

Federal Court



Cour fédérale

Date: 20260626

Docket: T-2035-25

Citation: 2026 FC 870

Ottawa, Ontario, June 26, 2026

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NEXGEN ENERGY LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND ORDER

[1] NexGen Energy Ltd. (the “Applicant” or “NexGen”) brings a Motion in Writing, the purpose of which is for the Canadian Nuclear Safety Commission (the “CNSC” or the “Commission”) to be ordered to transmit materials improperly withheld from the Certified Tribunal Record. The Attorney General is acting on behalf of the CNSC.

[2] The underlying Judicial Review Application seeks to challenge the decision (May 16, 2025) concerning an administrative monetary penalty imposed on NexGen in relation to a proposed uranium mine and will project in Northern Saskatchewan.

[3] The steps leading to the Motion for disclosure are as follows:

- Notice of Application: June 3, 2025;
- CTR transmitted on July 4, 2025;
- the Applicant requests better and further disclosure because of allegedly missing or incomplete materials; October 27, 2025;
- CNSC objects to any further disclosure: November 12, 2025.

[4] The Motion for disclosure turns on a debate often seen. The tribunal, here the CNSC, claims it has produced as required pursuant to rule 317 of the *Federal Courts Rules*, SOR/98-106 (“*FCR*”), the material which was before the tribunal when the impugned decision was made. What is sought over and above is the forbidden “fishing expedition”; the mechanism of rule 317 which calls for limited disclosure is not the equivalent of discovery. The Applicant argues that a further disclosure is required in order to ensure a meaningful review, one which does not allow immunization of the administrative decision-making. The refusal to submit more material leads to a Motion in accordance with rule 318.

I. The Facts

[5] The CNSC is a federal organization established as a body corporate, pursuant to the *Nuclear Safety and Control Act*, SC 1997, c 9 (the “*Act*”). One of its objects, according to s.9, is “to regulate the development, production and use of nuclear energy and the production,

possession and use of nuclear substances, prescribed equipment and prescribed information in order to” prevent two specific unreasonable risks:

- to the environment and to the health and safety of persons;
- to national security.

[6] As such, the CNSC is responsible for the regulation and licensing of current and future uranium mining and milling in Canada (*Uranium Mines and Mills Regulations*, SOR/2000-206). Among other provisions, s.5 of these *Regulations* deals with the requirement for a licence to prepare site and construct of a uranium mine and uranium mill. Other licences are required for other activities (licence to operate, licence to decommission, licence to abandon).

[7] The CNSC is an adjudicative body. In particular, s.65.1 of the *Act* provides as follows:

Right to request review

65.1 A person who is served with a notice of violation may, within 30 days after the day on which it is served, or within any longer period that the Commission allows, make a request to the Commission for a review of the amount of the penalty or the facts of the violation, or both.

Droit de faire une demande de révision

65.1 Le prétendu auteur de la violation peut, dans les trente jours suivant la signification d'un procès-verbal ou dans le délai supérieur que la Commission peut accorder, saisir la Commission d'une demande de révision du montant de la pénalité ou des faits quant à la violation, ou des deux.

The decision under review proceeds from the exercise by the CNSC of the review of the amount of the penalty imposed by a designated officer (s.37) for an alleged violation of the *Act*.

[8] The CNSC is a court of record with significant powers to summon and examine witnesses, to compel the production of records. It proceeds informally and expeditiously, as the circumstances and considerations of fairness permit (s.20 of the *Act*). I note that it is not bound by the legal rules of evidence, which translates into being capable to “receive and accept such evidence and information on oath, by affidavit or otherwise, as in its discretion it considers appropriate”; it can equally “refuse to accept any evidence that the Commission does not consider relevant or trustworthy” (ss.20 (4)).

[9] Here, a Notice of Violation was issued by a designated officer, and the review was conducted by the CNSC. It is tasked pursuant to s.65.14 with determining whether the amount of penalty was in accordance with the *Regulations* or whether there was a violation, or both. The burden is on the designated officer who issued the Notice of Violation. The burden is to establish, on a balance of probabilities (and not beyond a reasonable ground), that the identified violation has been committed. In the case at bar, the alleged violation is found at paragraph 26(e) of the *Act*. The whole section reads:

Prohibitions

26 Subject to the regulations, no person shall, except in accordance with a licence,
(a) possess, transfer, import, export, use or abandon a nuclear substance, prescribed equipment or prescribed information;
(b) mine, produce, refine, convert, enrich, process, reprocess, package, transport, manage, store or dispose of a nuclear substance;

Interdictions

26 Sous réserve des règlements, il est interdit, sauf en conformité avec une licence ou un permis :
a) d’avoir en sa possession, de transférer, d’importer, d’exporter, d’utiliser ou d’abandonner des substances nucléaires, de l’équipement réglementé ou des renseignements réglementés;
b) de produire, de raffiner, de convertir, d’enrichir, de traiter, de retraiter,

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| <p>(c) produce or service prescribed equipment;</p> <p>(d) operate a dosimetry service for the purposes of this Act;</p> <p>(e) prepare a site for, construct, operate, modify, decommission or abandon a nuclear facility; or</p> <p>(f) construct, operate, decommission or abandon a nuclear-powered vehicle or bring a nuclear-powered vehicle into Canada.</p> | <p>d'emballer, de transporter, de gérer, de stocker provisoirement ou en permanence ou d'évacuer une substance nucléaire ou de procéder à l'extraction minière de substances nucléaires;</p> <p>c) de produire ou d'entretenir de l'équipement réglementé;</p> <p>d) d'exploiter un service de dosimétrie pour l'application de la présente loi;</p> <p>e) de préparer l'emplacement d'une installation nucléaire, de la construire, de l'exploiter, de la modifier, de la déclasser ou de l'abandonner;</p> <p>f) de construire, d'exploiter, de déclasser ou d'abandonner un véhicule à propulsion nucléaire ou d'amener un tel véhicule au Canada.</p> |
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[10] The dispute which is the subject of adjudication by the CNSC turns on whether the Applicant, NexGen, was conducting work that was in the nature of the preparation for or construction of a future site of a uranium mine and mill.

[11] In order to have an appreciation of the request for further disclosure, it is necessary to review the facts which were alleged to constitute preparation for or construction of the site of a uranium mine.

[12] It is not a matter of dispute that a uranium mine or mill is a nuclear facility. The record shows (Notice of Application, para 10) that on February 14, 2019, NexGen made its application

to prepare the site and construct a uranium mine and mill on Patterson Lake, in northern Saskatchewan (Rook-1 Project). At the time the Notice of Violation was issued, no licence had been issued. The allegation, as already seen, is that the work conducted by NexGen had at least reached the stage of preparation of the site, and thus a licence had to be issued in application of 26(e) of the *Act*. NexGen contests that finding.

[13] The problem is said to have been that unconsolidated ground conditions for the surface down to basement rock may require freeze-ring infrastructure to freeze the ground in order to allow safe construction of the production and ventilation mineshafts. If the work done constitutes mineral exploration activities, ss. 2 (2) of the *Regulations* exempts “prospecting on surface exploration activities”. Simply put, as long as NexGen is in its exploration phase, no licence under paragraph 26 9(e) of the *Act* would be mandated. In Saskatchewan, the Ministry of Environment has issued such a permit for NexGen’s exploration.

[14] It is in November 2023 that Saskatchewan counterparts advised staff at CNSC that NexGen had constructed two large pads (100 m x 100 m each). Their location is said to be consistent with two mineshafts described in NexGen’s application. Followed a request from the staff at CNSC on December 20, 2023, for further information in order to determine if the activities had constituted site preparation.

[15] The Notice of Violation refers specifically to two statements made by NexGen in its response to the request in its letter of January 5, 2024. I reproduce the two statements:

“With respect to “whether and how the pads will be incorporated into NexGen’s proposed finished site”, as described in the Application and restated above, the purpose of the pads is to create a work platform for the provincially approved design confirmation drilling program. These pads are considered temporary structures and have not been considered for, requested for approval as, nor designed to accommodate, the deep civil foundations that would be required as part of the proposed Rook I Project that is the subject of ongoing Federal approval processes.”

The purpose of “design confirmation drilling” is described in the following fashion:

“The objectives of the design confirmation drilling are to collect data to validate ground conditions, drilling accuracy, and inform detailed engineering design.”

[16] The response seems to have prompted a CNSC staff visit of the site on January 16, 2024, during which the two pads were viewed and drilling activities on the pads were witnessed.

[17] Four months later, on May 13, 2024, NexGen informed the staff that the design confirmation drilling was now complete. The disturbed areas were to be decommissioned and reclaimed during the summer. That made the CNSC staff conclude that the pads and the design confirmation drill holes on the pads were to be decommissioned. That made them believe that the work done was temporary. That in turn supported the conclusion that these were exploration activities. If that is so, that did not constitute site preparation or construction activities. In other words, there was no violation of s.26 (e) of the *Act*.

[18] However, an interview for the benefit of investors, involving TD Securities and NexGen took place on October 8, 2024. The video stream was publicly available, and the CNSC staff was watching. It is said that they learned:

- That two large ‘shaft pads’ for the production and exhaust shafts for the Rook-I Project were in place.
- That ‘freeze-rings’ were in place and ready to go pending approvals.

(Notice of Violation, para 11)

I add that two portions of transcripts of the conversation giving rise to the understanding of the CNSC staff are appended to the Notice of Violation.

[19] One week later, on October 15, staff was informed by functionaries in Saskatchewan “that an array of holes in the form of a ring at each pad at the Rook-I site was present in May of 2024” (Notice of Violation, para 12). Furthermore, there was signage at one of the pads at the site indicating “Production site”. That same day, CNSC staff requested clarification from NexGen, which came three days later. NexGen responded that the holes were not related to the construction of the proposed nuclear facility. They were for geotechnical characterization and design confirmation purposes.

[20] That led to another inspection of the site. I reproduce paragraphs 14 and 15 of the Notice of Violation, which appear to be central to the case:

14. On November 19, 2024, a CNSC inspector conducted a site inspection. CNSC staff confirmed the presence of the rings of cased and capped drill holes filled with brine solution on each of the large pads. The inspection also identified signage present at both of the pads indicating that the areas were the future sites for

both the production and exhaust shafts (inspection report Attachment A #8).

15. The location of both drill pads and the ring of drill holes (See Attachment D Photos 2 and 4) viewed during the November 19, 2024, inspection align with the drawings and description (see Attachment C) provided in the licence application document “Ground Freezing FEED Stage Design for the NexGen Rook 1 Shaft Sinking (Attachment A #2) of the proposed Rook I facility. For example, the number of holes on each pad corresponds exactly with the number of holes in NexGen’s design for freeze infrastructure for that pad. There has been no updated version of these licensing documents provided since their latest version from July 2023.

[21] Of course, staff gave NexGen the opportunity to comment on observations made.

Questions or observations came on November 21, 2024. The response of December 3, 2024, according to the staff, was a reaffirmation that the drill holes were design confirmation drilling.

[22] The designated officer compared the on-site observations of November 19 to NexGen’s licence application. The conclusion was that the ring-shaped array of holes are freeze-rings. According to NexGen’s own plans, they are necessary for the construction of the nuclear facility. That constitutes in the view of the designated officer a violation of s.26(e) of the *Act*, in that it is considered to be preparing construction of a site without having obtained the required licence from the CNSC.

[23] The Notice of Violation concludes by calculating the administrative monetary penalty (*Administrative Monetary Penalties Regulations (Canadian Nuclear Safety Commission)*, SOR/2013-139). There is a formula which considers seven factors to which a score (called “scale

of regulatory significance”) is given by the designated officer with justification. The total is thereafter multiplied by a dollar amount. The penalty was calculated as being \$29,080. The seven factors are:

- compliance history;
- intention or negligence;
- actual or potential harm;
- competitive or economic benefit;
- efforts to mitigate or reverse effects;
- assistance to the Commission;
- attention of Commission.

The Notice of Violation is dated December 12, 2024. It bears the designated officer’s signature.

II. The Decision Under Review

[24] As we have already seen, the imposition of an administrative monetary penalty can be reviewed (both the penalty and the facts of the alleged violation). NexGen requested such a review by the CNSC: it wanted reviewed the actual commission of the violation and the monetary penalty. The request came on January 9, 2025.

[25] The hearing took place on April 8, 2025. I have read the transcript of the hearing. The designated officer presented the case for the violation. NexGen offered its perspective on the case. I note that counsel of record for NexGen in this case was also present at the hearing and he offered observations.

[26] The decision concludes that the monetary penalty should be reduced to \$11,920, in view of the different weight associated with the factors to be considered (para 59 to 96).

[27] The first half of the Record of Determination deals with the violation. It found that the burden of proof, which resides on the designated officer, was discharged on the balance of probabilities. The violation identified in the Notice of Violation was established.

[28] NexGen's own application for a licence indicated that the unconsolidated ground conditions were such that the construction of the nuclear facility would require a freeze-ring infrastructure to freeze the ground. The question to be determined is whether the work done by NexGen was exploratory, which does not require a licence issued by the CNSC, or was rather site preparation of a uranium mine and mill.

[29] Having reviewed the evidence put forth by the designated officer and appearing in the Notice of Violation, as well as NexGen's contention, supported by its own evidence, according to which the design confirmation drilling program was merely exploratory in nature, the CNSC panel confirmed the violation.

[30] In essence, the designated officer considered that the design confirmation drilling program, which indeed consisted of two large circular arrays of cased drill holes, was more than exploratory and became site preparation and construction. NexGen never informed staff that its design confirmation drilling would have the same number and location of holes as was specified by its freeze-ring design. Nor was it known that the holes were to be cased and preserved. The

holes were cased and filled with brine for preservation, contrary to other holes that are decommissioned by being cut down and backfilled, cemented, or grouted. The two large circular arrays of holes, cased and preserved, as is the case here, are consistent with the design submitted by NexGen as part of its licence application. It is not because further work will be needed that the work already done cannot constitute site preparation and construction work.

[31] NexGen was adamant that its work was exploratory:

- the design confirmation pads are temporary structures;
- the drill holes are needed to provide information on subsurface conditions;
- the holes are analogous to many other exploration holes that remain across the Rook 1 site. The holes are merely the product of the design confirmation drilling, which is considered exploratory in nature in the mining industry. The program's purpose is to provide information required to refine the engineering design of the freeze infrastructure, among other things. Indeed, the program was authorized by Saskatchewan as focused on geological aspects of the project, not construction. On the other hand, it was confirmed that there are no plans to decommission the design confirmation drill holes.

[32] The CNSC panel summarized the Applicant's position as being "that the design confirmation drill holes are not freeze holes and do not contain the necessary infrastructure required to freeze the ground and prepare the shafts for construction" (Record of Determination, para 56). Since work would be required for the existing holes to become suitable to support ground-freezing operations, the site preparation and construction stage had not been attained. NexGen representative stated during the hearing before the panel that "Repurposing of

exploration drill casings is common practice both prior to and following commencement of site preparation activities, a primary example being for the installation of instrumentation that is used for groundwater monitoring during environmental assessment baseline studies” (transcript, p.16, Motion Record, p.544)

[33] The CNSC panel accepts that the boreholes do not constitute a freeze-ring. But the issue is that the *Act* prohibits construction and site preparation while NexGen’s argument focuses on construction activities. At paragraph 52 of the Record of Determination, the Commission finds that the confirmation drill hole locations directly connect the drilling activities to site preparation and construction, and that the freeze holes are the act of establishing basic infrastructure to support the future construction. There was a reasonable basis for the designated officer to find that NexGen made its design confirmation drill holes in the same number and the same location as already specified in its freeze-ring design. Moreover, the holes have been cased and preserved; NexGen has no intention of decommissioning them. If the holes were intended for exploration, NexGen would intend to decommission them. That leads the panel to conclude as follows:

57. The Commission recognizes that the practice of design confirmation drilling may be a good practice in the mining industry; however, that does not mean that it can be undertaken without a CNSC licence when it relates to a uranium mine. Since the circular array matches exactly in size and number of holes with the drawings and description provided in the licence application document *Ground Freezing FEED Stage Design for the NexGen Rook I Shaft Sinking* of the proposed Rook I nuclear facility, the Commission finds that the work performed by NexGen was site preparation work. This work was performed with the goal of assessing whether the site is suitable for the shaft construction and NexGen planned to reuse the drill holes as they were preserved for the future.

58. The activities being undertaken were part of the licence application and are part of the site preparation for or construction of the proposed nuclear facility. This activity required Commission authorization under the NSCA. As a result, NexGen committed the violation stated in the Notice of Violation associated with 2024-AMP-06.

[34] The CNSC panel acknowledged that “there’s room for more clarity and guidance in the definition of site preparation for uranium mines and mills under the CNSC regulatory framework, including REGDOCs 3.5.1 and 3.6. The Commission also recognizes the evolution of mining techniques and practices over the years since the coming into force of the UMM Regulations” (Record of Determination, para 55). The panel also acknowledged the following:

37. The Commission acknowledges that NexGen’s design confirmation drilling program was undertaken in accordance with a permit from the Province of Saskatchewan. As a result, the Commission recognizes that NexGen could have reasonably come to the view that the design confirmation drilling constituted exploration.

38. However, the Commission is not satisfied that these activities were solely exploratory, entirely outside of the purview of the NSCA.

Moreover, the panel explicitly notes at paragraph 25 the comment of the designated officer according to which, had the staff been told by NexGen that “their planned design confirmation drilling would involve drilling the same number and location of holes as specified by their freeze ring design, and that the holes would be cased and preserved, and that they would not be decommissioned with the two large pads”, the staff would have advised NexGen of the violation because that would constitute preparation of site and construction.

[35] It is in that context that I understand the two comments with which NexGen takes issue.

The first one is in the introductory observations at paragraph 12:

12. With this decision, the Commission emphasizes that NexGen should not undertake any additional work at its Rook I site without first communicating with CNSC staff. While CNSC staff cannot authorize any activities that would be subject to a licence under the NSCA, the Commission expects NexGen to seek advice and direction from CNSC staff, and clearly communicate its intentions for any future work at the Rook I site. NexGen must understand what is and is not acceptable between now and the upcoming hearing on the Rook I environmental assessment and licence application.

This is supplemented by this concluding remark at paragraph 99:

99. Before closing, it's worth noting that the Commission finds this situation regrettable. This proceeding has made it clear that there is a communication issue between NexGen and CNSC staff. The Commission expects licence applicants to be forthcoming and to work with CNSC staff in a productive way. Applicants should be clear about their intentions and CNSC staff should be clear about the regulatory requirements and expectations for applicants. Where there are questions or uncertainties, applicants should seek clarification from CNSC staff. The Commission encourages NexGen and CNSC staff to establish a process to explicitly document all their exchanges and interactions, including meetings and site visits, and encourages further dialogue to ensure that there are no misunderstandings for future licensing processes.

[My emphasis.]

In other words, this imbroglio over what constitutes “exploration” as opposed to “site preparation and construction” could perhaps have been averted if the parties had had in place better communications.

[36] The administrative monetary penalty was reduced from \$29,080 to \$11,920. That result was attained by the CNSC panel downgrading the severity of the factors assessed by the designated officer:

[37] compliance history: from 2/5 to 0/5. I note that once again, the CNSC acknowledges the lack of clarity about what constitutes “exploration” and what is “site preparation”;

- degree of intention or negligence: from 5/5 to 1/5. Again, the CNSC acknowledges the lack of clarity of “exploration” and “site preparation”;
- Actual or potential harm: 2/5 maintained;
- Competitive or economic benefit: from 5/5 to 1/5;
- Efforts to mitigate or reverse effect: maintains 3/ (-2 to 3);
- Assistance to the Commission: from 2/ (-2 to 3) to 1/ (-2 to 3). Again, the CNSC acknowledges the lack of clarity of “exploration” and “site preparation”;
- Attention of the Commission: from 2/ (-2 to 3) to 0/ (-2 to 3). Again, the CNSC acknowledges the lack of clarity of “exploration” and “site preparation”.

The severity of the violation is therefore discounted, and the penalty imposed is reduced in view of extenuating circumstances for five of the seven factors.

[38] In sum, the sole issue before the CNSC panel was whether the activities conducted by NexGen went beyond exploration and attained the level of site preparation and construction. The panel found that the activities crossed the line. However, the lack of clarity in the definitions was such that the severity of the violation was mitigated, translating in an administrative monetary penalty discounted by some 60%.

III. The Notice of Application

[39] The Applicant challenges on judicial review both the finding that a violation has occurred and the reduced penalty.

[40] The grounds invoked for the review include:

- a. erred in interpretation of s.26(e) of the *Act*:
 - by making an *ex post facto* determination of the nature of the activity conducted by NexGen;
 - by incorrectly applying or interpreting CNSC’s regulatory guidance;
 - by interpreting “exploration” and “site preparation” inconsistently with the *Act*, the *Uranium Mines and Mills Regulations*, as well as the relevant guidance;
 - by intruding on provincial jurisdiction over mineral exploration activities through a determination of what constitutes “site preparation” which exceeds reasonable limits of federal jurisdiction under s.71 of the *Act*;
 - by finding that activities (in particular the Design Confirmation Drilling) simultaneously constitute “surface exploration activities” under UMM Regulations and “site preparation and construction” under s.26(e) of the *Act*;
- b. erred about burden of proof:
 - by, says the Applicant, the CNSC reaching the conclusion that, despite concluding that NexGen could reasonably have come to the view that the drilling constituted exploration, the violation was nevertheless established;
 - by acknowledging that despite, acknowledging that there could have been greater clarity on what constitutes “site preparation” within the regulatory framework, the violation was nevertheless established;
- c. the CNSC made unreasonable findings (fact and mixed fact and law) in reaching the conclusion that the completed work constitutes “site preparation and construction”;

- too much weight on comments made by NexGen during the conference call on October 8, 2024;
 - too much weight on signage at the shaft pads;
 - accepting the designated officer's conclusion that the ring-shaped arrays of holes were freeze-rings necessary for construction;
 - insufficient weight given to the own CNSC's determination (as of February 12, 2024, based on site visit of January 16, 2024) that the work to date was consistent with exploration. CNSC erred in accepting evidence of staff not present on January 16 despite NexGen personnel who were on site;
 - failure to give sufficient weight to authorization by the Province of Saskatchewan for exploration activities;
 - the information obtained through the Design Confirmation Drilling was not required for the Applicant's licence application, despite CNSC subsequently requesting detailed design information and data;
 - the Applicant's statements about the potential future use of the drill holes were mischaracterized;
 - finding that the decommissioning plan, which is said to be associated with the provincial permit, was limited to drill pads and not drill holes is contrary to evidence that the plan covered both;
 - unreasonably accepting the contention that the drill holes constituted site preparation despite acknowledging they would require additional work to be used for ground-freezing;
- d. erred by accepting conclusion that the administrative monetary penalty was issued within the statute of limitation (s.65.09 of the Act);
- e. procedural fairness was violated in the administrative monetary penalty process:
- by the hearing being conducted "by the Commission which is not independent of the CNSC, which creates heightened obligations on the Commission to ensure a fair process" (Notice of Application, para 41(a)) [transcribed as in the original];

- by the failure of the CNSC to implement processes to ensure sufficient independence from staff;
 - by not providing the Applicant an opportunity to conduct a cross-examination of the designated officer. The CNSC failed to test evidence in spite of conflicting evidence;
- f. the CNSC exceeded its jurisdiction by giving opinion on matters outside the scope of an administrative monetary penalty review and by issuing prospective direction regarding future conduct and communications;
- g. by making unreasonable findings in assessing the administrative monetary penalty. The CNSC relied on irrelevant considerations and failed to give sufficient weight to evidence offered by the Applicant concerning the harm from drilling activities.

IV. Notice of Motion

[41] The Notice of Application includes at paragraph 50 a request pursuant to rule 317 for material relevant to the application and in the possession of the tribunal. It reads:

50. Pursuant to Rule 317 of the Federal Courts Rules, the Applicant requests that the Commission send to the Applicant and to the Registry a certified copy of the complete record of the proceedings that are the subject of this application for judicial review, which includes, but is not limited to, all documents created, considered, submitted to or relied on by the Commission in relation to the Notice of Violation issued December 12, 2024, the Administrative monetary Penalty (2024-AMP-06), and the Decision (Record of Determination, DET 25-H109 In the Matter of NexGen Energy Ltd) issued May 16, 2025, including, without limitation, all correspondence between the Designated Officer and the Commission Review panel, any correspondence between the CNSC and any third party with respect to the Design Confirmation Drilling not being in compliance with NSCA and the origin of the allegation of non-compliance, including government entities and industry participants.

[42] The Notice of Motion seeks a supplementary Certified Tribunal Record. In the alternative, is sought an order from this Court requiring the CNSC to submit an affidavit (from a knowledgeable official) which discloses:

- the steps taken to assemble the Certified Tribunal Record (July 14, 2026);
- whether the items listed in an annex to the Motion were before the CNSC panel which rendered the decision (Record of Determination);
- any item not before the CNSC panel; in that case, what is the basis on which it was excluded.

[43] The Notice includes specifically paragraphs 12 and 99 of the Record of Determination, which are reproduced at paragraph 35 of these Reasons and Order. They are said to be prospective directions concerning future conduct and communications. NexGen qualifies these two paragraphs of “admonishment”.

[44] The “deficiencies” identified by NexGen are:

- missing pages or attachments of produced documents;
- documents identified as missing in submissions and said to be incorporated by reference;
- “other documents referenced in the parties’ submissions to the CNSC that are material to what was known by whom and when and to key evidentiary disputes” (Notice of Motion, para 14(c)). [Transcribed as in the original].

[45] The tribunal responded that the Certified Tribunal Record already produced included all records before the Commission. The materials referred to by the Applicant are not part of the

tribunal record. The rule 317 purpose is not to turn the disclosure of what was before the decision maker into discovery or a fishing expedition.

[46] The annex to the Notice of Motion (Schedule A) lists documents claimed to be missing. They fall in three categories:

- complete copies of documents, portions of which are missing;
- documents referenced in parties' submission by number (e-Doc) which are not included in the CTR (original Certified Tribunal Record);
- documents referenced in the submission or relied upon in the proceedings which are not included in the CTR. A list of ten documents (correspondence, notes, photographs) is supplied.

I have appended to the Reasons and Order a copy of Schedule A.

V. The Position of the Parties

A. *Nexgen*

[47] The Applicant presented Written Representations which were supplemented by an extensive Reply. I begin with the Written Representations.

[48] The Applicant considers that the purpose of rules 317 and 318 is to ensure a meaningful review. Immunization of administrative decision-making is to be prevented. The assertion that the material before the CNSC was the only material that ought to have been disclosed should not

be accepted. The Court may, and should, require the CNSC to produce the missing material or file an affidavit explaining why materials were not produced.

[49] In support of its contention that the purpose of rules 317 and 318 is to ensure meaningful review based on a complete record, the Applicant refers to two well-known Court of Appeal cases: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 and *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245, paras 15-18 [*Canadian National* (2023)]. That results in disclosure being ordered, says the Applicant, so long as there exists an “arguable case” that the documents sought are relevant to the pleaded grounds. It adds that when the decision is made in an ongoing regulatory context, access should be granted when “relevant materials may exist in related files” (Written Representations, para 27).

[50] Having pleaded a violation of procedural fairness (lack of independence from staff and absence of cross-examination of the designated officer), the scope of production is broadened. But the Applicant concedes that in those circumstances, only materials that are relevant to the fairness issue could be ordered disclosed.

[51] The Applicant contends that the exhortations for the Applicant and the CNSC staff to communicate better are “admonishments” which consist in forward-looking directions. That puts in play the role of the participants in the ongoing regulatory relationship. That, claims the Applicant without any authority in support, “strengthens the relevance of (i) communications between the Designated Officer/Staff and the Commission review panel, and (ii) communications with third parties (including provincial government counterparts) concerning

the origin and development of the alleged non-compliance” ... (Written Representations, para 34). What could be the relevance? The Applicant seems to speculate that “those communications” may bear on:

- “whether there were undisclosed *ex parte* communications or improper influences...;
- whether the Commission remained independent of Staff in an adjudicative process;
- the factual foundation for the Commission’s findings; and
- the reasonableness and jurisdictional propriety of including the Admonishment as part of the Decision”.

[52] The Applicant then moves more specifically to its contention concerning the categories of documents sought.

[53] First, it is contented that it is entitled to everything that was before the decision maker at the time it made its decision. That concerns missing pages and attachments to documents, that is documents that accompanied documents (*1185740 Ontario Ltd. v Canada (Minister of National Revenue)*, 1999 CanLII 8774 (FCA), 169 FTR 266, 247 N.R. 287, para 6). In that case, memoranda to the Minister indicated on the final page the word “attachments”. That made the Court of Appeal state that “To the extent that there were any attachments, they should be produced”. In the Written Representations, the Applicant states that the Court may order production of “attachments referenced in e-mails”. The Applicant suggests support in *Jewish National Fund of Canada Inc. v Canada (National Revenue)*, 2025 FCA 114. Walker J.A. found that the Applicant “has presented persuasive arguments that suggest the omission of specific, relevant materials from the proposed CTR” (para 24). Those specific documents were said to be

relevant (para 23). Schedule A to the Notice of Motion speaks of missing pages and attachments without precision. In fact the section of the Written Representations is entitled “the CTR appears incomplete”.

[54] The next category of documents concerns “referenced materials”. Here, the position taken by the Respondent is that footnotes or mere references to documents either in applications or submissions do not automatically become part of the record. They do not constitute attachments. The Applicant for its part falls back on the test found in rule 317: relevance and possession / control / power of the tribunal (not already in the possession of an applicant).

[55] The rule 317 request expressly sought the correspondence between the designated officer and the CNSC panel, and correspondence with third parties (government and industry). That concerns non-compliance allegations and their origin.

[56] The Applicant claims it is not expanding the scope of disclosure into discovery because it refers specifically to what it calls “material omissions” from the CTR. The documents requested are said to be referenced in the CTR. There is no precision as to what the “reference” is. NexGen argues that the “Court should not permit an approach that allows factual assertions or record references to be used before the Commission, while the underlying materials are withheld on judicial review. That would frustrate meaningful review and risks immunization” (para 47). The Applicant relies on *Canadian National* (2023) to argue that when demonstrating an arguable case that the documents might will be relevant, they should be disclosed.

[57] The Applicant goes on to refer to various items in its Written Representations (the 17 items appended to the Written Representations differ from the list appended to the Notice of Motion, which is appended to these Reasons and Order. In its Written Representations, the Applicant speaks of items that go beyond the 17 listed in its Schedule to the Written Representations). These items, and their justifications, are presented as examples:

- item 11: requests NexGen’s own initial complete application for a licence to the CNSC. That is said to be part of the “factual history”. In it, NexGen described its work for future development and advancing design, thus providing context for the interpretation of “exploration” compared to “site preparation”. No indication is given as to why NexGen did not include its own application in its contestation of the administrative monetary penalty;
- item 15: NexGen is searching for records evidencing “further facts” which got the CNSC staff changing its views after February 12, 2024 about the work done by NexGen being consistent with exploration. Neither in the Schedule A nor in its Written Representations or its Motion for Disclosure does NexGen identify what the documents may be, or whether they even exist. There is no indication either of the relevance of the documents, if they exist;
- item 16: NexGen requests all photos from site visits from January 16, 2024 and November 19, 2024. Comparisons were made and NexGen claims that selected images may not tell the whole story;
- items 14, 17, 18, 19 and 20: the Applicant contends that these records would assist in establishing whether assertions made by staff were properly grounded: what information

was available to staff and put before the CNSC, and whether NexGen did in fact respond to and refute staff's concerns. These items are:

- item 14: records reflecting how staff became aware of and assessed the TD Securities web interview (October 8, 2024);
- item 17: correspondence between CNSC staff and the Saskatchewan Ministry of the Environment about whether drill holes were actively preserved and subject to provincial decommissioning requirements;
- item 18: "Records relating to: (i) the January 2024 desktop sharing referenced by NexGen; (ii) NexGen's May 13, 2024 offer to provide additional technical information; and (iii) the June 26, 2024 meeting and presentation to CNSC Staff";
- item 19: records of communications between CNSC staff and the Ministry of Environment concerning an email (January 15, 2024) referenced in submissions "regarding analytical data and the reliability of sampling results". No further details are offered as to the possible relevance of that information, if records exist;
- item 20: the email of the Applicant in response to CNSC staff following November 25, 2024 email, as well as any related correspondence.

[58] This is as far as the submissions of the Applicant have gone. The Respondent has responded.

VI. The Respondent

[59] The Respondent offered the affidavit of Ms. Candace Salmon; she is the Registrar of the Canadian Nuclear Safety Commission. I note that Ms. Salmon acted as the Registrar for the hearing of this matter by the CNSC on April 8, 2025.

[60] Ms. Salmon bears the responsibility for the processing, recording, and directing of all the documents filed with the Commission. She is also tasked with recording all steps and events during the life of proceedings before the CNSC. She is of course assisted by some staff.

[61] The affiant insists on the independence of the CNSC as a quasi-judicial tribunal. It is a court of record (s.20 of the *Act*). The CNSC also maintains its independence from the staff by communicating only through the Registry and through formal hearings.

[62] When a matter is to come before the CNSC, the parties (which include the staff), file the documents on which they will seek to rely. The documents received are provided to the participants. The CNSC will receive the same bundle.

[63] Ms. Salmon testified as follows:

11. Copies of any additional materials that might have been referenced in these documents were not provided to the Commission Registry, and the Commission Registry does not search out materials to add to the record. These referenced materials were therefore not added to the record and were not before the Commission. Neither NexGen nor CNSC Staff asked for any such referenced materials to be added to the record. The

Commission did not direct that any such materials be added to the record either.

12. No material would have been added to the record of this proceeding without the knowledge of all participants.

...

18. As part of the proceeding, NexGen never raised any concerns regarding the completeness of the record for this proceeding. For example, NexGen never:

- a. asked for clarity regarding the content of the record, including whether documents referenced in a submission but not attached to it were part of the record;
- b. asked to add additional documents to the record (beyond the ones in paragraph 10 above); and
- c. asked to delay the proceeding so that it could gather more documents or evidence.

19. For clarity, the Commission Registry did not supplement the record of this proceeding beyond the materials provided by NexGen and CNSC staff.

[My emphasis.]

My review of the transcript of the April 8, 2025 hearing confirms that no concerns about the record were raised by the Applicant or the Respondent.

[64] The Registry confirms that all the documents provided to it were transmitted to the CNSC ahead of the hearing; they were included in the CTR. Conversely, the affiant confirms that the documents described in Schedule A to the Notice of Motion were not submitted to the CNSC, nor were they added, with two exceptions which were among the documents received from NexGen:

- a. item 4: the letter from NexGen is included at pages 192 to 213 of the CTR (it runs for some 600 pages).
- b. item 6: the letter to Premier Moe from the acting CEO of the CNSC is to be found at pages 317-318 of the CTR.

[65] Finally, an explanation is provided concerning what is described as an e-Doc. The Applicant sought disclosure of four e-Docs. These are part of an exclusively internal management system populated by documents added to the database by staff. Each document receives an e-Doc number, which allows for the retrieval of documents. That, says the affiant, “does not mean that a document has been filed with the Commission Registry or that the document has been before the Commission or added to the record of a Commission proceeding” (affidavit of Candace Salmon, para 23).

[66] The Respondent’s position, following in the footsteps of Ms. Salmon’s affidavit, is that there is no uncertainty as to what materials were before the CNSC. They were the materials filed by NexGen and the designated officer. Only that which was before the decision maker when a decision is made ought to be in the CTR unless exceptional circumstances are established. There are none here.

[67] The Applicant could have led the requested documents, many of which were in its possession. An attempt, *ex post facto*, to expand the scope of the CTR for that expanded CTR to be considered by this Court is not permitted. At any rate, the documents sought are not relevant

to the grounds of review. Bald allegations of violation of procedural fairness and lack of jurisdiction should not be entertained: this constitutes a fishing expedition.

[68] The Respondent highlights that only that which was before the decision maker is part of the CTR; thus, documents solely in the possession of CNSC staff, which were not presented to the CNSC panel, are not, and ought not to be part of the CTR. Indeed, the Applicant never raised any objection at the hearing of April 2025 either on procedural grounds or regarding the completeness of the record. The Record of Determination came on May 16, 2025. The Notice of Application bears the date of June 13, 2025. It is only on October 27 that the Applicant complained about the content of the CTR. A few days later, the CNSC responded that the requested documents were not before the CNSC when the decision was made.

[69] The fundamental argument offered by the Respondent is that only that which was before the decision maker when the decision was made, and not in the possession of the Applicant, is to be in the tribunal record (*Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224, para 7; *Girouard v Canadian Judicial Council*, 2019 FCA 252, para 17). There are limited exceptions to the rule, where there is an allegation of a violation of procedural fairness or some jurisdictional error. However, obtaining disclosure of material not before the decision maker requires a factual basis supported by evidence (*Access Information Agency Inc (supra)*, para 21; *Canada (Public sector integrity commissioner) v Canada (Attorney general)*, 2014 FCA 270, para 4). Raising a breach of procedural fairness to gain access to material is not permitted. It is a fishing expedition.

[70] The mechanism in judicial review applications of rules 317-318 is for the purpose of putting before the reviewing court the record that was before the administrative decision maker. It is not to supplement the record.

[71] There are exceptions to the rule. The Respondent refers to *Canada (Public sector integrity commissioner) v Canada (Attorney general) (supra)* where the Federal Court of Appeal states that the general rule is that the judicial review application must be decided on the basis of the information in the possession of the decision maker when the decision is made. If not before the decision maker, an applicant will have to establish the factual basis (supported by appropriate evidence) for one of “well settled” exceptions to apply. In that case, procedural fairness was the exception raised (as is oftentimes the case). The Court warned that establishing the exception is “particularly important because it prevents an applicant raising a breach of procedural fairness simply to gain access to material that the applicant could not otherwise access” (para 4). That is evidently the Respondent’s contention in this case that the Applicant raises exceptions to the general rule to thus seeks access to whatever may be found. Disclosure under rule 317 is not discovery.

[72] The Respondent argues that whatever was before the CNSC when it made its decision is in the CTR. In fact, the Applicant is in possession of many of the requested documents: it chose not to file them in evidence before the CNSC. The Applicant did not offer any evidence that there were other materials before the decision maker when the decision was made.

[73] The *Jewish National Fund of Canada Inc.*(*supra*) case cited by the Applicant is not applicable. It relied on documents obtained through an access to information request, no such evidence being present in the case at hand. More importantly, evidence (factual basis supported by appropriate evidence) about alleged bias, in that case which constitutes the exception of a violation of procedural fairness, giving access to broader disclosure, was presented. Not so in this case.

[74] Not only is the rule clear that only the material before the decision maker finds its way in the CTR, but the Applicant knew that documents merely referred to but not attached are not put before the CNSC (*Canadian Nuclear Safety Commission Rules of Procedure*, SOR/2000-211). Indeed, says the Respondent, being the author of many of the documents now requested, the Applicant was free to submit these in evidence. What is more, the Applicant was in possession of what was in the CTR ahead of its decision to file further documents. The Respondent identifies the following documents from the Applicant's Schedule A as being likely in the possession of the Applicant: items 1 to 9, 11 and 17. Finally, prior to or at the hearing of this matter on April 8, 2025, no concerns were raised about the adequacy or completeness of the materials put before the CNSC. As I noted before, having read the transcript of the hearing I note that I could not find any complaint about the state of the record before the CNSC, including on the part of counsel appearing on behalf of the Applicant (transcript, p.53-54, Motion Record, p.581-582; transcript, p.78 to 85, Motion Record, p. 606 to 613).

[75] The Applicant sought to expand the scope of documents that should be disclosed because of an ongoing regulatory context involving NexGen and the CNSC (*Bell Canada v 7262591*

Canada Ltd. (Gusto TV), 2016 FCA 123) [*Gusto TV*]. Not only none of the documents sought relate to past proceedings or broader regulatory experience, but the decision is with respect to a narrow and discrete issue: the review of a Notice of Violation with respect to a single issue and the imposition of an administrative monetary penalty. The issue was simply whether the Applicant had performed site preparation and construction of a uranium mine and mill facility. The Applicant contended that the work constituted exploration, which does not require a CNSC licence. There are no multiple files or past proceedings.

[76] The Applicant, in its attempts to broaden the scope of disclosure, raises three grounds: (1) jurisdictional error in view of the “admonishments”, (2) inability to cross-examine, (3) non-independence of the CNSC from staff. As seen before, mere allegations will not do (*Canada (Public sector integrity commissioner)*, para 4).

[77] The Applicant calls paragraphs 12 and 99 of the decision “admonishments”. Not so says the Respondent. These are encouragements by the CNSC for better communication between staff and the Applicant.

[78] Since, for disclosure to be ordered pursuant to rule 317, documents must be relevant to a ground of review, they must be in relation to the allegation in the Notice of Application that they constitute an excess of jurisdiction because the CNSC purports to issue prospective directions (Notice of Application, para 42). The Respondent argues that the requested documents are not relevant to the alleged excess of jurisdiction through “admonishments”.

[79] In effect, the Respondent takes issue with the Written Representations of the Applicant. In its paragraphs 32 to 34, NexGen seems to connect the “admonishments”, “ongoing regulatory relationship” and the possibility of “undisclosed *ex parte* communications or improper influences, particularly in connection with the genesis of the NOV and the AMP” and “whether the Commission remained independent of Staff in an adjudicative process” (taken from para 34 of the Applicant’s Written Representations, as reproduced at para 45 of the Respondent’s Written Representations). The Respondent claims that the allegation of an excess of jurisdiction does not justify the request for the documents having to do with undue influence and the independence of the Commission in its adjudicative process.

[80] The Respondent seems to assert that it is unclear what the Applicant tried to do with its paragraphs 32 to 34 of its Written Representations. The Applicant, in Written Representations, not on the basis of its Notice of Application, was attempting to make a case for documents which, perhaps, would reveal *ex parte* communications or improper influences, a lack of independence of the Commission and the reasonableness and jurisdictional propriety of uttering “admonishments”. Paragraphs 32 to 34 of the Applicant’s Written Representations are found under the title “Where procedural fairness (including bias) is pleaded, disclosure is broader”. However, how excess of jurisdiction by reason of an alleged forward-looking direction can support access to communications between staff and the Commission or communications with third parties (including provincial government counterparts) remains, arguably, elusive. That is the point made by the Respondent at its Written Representations at paragraphs 45 and 46. The purported jurisdictional error does not relate to any of the requested documents, and as such it cannot be ordered.

[81] The Respondent adds that, at any rate, paragraphs 12 and 99 of the Record of Determination are not reviewable because this is a non-binding suggestion. These comments are not part of the decision: the comments do not impact legal rights or impose obligations on the Applicant. An impermissible ground of review does not support disclosure of additional documents.

[82] There is no connection either between the allegation of bias (lack of independence between staff and the Commission) and the requested documents, pleads the Respondent. That connection had to be established by the Applicant: how are the documents relevant to the alleged partiality as pleaded in the Notice of Application? That constitutes a fishing expedition. The *Jewish National Fund of Canada Inc. (supra)* decision offered a particularized allegation of bias supported by evidence that the decision was in response to public pressure. Not so here. Moreover, in cases like *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884 at para 40 and *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, at para 20, the Supreme Court has found that the overlapping of functions in a single agency (investigations, prosecutions before the tribunal) “is not unusual, and does not on its own give rise to a reasonable apprehension of bias” (*Bell Canada*, para 40). For good measure, the Respondent makes the argument that the lack of impartiality had to be raised before the decision maker. The issue is certainly not new. The argument was not made at a time it could and should have been raised (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263, para 26).

[83] The inability to cross-examine has not been established as supporting any contention that the documents requested are connected to that kind of an argument. There must be relevance in view of grounds of review. Relevance has not been established. What is more, as in the other allegation of violation of procedural fairness, the Court should not entertain such argument on judicial review where the matter should have been raised at the time of the administrative proceedings (*Bernard*, (*supra*), para 26).

[84] The Respondent has appended to its Written Representations an annex, which addresses in a more extensive way the items found in the Applicant's Schedule A. The arguments are presented in a particularized way for every item. None of the items is deserving of further disclosure. The position is summarized at paragraph 54 of the Written Representations. The Applicant is likely in possession of items 1 to 9, and 11 and 17. The correspondence between Saskatchewan and CNSC staff, sought at items 12 and 13 is unrelated to the matter before the Court, including about an alleged jurisdiction error and violation of procedural fairness. Other requests are prohibited fishing expeditions.

A. *Reply by NexGen*

[85] NexGen saw fit to reply.

[86] NexGen submits that its Motion's purpose is to ensure that the documents already in the CTR are complete (pages and attachments) and to have materials that are relevant to procedural fairness and excess of jurisdiction grounds.

[87] The Applicant refers to its three pillars already advanced in its Written Representations:

- allegations of breaches of procedural fairness may allow broader disclosure;
- the ongoing regulatory context counts, “Relevant materials may exist in related files and may be admissible” (Reply, para 5);
- a tribunal may be required to explain the scope of its search in order to explain its alleged completeness of its production.

[88] Thus, NexGen contends that its allegations concerning fairness and jurisdiction are not “bald”, as argued by the Respondent. These are the independence of the CNSC from staff and the absence of cross-examination, and the prospective directives (“admonishments” in the words of the Applicant). The grounds of review also include the unreasonableness of the decision.

[89] The Applicant repeats its assertion, based on *Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201, para 21, that an allegation of a breach of procedural fairness opens the door to broader disclosure to documents in the possession, control or power of an administrative decision maker that are relevant to the allegation.

[90] The Applicant takes issue with the Respondent’s argument according to which NexGen had to object to procedural concerns. According to NexGen, its counsel objected: however, the Reply does not specify what counsel objected to. I have been able to find one objection. But it does not concern procedural fairness. Counsel referred in his “legal submission” to the use made by the designated officer of hearsay evidence in an inappropriate fashion. In the words of counsel, “...hearsay is admissible, but there are limits to everything...” (transcript, p. 52-53;

Applicant's Motion Record, p.581-582). Counsel did not explain during the hearing what the objection was based on other than stating: "And so, I just want to register this objection with respect to this evidence that Mr. Sigouin [the designated officer] has been giving. I presume it's evidence; I'm not sure if it's argument or evidence, but as Mr. McPherson said, the people that were there can speak to it. The people that were there could also have spoken to it on the CNSC side. They had the opportunity to come. It's Mr. Sigouin's burden. He can't do it this way" (pages 581-582). The other allusion to the objection I have found is at page 607. Counsel puts his "objection" as "...Mr. Sigouin's views or assessments or beliefs carry no imprimatur and no weight". Counsel did not explain how the designated officer ran afoul of subsections 20(3) and 20(4) of the *Act*. More importantly, the recorded "objection" was not about the announced concerns about procedural fairness.

[91] Was also challenged the view expressed by the Respondent that NexGen did not raise concerns about the adequacy or completeness of the materials put before the Commission. The Applicant puts in its Reply the second comments of Luke Moger in the extract I reproduce hereinafter. Mr. Moger was one of NexGen's representatives at the hearing. As in many things, context matters. Here is the complete exchange (Applicant's Motion Record, p. 491 to 493, transcript , p.47 to 49):

THE PRESIDENT: So, I've just got a number of questions from my perspective on it, but first question -- there appear to be -- there's a lot of correspondence, there's a number of inspections, a lot of dialogue and discussions that are documented in both the CNSC CMD and the proponent's CMD as well, and I just am curious -- well, I would like to know if there is any disagreement about that correspondence, anything missing, or are we agreed around the salient facts, the discussions, the inspections that have taken place? Just to get that out of the way.

So, first to NexGen.

LUKE MOGER: Luke Moger, for the record. I would say yeah, acknowledgment of correspondence that was exchanged. In terms of what information was or was not known, or inferred to be was and was not known, I think that's a separate question, you know, in terms of agreement or disagreement, if that's fair, Commission Member Tremblay. So, I just want to make sure I completely understand the question in terms of the –

THE PRESIDENT: That was it. That was it. I know that interpretations may be different, but I am asking you if the facts, as they are documented in the two submissions -- you take no argument with?

LUKE MOGER: Yes. In terms of the facts of the submissions back and forth, taken as -- yeah, those being the facts, and the key submissions recognizing the informal and other, formal, correspondence that Mr. Sigouin acknowledged as well outside of those -- so, it's not comprehensive or covers every single exchange, but it does highlight the key submissions that were made back and forth.

THE PRESIDENT: All right. Before I turn to the CNSC staff, there is a hand up there -- presumably NexGen?

JON HENDERSON: It's Jon Henderson, for the record.

I wanted to just acknowledge as well, in addition to the correspondence that was referred to formally in the request for review and the CNSC response, a number of meetings -- standing meetings throughout the year in 2024, we met consistently with CNSC staff both at the project officer level and at the director level. And during those meetings, we had, you know, provided updates on the status of design confirmation drilling, decommission reclamation, as well as offered to share information. We, you know, provided the information we understood that the CNSC staff were looking for, and -- but relied on those engagements as well, to take our cues in terms of what areas of interest from CNSC staff. And so, those are not currently called out, but I want to acknowledge those because they are important forums for discussion between NexGen and the CNSC staff.

[My emphasis.]

Evidently, the CNSC panel showed an interest in ascertaining that there was agreement around the salient facts, discussions and inspections that took place. There was no agreement as to how the evidence was to be interpreted, but Mr. Moger acknowledges that the key submissions are highlighted, though every single exchange is not covered. The transcript is clear: neither Mr. Moger nor Mr. Henderson requested any more in terms of adequacy or completeness of the record (assuming it existed) that could have made a difference. Counsel for NexGen did not comment either.

[92] Seeking to defend its argument that being in an ongoing regulatory context should allow a broader scope to the required disclosure, the Applicant resorts to the “admonishments” of paragraphs 12 and 99 of the Record of Determination for the proposition that the CNSC itself considered the matter in the context of an ongoing regulatory relationship. The Applicant argues, if I understand the point, that it opens the door to the disclosure of third-party communications concerning the origin of the non-compliance allegation. It cites in its Reply (para 18) a few words from a paragraph in the introduction by the CNSC to the hearing of April 8, 2025. Reference to a few words does not provide the gist of what was actually said, which in my view is rather innocuous:

We have received multiple letters about the future licensing hearing for NexGen Energy's proposed Rook I project. To be clear, this is not a matter that is before me today and is not a matter upon which I will receive evidence or argument.

(transcript, p.2, at p.530 of the Motion Record)

The paragraph came directly after the panel had defined its role as determining whether there was a violation of the *Act* and whether the penalty imposed was in accordance with the *Regulations*. The paragraph merely acknowledged the interest generated by the future licensing of the Rook-I project. That is not a matter before the CNSC on that day. The only thing to be considered was the violation alleged to have been committed, not the licensing of the project. In other words, the matter to be determined is a narrow one.

[93] Next, NexGen sought to make a case for the inclusion in the CTR of the identified e-documents in its list at Schedule A. There are four of them. There was not an attempt to address directly the Respondent's comments in its chart appended to its written submissions. The fourth such e-document is already in the CTR according to the Respondent. As for the other three such documents, these could have been, but were not attached to documents as evidence before the Commission; they were simply referenced in footnotes in the Applicant's request for review on January 9, 2025. The three e-Docs relate to correspondence between NexGen representatives and CNSC staff members. As pointed out by affiant Salmon, these are internal documents for the staff. They were not part of the CTR. The Applicant would be in possession of the correspondence to which it referred in the application for review of January 2025. At any rate, the Respondent makes the point that the relevance of the documents to a ground of review has not been established. The Reply did not add to how they could be relevant.

[94] The Applicant's contention that the record is incomplete goes further. It argues that the Respondent must explain why pages are missing. The affidavit by Ms. Salmon is not sufficient, says NexGen.

[95] The Respondent asserts that communications between the Saskatchewan Ministry of Environment and the CNSC staff are not relevant; the request constitutes a fishing expedition. The Applicant for its part claims that the Notice of Violation refers to an exchange of information which speaks to activities taking place at the site. That was referred to by the designated officer before the CNSC panel. Indeed the Record of Determination states that in November 2023, Saskatchewan informed (as part of normal information sharing, said the designated officer) that two large pads had been constructed. Context may be remembered. The web interview of October 8, 2024 conducted by TD Securities seems to have aroused suspicions. According to the Record of Determination, it was stated that two large shaft pads for production and exhaust shafts were in place, as well as freeze-rings, ready to go pending approvals. A week later, Saskatchewan advised that an array of holes in the form of a ring was present with signage indicating that the area was the “Production Shaft”. A month later, on November 19, 2024, an inspection of the site was conducted by the staff. It revealed the presence of rings of cased and capped drill holes filled with brine solutions. Signage was present indicating that the areas were the future site for both production and exhaust shafts. According to NexGen, it is entitled to know what was exchanged with counterparts in the Saskatchewan government. It does not explain why. There is no indication as to what is the relevance of the communications in view of the issue to be decided by the CNSC: did the work done constitute site preparation or exploration, a decision that rests with the Commission as the adjudicator on the basis of the record submitted to it by the staff and NexGen.

[96] Finally, the Applicant seeks to discount the requirement under rule 317 that the material requested be “not in the possession of the party” by claiming its entitlement to the integrity of the

record sought. No authority is offered in support of that proposition which defeats the very purpose of rule 317. In effect, that which was not produced before the Commission by the party who has possession could be brought in through the back door because it would be sufficient to speculate that it could include annotations or other changes differing from what NexGen possesses. There is no need to consider any further what amounts, in my view, to the prototype of a fishing expedition the purpose of which is to avoid the limited disclosure mandated by rule 317: that is not to say that it could never be entered. It is more that a general allegation cannot suffice.

VII. Analysis

[97] I have come to the conclusion that the Motion for Disclosure must be dismissed. The nature of a judicial review application, the binding authorities, the recognized scope of rule 317 and the matter effectively before the Court leave no other option but to dismiss the Motion. Here are the reasons.

What is the scope of disclosure under rule 317?

[98] A proper starting point may be what is the scope of rule 317. Close to twenty years ago, the Court of Appeal opined in *Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224 that “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” (para 21). This does not accord with the Applicant’s Written Representations at its paragraph 9: “Rules 317 and 318 exist to ensure meaningful review and to prevent the “immunization” of administrative decision-making through an incomplete record”. The Applicant’s submission is based on that view of the scope of rule 317-318. The reality is more complex.

[99] *Access Information Agency Inc.* is not an outlier. It was cited again in *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41, at para 17. The entitlement under rule 317, subject to recognized exceptions, is for a “party to receive everything that the decision maker had before it when it made its decision” (para 22). According to the evidence of the Registrar of the CNSC, that was done in this case. That was not disputed.

[100] Already in 2007, the Court of Appeal was not foreclosing the possibility that the scope of the discovery be broadened. But if the circumstances are such that there should be that broadening, the burden is on an applicant who will have the onus of advancing evidence to justify such a request over and above the strict requirement of rule 317. The Court insisted in *Access Information Agency Inc.* that the request not be in vague terms and that there be evidence in support of the request.

[101] The requirement that the scope of disclosure be limited to material that was before the decision maker did not emerge in 2007. In *1185740 Ontario Ltd. v Canada (Minister of National*

Revenue), 1998 CanLII 7910, Nadon J., then of this Court, decided that an applicant “is entitled only to those documents that were before the Minister [Minister Dhaliwal] 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” (para 11). The request for documents under the equivalent of rule 317 in that case was very extensive and well outside the parameters of the rule. The Court ruled that they were not within the purview of rule 317. The Court of Appeal agreed (*1185740 Ontario Ltd. v Canada (Minister of National Revenue)*, 1999 CanLII 8774). Two points were made by the Court of Appeal. On the authority of *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455, the Court found that only documents which were actually before the adjudicator in making the decision had to be produced. Documents relied upon by the investigator but that were not before the decision maker do not have to be produced unless there is evidence that they were inaccurately summarized. If not relied upon, the production would not be required unless an exception to that general rule applied. The second point was that the memoranda to the Minister, which had to be produced, showed on the final page the word “attachments”. That suggests of course that attachments were included in the memoranda that found their way to the Minister. Hence, the Court of Appeal stated that “If there were attachments, these also would have been before the Minister. To the extent that there were any attachments, they should be produced” (para 6). It is therefore the physical attachments which are to be produced because they are before the decision maker. The meaning of “attachments” is obviously circumscribed. In this day and age, documents transmitted to a decision maker electronically, to which documents are attached, would be producible in my view. That is not a situation which presents itself in this case.

[102] The rule is firm. In *Ron W. Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175, the Court recognized that the general principles are well established. “Only material “relevant to an application” must be produced. Relevance is determined by reference to the Notice of Application or, in this case, the Notice of Appeal” (para 10). In that case, as in this case, the Respondent objected to the production of documents not in front of the decision maker; furthermore, there was an affidavit confirming that what was in the CTR was what was effectively before the decision maker. The Court in that case saw “no reason to reject this clarification” (para 20). The same is true here. The limited purpose of rule 317, meaning that it is not discovery, is specifically recognized. That gets the Court to comment that “production of documents where there is no evidence of their existence” (para 41), or requests to create lists (para 42) are not possible under rule 317. The point of the matter is that rule 317 is to be strictly enforced (*Chateau d’Ivoire Stores Inc. v Canada (Attorney General)*, 2022 FC 405; 2023 FCA 100).

[103] In a case still followed, the Federal Court of Appeal explained the role played by a court of review and why the record before it is limited. In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, we read this passage which I reproduce in its entirety, even if quite long, because it underpins the critical framework that governs the examination of the matter at bar:

[14] Judicial review courts are often confronted with procedural questions such as the one posed in this case. The answers to these questions often rest in an appreciation of the different roles played by judicial review courts and the administrative decision-makers they review.

[15] A good example can be seen in the Supreme Court's recent consideration of whether a judicial review court can entertain new arguments on the merits (i.e., arguments that were not made to the administrative decision-maker): *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. In that case, the Supreme Court adopted a restrictive approach to new arguments because of the differing roles played by the judicial review court and the administrative decision-maker under review. It noted that the former was limited to its judicial review powers while the latter was the forum for arguments on the merits, including the fact-finding necessary for those arguments (paragraphs 23-28). In the case before it, the Supreme Court held that an exception applied, finding that "the rationales for the general rule have limited application [in this case]" (at paragraph 28).

[16] In my view, the Supreme Court's approach in *Alberta Teachers' Association* is a useful analytical tool for deciding a number of procedural issues in judicial review courts, such as the one before this Court in this case: whether the Julianio affidavit should be admitted. As we shall see, the Supreme Court's approach is really nothing new in this Court: it is embodied in this Court's existing case law on the admissibility of affidavits. This Court's case law shows that concerns about the differing roles played by judicial review courts and administrative decision-makers have shaped the law in this area.

[17] In determining the admissibility of the Julianio affidavit, the differing roles played by this Court and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for the Board – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.

[18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the

overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.

[19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), “[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court.” See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

(a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as factfinder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.

(b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness. For example, if it were discovered that one of the parties was bribing an administrative decision-maker,

evidence of the bribe could be placed before this Court in support of a bias argument.

(c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[My emphasis; some case citations omitted.]

[104] The re-examination of the approach to judicial review of administrative decisions undertaken in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; [2019] 4 SCR 653, *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, [2019] 4 SCR 845 and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 DLR (4th) 583 has not displaced the jurisprudence of the Court of Appeal. In fact, it has only strengthened it. For instance, in *Mason* the Court repeats that the role to be played by the reviewing court is not to conclude on the merits, but rather to examine the legality of the decision made. Most administrative decisions are reviewed on the standard of reasonableness, including questions of law other than a limited number of such questions, none of which is found in this case. Reasonableness is not a standard that allows for a review of the merits of an administrative decision.

What are the exceptions to the general rule and their scope?

[105] In subsequent cases, the Court of Appeal has insisted on particular features. Thus, in *Canada (Public sector integrity commissioner) (supra)*, the Court refers to the well-settled exceptions to the general rule (judicial review is to be decided on the basis of information in the

decision maker's possession at the time the decision was made) and it warns that the breach of procedural fairness cannot merely be invoked in order to gain access to material not otherwise accessible; there must be a factual basis supported by appropriate evidence.

[106] The same point was made in *Ford v Canada (Attorney General)*, 2023 FC 1513; 2025 FCA 26. The Court of Appeal endorsed the finding in our Court that “the party demanding more complete disclosure has the burden of advancing the evidence justifying the request” (FCA, para 5). In that case, Mr. Ford had raised a breach of procedural fairness in an attempt to broaden disclosure. The failure of the Applicant in that case to explain why the disclosure was relevant and necessary for the purpose of the grounds raised on judicial review was held against him (para 6). In our Court, Walker J, then of this Court, stressed that “Section 317 of the Rules is not intended to facilitate the disclosure of documents and information in the hands of a decision-maker”, citing *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153. The judge goes on to say that “Even if a party alleges a procedural defect, this does not allow it to engage in a fishing expedition in the hopes of discovering some documents to establish the claim” (para 28). Walker J. was quoting from *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66, at para 8. As a matter of fact, the Court of Appeal in *Humane Society of Canada Foundation* quoted paragraph 21 from *Access Information Agency Inc.*, which spells out that the purpose of rule 317 is to limit discovery to what is in the possession of the decision maker when the decision is made. In the words of our Court in *Ford*, “Section 317 of the Rules cannot be used for exploratory purposes” (para 35). At the very least, one draws from the case law that the purpose of rule 317 is to limit disclosure and that evidence and precision are needed when an exception to the general rule is invoked. Because of the very nature of judicial review,

the Courts must be respectful of the differing roles of reviewing courts and administrative tribunals. The fact-finding function is the province of the administrative decision maker. Where new evidence is permissible, it is limited to that which is relevant to the exceptions.

[107] The three “well settled” exceptions permit a limited possibility to add to the record put before the decision maker. After all, “evidence that could have been placed before the administrative decision-maker, here the Board, is not admissible before the reviewing court” (*Bernard (supra)* at para 13). In effect, the case follows in the footsteps of *Access Copyright*, insisting on the different roles played by reviewing courts and administrative tribunals. The general rule is rooted in larger values identified as the rule of law, good administration, democracy and the separation of powers. Having already reminded us that evidence that could have been presented to the administrative decision maker is not admissible on judicial review, since it is the administrative decision maker who has been mandated to examine to receive the evidence and decide the merits of a case, the Court notes that the procedural fairness exception must also be raised before the administrative tribunal:

[26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 195 D.L.R. (4th) 399; 264 N.R. 174; *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).

Thus, the procedural defect, which is the exception most often used, must be supported by evidence, but it must not have resulted from a failure to raise the matter before the decision maker. The new evidence is that which will support the exception, not to turn the exception into a general fact-finding exercise. That is consonant with the roles to be played by the decision maker and the reviewing court. That also underlines some more that the case is to be presented to the decision maker who has been designated by Parliament to resolve disputes. An applicant is not to treat the case before an administrative decision maker as a rehearsal for the main event before a reviewing court where the record can be supplemented with new evidence, or with old evidence not presented before the administrative decision maker.

[108] The Federal Court of Appeal has been steadfast in its jurisprudence on the admissibility of new evidence on judicial review. We have already reviewed *Access Copyright* and *Bernard. Sharma v Canada (Attorney General)*, 2018 FCA 48 is another case in point. The Court re-asserts that “Our role is to review the decision of the Appeal Division based on the facts before it. It is not to consider new evidence that should have been placed before the General Division and the Appeal Division” (para 9). In *Andrews v Public Service Alliance of Canada*, 2022 FCA 159, paras 16-24, the Court rejects the argument that the new information would assist the Court in understanding the nature of the case and the relevant circumstances. For the Court, it is beyond dispute that only evidence that was before the decision maker can be considered on judicial review. A reviewing court’s role is not to make its own determination of the merits of the matter. It rather examines the reasonableness of the decision. Indeed, what would be the purpose of admitting new evidence? The Court makes a critical observation that “for a reviewing court to accept fresh evidence on judicial review would be tantamount to performing a *de novo* analysis

of the evidence itself” (para 18). That consideration is very much alive in this case. What use can be made of evidence which was not before the decision maker? Moreover, the Court in *Andrews* refuses to consider new arguments on judicial review in view of its role. It states: “This Court cannot consider these new arguments because its role is strictly limited when performing a judicial review as noted above” (para 23). Other cases to the same effect include *Portnov v Canada (Attorney General)*, 2021 FCA 171, [2021] 4 FCR 501, *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, [2022] 1 FCR 3, at para 74, and *Landau v Canada (Attorney General)*, 2022 FCA 12, paras 9 and 11.

[109] In sum, a judicial review is not an appeal, and it is certainly not a trial de novo. As the binding case law shows the reviewing court considers the legality of the decision made by an administrative tribunal. It limits itself to the evidence before the decision maker, as its institutional role is to review, for legality not to decide the merits (*Vavilov*, para 83). It follows that the admissibility of new evidence is very limited. To the extent the decision is “based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, para 85), the reviewing court will show deference. That is why, in the end, only that which was before the decision maker is said to be relevant on judicial review. That appears to be specifically confirmed in *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, [2016] 3 FCR 19:

[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. Saskatchewan (Commission of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24 (commenting on a rule similar to Rule 317).

[14] This excerpt from *Hartwig* recognizes the relationship between the record before the reviewing court and the reviewing court’s ability to review what the administrative decision-maker has done. 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 error. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. See *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paragraph 276 (dissenting reasons but not opposed on this point).

[15] Rule 317 can fulfil another purpose that is less lofty but still important. Parties before the administrative decision-maker will often have in their possession all of the material the administrative decision-maker considered in making its decision. But not always. And sometimes parties may be unsure whether they do. Sometimes they wish to confirm exactly what the administrative decision-maker actually considered in making its decision. Rule 317 of the Federal Courts Rules provides a means by which parties can achieve those ends.

[My emphasis.]

The inadequacy of the tribunal records stems from not putting before the reviewing court that on which the administrative tribunal relied in making its decision. The affidavit of Ms. Salmon establishes that the Certified Tribunal Record contains that which was before the decision maker, and nothing else.

[110] The Applicant referred repeatedly to the Court of Appeal decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, *Jewish National Fund of Canada Inc. v Canada (National Revenue)*, 2025 FCA 114, *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 in an attempt to broaden the scope of the required disclosure. I now turn to a consideration of these cases.

[111] *Tsleil-Waututh Nation* consists of an updated review of the law disclosure. The Court insists that the evidentiary record before the administrative tribunal is indispensable in order to engage in a meaningful review. In fact, a lack of evidence may open the door to a finding of unreasonableness (para 72).

[112] It remains that the general rule is that which was stated in *Access Copyright*: the evidentiary record that was before the decision maker is admissible on judicial review. The Court eloquently stipulates why the scope of the evidence on judicial review is limited and its admissibility restricted:

[85] Finally, and perhaps most significantly, reviewing courts are not trial courts. Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers—not the reviewing courts—have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, e.g., *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 14-19; *Bernard* (2015), above at paras. 22-28. This consideration alone significantly affects the law of admissibility of evidence in the reviewing court, a topic I turn to now.

[113] The three “well settled” exceptions (the list is not closed) are referred to before the Court seeks to explain the limits of a request under rule 317. The Court does not depart from the case law already reviewed:

- Rule 317 plays a limited role, and it means what it says;
- Relevance is not what could be relevant in the hope of later establishing relevance;
- A reviewing court will read the grounds of review with a realistic appreciation of their essential character. Reference is made to *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 25, [2014] 2 FCR 557 where the Court warns against “sophisticated wordsmithing tools and cunning minds” and “skilful pleaders” (para 49);
- Rule 317 is restricted to the actual material before the decision maker when making the decision and nothing more;
- Rule 317 does not in any way serve the same purpose as discovery;
- Not everything that is admissible can be obtained under rule 317. Materials must be in possession of the administrative tribunal. Materials that, it is suggested, should have been before the decision maker are not to be produced pursuant to rule 317.

With respect, there was nothing new coming out of *Tsleil-Waututh Nation*. It confirms the evolution of the case law. The general rule is the same and the exceptions to the rule remain the same. As for rule 317, it is not a discovery tool. It serves the purpose of putting before the reviewing court the record that was before the administrative tribunal because the role of the reviewing court is limited to controlling the legality of the decision made. As for the exceptions,

the most relevant is where there is an allegation of a violation of procedural fairness. But, here again, the evidence that can be produced must be connected to the ground raised.

[114] *Canadian National* (2023) is another case deserving of special attention. In it, we are reminded that if documents and information relied on for the decision are withheld, “the spectre of immunization of decision-making arises” (para 10). Note that this applies to information on which the administrative decision maker relied, not to material that a party to the judicial review would want, in retrospect, to use. If a decision relies on documents which are not disclosed, it will be difficult to test whether the decision is legitimate. But the work, the “heavy lifting”, is done within the confines of rules 317-318. That implies that the reviewing court looks at the Notice of Application. The Court warns again against undue influence of “sophisticated wordsmithing tools and cunning minds” in seeking to understand the real essence of the application, “a realistic appreciation’ of the proceedings” (para 14). Then the Court exposes the fundamental tension which must be resolved in every case:

[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.

[16] In assessing what material is responsive to a Rule 317 request, the Court must pay close attention to context. For example, take a decision concerning a one-off, isolated matter. All of the documents and information leading to the decision will be found in the one specific file for the case. But take a decision that is just the latest chapter in an ongoing regulatory project consisting of multiple decisions. The documents and information will rest in the specific file for the case but also in related files. See generally *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin L.R. (6th) 175 at paras. 14-15.

[My emphasis.]

[115] Thus, it is what the administrative decision maker has relied on that must be disclosed so that public scrutiny and meaningful review can take place. I repeat, the judicial review's purpose is to control the legality of the decision made, not its merit (see recently, *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*, 2026 FCA 110). If material on which the decision maker relied is not before the reviewing court, the meaningfulness of the review is jeopardized. The general rule continues to prevail. The disclosure is concerned with documents and information leading to a decision. In a decision concerning an isolated matter, the said documents and information will be found in one file. If the matter is relating to an ongoing regulatory project where there have been multiple decisions, the information relied on may well be in related files. Not considering that information may serve to immunize the latest chapter of that ongoing regulatory project. As can be seen, issues that are linked should not be artificially de-linked.

[116] In *Canadian National* (2023), the Court found that there were underlying decisions that led, in part, to the decision under appeal (para 27). That explains why materials associated with the underlying decisions were relevant. We are told that “the material bears upon the revenue cap and price index that led to the decision challenged by CN” (para 26). It was not the mere fact that the CN is regulated by the *Canadian Transportation Agency* that created relevance. It is rather that the matter at hand was connected to prior decisions, rendering them relevant within the meaning of rule 317. With all due respect, there is nothing of the sort in the case at hand.

[117] In effect, the *Canadian National* (2023) resembles the decision in *Gusto TV* case (*supra*), which itself followed in the footsteps of *Canadian Copyright Licensing Agency (Access Copyright)* (*supra*). It is the evidence which was before the administrative tribunal that cannot be withheld without running the risk of immunization. In *Gusto TV*, the ongoing regulatory context was such that for some decisions, the administrative decision maker may go further than to focus on the evidence placed before it in the specific matter and may draw on “broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience” (*Gusto TV*, para 14). There is a connection with past proceedings which may make them relevant. It is not the ongoing regulatory context that opens the door to what ever a party would now want to add to the record on judicial review, but rather it is the data, or parts of those data, that become part of the record. Here is paragraph 15 from the *Gusto TV* decision:

[15] In those circumstances, past proceedings and regulatory experience can form part of the data the administrative decision-maker can draw upon in making a decision. Accordingly, parts of that data, identified by the parties as matters that the administrative decision-maker drew upon in making its decision, can form part of

the evidentiary record before the reviewing court. The inclusion of that data in the reviewing court's record can often be useful in assessing reasonableness: a decision at odds with past proceedings and regulatory experience might be suspect, while one that is consistent with past proceedings and regulatory experience might be more likely to be found acceptable and defensible.

[My emphasis.]

[118] NexGen tried to make hay out of its regulatory relationship with the CNSC. What was mentioned in its original submissions (para 33) was more prominently featured in its Reply. The point is that, if there is an ongoing regulatory context, it may be possible to access more material than was disclosed in the CTR. The case law just reviewed supports to some extent the proposition that the regulatory context would justify in some circumstances the ability to broaden the record. But the circumstances are limited as the two cases explain. The regulatory context writ large does not justify unprincipled broadening. It is the reliance on some decisions or data in the regulatory context that explains the relevance in a judicial review, that is a review based on the record in front of the decision maker.

[119] As in cases involving a breach of procedural fairness, raising regulatory relationships allows for more disclosure, to the extent that the administrative tribunal relies on that material. Not anything an applicant would want to put its hands on becomes allowable. What did the regulator rely on? Because of the intersection between the case itself and the ongoing regulatory relationship, regulators “may go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience” (para 14). The Court brings more precision concerning what is at stake. Thus, “parts of that data,

identified by the parties as matters that the administrative decision-maker drew upon in making its decision, can form part of the evidentiary record before the reviewing court” (para 15). There is a threshold that must be met, which was not met here: “When faced with a question of admissibility of this sort of data on judicial review, the reviewing court must be persuaded that there is at least a case for saying that the administrative decision-maker drew upon it” (para 16). There is evidently the concern that the record before the decision maker would be unduly expanded by sophisticated wordsmithing tools and cunning minds, turning a judicial review into a fact-finding exercise, resulting in a new set of facts requiring the reviewing court to become the merits decider. Preservation of the nature of judicial review appears to be paramount. On the other hand, if the decision maker drew in the context of an ongoing regulatory relationship on material outside what was placed in the CTR, the judicial review may be frustrated because of a truncated record.

[120] The *Gusto TV* case was concerned with the contents of the appeal book concerning a CRTC decision. Rule 317 was not mentioned. The Court in *Canadian National* (2023) saw a resemblance. In *Gusto TV*, it was data which was discussed. In *Canadian National* (2023), the Court was concerned with underlying decisions (the latest chapter) that led in part to the decision under appeal. In both cases, it is what has taken place prior to the decision under review which brings relevance to a fuller disclosure, as long as it is shown that the decision maker drew upon the material.

[121] What needs to be stressed is that in order for those data or decisions to be admissible, drawing upon the data or the previous decision appears to be essential. In the words of the Court,

“When faced with a question of admissibility of this sort of data on judicial review, the reviewing court must be persuaded that there is at least a case for saying that the administrative decision-maker drew upon it” (*Gusto TV*, para 16). Similarly in *Canadian National* (2023), there is that connection. I have not found any such connection in the case at bar. Indeed, the case appears to be rather of the “one-off isolated matter” variety. In the early stages of an eventual relationship, the CNSC found that NexGen should have sought the licence required by s.26(e) of the *Act*. The Applicant has not shown that prior decisions or data (or matters of that nature) as part of an ongoing relationship had any impact on what is a relatively simple issue: exploration or site preparation and construction.

[122] The case of *Jewish National Fund of Canada Inc. [JNF]* does not diverge from the line of authorities already reviewed.

[123] The case involves the revocation of the charitable status of the Applicant. The allegation was clearly one involving one of the three “well-settled” exceptions: procedural fairness in the form of an alleged bias. The Court does not depart from the general rule. The breadth of materials disclosable is increased as long as the documents are relevant to the allegation of bias. That, says the Court, does not permit a “fishing expedition in the hope of discovering material to establish their claim” (para 14).

[124] The allegation of bias was seen as not being a bald one, as the Appellant put before the Court examples of public and media pressure which were enough to consider the allegations that the decision was in response to significant public pressure. It is said that the pressure on the

Revenue Agency “reflected in internal communications and documents among CRA personnel, including personnel who were not involved in CRA’s audit of *JNF*” (para 15). That says the Court is a tenable ground of appeal as the ground of appeal is explained in some detail (para 17).

[125] But the Respondent had asserted that all relevant documents had been disclosed. In respect of the allegation of bias, the Court ordered that a supplemental search be made, with an affidavit to be filed if no further information were to be found.

[126] On the other hand, the allegation of an incomplete record before the Charities Directorate was not substantiated, such that exclusion or omission of materials in the CTR was established (para 21). The appellant in that case had not persuaded the Court “of the existence of further relevant materials considered by the Charities Directorate” (para 22).

[127] Finally, it appears that the *Jewish National Fund of Canada Inc.* was able to identify some specific documents which should have been included in the CTR, and to persuade the Court of Appeal judge that these documents, seemingly identified with precision, were omitted. Their production was ordered (para 24).

[128] The *JNF* decision merely confirms that bald assertions of a violation of procedural fairness will not suffice: That is consonant with *Canada (Public sector integrity commissioner)* (*supra*) where the Court of Appeal finds the requirement that be shown “a factual basis supported by appropriate evidence” (para 4). That requirement is “important because it prevents an applicant raising a breach of procedural fairness simply to gain access to material that the

applicant could not otherwise access”. In *JNF*, the Court ordered a new search to ensure that materials relevant to a tenable allegation of bias be conducted.

[129] The Court in *JNF* also found a factual basis about the omission of specific, relevant materials. It is not clear what they were, other than the suggestion that they (or some of them) were received in response to an access to information request. Without more, the case is of little assistance.

[130] This case is concerned with a simple regulatory matter. The *Nuclear Safety and Control Act* provides that “no person shall... prepare a site for, construct, operate, modify, decommission or abandon a nuclear facility” (para 26(e)). There is no dispute that NexGen’s project for a uranium mine or mill is captured by the definition of “nuclear facility” in the Act. If the exploration that has been conducted by NexGen had reached the stage of preparation of a site for a nuclear facility, or its construction, a licence would have to be issued by the CNSC. Hence, the debate turns on whether NexGen had reached that stage. The CNSC concluded that it had, but reduced significantly the administrative monetary penalty, finding that the various factors were not sufficient to justify the penalty assessed in the Notice of Violation. In my view, *Canadian National* (2023), *Bell Canada (Gusto TV)* and *Jewish National Fund* are of no assistance to the Applicant. They address limited situations that have not been shown to present themselves in this case.

[131] In our case, there are no underlying decisions, nor at least a case for concluding that the administrative decision maker drew on anything stemming from the regulatory relationship. In

effect, the Applicant has not shown how the matter is nothing other than a discrete dispute that should be dealt with on the basis of the evidence before the CNSC. The Applicant is not wrong that the decision (the Record of Determination) is within the overall context of the regulation of nuclear facilities. But neither *Gusto TV* nor *Canadian National* (2023) are authorities supporting the contention that the door to disclosure is wide open. It cannot be lost sight of the fact that this matter is solely concerned with the issue that the work performed by NexGen was found to be beyond mere exploration and had reached the level of site preparation. At this stage, the existence of a regulatory context is fairly modest and removed, and it has not been shown as changing the scope of the disclosure under rule 317.

[132] The CNSC also commented in its Record of Determination about the lack of adequate communication between the staff and NexGen (para 12 and 99 reproduced at para 35 of these Reasons and Order). It calls the situation “regrettable”. Those comments are presented by the Applicant as “admonishments” in the nature of some directive. There is in my view a strong argument, as offered by the Respondent, that this is no more than encouragement to communicate better in the future with a view to avoiding another situation. The Respondent argues that no obligation is created and that there is nothing reviewable by a court of law. There is context to these comments which helps provide the true meaning in view of an emerging relationship. During the hearing of this matter, the panel had this to say:

THE PRESIDENT: All right, thank you for that. I'll start with NexGen and go back to CNSC. We all appreciate the significance of this project, and these things are a long-term undertaking. You know, successful application will lead to years and years of operations and interactions between the operator, if you will, and the various authorities.

I'm just struck by the gap between the parties on this matter. And I'm just wondering, given the extensive and communications and correspondence that's taken place, why are we here today, and why is there such a gap between the parties? So just offer NexGen the floor around talking about this and kind of how and why you feel we got into this situation.

[My emphasis.]

[transcript, p.57-58; Motion Record, p.585-586]

When read in context, it is not easy to see a direction going forward. Rather, this appears to be a gentle encouragement not to reach the “Why are we here today?” stage in the future on account of deficient communications.

[133] But whether or not that could be portrayed on judicial review as some lack of jurisdiction, the point ought to be rather at this stage whether the alleged lack of jurisdiction opens the door to any of the items requested by the Applicant in its Motion. The Respondent is right that the Notice of Application pleads that the comments exceed the jurisdiction of the Commission. NexGen seeks to use paragraphs 12 and 99 of the Record of Determination as evidence that the CNSC considered the relationship as ongoing. That does not assist in establishing how a lack of jurisdiction in making those comments allows gaining access to material not before the decision maker. It was for the Applicant to persuade that there was a connection. It has failed to do so. The reliance placed on *Gusto TV* in the Reply is misplaced. The connection between an alleged ground and the information requested must be shown. The regulatory context alone is of no assistance.

How do these rules apply to the request for more disclosure?

[134] The Court is staying clear of the merits of this judicial review application. That is for another day. Its role is more modest. It consists in determining if there is a case for enlarging the CTR.

[135] What was before the decision maker is what has been transmitted to the parties. There is no reason to doubt the affiant, Ms. Candace Salmon, who is the Registrar at the CNSC. She says that what was submitted constitutes the CTR. That is what was before the CNSC to render its decision. Thus, the Applicant's request for disclosure goes beyond what was before the decision maker when the decision was made, what has been referred to as the "general rule". It follows that NexGen seeks to use exceptions to that general rule. As such, it bears the burden. Has the Applicant been successful?

[136] The grounds invoked for the judicial review of the decision under review (whether the work conducted by NexGen was exploration and not site preparation or construction) include exceeding jurisdiction, together with the reasonableness of the decision made (including errors of law which, according to *Vavilov* and its progeny, are reviewed on the reasonableness standard, except for limited exceptions) and violations of procedural fairness. Having reviewed the authorities that bear on the scope of rule 317 the Court turns its attention to these grounds more specifically.

[137] The Notice of Application details the Applicant's contentions about the merits of the decision, and thus its reasonableness. These issues were decided on the basis of the record before the CNSC. It is now too late to seek to add to the evidentiary record. It is what it is. Indeed, if it were permitted to add to the record *ex post facto*, it would be in an attempt to get the reviewing court to opine on the merits of the case in view of a supplemented record. This is an invitation that can only be resisted. The admissibility of new evidence has been repeatedly prohibited by the Court of Appeal for the very reason of the differing roles of administrative decision maker and reviewing courts. The general rule, requiring that only the record before the decision maker be made available to the reviewing court, works hand in hand with the role to be played by reviewing courts. It is for the administrative tribunal to proceed to assess the evidence put before it. It is for the reviewing court to assess the legality of the decision made on the record presented before the administrative tribunal.

[138] The jurisdiction issue concerns the issuing of prospective directions by the CNSC, which is a reference to the supposed "admonishment". The Applicant had to show the connection between the ground and any of the items requested. That demonstration has not been made.

[139] As for procedural fairness, the Applicant raised the alleged lack of independence of the Commission sitting as an adjudicator and the CNSC staff. It also complains about the inability to conduct the cross-examination (although NexGen did not oppose the statement made at the outset of the hearing; see transcript, p. 2-3; Applicant's Motion Record, p. 530-531).

[140] One of the exceptions to the general rule is of course when there is an allegation of violation of procedural fairness. An allegation of bias or lack of independence may require that the record be expanded in appropriate circumstances in order to allow the reviewing court to control the legality of decision made, that is whether there is a lack of independence. But what is asked for must be in relation with the ground raised. An allegation of a violation of procedural fairness does not give access to all sorts of information. The illustration given in *Bernard (supra)* is telling:

[25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662* (1998), 161 Nfld. & P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become functus a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

[My emphasis.]

It is that which is connected to the allegation that must be disclosed. Seeking through the means of an allegation of a violation of procedural fairness that which relates to the reasonableness of the decision would contravene the division of roles between the administrative tribunal and the reviewing court. At any rate, it is for an applicant to make the case for information that is relevant to their allegation. That was not achieved on this record.

[141] The Court must gain a realistic appreciation of the proceeding's essential character. As found by the Court of Appeal, simply invoking a violation of procedural fairness does not discharge an applicant of its burden. There is a requirement that there be a factual basis supported by appropriate evidence. In the words of the Court of Appeal in *Canada (Public sector integrity commissioner)* (*supra*), that requirement "is particularly important because it prevents an applicant raising a breach of procedural fairness simply to gain access to material that the applicant could not otherwise access" (para 4). And the material sought must be actually relevant, not material "that could be relevant in the hopes of later establishing relevance" (*Access Information Agency Inc.* (*supra*), para 21, as quoted in *Tsleil-Waututh Nation* (*supra*), para 108). Furthermore, an applicant who could reasonably have had the capacity to object before the administrative decision maker, and does not, cannot make its case later (*Bernard* (*supra*), para 28; *Sierra Club Canada Foundation* (*supra*), para 70-71: "Parties cannot keep their concerns to themselves, lay in the weeds, and then pounce on judicial review"). When considering a disclosure motion, context counts and courts are invited "to pay close attention to context" (*Canadian National* (2023) (*supra*), para 16). Simply labelling something as bias, lack of independence or of ability to cross-examine, or lack of jurisdiction will not do.

[142] NexGen would have been better inspired if it had actually indicated that the panel specifically referred to not only an absence of cross-examination but, also, that there would not be examinations of witnesses by any participant. The panel referred to the *Act* providing that the proceedings are to be conducted "as informally and expeditiously as the circumstances and considerations of fairness permit" (as stated at s.20 (2) of the *Act*). The panel stated that "Questions from the Commission are the tool to gather the required evidence" (transcript, p.2-3;

Motion Record, p.530-531). The Applicant cannot claim having been taken by surprise, that the designated officer was presenting the case and that the Commission was proceeding as it did. According to *Bernard* and *Sierra Club Foundation*, the matters should have been raised at the hearing. They were not. That should be fatal.

[143] Be that as it may, the Respondent also argues that there is no connection between the various items requested by the Applicant and allegations of breach of procedural fairness. What are the items requested that are relevant to the allegations of violation of procedural fairness? The Respondent is right and this should not be entertained any further. We are taken back once again to *Canada (Public sector integrity commissioner)* (*supra*): labelling as breach of procedural fairness is insufficient to allow access to documents. Reference to *Access Information Agency Inc.*, (*supra*) at paragraph 21, is an authority to the same effect quoted repeatedly since 2007. Factual basis supported by appropriate evidence is needed. And an applicant must connect the alleged breach to the documents it wants disclosed over and above the record before the decision maker. Not only a party should not let the announced process unfold, to then raise the objection that could, and should have been raised, but if it can be raised, there must be a connection between what is needed and the violation alleged. In the context of a motion for further disclosure, the ground concerning the inability to conduct cross-examination required a demonstration of the relevance to the items requested. The lack of demonstration made a red-herring of the contention.

[144] In my view, the reference to an allegation that the CNSC lacks independence from its staff does not fare any better. I have read and re-read the Applicant's submissions and Reply.

The Applicant does not dispute that an allegation of breach of procedural fairness constitutes an exception to the general rule. That exception allows disclosure of more than what was before the decision maker as the decision was made. The Applicant cites *Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201, at paragraph 21. But that authority does not purport to open the door to any new disclosure. It rather limits it: “Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure” (My emphasis). That is the connection that the Applicant had to make. It did not.

[145] It is in vain that I have looked for the Applicant to connect the dots, that is the documentation requested and the precise violation of procedural fairness. The burden was not discharged.

[146] As the Respondent noted, that an administrative agency has overlapping functions “is not unusual, and does not on its own give rise to a reasonable apprehension of bias” (*Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884, para 40). The unanimous Court goes on in that same paragraph 40 to refer to an equally unanimous Supreme Court in *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, at paragraph 41, where we read that “the overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role”. Given these well-known authorities, without more, the Applicant’s assertion is a bald one. The matter was raised by the Respondent. The Applicant had to state at least in its Reply how the fact

that there exist overlapping functions leads in this case to an absence of independence on the part of the adjudicator, together with establishing the relevance of the documents requested.

[147] In *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, the Court of Appeal does not allow a bald assertion in a Notice of Appeal to be a springboard to a fishing expedition. The Notice of Appeal read:

5. The Notice of intention to revoke and its confirmation violate the principles of procedural fairness and natural justice and should be quashed or vacated on the basis that they suffer from personal and institutional bias, well beyond a mere apprehension of bias.

The Court writes emphatically that “a bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the appellant to go on a fishing expedition to see if something can be found to support the allegation of bias” (para 12). With respect, the allegation of violation of procedural fairness in the Notice of Application in this case is not any more precise or articulated. The Court in *Humane Society of Canada Foundation* refers to paragraphs 42 to 45 in *JP Morgan Asset Management (Canada) Inc.*. The grounds in a Notice of Application should not be bald. The grounds have to be stated with some particularity. Simply stating, for instance, that a decision maker abused its discretion is not sufficient. There must be the “how” and the “what”. Indeed, the Court notes “Before a party can state a ground, the party must have some evidence to support it” (para 44). In the case at bar, the allegation of a breach of procedural fairness in the Notice of Application does not rise above a bald assertion of bias. As such, it does not open the door to the further disclosure sought by the Applicant.

[148] Finally, I was less than convinced that the various categories of documents sought [(1) complete copies of documents produced; (2) e-Doc not included in the CTR; (3) documents referenced in submissions and / or relied upon in the Commission proceeding)] would have to be disclosed due to a general lack of articulation of the argument. A Court should expect an applicant to address with specificity how the documents requested actually satisfy the requirements of the law of disclosure. An applicant should go from generalities to sufficiently precise requests that make the point of the relevance of the various items requested. In this case, the Respondent provided a chart in response to the documents requested by the Applicant. On the other hand, the specificity was lacking on the side of the Applicant.

[149] As for the first category, the Respondent supplied a full response. Not only some of the items are already part of the CTR, but there are no missing pages as neither party filed such pages. But more importantly, the Applicant was either the recipient of the correspondence, its author or a participant. Rule 317 is specific that material which is in the possession of the party is not the subject of disclosure. Moreover, the Applicant could have but did not produce these before the decision maker. A Motion for Disclosure is not for the purpose of entering into the record *ex post facto* that which was not submitted to the decision maker.

[150] It is for the Applicant to establish that the documents found in its third category are accessible pursuant to rule 317 beyond what was put by the parties before the CNSC. The reviewing court does not consider the merits of the decision. Even worse, it will not sit *de novo*. With respect, where the Applicant in its submissions says that “The Court should not permit an approach that allows factual assertions or record references to be used before the Commission,

while the underlying materials are withheld on judicial review” (Written Representations para 47), it strays from the “general rule”. This appears to be a disguised attempt at arguing the merits of the decision made with the assistance of evidence which was not before the decision maker. This is meant to be a disclosure motion within a judicial review, not an attempt at discovery. Moreover, what is sought is largely in the nature of a fishing expedition. The Applicant seeks to discover what ever it can to see whether a ground for judicial review might exist.

[151] In its Written Representations, the Applicant refers “by way of example” to most of the items in its Schedule A to its Notice of Motion (Written Representations, para 49). With respect, these are items that follow the assertion at paragraph 47 of the Written Representations that it should be able to challenge factual assertions. The “examples” given are for the purpose of challenging the merits of the decision and, in some cases, are a fishing expedition *ex post facto*. The Applicant is asking, for instance, for “what information was available to CNSC Staff and put before the Commission, and whether the Applicant did in fact respond to and refute CNSC Staff’s concerns (all of which bear on the reasonableness of key findings and the procedural fairness concerns pleaded)”. These are said to be in relation to items 14,17,18,19 and 20. If that new information exists and it can be ordered disclosed, the reviewing court becomes the decider on the merits. The fact-finding function is not performed by the administrative tribunal.

[152] No indication is provided as to how that information, if it exists, relates to violations of procedural fairness as alleged which allows for some broadening of disclosure to address the specific violation. That should not be allowed.

[153] Only three of the four e-Docs requested are not already in the CTR. These documents lack a description of what they are or how they have any relevance to the case. It is only when reviewing the chart appended to the Respondent's Written Representations that a general idea emerges. The three refer to correspondence between NexGen and staff. Not only it is also unclear how these could escape the general rule, or how they can have any relevance, but the items are likely in the possession of the Applicant. A motion for disclosure is not for the purpose of bringing back into the record that which could have been filed in due course. As for the fourth one, the numbered e-Doc does not exist. If the Applicant meant 7404760, it is already produced under "e-Doc: 7404760/7186260". It should not be possible to neglect to file evidence to, then, in retrospect, seek to include *ex post facto* that which can only go to the merits of the decision. The e-Docs should not be ordered produced.

[154] As I have concluded that none of the exceptions to the general rule has been established, the 20 items requested for inclusion in a supplementary CTR are not allowed. The material that was before the decision maker is that which can be used to control the legality in what is a narrow case: did the work performed by NexGen constitute preparation of the site, or was it restricted to exploration?

VIII. Conclusion

[155] The Motion for Disclosure in order to transmit materials improperly withheld by the CNSC must be dismissed. Disclosure beyond what was produced before the CNSC is the exception rather than the rule. It is in the nature of a judicial review that what was before the

decision maker constitutes the record on which the reviewing court will rely to assess the legality of the decision made. Rules 367-368 are to limit the discovery of documents to what was in the hands of the decision maker when the decision was made.

[156] The class of documents to be disclosed may be expanded where an exception to the general rule applies. The one referred to the most is where an allegation of violation of procedural fairness is made and information in the hands of the decision maker relevant to the specific allegation should be made available. However, a mere allegation will not suffice: there must be a factual basis supported by appropriate evidence.

[157] In order to avoid immunization of decision making by administrative tribunals, access to more information may also be appropriate. In cases where there exists a regulatory relationship, it may be that prior decisions by the administrative tribunals might shed light on the decision under review (*Canadian National* (2023)). There may be data, or other information on which the decision maker drew in making its decision (*Gusto TV*). But none of these exceptions opens the door to broad-based disclosure. In line with the nature of judicial review, if the administrative decision maker drew from material resulting from the ongoing regulatory relationship, that is accessible.

[158] That is because of the different roles to be played by the administrative decision maker and a reviewing court. The reviewing court cannot allow itself to become a forum for fact finding on the merits. That is the province of the administrative decision maker. The reviewing court does not decide on the merits, even less so conducting a trial de novo or conducting a

brand-new trial with new evidence thrown in. Accordingly, the availability of new evidence is limited by the very nature of the process and the institutional role played by a reviewing court.

[159] In the case at bar, the uncontroverted evidence is that the decision maker had before it all the evidence offered by the parties. The Applicant would now want to include more. Some of the new information is simply in the nature of a fishing expedition. This is not permitted. Other information could have been offered but was not. But the real question remains: to what purpose information, that is suggested would go to the reasonableness of the decision, is to be admitted *ex post facto*, if it is not to challenge the decision on the merits? Hence, the documents and records sought must not be for the purpose of challenging the merits of the decision. At the very least, the Applicant had to identify the purpose for which these items were sought and persuade that such is its true purpose, as opposed to artful pleadings. The reviewing court assesses the legality of the decision, as the notion has been defined since *Vavilov* and its progeny. It does not try the case again.

[160] The burden rests on the Applicant, and it has been unable to discharge it. It is true with respect to allegations of violation of procedural fairness as well as attempts to invoke the regulatory process or jurisdictional arguments. None of these generated the availability to access the information sought. The same is evidently true of arguments based on challenging the merits.

[161] In the end, the binding authorities of the Federal Court of Appeal take the Court to the conclusion that the Motion fails. Indeed, the scope of rule 317 is not what the Applicant hoped for. The disclosure of rule 317 is not the discovery where an action is launched.

[162] The Applicant suggested that, in the alternative, the Court may order the Respondent to explain, by affidavit, what was searched and why the identified materials were not produced. Such an order will not be made. A threshold issue is of course that the Applicant shows some entitlement to any of the information sought. There is not even an arguable case that documents sought are relevant or accessible.

[163] The parties have sought their costs. The Respondent, as the successful party, is entitled to its costs. It has suggested a fixed amount of \$720. That is more than reasonable in the circumstances of this case. Accordingly, costs in the amount of \$720, inclusive of taxes and disbursements, will be granted.

ORDER IN T-2035-25

THIS COURT ORDERS:

1. The Motion for an order to transmit to the Registry of the Court and serve on the Applicant a supplementary Certified Tribunal Record including the documents described in the annex to these Reasons and Order is dismissed.
2. Costs are awarded to the Respondent in the amount of \$720, inclusive of disbursements and taxes.

“Yvan Roy”
Judge

SCHEDULE “A”
(Documents and records sought for inclusion in a supplementary Certified Tribunal Record)

The Applicant seeks production of the following documents and records which were before the tribunal but omitted or incomplete in the CTR transmitted by the Commission on July 14, 2025:

A. Complete copies of documents produced only in part in the CTR:

1. Correspondence P. Elder /K. Owen-Whitred (CNSC) to L. Curyer (NexGen)
CNSC staff request for information on work done at the Rook I site (December 20, 2023), including any missing page(s) and all attachments.
2. Correspondence L. Curyer (NexGen) to K. Owen Whitred/P. Elder (CNSC) NexGen Energy Ltd. Response to CNSC staff request for information (January 5, 2024), including any missing page(s) and all attachments.
3. Correspondence N. Kwamena/P. Burton (CNSC) to L. Moger (NexGen) CNSC staff response to NexGen Response Letter Date February 12, 2024, including any missing page(s) and all attachments.
4. Correspondence L. Moger (NexGen) to P. Burton/N. Kwamena (CNSC)- RE: CNSC staff response to NexGen Response Letter Date February 12, 2024 (May 13, 2024), including any missing page(s) and all attachments.
5. The complete email chain referenced as “Correspondence L. Moger (NexGen) to P. Burton (CNSC) - RE: Time for a call today? NexGen November 2024 request for info (November 25, 2024)”, including the December 3, 2024 email (and any subsequent response) from this correspondence chain.
6. Correspondence R. Jammal to Premier Scott Moe – Response to letter of January 4, 2024 (February 12, 2024), including any missing page(s) and all attachments.

B. Documents referenced in the parties’ submissions by e-Doc number and not included in the CTR:

7. e-Doc 7415542
8. e-Doc 5896453
9. e-Doc 7119165

10. e-Doc 7604760

C. Documents and records referenced in the submissions and/or relied upon in the Commission proceeding, not included in the CTR:

11. The February 14, 2019 application submitted by NexGen to CNSC (as referenced in CNSC Staff submissions) and all attachments.
12. All correspondence, emails, notes, and records of information exchange between CNSC Staff and counterparts from the Government of Saskatchewan in or about November 2023 concerning activities at the Rook I Project site, including construction of pads.
13. Notes, records, or other documentation of the verbal discussion referenced in the October 15, 2024 email exchange between T. Moulding (Saskatchewan Ministry of Environment) and P. Burton (CNSC) concerning the circular arrays of holes.
14. Records (including internal emails, notes, and communications) reflecting how CNSC Staff became aware of and assessed the October 8, 2024 TD Securities web interview, and any related impressions or conclusions relied upon.
15. Documents and records evidencing the “further facts” said to have caused CNSC Staff’s regulatory position to evolve after February 12, 2024, and any records of their consideration.
16. All photographs taken by CNSC Staff during the January 16, 2024 site visit and the November 19, 2024 site visit that relate to the matters at issue in the AMP review.
17. All correspondence and records between CNSC Staff and Saskatchewan Ministry of Environment concerning whether the drill holes were actively preserved and whether they were subject to provincial decommissioning requirements, including the origin and initiation of any such requests.
18. Records relating to: (i) the January 2024 desktop sharing referenced by NexGen; (ii) NexGen’s May 13, 2024 offer to provide additional technical information; and (iii) the June 26, 2024 meeting and presentation to CNSC Staff.
19. Records of communications between Saskatchewan Ministry of Environment and CNSC Staff relating to the January 15, 2024 email referenced in CNSC Staff submissions regarding analytical data and the reliability of sampling Results.

20. The response email from NexGen to CNSC Staff following the November 25, 2024 email in the chain referenced in the CTR (if not already included in item 5), and any related correspondence.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2035-25

STYLE OF CAUSE: NEXGEN ENERGY LTD. V ATTORNEY
GENERAL OF CANADA

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

REASONS AND ORDER: ROY. J

DATED: JUNE 26, 2026

WRITTEN REPRESENTATIONS BY:

Nando De Luca
Luke Devine
Cailen Brust
Nicole Sample

FOR THE APPLICANT

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Goodmans LLP
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Saskatoon, Saskatchewan

FOR THE RESPONDENT