounds of review. That is done through a careful review of the Notice of Application. What is truly relevant to the Application? Courts of review will be careful not to fall for "sophisticated wordsmithing" offered by "skilful pleaders". This case is about the constitutionality of the cost recovery scheme and its alleged deficiencies on the administrative law front. What was before the Minister? She was asked to approve regulations that articulate a cost recovery scheme allegedly authorized by new section 42.1 of the *TVPA*. Does the refusal to go beyond what was before the Minister when she made her decision result in an immunization

of the decision-making process? This issue can be addressed by considering what is sought and how that material may be said to be relevant to the decision made by the Minister.

[107] I will review that specific material with a view to understanding what is sought and determining if further disclosure would be appropriate. Has a case been made out such that it is arguable that more ought to be disclosed on account of the constitutional and administrative law grounds raised in the Notice of Application? The merits of the *Regulations*, or their legitimacy, are not matters the Court is reviewing.

[108] **Description of activities targeted for cost recovery:** because the CTR includes documents which provide a non-exhaustive list of areas of activities to be covered, the Applicant claims to be entitled to the analysis it suggests must exist of what they are and what is their costs. Referring to the Consultation document which indicates that the charge was developed in accordance with the TBS Guide to Costing, which has its requirements, the Written Representations laconically declare this information is necessary in the examination of the constitutionality and reasonableness of imposing the charge to fund undefined activities. The Reply insists on the specific activities and declares that the Court should “draw an inference that the Minister had before her a description of the actual activities in question and their costs” (Reply, para 47). The Applicant would go so far as asking the Court that a “cost breakdown structure, showing the specific costs targeted for recovery, exists and forms part of the material considered by the Minister” (Reply, para 48). The Applicant offers no more than speculation that

such material exists and was before the Minister when the decision to go a head with *Regulations* was made.

[109] There is no reason given for why this type of information, if it existed and was shared with the Minister (as part of the only decision under review, i.e. authorizing the *Regulations*), can be of any assistance on issues of constitutionality or of deficiencies on administrative law grounds. That was the Applicant's burden. Some granularity is needed to make the case arguable. There must be a connection between the grounds for the challenge and the information requested. That is not to say that the parties are prevented from providing that kind of information as part of their case. In the challenge to the firearms regulations, there were upwards of 100 affiants, with both sides seeking to justify the said regulations. In its attempt to justify the charges, the government may choose to provide further detail as to the activities to be covered and at what cost. The failure to do so may have repercussions. On the other hand, the Applicant is not entitled as of right to know about the actual cost breakdown structure or whether the "Guide to Costing" was followed. In effect, all these issues are to be explored as the parties develop their case. Without any indication as to how the information requested will assist the Applicant, other than bald statements, the Court would be merely speculating. We are far from an arguable case demonstrated to the Court.

[110] **Itemized calculation of the "annual cost base" and the business case submitted to TBS:** the same comments apply with even more acuity to an itemized calculation of the "actual cost base" and the business case. The Applicant requests the itemized calculation (there is an

annualized estimated value of \$42.53 millions that was revealed) because it would be unfair for that not to be disclosed. This constitutes a weak justification. It is said that “it can be assumed that such analysis was conducted” (Written Representations, para 55). The same assumption is made that it was part of the record when the decision was made merely because it was mentioned in the RIAS. As a matter of fact, what was “assumed” in the Written Representations becomes urging the Court to “infer that the costs have been considered by the Minister” (Reply, para 49). There is no basis offered to state that an inference can be made. There is not any indication either as to the relevance of an itemized calculation given what is at stake. The lack of specificity can only be fatal. It is for the Applicant to make an arguable case. Another inference is urged on the Court is that the business case was before the Minister because the business case exists and the Regulations “would not have been possible without considering its contents (the costs to be recovered)” (Reply, para 51). This is a bold and bald assertion. With respect, this does not establish relevance. The relevance of a business case from the standpoint of the constitutional argument, or the administrative law vires of the *Regulations* is certainly not self-evident. It looks more like a request in search of some eventual use if something were to be found. Here, it is difficult not to conclude that this is no more than a fishing expedition.

[111] **Public consultation: submissions and notes of meetings, and technical briefings and materials provided to Indigenous governments, organizations and communities.** The CTR contains a “deck” with the title “What we have heard”. The Applicant would want to have access to the submissions and notes of meetings. We do not know how this information could be relevant to the issues identified in the Notice of Application. It is said in the Reply that the Court

should infer that the submissions were taken into account beyond the summary prepared by the staff. There is no indication how can be inferred that the summary of the consultations is not in line with the submissions received. It is equally impossible to see how the *vires* of the *Regulations* may be affected by submissions made as part of a consultation process. The same is true of technical briefings provided to Indigenous governments, organizations and communities.

[112] In its Reply, the Applicant says that the topic of the costs to be recovered for Indigenous activities is not disclosed in detail. At its highest, the Applicant claims that the material “would be relevant to the Court’s evaluation of the validity of the choice of programs and activities to target for cost recovery” (Reply, para 54). How something that is not even alleged to have been before the Minister, which something seeks on its face to challenge the merits of some choice of programs and activities, can be of assistance to the Court on the constitutional validity of regulatory charges and the *vires* of *Regulations*, in view of s.42.1 of the *TVPA*, remains unsaid and nebulous. Stating is not demonstrating. There is no reason to consider this any further.

[113] **Analysis of the price increase expected as a result of the cost recovery:** Because the RIAS indicates that the price increase of the tobacco products is expected to be small, the Applicant states that the analysis which led to that result should be accessible. It is “fair to infer” that the Minister considered this analysis, claims the Applicant without offering any indication why such an inference was or could have been made. How the price increase due to the cost recovery is to support the challenges in their case is unknown.

[114] Reading the submissions found in the Written Representations and the Reply, one is left with the possibility that the Applicant is in fact challenging the merits of the scheme as opposed to its constitutional validity or its *vires* as delegated legislation. At any rate, there is a complete lack of articulation as to what relevance there may be to the issues to be litigated. If weight is to be given to the request, the Applicant must engage and demonstrate an arguable case. Here again, the lack of specificity is fatal. Generalities and lack of articulation make it impossible for the Court to consider any further requests that are not articulated as a function the Notice of the Application. They are statements.

VI. Conclusion

[115] Rule 317 is not a discovery mechanism. I would not foreclose the possibility that material that would be for the consideration of a decision maker be accessible under rule 317. Evidence that would be admissible does not become accessible, as was seen in *Canadian Coalition for Firearm Rights / Parker (supra)*. The limitations of rule 317 are real. If an applicant is to broaden its scope, it must show some close connection with the requirement that the material was before the decision maker when the decision was taken. Speculations and call for inferences without some solid foundation will not do. By choosing its procedural vehicle, an applicant accepts the limitations of the tools made available by the Rules of the Courts. That is the case with rules 317-318. In order to present its case, an applicant may resort to other available tools, such as affidavits as was the case in *Canadian Coalition for Firearm Rights* where, in a constitutional matter, upwards of 100 affidavits were filed. Admissibility is not to be confused with accessibility under rule 317.

[116] It follows that the Motion to compel disclosure of material based on rule 317 of the FCR cannot succeed. The material requested was not before the decision maker when the impugned decision was made. In effect, the Respondents did not oppose the disclosure of information that was before the Minister; what is sought by the Applicant was not before the decision maker. They rather opposed enlarged disclosure that they argue was in the nature of a fishing expedition.

[117] Furthermore, the Court considered whether there was somehow an attempt at immunization of the decision-making process. Had there been an arguable case that the requested documents might be relevant to the Application, disclosure could have been ordered. That would require a reasonable chance of success.

[118] The Court would be speculating if it were to opine that the broad request made by the Applicant is in any way justified. The kind of general assertions made in this case do not establish an arguable case. General assertions can be made in every case, but they establish nothing. There should be, at least, an articulation at a level of granularity sufficient to establish an arguable case. Merely stating that something could be of use to the Court falls short. This is in the nature of disclosure. In cases where the logic is self-evident, that may suffice. Such is not the case here. Something more than allegations or statements, however worded, is needed to order the disclosure of that which was not before the decision-maker. It is not for the Court to seek to construct an argument that may or may not support a desired conclusion. The Applicant's argument that some information may assist the Court in conducting a meaningful review is not persuasive. Specificity and granularity are deficient.

[119] Must be kept front of mind the real issues in play when considering what is relevant (*Canada (Attorney General) v Maloney*, 2025 FCA 165). In the case at bar, absent an articulation, with specificity, of how the information sought is relevant to the issues raised on judicial review, the Court is left with very little to try to assess the value of the contention. The Applicant was so short on granularity, let alone articulation of the connection between the information and issues to be litigated, as to make it impossible to consider the matter judicially. In those circumstances, the Applicant fails to meet its burden.

[120] The Respondents sought their costs. The parties are invited to make submissions to that effect if they cannot reach a consensus on the quantum. Submissions of no more than three pages may be made within five days following the issuance of the Reasons and Order.

ORDER IN T-3758-25

THIS COURT ORDERS that:

1. The Motion to compel disclosure of material is dismissed.
2. Costs in favour of the Respondents are granted. The parties are invited to submit an agreed upon amount on account of costs. If unable to reach an agreement, submissions of no more than three pages, to be served and filed no later than five days following the issuance of these Reasons and Order, may be made for the Court's consideration.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-3758-25

STYLE OF CAUSE: JTI MACDONALD v ATTORNEY GENERAL OF
CANADA AND MINISTER OF HEALTH

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

REASONS AND ORDER: ROY. J.

DATED: MAY 28, 2026

WRITTEN REPRESENTATIONS BY:

Patrick Plante
Julien Boudreault
Abbie Buckman

FOR THE APPLICANT

Lindy Rouillard-Labbé
Joshua Wilner
Thomas Swerdfager

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

BORDEN LADNER GERVAIS
LLP
Montréal, Québec

FOR THE APPLICANT

Attorney General of Canada
Montréal, Québec

FOR THE RESPONDENTS