

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260918

Docket: A-324-24

Citation: 2026 FCA 156

**CORAM: RENNIE J.A.
MONAGHAN J.A.
WALKER J.A.**

BETWEEN:

**PACIFIC COAST TERMINALS CO. LTD., VITERRA CANADA INC.,
CASCADIA PORT MANAGEMENT CORPORATION, FRASER GRAIN
TERMINAL LTD. and ALLIANCE GRAIN TERMINAL LTD.**

**Appellants
Respondents by cross-appeal**

and

VANCOUVER FRASER PORT AUTHORITY

**Respondent
Appellant by cross-appeal**

Heard at Vancouver, British Columbia, on January 21, 2026.

Judgment delivered at Ottawa, Ontario, on September 18, 2026.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**MONAGHAN J.A.
WALKER J.A.**

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This appeal addresses substantive and procedural issues pertaining to the content of the record in judicial review. More particularly, it concerns the demarcation between the obligation of a tribunal to transmit a certified tribunal record (certified record) under rule 317 of the *Federal*

Courts Rules, SOR/98-106 [Rules], and the evidence that the applicant and respondent put before a court under rules 306 and 307.

[2] These issues arise from an application for judicial review by the appellants of a decision by the Vancouver Fraser Port Authority fixing the fees to be charged to users of the port. A dispute arose as to the contents of the certified record under rule 317, prompting a motion by the appellants under rule 318 compelling broader production. The motion came before an Associate Judge of the Federal Court (*Pacific Coast Terminals Co. Ltd. v. Vancouver Fraser Port Authority*, 2024 FC 119 [Associate Judge Decision]). Associate Justice Horne granted the motion and ordered further production. The decision was appealed to the Federal Court (*Pacific Coast Terminals Co. Ltd. v. Vancouver Fraser Port Authority*, 2024 FC 1531 [Motions Judge Decision]). Strickland J. allowed the appeal, reversed the production order, and remitted certain questions back to the Associate Judge for redetermination.

[3] The appellants, who I will refer to as the Terminals, appeal to this Court. The respondent, the Vancouver Fraser Port Authority, who I will refer to as the Port, cross-appeals with respect to the decision to remit questions back to the Associate Judge.

[4] An understanding of the issues in this appeal requires a somewhat more detailed explanation of the factual background than usual.

Facts

[5] The Port is established under the *Canada Marine Act*, S.C. 1998, c. 10 (the Act) and operates the Port of Vancouver. The Terminals own and operate various shipping and bulk commodity facilities located within the port.

[6] Under subsections 49(1), 49(3) and 50(1) of the Act, a port authority is authorized to fix fees to be paid in respect of ships, vehicles, aircraft and persons coming into or using the port; goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port; and any service provided by the port authority, or any right or privilege conferred by it, in respect of the port. These fees must be fixed at a level that allows the port authority to operate on a self-sustaining financial basis. They must also be fair and reasonable. Port authorities are prohibited from unjustly discriminating among users or classes of users of the port, giving an undue preference to any user or class of user, or subjecting any user or class of user to an undue or unreasonable disadvantage.

[7] In 2017, the Port announced a multi-year plan to improve the capacity and efficiency of the Port infrastructure and related transportation networks. As part of the planning process for what became known as the Gateway Infrastructure, the Port constituted the Gateway Infrastructure Fee 2 Team (the GIF2 Team), comprised of the Port's Trade Development and Finance staff and external consultants. The GIF2 Team's mandate was to examine the cost of the infrastructure renewal and the fee structure necessary to meet the Port's statutory obligation to be self-financing. On October 15, 2021, after a lengthy period of internal consideration and

consultation with industry by the GIF2 Team, the Port issued a Notice of Fee Amendments setting the Gateway Infrastructure Fee 2 (GIF2022). The GIF2022 was described as a tonnage-based fee that would be applied to all users of the port, the revenues of which would support gateway infrastructure projects. The Port invited the public to comment on the fee, with written submissions to be filed before December 16, 2021.

[8] This prompted the Terminals to file an application for judicial review of the Notice of Fee Amendments. The application was accompanied by a request for transmittal of the certified record under rule 317 with respect to the decision to establish the GIF2022.

[9] Shortly after the filing of the application, the Port postponed the implementation of the GIF2022. Additional materials related to the GIF2022 decision would be shared with stakeholders who would have the opportunity to make further submissions. However, as the judicial review remained outstanding, and the deadline for transmittal of the certified record was approaching, on January 19, 2022, counsel for the Port transmitted the certified record in respect of the October 15, 2021 fee decision.

[10] On February 15, 2022, the Port issued a second Notice of Fee Amendments and invited further submissions from stakeholders. One month later, on March 21, 2022, counsel for the Terminals advised that, based on the further disclosure and after a review of materials publicly available on the Port's website, the certified record was deficient. The Terminals sought further disclosure, including the production of certain specific documents. It also requested that the implementation of the GIF2022 be postponed.

[11] Submissions on the second Notice of Fee Amendments were due April 15, 2022. On April 25, 2022, the Port again announced that it was postponing the implementation of the GIF2022. Given the development, and at the prompting of the case management judge, the Terminals filed a notice of discontinuance for the first application.

[12] On September 1, 2022, the Port released the “Gateway Infrastructure Fee 2022: Summary report for recommendation to implement fee” (the Summary Report). This document canvassed the GIF2 Team’s first and second round of studies, technical reports, financial analysis, consultations, and recommendations. The Summary Report was sent to the Port’s Board of Directors along with a draft resolution recommending approval.

[13] The Board adopted the draft resolution without amendment on September 13, 2022 (the Decision). It is not disputed that in making the Decision to approve the new fees, the only documents before the Board were the Summary Report and draft resolution.

[14] The Terminals filed a second application for judicial review. In this application the Terminals allege that the Port acted beyond its jurisdiction and erred in law in its interpretation and application of subsection 49(3) of the Act in establishing fees that were neither fair nor reasonable, were disproportionate to the Terminals’ use of infrastructure and gave unreasonable preference to certain groups or classes of users. The Terminals also assert that the Port failed to observe the principles of procedural fairness by failing to disclose documents during the consultation process. This deprived them of an opportunity to know the case they had to meet, to

understand the reasoning behind the Decision and to meaningfully present their counterarguments.

[15] The Terminals refreshed their request under rule 317, now seeking a certified copy of all documents referred to in the Summary Report or used in its preparation. The rule 317 request also identified certain specific documents:

5. The Applicants request that VFPA send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of VFPA to the Applicants and to the Registry:

(a) All materials considered by VFPA in making the Decision that were not also provided to the Applicants including, in particular:

(i) the Mott MacDonald Study and any other studies or cost/benefit analyses obtained or completed by VFPA;

(ii) the “Input and Assumptions Summary Sheets related to GIF2022 projects” by Mott MacDonald, as listed in the Summary Report;

(iii) the proposals for project funding submitted by VFPA, CN and/or any other applicable project proponents under the National Trade and Corridors Fund;

(iv) all materials listed by VFPA in the Summary Report which have not already been provided to the Applicants;

(v) all materials considered by VFPA in determining the link between each Applicant and the applicable trade area(s) assigned by VFPA to that Applicant for the purpose of implementing the Decision; and

(vi) all materials considered by VFPA in determining the link between each gateway infrastructure project and the applicable trade area(s) to which VFPA assigned those infrastructure projects, for the purpose of implementing the Decision.

[16] The Port did not object to the rule 317 request; rather, counsel for the Port provided counsel for the Terminals with a “Decision Record” which was described as “its certified copy of the material relevant to the application pursuant to rule 318(1)(a)”. This “record” consisted of 217 documents totalling approximately 4,000 pages, well beyond the Summary Report and the draft resolution that were put before the Board. However, on the same day the Port provided the Decision Record, the Port also explained to the Terminals that some of the documents identified in their rule 317 request, including those specifically requested, were not provided as they had either not been considered by the Board, did not exist or were not relevant. I will refer to these documents collectively as “the disputed documents”.

[17] The Terminals objected to what it said was limited compliance with rule 317 and sought an order under rule 318 compelling the Port to produce the disputed documents. The disputed documents include third-party reports and studies, copies of agreements between the Port and funding partners, funding applications for projects related to GIF2022, submissions received by the Port during its consultations on GIF2022, and various other documents addressing the Port’s analysis of the financing of the Gateway Infrastructure projects.

[18] The new fee regime became effective on January 1, 2023.

Associate Judge's Production Order

[19] The Associate Judge granted the Terminals' rule 318 motion in part. He found that the Board of Directors, as opposed to the Port, was the decision-maker, and that this would ordinarily restrict the certified record to documents considered by the Board. However, relying in part on *China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, 2023 FCA 202 [*China Mobile*], the Associate Judge concluded that the GIF2 Team's recommendation was subsumed in the final decision, thereby expanding the certified record to documents considered by the GIF2 Team in the preparation of the Summary Report, including the disputed documents. The Associate Judge also considered that the decision with respect to the GIF2022 was part of a continuing course of conduct, beginning with the consultations leading to the first fee announced in October 2021 and extending onwards to the September 13, 2022 fee Decision. The Associate Judge further stated that a "holistic reading" of the application suggested that actions by the Port prior to the Board meeting were the subject of the procedural fairness allegations. This too warranted the grant of a broader production order.

[20] The Associate Judge considered that the expansive way the Port had responded to the rule 317 request bolstered his conclusion that the Decision was part of a broader continuing course of conduct. As noted, the Port disclosed 217 documents which were not before the Board and yet "certified" them as the "certified decision record". The Associate Judge reasoned that the Port could not "now take the position that other, similar, or related documents are immune from disclosure" (Associate Judge Decision at paras. 49–51). The Associate Judge concluded that restricting the record to the two documents that were before the Board would prevent the Federal

Court from completing a “meaningful review” of the Decision (Associate Judge Decision at para. 51).

[21] The Associate Judge also noted that the general rule that limited disclosure under rule 317 to documents that were before the decision-maker was displaced where there was an allegation of procedural fairness, as there was in the notice of application. This also justified the disclosure of documents beyond those considered by the Board (Associate Judge Decision at para. 44).

Motions Judge Decision

[22] The Port’s appeal of the Associate Judge Decision was allowed in part.

[23] Strickland J. found that the Associate Judge erred in concluding that the Summary Report, and along with it, all the disputed documents, were subsumed in the Decision. This was an error of law or, alternatively, a palpable and overriding error (Motions Judge Decision at para. 90). In Strickland J.’s view, the Associate Judge misread *China Mobile* and conflated two distinct circumstances which may alter the scope of the record. The certified record can be expanded where multiple decisions form part of a single course of conduct amenable to a single judicial review, or where, depending on the statutory scheme in question, a recommendation may be subsumed in a final decision (Motions Judge Decision at paras. 70–71). Neither of these exceptions to the general rule that the record was limited to the documents before the decision-maker arose on the facts of the case.

[24] Strickland J. found that the Associate Judge erred in taking the Port's decision to disclose and certify the 217 documents into account. Relying on established jurisprudence, Strickland J. reasoned that what constitutes a certified tribunal record under rule 317 is restricted to what was before the decision-maker, in this case, the Board, and the scope of the record could not be extended by the conduct of the Port in disclosing more documents than was required by law (Motions Judge Decision at paras. 107–108).

[25] Strickland J. further determined that the Associate Judge erred in law in determining that the disputed documents should be disclosed based on the allegation of breach of procedural fairness (Motions Judge Decision at para. 111). The Associate Judge had analysed the relevance of the disputed documents in relation to the substantive issue raised in the application (whether the fees were reasonable and non-discriminatory), but had not considered their relevance to the procedural fairness obligation; nor had the Terminals advanced arguments that satisfied her that the disputed documents were relevant to the procedural fairness grounds of review (Motions Judge Decision at paras. 109–110). As the Associate Judge was better positioned to examine whether the disputed documents were relevant to the allegations of procedural unfairness, Strickland J. remitted this question to the Associate Judge for reconsideration (Motions Judge Decision at paras. 119–120).

[26] Finally, Strickland J. determined that the Associate Judge did not err in holding that the decision-maker was the Board rather than the Port itself (Motions Judge Decision at para. 117).

[27] The Terminals appeal the issue of whether the Port was obligated to produce the disputed documents. They also appeal the ruling that the Board, and not the Port, was the decision-maker.

The Port cross-appeals from the decision of Strickland J. to remit the issue of whether the documents are relevant to procedural fairness to the Associate Judge.

Standard of Review

[28] The ordinary standard of appellate review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 governs this appeal and cross-appeal. This Court's task is to review whether the motions Judge erred in interfering with the Associate Judge's order based on errors in law or palpable and overriding errors in the assessment of the evidence (*Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 34; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215).

Rule 317 - General Principles

[29] The requirement that a tribunal produce, without hesitation, the entire record before it is central to judicial review. Rule 317 is the codification of the common law writ of *certiorari* that requires that the lower tribunal send the record to the supervisory court without delay. The Rules do not require that the transmittal be accompanied by an affidavit; rather the tribunal must "certify" that the documents constitute "the record" before the tribunal. This language is consistent with the historical origins of *certiorari* itself. The original writ of *certiorari* read in part:

We do command that you do send forthwith before us all and singular the said orders with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our Writ, that we may cause further to be done thereon what of right and according to the law and custom of England we shall see fit to be done.”

(*R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* (1951), [1951] EWCA Civ. 1 (BAILII), [1952] 1 K.B. 338; see also *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 11–12)

[30] As the writ itself makes clear, the requirement is unequivocal and immediate. Today, it is broader in scope and is tempered only by recognized privileges and the pragmatic consideration that frequently portions of the tribunal record, particularly in the case of highly specialized agencies with lengthy proceedings canvassing many issues, may not be “relevant” to the issues on the application.

[31] In *China Mobile*, this Court previously distinguished civil discovery from record transmittal in judicial review:

Arguments that seek to infuse Rule 317 with discovery-like attributes are inconsistent with the historical underpinning of judicial review. The writ of *certiorari* was addressed to inferior courts and tribunals, requiring them to return the record that was before them to the supervising court. Rule 317 reflects, precisely, its jurisprudential provenance. Requests for all documents that could potentially bear on a matter in the hopes of establishing relevance have no place under Rule 317. Consequently, parties applying for judicial review cannot rely on Rule 317 to obtain every document they may wish to examine while preparing their application.

(*China Mobile* at para. 39, citing *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, 178 A.C.W.S. (3d) 696 at para. 15; *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 162 A.C.W.S. (3d) 570 at para. 17)

[32] *Certiorari* and transmittal of the record is not the same as documentary discovery in an action. While rule 317 speaks of documents “relevant to the application”, the obligation to transmit the decision record under rule 317 is not a proxy or synonym for the obligation to produce documents in civil discovery. Words such as “disclosure” and “production” are an ill fit and can lead to a blurring of the conceptual distinction between the determination of “relevancy” in an action, and the transmittal of documents by a decision-maker in judicial review. The drafters of the Rules used the word “transmit” advisedly, cognizant of the historical provenance of applications in the writ of *certiorari*. Transmittal is a better descriptor, as it conveys the core elements of *certiorari*—the immediate, non-discretionary conveyance of the tribunal record to the supervisory court.

[33] Nor is the issue of what must be “transmitted” under rule 317 to be confused with the filing of affidavits by the applicant, under rule 306, and the respondent, under rule 307. These steps, which are downstream of the transmittal of the record, are governed by their own rules and jurisprudence. I will discuss these later.

[34] Under rule 317, a party may request a decision-maker to transmit material that is “relevant to an application”. Relevancy, in this context, is defined with reference to the wording of the application. It is limited to the actual material that was before the decision-maker when it made the decision under review. It only requires disclosure of material that is “in the possession” of the administrative decision-maker, not others. There are certain exceptions to this, including where a party claims a denial of procedural fairness or bias, which may require greater disclosure to enable a court to assess the merits of the claim (*Humane Society of Canada Foundation v.*

Canada (National Revenue), 2018 FCA 66 at paras. 4–6; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 117 [*Tsleil-Waututh*]).

[35] In most cases, the application of these principles is straight-forward; that is, of course, unless there is a dispute as to the identity of the decision-maker. That is the case here, and it is to that issue that I now turn.

The Decision-Maker

[36] The identity of the decision-maker determines what must be conveyed under rule 317. If the decision-maker is the Port, as is asserted by the Terminals, then documents prepared, received, or relied on during the GIF2022's consultations and analysis in the preparation of the Summary Report would be included in the certified record. If, on the other hand, the decision-maker is the Board of Directors, the certified record is limited to the two documents before the Board, namely the Summary Report and draft resolution.

[37] Both the Associate Judge and Strickland J. determined that the decision-maker was the Board. I agree.

[38] The Terminals contend that sections 20 and 49 of the Act designate port authorities, not their Boards, as the bodies that fix fees. They argue that this reading of the statute is also consistent with analogous Federal Court decisions in *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 at paras. 65–66 [*GCT*], and *Canadian*

Constitution Foundation v. Canada (Attorney General), 2022 FC 1233 at paras. 52–53

[*Canadian Constitution Foundation*].

[39] These key statutory provisions are reproduced below:

Canada Marine Act, S.C. 1998, c.10

PART 1 CANADA PORT AUTHORITIES

20 The board of directors is responsible for the management of the activities of a port authority.

[...]

49 (1) A port authority may fix fees to be paid in respect of

(a) ships, vehicles, aircraft and persons coming into or using the port;

(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port; and

(c) any service provided by the port authority, or any right or privilege conferred by it, in respect of the port.

Loi maritime du Canada, L.C. 1998, ch. 10

PARTIE 1 ADMINISTRATIONS PORTUAIRES CANADIENNES

20 Le conseil d'administration d'une administration portuaire est chargé de la gestion des activités de celle-ci.

[...]

49 (1) L'administration portuaire peut fixer les droits à payer à l'égard :

a) des navires, véhicules, aéronefs et personnes entrant dans le port ou en faisant usage;

b) des marchandises soit déchargées de ces navires, chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit passant par le port;

c) des services qu'elle fournit ou des avantages qu'elle accorde, en rapport avec l'exploitation du port.

[40] The Terminals also rely on paragraph 7.1(b) of the *Vancouver Fraser Port Authority Letters Patent*, Supplement to Canada Gazette, Part I, Vol. 141, No. 51 (2007) [Letters Patent]:

7.1 Activities of the Authority Related to Certain Port Operations. To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(a) of the Act to the extent specified below:

[...]

(b) creation, imposition, collection, remission or reimbursement or other fixing or acceptance of fees or charges authorized by the Act including the fixing of the interest rate that the Authority charges on overdue fees;

7.1 Activités de l'administration liées à certaines opérations portuaires. Pour exploiter le port, l'administration peut se livrer aux activités portuaires mentionnées à l'alinéa 28(2)a) de la Loi dans la mesure précisée ci-dessous :

[...]

b) création, imposition, perception, remise ou remboursement, ou autre établissement ou acceptation de droits ou de frais autorisés par la Loi, notamment l'établissement du taux d'intérêt imposé par l'administration sur les droits impayés

[41] The Terminals observe that section 49 of the Act and paragraph 7.1(b) of the Letters Patent expressly vest the authority to fix fees in the Port itself. Other provisions of the Act also describe the broad powers and responsibilities of the Port and reinforce its argument that the true decision-maker was the corporation *qua* institution, and not the Board of Directors. They also observe that the Port itself consistently speaks of the GIF2022 being decided or imposed by “the Port Authority”, a recognition in the evidence of what the statute provides.

[42] In response, the Port points to section 20 of the Act, which vests responsibility for management of the Port in the Board of Directors. It also relies on the affidavit of the director of customer engagement at the Port. That affidavit asserts that only the Board of Directors had the authority to decide to implement the GIF2022, and while the Board has the power under section

21.1 of the Act to delegate the management of the Port to an officer, it had not done so with respect to establishing fees.

[43] A point of evidence arises.

[44] Statements in this affidavit to the effect “that only the Board had the authority to make” the GIF2022 decision constitute opinion evidence on a question of law and are inadmissible (*International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 at paras. 78; *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43 at para. 18). An affidavit that explained the Port’s internal operating procedures in a neutral and objective manner might be admissible in some limited circumstances to assist the Court’s understanding of a complicated decision-making process, but this affidavit was not that and expressed an opinion on a matter that is for the Court to determine. I place no weight on the affidavit.

[45] I return to the merits of the Terminals’ argument. I find it fails on the plain text of the Act, but also because it does not align with settled principles of corporate law.

[46] It is a basic tenet of corporate law that a corporation has no mind of its own and acts through its officers or agents; in this case, the Board: see, for example, *Lennard’s Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd*, [1915] A.C. 705 (H.L.), *per* Viscount Haldane L.C., at p. 713:

[...] a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself.

[47] Statutes establishing the legal framework for Canadian corporations, whether federal or provincial, typically create a board of directors to supervise the management of the corporation. Directors are given the power to determine the direction of the corporation and have the obligation to exercise this power with a view to the best interests of the corporation (see, for example, the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, ss. 102(1), 122(1)). The board acts as the ultimate decision-maker and determines what is in the corporation's best interests. Boards must exercise their powers for the benefit of the corporation, but it is the board which determines what the corporation wishes to be done (Leonard I. Rotman & Muharem Kianieff, *Canadian Corporate Law: Cases, Notes & Materials*, 5th ed (Toronto: LexisNexis Canada, 2024) at § 3.02; Ruth I. Wahl & Maurice Coombs, *Halsbury's Laws of Canada: Business Corporations (2026 Reissue)*, (Toronto: LexisNexis Canada, 2026) at HBC-78).

[48] Crown corporations and agencies established by Parliament are no different, leaving aside the unique authority given to the responsible minister or Cabinet to give directions to Crown corporations. Absent a statutory indication to the contrary, section 20 of the Act and Article 7.1 of the Port's Letters Patent should be read consistent with these general principles. Section 20 grants the Board responsibility for "the management of the activities" of the Port, which would include the fixing of fees to be charged to the users of the port. While it is true that the Board and the Port's officers have distinct responsibilities, this does not make the Board a

legal entity divisible from the Port. The will of the corporation is determined and expressed through the decisions of its board. Reading the Act through these principles, it is perhaps more accurate to say that the Port, acting through, with, and by the authority of its Board of Directors, established the fees.

[49] This aligns with the case law with respect to who is the decision-maker. The decision-maker is often the individual or group of specific individuals who made the decision, and not the organization or institution as a collectivity. For example, immigration officers in the context of temporary resident visa decisions (*Nesarzadeh v. Canada (Citizenship and Immigration)*, 2023 FC 568), Canada Revenue Agency officers in the context of decisions on eligibility for certain benefits (*Walker v. Canada (Attorney General)*, 2022 FC 381), and adjudicators at the Canada Industrial Relations Board (*Hussey v. Bell Mobility Inc.*, 2022 FCA 95).

[50] Staff recommendations, whether arising in the context of a government ministry or a Crown agency, as here, are generally not incorporated into the final decision of an administrative decision-maker (*Gitxaala Nation v. Canada*, 2016 FCA 187 at paras. 119–27). A decision-maker is entitled to rely on its staff, but that does not broaden a rule 317 disclosure beyond the documents that were consulted by the decision-maker to encompass the documents that were consulted by its staff. Nor are decision-makers required to personally perform all the tasks necessary to make an informed decision or to perform the duties tasked to them by the legislation. They may delegate certain tasks upon which efficient and informed decision making depends (*Château d'Ivoire Stores Inc. v. Canada (Attorney General)*, 2022 FC 405 at paras. 23-26 [*Château d'Ivoire*], *aff'd*, 2023 FCA 100; *Violator no. 10 v. Canada (Attorney General)*,

2018 FCA 150 at paras. 40–46; *Eli Lilly and Co. v. Nu-Pharm Inc.*, 1996 CanLII 4073 (FCA), [1997] 1 F.C. 3 (C.A.) at pp. 28–29; *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.*, 2000 CanLII 15536 (FC) at para. 27).

[51] Applying those principles here, the Summary Report did not become the decision of the Board. It may, or may not, justify the decision taken by the Board, but it does not become the decision, and while counsel for the Port referred to the Summary Report and draft resolution as “the decision” while transmitting the record, that does not make it so.

[52] I turn to the Federal Court jurisprudence cited by the Terminals.

[53] The Terminals point to *GCT* as authority for the proposition that the Port is the decision-maker in a rule 317 motion. As here, *GCT* concerned a rule 317 motion and a dispute over who was the decision-maker and the contents of the certified record.

[54] By way of background, *GCT* sought to expand its facilities in a terminal operated under a long-term lease with the Port. Further to this objective, known as the Delta Port 4 project (DP4), it submitted a preliminary project enquiry, which the Port refused. The Port subsequently rescinded that decision. The applicant sought judicial review of both the refusal and the rescission, asserting, amongst other grounds, breach of procedural fairness and bias.

[55] The Port stated that an officer of the corporation was the decision-maker, and produced limited documents that had been before him, but resisted production of documents before the Board.

[56] The key question in the Federal Court was whether the allegations of bias justified an exception to the general rule that the record on judicial review is limited to material before the decision-maker. It was through the lens of the bias allegation that the Court considered the scope of the record.

[57] Pentney J. accepted the Port's argument "that the decisions were taken by senior officials" and accordingly, ordered the production of staff documents considered by those officials. However, he also agreed with *GCT*'s counterargument that "these [senior] officials were accountable to the Board, and anything said by the Board would presumably influence their decision" (*GCT* at paras. 65–66).

[58] The Federal Court concluded that confining the rule 317 record to the materials before the senior officer would result in an incomplete record (*GCT* at para. 71). The evidence already in the record included references to the involvement of the Board in the decision at issue including, for example, an email chain referring to materials to be prepared for the "DP4 conversation with the Board" and a variety of other materials that warranted a review of "what VFPA told the Board about the two projects, how it described [the applicant] and the DP4 project, and what, if anything, the Board's discussions reveal about its views on the matter or its instructions to management" (*GCT* at para. 70).

[59] The Terminals contend that in this appeal the Port is adopting a position opposite to that which it took in the Federal Court in *GCT*.

[60] I do not understand the Port to be taking a legally inconsistent position; rather, on the facts of the two cases, the decision-makers were different. In *GCT*, the decisions were taken by a senior officer, with the attendant consequences for the contents of the certified record. Not all decisions of a corporation must go to the board. However, the evidence in *GCT* implicated the board in the decision to rescind and therefore the record necessarily included any documents before or minutes of discussion with the board. The differences between *GCT* and this appeal lie in their facts, not in the governing legal principles.

[61] I also read *GCT* as consistent with the established principles of corporate governance noted earlier. While the senior officer made the decision, he did so following consultations with the board. Recognizing the *real politique* of the relationship between corporate officers and the board, if there was some evidence indicating that the board was consulted, it is highly probable that the “decision” taken by the officer aligned with the instructions or “guidance” of the board.

[62] Thus, where there is evidence in the record that the actual decision-maker consulted a higher authority with the power to bind or instruct, in this case, the board, then it is appropriate to expand the record to include the documents before the latter.

[63] This decision is an important reminder that the identity of the decision-maker does not depend on the slavish application of legal principles, nor is it determined by a factual statement

or admission by the party. There may be situations where the decision-maker is, in fact, different than what the law would describe. But that would have to be established as a matter of evidence. Here, while Port staff were undoubtedly involved in the analysis, consultations, and studies leading up to and including the Summary Report, there is nothing in the record that supports the argument that the senior officers of the Port were the decision-makers.

[64] The Terminals also rely on the decision in *Canadian Constitution Foundation* to argue that the Court ought not be bound by the legal theories that underpin corporate governance and should instead look to the reality of how decisions are made in an institutional or corporate context. I agree with that proposition; but, for the reasons given, find that it does not vary the conclusion as to who was the decision-maker.

[65] In *Canadian Constitution Foundation*, the applicant challenged the lawfulness of an Emergency Proclamation issued by the Governor in Council (GIC) under the *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), and requested the records of materials before the GIC in respect of the Emergency Proclamation. In particular, the applicant sought minutes from meetings of a Cabinet subcommittee and minutes of a meeting of the GIC, as well as records of discussions between ministers.

[66] The Attorney General argued that there was a distinction between Cabinet and the GIC, and that since the GIC was the “tribunal”, materials that were before the Cabinet committee were not producible. Prior to the hearing on this motion, the Attorney General delivered redacted

meeting minutes. This rendered most of the motion moot, and any discussion about the distinction between the GIC and Cabinet, *obiter*.

[67] The Federal Court acknowledged that while the Attorney General’s position was constitutionally correct, it ignored the practical reality as to how decision-making takes place in a Westminster parliamentary democracy, as well as the constitutional convention that the GIC acts on the advice and recommendation of Ministers of the Crown. Cabinet was, in effect, the decision-maker responsible for the declaration of the Emergency Proclamation and subsequent regulations.

[68] I express no view on the Federal Court’s statement that Cabinet and not the GIC was the decision-maker because of the “practical reality” of the decision-making process. The point was not argued before us and, in any event, is not pertinent. The relationship between a corporation and its board of directors is not factually or legally analogous to the relationship between Cabinet and the GIC. Judicial review of ministerial and GIC decisions comes with a discrete set of legal principles, conventions and considerations. This includes the nature and content of the record, privileges, the fact that reasons are not often given, and how reasonableness review is conducted (*Auer v. Auer*, 2024 SCC 36).

[69] With the decision-maker being established, I turn to the second question, and that is whether the certified record should be expanded to include documents beyond the Summary Report and draft resolution that were before the Board.

The rule 317 transmittal is limited to the documents before the Board

[70] The Terminals advance several arguments as to why the record should be expanded beyond the two documents that were in fact before the Board to include the disputed documents. At the risk of over-simplification, they may be characterized as expansion by incorporation, expansion as a part of an ongoing course of conduct, where there is a pleading of procedural fairness, and finally, where the evidence is necessary to ensure meaningful judicial review.

An anterior decision is folded into a second decision

[71] The first justification for expanding the record to include the disputed documents rests on the decision of this Court in *China Mobile*. The Associate Judge relied on *China Mobile* to find that the documents relied on by the GIF2 Team in preparing the Summary Report were subsumed or incorporated into the documents that were before the Board.

[72] An appreciation of *China Mobile* best begins with the decision itself. There, the Court wrote:

I accept that multiple decisions that constitute a continuing course of conduct may be challenged in a single application for judicial review where the decisions were linked either by virtue of the statute, the decision-makers, the applicable legal questions, the timing of their issuance, or the commonality of facts or allegations and relief sought (*Key First Nation v. Lavallee*, 2021 FCA 123, 334 A.C.W.S. (3d) 677). I also accept that there may be situations where a preliminary decision or recommendation is subsumed in a final decision. But that is not the case here given the structure of the statute.

(*China Mobile* at para. 47)

[73] Relying on *China Mobile*, the Terminals argue that the Associate Judge did not err in finding that the documents relied on by the Port in preparing the Summary Report were subsumed in the final decision. They argue that the Associate Judge’s finding that there was a “continuing course of conduct” was a determinative finding of mixed fact and law which supported the conclusion that the disputed documents were subsumed in the final decision (Motions Judge Decision at para. 69). Strickland J. erred in intervening, they say.

[74] I do not agree. Strickland J. was right to intervene: the issue before her, and before us, is a substantive legal question addressing the question of the legal parameters of a certified record.

[75] *China Mobile* arose in the context of a decision under the *Investment Canada Act*, R.S.C., 1985, c. 28 (1st Supp.) [ICA], and the question as to what constituted the record “pivot[ed] on the unique statutory language of the ICA” (*China Mobile* at para. 48). There, a threshold decision was taken by the responsible Minister, and thereafter by the GIC. The discretion of the GIC was contingent on the decision of the Minister, and the issue was whether the applicant ought to have challenged the initial decision of the Minister. The appellants argued that their application for judicial review sought to challenge “a continuing course of conduct” under the ICA, under which the Minister’s decision was subsumed in the GIC’s. The notice of application targeted the decision of the GIC, but, given the dependency of the GIC’s decision on the prior decision of the Minister, the applicant contended that the issues on judicial review, and the record, encompassed the considerations and documents before the Minister.

[76] This argument was rejected, this Court holding that the statutory scheme framed the question of who was the decision-maker; it established a decision by the GIC, and a decision by the Minister. Compliance with rule 317 did not, therefore, require production of the record before the Minister as the notice of application challenged the decision of the GIC. The decision identified in the notice of application is fundamental to judicial review, and the applicant could not call on the generosity of the Court to challenge a decision other than that identified in the notice of application.

[77] *China Mobile* is an application of the general principle that the notice of application is critical in framing what decision is being challenged. While notices are to be read holistically, and a court is not a slave to form, it is constrained by the statutory scheme which, in *China Mobile*, situated separate decisions by the Minister and GIC; hence the argument that the record and issues before the Minister were imported into the final decision of the GIC was rejected. The statutory scheme itself was inconsistent with that argument; the factors that the Minister was required to consider were discrete and did not necessarily overlap with those considered by the GIC. The Court noted that, exceptionally, there may be circumstances where an earlier decision, along with its record, may be subsumed or incorporated into a subsequent decision; but, as I will discuss later, that line of jurisprudence is more accurately understood as addressing situations where multiple decisions that are part of a course of conduct may be challenged in a single judicial review. In this sense, they address rule 302 directly, and rule 317 consequentially.

Ongoing course of conduct

[78] I turn to the Terminals’ argument that the fee-making process was a “continuing course of conduct” which broadened the record to include staff documents.

[79] A bit of historical context clarifies why this argument fails.

[80] Subsection 18.1(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 does not limit the Court’s jurisdiction on judicial review to “decisions or orders” of a federal board. The subsection captures a broader range of conduct, as “[a]n application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought” (emphasis added). Indeed, actions or “[o]ngoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment” (*Air Passenger Rights v. Canada (Attorney General)*, 2024 FCA 128 [*Air Passenger Rights*]; *Key First Nation v. Lavallee*, 2021 FCA 123 at para. 24 [*Key First Nation*]; *Democracy Watch v. Canada (Attorney General)*, 2021 FCA 133; *May v. CBC/Radio Canada*, 2011 FCA 130 at para. 10, citing *Sweet v. Canada*, 249 N.R. 17 (C.A.), 1999 CanLII 8927; *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.), 1999 CanLII 9338 at paras. 20–23 [*Krause*]).

[81] The concept of an ongoing course of conduct captures situations where a series of decisions over time or the application of an ongoing policy may be the subject of a single application for judicial review. The concept aligns with, and supports, the jurisdiction over

“matters”, as a “matter” may not lend itself to, or crystallize as, a discrete or a single decision. This is of particular importance in understanding when the period for commencing judicial review begins.

[82] The cases cited in *China Mobile* illustrate this principle.

[83] In *Key First Nation*, issues arising over several months from a Band’s contentious retainer agreement with a law firm were “a matter”, and the time for commencing judicial review was not restricted to the execution of the retainer. Similarly in *Krause*, the government’s accounting practice of amortizing surpluses in federal pension plans monthly was reviewable as an ongoing course of conduct, and the time for commencing judicial review was not constrained to a particular monthly entry in the books of account.

[84] It is difficult to see how the facts of this case give rise to an ongoing course of conduct that would bring the disputed documents into the certified record. It is true that consultations and discussions with respect to the fee structure had been lengthy, commencing in 2017, leading to the aborted 2021 proposed fee and concluding in the September 13, 2022 fee Decision. But throughout that time, only one decision affected the legal rights or interests of the Terminals, and that was the September 13, 2022 Decision to establish the new fee structure.

Meaningful judicial review

[85] The Terminals contend that a broader production order is warranted if the Court is to be able to conduct a meaningful judicial review. They buttress this argument by noting that a party can, through tactical management of the record placed before the decision-maker, insulate a decision from judicial review. They say that the Port, simply by its internal delegation policy, have done so here. They point to *Château d'Ivoire* at paragraph 23, where Pamel J. (as he then was) criticized the very conduct in issue here, remarking that; “[i]t would be rather Kafkaesque” if the decision-maker could shield relevant material from judicial review by “delegating decision-making authority to staff who would then simply place limited material before the decision-maker with a draft decision, ready to be signed without question.”

[86] Judges are not naïve. A party can try to insulate a decision from judicial scrutiny, but they do so at their peril. The parties have several tools at their disposal, and the Court has robust responses to ensure that the decision of the true or actual decision-maker is reviewed, and that that review takes place on a comprehensive record. As noted by de Montigny C.J., “[i]n short, and keeping in mind that as a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review, there is no dearth of tools at the disposal of the parties and of the Court to ensure that the party challenging the decision is able to mount an effective case, and that the Court, in exercising its reviewing role, is equipped with a full record to assess the defensibility and legality of an administrative decision” (*Southern Railway of British Columbia Limited v. Vancouver Fraser Port Authority*, 2024 FCA 175 at para. 34 [*Southern Railway*]).

[87] I will discuss three of these guarantors of the integrity of judicial review. However, as will become apparent, it is premature to consider any of these remedies; the parties have yet to exchange affidavits under rules 306 and 307, and cross-examinations may follow. Any deficiency in the record that impedes the Federal Court from doing what it is required to do can be addressed if and when the matter arises.

[88] The first protection against the risk posited by the Terminals lies in rule 318 itself. As the case law noted above indicates, the courts do not take a narrow-legalistic view to who is the decision-maker. Where, as in *GCT*, there was evidence that the decision-maker in fact consulted a more senior authority with respect to the decision, the record will be expanded accordingly.

[89] Second, under rule 313, a court can, of its own initiative or at the request of a party, order further material be filed if it considers that the application records of the parties are incomplete. Discretion exercised under this rule must, however, reflect the distinction between the role of the court sitting in a supervisory context, as opposed to the role of the tribunal or decision-maker authorized to make the substantive decision. A court must be mindful of not tripping over the line (see *Rémillard v. Canada (National Revenue)*, 2022 FCA 63). Additionally, a court can make use of its general supervisory power in administrative matters (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385) and its plenary jurisdiction to make orders necessary for the conduct of proceedings (*Southern Railway; Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 19–25; *GCT* at para. 26.)

[90] An important note of caution; this is an exceptional power and is used sparingly. It is not licence for judges sitting in judicial review to order discovery-like production simply because it might be “helpful” or shed light on the matter.

[91] Third, following the exchange of affidavits, a party can also invite the Court to draw an adverse inference from missing evidence.

[92] Beyond the tools the courts might employ, the nature of reasonableness review itself incentivizes respondents to provide a comprehensive record on judicial review.

[93] If the record, even when bolstered by permissible inferences and evidentiary presumptions, is so scant that the reviewing court cannot conduct reasonableness review, the decision must be quashed.

[94] Reasonableness review searches for justification in the reasoning in light of the legal and evidentiary constraints, and a decision founded on a weak record will generally have a harder time meeting the burden of justification. Here, where the decision to fix fees is based on the Summary Report, the role of the Court on judicial review will be to determine whether the decision, when viewed in light of the record, conforms with the applicable legal and evidentiary constraints (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 94–98 [*Vavilov*]).

[95] In exceptional cases, the nature of a decision-maker may give rise to a narrower record. Some bodies, usually those at the apex of machinery of government, such as the GIC, do not give reasons for their decisions nor produce the record before them; in contrast, the record before an adjudicative or quasi-judicial body may be expansive. The reasonableness methodology is tailored accordingly (*Canada (Attorney General) v. Responsible Plastic Use Coalition*, 2026 FCA 17 at para. 7).

[96] Insofar as the nature of a decision-maker and decision suggests a more fulsome record, a scant record of the decision has a direct bearing on the likelihood that the decision will survive reasonableness review. The answer, however, is not to expand what must be transmitted under rule 317 to the point where the decision passes the threshold criteria of transparency, justification and intelligibility. To proceed on this basis is to blur the line between transmittal of the record before the decision-maker and discovery of documents in an action (*Tsleil-Waututh* at para. 79).

[97] The law also prevents a decision-maker from backfilling a decision with affidavits offering rationalizations and explanations *ex post facto* that are not, at a minimum, apparent on the face of the record. Affidavits submitted by administrative bodies raise concerns of “bootstrapping”, patching up, or making submissions to reviewing courts that are essentially new reasons supporting the administrative decision; this erodes the duty of decision-makers to give reasons that adequately justify the decision (*Canadian Nuclear Laboratories Ltd. v. Canada (Attorney General)*, 2026 FCA 106 at para. 43; *Vavilov* at para. 83; see also *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paras. 64–65 and *Sellathurai v.*

Canada (Minister of Public Safety and Emergency Preparedness), 2008 FCA 255 at paras. 46-47).

[98] There is some flexibility on the extent to which a decision-maker can advance arguments that are not apparent on the face of the record, but there is no flexibility when it comes to the evidence. The decision-maker is *functus* and the reasons are the reasons transmitted in the record. Transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion (*R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267).

[99] As a corollary to this, generally speaking, a party to an application for judicial review cannot submit new evidence (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 17–20 [*Access Copyright*]; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras. 13–28 [*Bernard*]; *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at paras. 7–9; and *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159 at para. 18).

[100] The exceptions to this general rule are few and limited. This too guards against a decision-maker shielding a decision from judicial review (*Access Copyright* at para. 20).

[101] There are three well-established exceptions: background information; evidence to establish the absence of evidence before the administrative decision-maker concerning a

particular subject matter, and evidence relevant to an issue of natural justice, procedural fairness, improper purpose, or fraud. The third exception concerns only evidence that does not interfere with the role of the administrative decision-maker as the merits-decider. The list of exceptions is not closed, and additional exceptions can be recognized as long as they are consistent with the rationale behind the general rule (*Bernard* at paras. 19, 28).

Procedural fairness

[102] There are two branches to the Terminals' argument of breach of procedural fairness: first, that the Port unilaterally altered its stated criteria for implementing fees, and second, that the Port deprived them of the opportunity to evaluate third-party documents and other materials that the Port relied on. The Terminals stress the importance of the fees to their businesses and their legitimate expectations as to how the fee-setting consultations would unfold. The Terminals did not know the case they had to meet and were denied the opportunity to meaningfully respond.

[103] Strickland J. held that the Associate Judge "erred in law in finding that the disputed documents could be ordered produced under rule 317, [...] without explaining how those specific documents were relevant to the allegations of procedural unfairness" (Motions Judge Decision at para. 111). Therefore, Strickland J. remitted the question of whether the disputed documents should be produced back to the Associate Judge, stating that "he is best positioned to re-determine if, in these circumstances, the documents should be produced on the basis of procedural fairness" (Motions Judge Decision at para. 120). The Port cross-appeals on whether Strickland J. should have remitted this question to the Associate Judge.

[104] The Terminals argue that the disputed documents must be produced as they are relevant to the allegations of procedural fairness, the particulars of which include that:

(i) VFPA failed or refused to disclose information, submissions or other materials relied upon by VFPA in its selection of infrastructure projects to be funded by GIF2022, and any cost-benefit analyses completed in respect of those infrastructure projects;

(ii) VFPA failed or refused to disclose the information, submissions or other materials relied upon by VFPA in deciding the basis for which GIF2022 will apply to the Applicants and others;

(iii) VFPA failed or refused to disclose the information, submissions or other materials relied upon by VFPA in determining the allocation of fees for GIF2022 between and among "trade areas" and amongst gateway infrastructure users, including the allocation of fees to the Applicants; and

(iv) VFPA considered and relied on information, submissions or other materials prepared by third parties, including but not limited to:

(A) information, including operational data, provided by the railways, which will derive benefit from and retain ownership over the infrastructure being funded by the Applicants, and

(B) a consultant's report prepared by Mott MacDonald Group,

without making those materials available to the Applicants, giving the Applicants any opportunity to evaluate or respond to them, or taking other steps to independently verify the information provided by the railways that VFPA relied on.

(v) VFPA failed to observe the principles of procedural fairness, and acted unlawfully and unreasonably. by *ex post facto* changing the criteria governing the implementation of GIF2022. Specifically, the Applicants relied upon and had legitimate expectations that VFPA would implement GIF2022 based upon VFPA's stated criteria of fairness, effectiveness and efficiency. However, VFPA unilaterally altered the fairness criteria, without consulting the Applicants, after VFPA had already completed, *inter alia*, consultations on the selection of projects, the assignment of projects to trade areas, the assignment of terminals to trade areas, and the cost recovery mechanism(s). VFPA thereby fundamentally altered the meaning and scope of the criteria, to the prejudice of the Applicants.

(Notice of Application, Appeal Book, pp. 235–36)

[105] The Terminals further argue that the Associate Judge implicitly acknowledged that the disputed documents were relevant to the procedural fairness allegations where he found that “the notice of application does not expressly refer to a course of conduct, but a holistic reading of it reveals that certain actions of the Port prior to the Board meeting are being challenged, particularly in respect of procedural fairness” (Associate Judge Decision at para. 40).

[106] I agree with Strickland J.’s assessment that the relevancy of the disputed documents to the procedural fairness argument was not addressed. However, I do not agree that it was appropriate to remit the question to the Associate Judge. Normally the question whether to remit an issue of relevancy or not to the first level decision-maker would be a discretionary matter with which an appellate court would not interfere. Here, however, there is no legal foundation by which the disputed documents could be relevant to the procedural fairness argument as framed. In saying this I note there is no allegation of bias.

[107] Where arguments of procedural fairness are raised, what must be transmitted under rule 317 is broadened to include documents relevant to the allegations of bias or breach of procedural fairness. A party seeking broader disclosure to support an allegation of breach of procedural fairness must establish that the documents sought are relevant (*Jewish National Fund v. Canada (National Revenue)*, 2025 FCA 114 at para. 13, citing *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at para. 21; *Château d’Ivoire* at para. 27).

[108] The disputed documents cannot be legally relevant to the allegations of procedural fairness.

[109] To successfully make out a breach of procedural fairness, the Terminals must prove that a duty of procedural fairness was owed, establish the scope of that duty, and establish that the Port failed to meet that duty. All of these arguments are open to the Terminals to make, based on their own knowledge and experience with respect to the process. Absent a plea of bias, it is hard to see how a document not in their possession compromises their ability to advance these arguments.

[110] The same holds for the legitimate expectations argument as to how consultations and the decision-making process would unfold. The legal foundations of legitimate expectations rest on a discrepancy between what the Terminals were told about the process and how they reasonably expected it to be conducted, measured against how it unfolded or was conducted by the Port. Again, documents which are not in the possession of the Terminals could have no bearing on this argument.

Effect of prior certification

[111] An ancillary question concerns whether what must be produced under rule 317 is influenced by the conduct of the parties.

[112] I put no weight on the fact that the Port took a broad approach to certification in the first judicial review. Strickland J. correctly held that “[t]he manner in which VFPA responded to the rule 317 request is not [...] the correct legal basis for the determination of whether the disputed documents should be disclosed under rule 317” (Motions Judge Decision at para. 108). I would only add that the parties’ conduct may well colour and inform the court's appreciation of who is

the decision-maker and what documents were before them; but this is a matter of evidence, not law.

Conclusion

[113] I would therefore dismiss the appeal and allow the cross-appeal, all with costs.

"Donald J. Rennie"

J.A.

"I agree.

K.A. Siobhan Monaghan J.A."

"I agree.

Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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WALKER J.A.

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