Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

REPLY OF THE APPLICANT, AIR PASSENGER RIGHTS

Bifurcated Show Cause Motion for Contempt of Court – Part 1
(pursuant to Rules 467(1) and 369.2 of the *Federal Courts Rules*)

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
Civil Litigation Section
50 O'Connor Street, Suite 300
Ottawa, ON K1A 0H8

Sanderson Graham
Tel: 613-296-4469
Fax: 613-954-1920
Email: *Sandy.Graham@justice.gc.ca*

Counsel for the Respondent,
Attorney General of Canada

AND TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, QC K1A 0N9

Barbara Cuber
Tel: 613-301-8322
Fax: 819-953-9269
Email: *Barbara.Cuber@otc-cta.gc.ca*
Email: *Servicesjuridiques.LegalServices@otc-cta.gc.ca*

Counsel for the Intervener,
Canadian Transportation Agency

Table of Contents

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

REPLY OF THE MOVING PARTY / APPLICANT

1. The purpose of this bifurcated motion is to ensure that the panel hearing the merits of judicial review will have before it the evidence this Court already determined to be relevant and necessary.[1] The CTA's attempt to recast this motion as concerning burden of proof about existence of the Withheld Materials is misguided. This Court may exercise its plenary power to order that evidence be produced from the party that controls that evidence, to enable the Court to exercise its independent review function.[2]

2. The CTA accepted that eighteen of the twenty-one categories are within the scope of the Disclosure Order. The CTA's myriad of technical objections lack any factual basis and are red herrings designed to cause the Court to fall into error.

3. The CTA's submissions are replete with bald assertions, without evidence, of the destruction and non-existence of documents, and that a PDF tool made material alterations to a document's contents. The CTA's claims raises concerns of spoliation.

---

[1] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 20-22 [Show Cause Motion Record (**SCMR**), Tab 5, pp. 287-288].

[2] *Constantinescu c. Canada (CS)*, 2021 FC 229 at paras. 97 and 112 [Tab 4, pp. 48 and 50].

4. The CTA also seeks to relitigate the scope of the Disclosure Order and the relevance of the documents covered by the Disclosure Order. These issues were already decided and are *res judicata*. The CTA argues that an order to disclose "documents" excludes original electronic copies, contrary to the authorities and common sense. The Court never permitted the CTA to selectively decide what documents to exclude.

5. The CTA should be ordered to disclose the Withheld Materials and to file an affidavit detailing its document search process, to ensure the integrity of the documents.

A. The CTA is Making Bald Allegations Unsupported by Any Evidence

6. In its Written Representations, the CTA made bald allegations on the destruction, existence, and/or alteration of the documents regarding eighteen of the twenty-one categories of Withheld Materials. The CTA admitted the existence of the three remaining categories of Withheld Materials (i.e., MS Word Documents in A1 and A5; and Emails and Twitter Messages in B4), which will be addressed below.

7. The CTA enjoys no special status as a litigant in regards to proof and is bound by the same rules as are private litigants in the federal courts.[3] The law of evidence and Rule 363 of the *Federal Courts Rules* requires that a party on a motion must file an affidavit for any facts not already in the court file.[4] Rule 363 is not a mere technicality.[5]

8. Previously, this Court specifically reminded the CTA and the same counsel that "facts are to be introduced by a witness, not as part of the written representations of counsel" and "it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial no-

---

[3] *Alaktsang v. Canada (CI)*, 2006 FC 1168 at para. 19 [Tab 2, p. 17].
[4] *Lukács v. Canada Transportation Agency*, 2014 FCA 239 at paras. 8-9, 11, and 13 [Tab 8, pp. 103-105].
[5] *Frame v. Riddle*, 2018 FCA 204 para. 30 [Tab 5, p. 68]; and *Pfeiffer & Pfeiffer Inc. v. Canada (DSPSRA)*, 2003 FCA 391 at para. 5 [Tab 9, p. 109].

tice of such facts."[6] This Court cannot take judicial notice of the destruction, existence, and/or alteration of the CTA's own documents, which are contested facts.[7] Unfortunately, the CTA and its counsel chose not to adhere to this Court's clear guidance.

9. The Federal Court previously held that a motion record without any supporting affidavit is inadmissible and should be dismissed for that reason alone.[8] This Court may similarly consider disregarding the CTA's Written Submissions in its entirety, or alternatively, the paragraphs in the CTA's Written Representations that contain the bald assertions.[9] The specific paragraphs are identified in the three subsections below.

i. Documents that Existed But Have Allegedly Been Destroyed

10. The CTA claims that two categories of the Withheld Materials "**no longer** exist" (i.e., were destroyed):[10]

(B1) Ms. Marcia Jones's Original Email on March 25, 2020 Announcing the Statement on Vouchers; and

(B2) Encrypted Email on March 18, 2020 from Mr. Colin Stacey at Transport Canada.

11. The CTA's bald assertions are not supported by any evidence, particularly evidence of *why* and *when* these emails were deleted, the CTA's record keeping and archiving procedures, whether the CTA had conducted any investigation on this deletion of documents, and whether the CTA even searched their encrypted email system, archives, or backups (i.e., the Colin Stacey email was encrypted).[11] The CTA also failed to provide any evidence on whether the destruction was human-caused and/or intentional.

---

6 *Lukács v. Canada Transportation Agency*, 2014 FCA 239 at para. 9 [Tab 8, p. 104].
7 *Berenguer v. SATA Internacional - Azores Airlines, S.A.*, 2021 FCA 217 at paras. 54-55 [Tab 3, p. 30].
8 *Laliberté v. Canada*, 2004 FC 208 at paras. 4-5 [Tab 7, pp. 97-98].
9 *Lukács v. Canada Transportation Agency*, 2014 FCA 239 at para. 13 [Tab 8, p. 105].
10 CTA's Written Representations, para. 50 (emphasis added).
11 Lukács Affidavit (Feb. 6, 2022), Exhibit "A", p. 2.

12. B1 is an important document because it reveals the extent of the external influences on the CTA with respect to the Statement on Vouchers. Thus far, the CTA only selectively revealed the identity of two external parties (i.e., CAA and Transat).[12]

13. As for B2, the CTA has yet to disclose the **complete** email that Mr. Stacey from Transport Canada sent to Ms. Jones on March 18, 2020. On January 31, 2022, the CTA produced an unredacted copy of a fragment (page 1) of that email,[13] which was initially redacted while Transport Canada was seeking more time for consultations.

14. The email fragment consists of Mr. Stacey's summary of Transat's request. This newly unredacted fragment reveals that Transport Canada was pressuring the CTA to get involved in protecting an air carrier's cash flow:

> Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.[14]

15. The aforementioned fragment, however, concealed the forwarded content and any attachments in Mr. Stacey's encrypted email. Indeed, the subject line reveals that Mr. Stacey was forwarding [FW] an email, and not merely initiating a new email chain.[15] The concealed content is material evidence for the bias ground of review.

16. The CTA's late claim that these documents "no longer exist" is very suspicious.

17. Firstly, the CTA was served with the Notice of Application on April 9, 2020, about three weeks after the documents came into existence. The Notice of Application indicated four categories of materials that the CTA was requested to transmit to

---

[12] Lukács Affidavit (Jan. 16, 2022), Exhibits "AL" and "AM" [SCMR, Tabs 2AL and 2AM, pp. 172 and 176].
[13] Lukács Affidavit (Feb. 6, 2022), Exhibit "A", p. 6.
[14] Lukács Affidavit (Feb. 6, 2022), Exhibit "A", p. 6.
[15] Applicant's Written Representations (Jan. 16, 2022), paras. 22-23 [SCMR, Tab 6, p. 301].

the Court and the Applicant, which would also capture B1 and B2 of the Withheld Materials. The CTA was clearly on notice that it had a legal obligation to preserve its documents. There is no evidence explaining why the CTA nevertheless failed to do so.

18. Secondly, on December 14, 2021 when the CTA disclosed its documents, the CTA had not indicated that documents covered by the Disclosure Order "no longer exist." Although the Disclosure Order did not specifically order the CTA to provide explanations with the disclosure, the fact that documents "no longer exist" is a serious issue and material fact. The duty of candour would require that this be promptly brought to the Court's attention. However, the CTA failed to do so and remained mum.

19. Finally, the CTA continued to stonewall the Applicant despite multiple follow-ups that these two categories of documents were missing.[16] It was only after the *show cause* motion was served and filed that the CTA now claims that those documents "no longer exist"—all without any evidence whatsoever.

ii. The CTA's Bald Allegation of "Non-Existence" of Documents

20. For fifteen of the twenty-one categories of Withheld Materials (i.e., A2-A3, A6, B3, B5, and C1-C10), the CTA baldly claims that it conducted a "thorough search" and that it is not in possession of those documents—all without any supporting evidence. The CTA's bald assertions are found in the following paragraphs of its Written Representations: 43, 48, 53, 65, 69-71, 74, 77, 80, 88, 92, 95, and 98.

21. The Applicant has a strong evidentiary basis, grounded firmly in the CTA's own documents, that each of the Withheld Materials exist.[17] The CTA's bald allegations that the Applicant is speculating simply ignores a common sense interpretation of the CTA's documents.

---

[16] Lukács Affidavit (Jan. 16, 2022), Exhibits "AO"-"AV" [SCMR, Tabs 2AO-2AV, pp. 186-243].

[17] Applicant's Written Representations, paras. 77, 80, and 86 [SCMR, Tab 6, pp. 314-317].

22. For example, the CTA claimed for C5 that the then-Chairperson's direction 1.5 hours before the meeting that "the attached [draft Statement on Vouchers] will be one item for discussion..."[18] is speculation that the statement was discussed at the meeting.[19]

23. The Applicant has established "logical and sufficient reasons" for the Court to compel the CTA to produce the Withheld Materials, which are necessary to enable the panel to discharge its judicial review function. To the extent that the CTA is claiming "non-existence," it falls on the CTA to provide a reasonable explanation to this Court, supported by affidavit evidence.[20] The CTA has failed to do so.

24. The CTA's Written Representations are also silent on two pertinent matters. Firstly, it remains unclear if the CTA searched its encrypted emails at all when the CTA had sent or received emails in an encrypted fashion relating to the Statement on Vouchers. Secondly, for the Meeting Documents category in C1-C10, the CTA has not indicated whether "video or audio recordings of the meeting" exist(ed) or not for any of the meetings regarding the Statement on Vouchers. Retaining a recording of the conference appears to be a basic feature for nearly any conferencing system, and is a feature frequently used by the federal courts.

iii. The CTA's Implausible Explanation for the Tampered Documents

25. For one category of Withheld Materials (i.e., A4), the CTA claims that it did not alter the contents of the document. The CTA claims that a PDF tool, on its own, removed and replaced email header information as part of the "process of converting e-mail to pdf format for the purposes of disclosure."[21] The CTA's bald assertion is not supported by any evidence, and defeats basic common sense.

---

[18] Lukács Affidavit (Jan. 16, 2022), Exhibit "L" [SCMR, Tabs 2L, p. 88].
[19] CTA's Written Representations, para. 67.
[20] *Constantinescu c. Canada (CS)*, 2021 FC 229 at paras. 87 and 111-112 [Tab 4, pp. 47 and 50].
[21] CTA's Written Representations, paras. 44-45.

26. Based on a side-by-side comparison,[22] it is clear that the header information in the printed email had been tinkered with. It is inconceivable that any PDF printing tool authorized for government use would automatically remove substantive content, and replace it with some other content, all without human intervention. It falls on the CTA to adduce evidence on **how** its PDF tools could have this level of "self-awareness."

27. After the CTA provides admissible evidence of their "pdf conversion process," and if necessary to verify the authenticity of the emails the CTA produced, the Applicant may seek directions from the Court. The circumstances calls for caution to ensure the integrity and reliability of the CTA's documents.

B. The CTA's Attempt to Relitigate the Disclosure Order: *Res Judicata*

28. The CTA admitted it is in possession of the three remaining categories of Withheld Materials (i.e., MS Word Documents in A1 and A5; and Emails and Twitter Messages in B4). The CTA's technical objections for these categories are addressed below.

i. Electronic Documents Containing Metadata Must be Produced

29. The CTA asserts that it only needs to produce copies of original documents that have undergone its unspecified "pdf conversion process," and thereafter "certified" by the CTA. The CTA is relying on Rule 318(1)(a)-(b) to "read-down" the Disclosure Order to create an exception for the MS Word format documents containing metadata on authorship of the Statement on Vouchers and the media response (i.e., A1 and A5).

30. The Disclosure Order requires production of "**all** non-privileged documents..." in three categories. The CTA's argument limits the word "documents" to paper records only, when there is no such limitation in the order's text. The common and ordinary meaning of "documents" in the federal courts includes electronic documents.

---

[22] Lukács Affidavit (Feb. 6, 2022), Exhibit "B", p. 13 *versus* Lukács Affidavit (Jan. 16, 2022), Exhibit "AA" [SCMR, Tab 2AA, p. 140].

31. In the same vein, the Disclosure Order never permitted the CTA to selectively determine what documents to exclude, nor did it permit the CTA to "convert" its electronic documents into the CTA's preferred format with the metadata evidence removed. The CTA cannot use its own subjective preference to subvert the text and the clear and unambiguous meaning of the Disclosure Order.

32. Indeed, in a recent decision interpreting Rules 317-318, the Federal Court ordered production of the original MS Excel files, noting that a PDF printout would have excluded the underlying data.[23] The Federal Court also rejected the same technical distinction the CTA is advancing about "certified" *versus* "original" documents,[24] noting that no explanation was provided to support withholding the original format of the documents. By the same token, there is no real explanation from the CTA.

33. The panel hearing this judicial review would be deprived of evidence to adjudicate the bias ground if the CTA were permitted to selectively exclude metadata for the Statement on Vouchers and its related template media response.[25] The metadata would reveal *who*, in fact, authored or gave direct input on these key documents that were widely disseminated to the public in the CTA's name.

ii. Twitter Posts and Direct Messages, and Emails to Third Parties

34. The CTA once again relies on technical arguments to "read-down" the Disclosure Order, to excuse itself from producing B4 of the Withheld Materials.

35. In paragraphs 59-61 of its Written Representations, the CTA improperly attempts to relitigate the Disclosure Order's scope and the relevance of the documents covered by that order. These issues have already been decided and are *res judicata*.[26]

---

[23] *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 at paras. 41-48, and 132 [Tab 6, pp. 79-80 and 93].
[24] *Ibid.*, 2021 FC 624 at para. 47 [Tab 6, p. 80].
[25] *Ibid.*, 2021 FC 624 at para. 47 [Tab 6, p. 80].
[26] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 22-29 [SCMR, Tab 5, pp. 288-290].

36. The CTA acknowledges that its Info Email and Twitter were used to correspond with third parties. The Court has confirmed that "third parties include anyone other than a member or employee of the CTA."[27] The Disclosure Order clearly captures Category B4 of the Withheld Materials.

37. The CTA's Info Email and Twitter Direct Messages are squarely relevant to the bias ground of judicial review. These third-party correspondences reveal *the extent* that the Statement on Vouchers was disseminated privately to third parties, including passengers and the industry. These correspondences also reveal the CTA's attitude toward the passengers the CTA claimed to be protecting with the Statement on Vouchers.[28] The admissibility and weight to be attributed to the correspondences in category B4 is a matter left for the panel to decide at the merits hearing.

38. Lastly, in paragraphs 56-58 of its Written Representations, the CTA overlooked that the four categories of documents in the Notice of Application are not watertight compartments, and that there are overlaps between them. The Disclosure Order must be interpreted based on its plain and ordinary text, not the initial Notice of Application filed nearly two years ago, before the CTA disclosed any document.

C. CTA Should be Ordered to File an Affidavit Detailing its Document Search

39. The CTA's submissions present the Court with a potential practical problem. The CTA's bald claims of non-existence and/or destruction of documents could render the Disclosure Order and any further order meaningless and toothless if the CTA is left to determine for itself what documents "exist" or can be "found"—the whole without any oversight or safeguards to ensure meaningful compliance. The CTA should not be left to police itself in a case where the CTA's (im)partiality is in question, with allegations of serious conduct affecting millions of passengers.

---

[27] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [SCMR, Tab 5, pp. 288].
[28] Lukács Affidavit (Jan. 16, 2022), Exh. "Y" and "AD" [Tabs 2Y and 2AD, pp. 134 and 148].

40. Recently, the Federal Court was faced with a similar situation on a motion for further production of documents under Rules 317-318. The Federal Court concluded that the tribunal's disclosure was wholly deficient. The Federal Court then ordered production of the missing documents, including specifically the original electronic formats of some PDF-converted documents. The Federal Court also imposed appropriate safeguards by ordering that the tribunal name a senior official to supervise the document search and swear an affidavit detailing the document search procedure.[29]

41. In another recent Federal Court decision, where "non-existence" of documents was being advanced by a government institution, the Federal Court also ordered the delivery of an affidavit of documents to enable the Court to address the "non-existence" assertions in a timely and efficient manner.[30]

42. This Court should apply a similar approach in this case to protect the integrity of the judicial review. Doing so would provide the CTA with an opportunity to substantiate its assertions and to address the numerous gaps in their explanations.

43. It is submitted that the CTA should be directed to file an affidavit sworn by a senior CTA official, with personal knowledge, containing at least the following details:

(a) how the CTA narrowed down the several thousands of pages of documents[31] to less than two hundred pages only;[32]

(b) what steps were taken, if any, to gather and/or preserve documents upon being served with the Notice of Application on April 9, 2020;

(c) who at the CTA conducted the previous "thorough search" and the new search;

(d) whether the CTA reviewed its encrypted emails or documents;

---

[29] *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 at paras. 3, 56, 81, 87, 94, 105-106, 126, and Order at paras. 3 and 4 [Tab 6, pp. 70, 81, 85-87, 89, 92, and 94-95].

[30] *Constantinescu c. Canada (CS)*, 2021 FC 229 at paras. 87 and 97-100 [Tab 4, pp. 47-49].

[31] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 11 [SCMR, Tab 5, pp. 284].

[32] CTA's Written Representations, para. 14.

(e) what "record-keeping systems"[33] the CTA has, and whether all of them were searched for responsive documents;

(f) whether the CTA has any backups or archives of their emails and other electronic documents, and whether those backups or archives were searched;

(g) what record-keeping policies or practices the CTA has, whether those policies or practices were followed, and if not, why they were not followed;

(h) whether the CTA conducted any investigation after learning that some documents allegedly "no longer exist,"[34] and any steps taken to recover those documents;

(i) whether the CTA's audio or video conferencing system has a recording feature, and whether the conferences between March 9 and 25, 2020 were recorded;

(j) what "pdf conversion process" the CTA employed;[35] and

(k) the number of documents that were found and reviewed in the new search.

44. To ensure the integrity and transparency of the CTA's document search, the Court may also consider appointing an *amicus curiae*, at the CTA's cost, to act as an independent supervising solicitor to oversee the CTA's search of documents on the Court's behalf. Normally, the Attorney General of Canada [**AGC**] may be suited to fulfill this role as the defender of the rule of law. However, since the AGC is the respondent on this judicial review, the AGC should not be put in a potential conflict of interests.

D. Costs

45. The Applicant submits that costs be awarded for this bifurcated motion and be payable forthwith by the CTA. The CTA's conduct has repeatedly caused judicial resources to be unnecessarily expended on mundane document disclosure matters.

---

[33] CTA's Written Submissions, para. 88.
[34] See paragraphs 10-19, *supra*.
[35] CTA's Written Representations, para. 44.

46. The CTA also failed to comply with the *Federal Courts Rules* and this Court's guidance that the CTA must not include bald assertions in written representations, and must substantiate facts using an affidavit. The CTA's conduct is egregious as it is using bald assertions to inhibit the panel and the parties from accessing material evidence for the judicial review.

47. Furthermore, the CTA's technical arguments were devoid of any merit. The CTA's submissions do not reveal any genuine dispute about the terms of the Disclosure Order. Rather, the CTA was seeking to relitigate the Disclosure Order, relying on alleged technicalities to defeat the plain and ordinary reading of the Disclosure Order to frustrate the judicial review process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 6, 2022

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

LIST OF AUTHORITIES

Case Law

2006 FC 1168, 2006 CF 1168
Federal Court

Alaktsang v. Canada (Minister of Citizenship & Immigration)

2006 CarswellNat 3016, 2006 CarswellNat 4636, 2006 FC 1168, 2006 CF 1168, 151 A.C.W.S. (3d) 916, 300 F.T.R. 175 (Eng.)

Tashi Dolma Alaktsang, Applicant and The Minister of Citizenship and Immigration, Respondent

M.L. Phelan J.

Heard: September 27, 2006
Judgment: October 2, 2006
Docket: IMM-1728-06

Counsel: Ms Geraldine MacDonald, for Applicant
Ms Leena Jaakkimainen, for Respondent

***M.L. Phelan J.*:**

I. Background

1 The Applicant, a Convention refugee and Tibetan citizen of China, had her application for permanent residence denied by an Immigration Officer (Officer) on the grounds that she was an Indian citizen. The Applicant was held to be a member of a prescribed class listed in s. 177 of the *Immigration and Refugee Protection Regulations* (Regulations). This is the judicial review of that decision.

2 In the course of this matter, the Applicant brought a motion to require the Respondent to produce those parts of the certified tribunal record which had been excluded on the grounds of solicitor-client privilege. That motion was dismissed for reasons set forth herein.

II. Facts

3 The Applicant claims that she is a Tibetan citizen of China. She was found to be a Convention refugee on July 23, 1999. The Respondent, who could have participated in the immigration hearing, chose not to do so and did not object to the refugee application. That refugee application was based on the Applicant's assertion that she is a Tibetan citizen and feared persecution in Tibet.

4 On November 4, 1999, the Applicant applied for permanent residence. By letter dated March 3, 2006 - 6 $^{1}/_{2}$ years after her application was filed — the Officer refused to grant the application for permanent residence on the basis that she was a citizen of India, a country other than the one where she feared persecution. The provision at issue, s. 177 of the Regulations, reads:

> 177. For the purposes of subsection 21(2) of the Act, the following are prescribed as classes of persons who cannot become permanent residents:
>
> (a) the class of persons who have been the subject of a decision under section 108 or 109 or subsection 114(3) of the Act resulting in the loss of refugee protection or nullification of the determination that led to conferral of refugee protection;
>
> (b) the class of persons who are permanent residents at the time of their application to remain in Canada as a permanent resident;
>
> (c) the class of persons who have been recognized by any country, other than Canada, as Convention refugees and who, if removed from Canada, would be allowed to return to that country;
>
> (d) the class of nationals or citizens of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; and
>
> (e) the class of persons who have permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.
>
> 177. Pour l'application du paragraphe 21(2) de la Loi, les catégories réglementaires de personnes qui ne peuvent devenir résidents permanents sont les suivantes:
>
> a) la catégorie des personnes qui ont fait l'objet d'une décision aux termes des articles 108 ou 109 ou du paragraphe 114(3) de la Loi rejetant la demande d'asile ou annulant la décision qui avait eu pour effet de conférer l'asile;
>
> b) la catégorie des personnes qui sont des résidents permanents au moment de présenter leur demande de séjour au Canada à titre de résident permanent;
>
> c) la catégorie des personnes qui se sont vu reconnaître la qualité de réfugié au sens de la Convention par tout pays autre que le Canada et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays;

> d) la catégorie des personnes qui ont la nationalité ou la citoyenneté d'un pays autre que le pays qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées;
>
> e) la catégorie des personnes qui ont résidé en permanence dans un pays autre que celui qu'elles ont quitté ou hors duquel elles sont demeurées par crainte d'être persécutées et qui seraient, en cas de renvoi du Canada, autorisées à retourner dans ce pays.

5 The Applicant had entered Canada using an Indian passport which she admitted was false having been secured by bribery. As proof of her Tibetan citizenship, she produced a "green book", a recognized document establishing Tibetan identity.

6 In 2003 another immigration official who was handing the Applicant's permanent residence application became suspicious that the Indian passport was genuine. It would appear that this officer, who had experience in India, embarked on this inquiry more by instinct than evidence. He did so at a time when third parties, including the local MP, were entreating the department to get on with issuing the permanent residence card after a four-year delay.

7 This official forwarded "tombstone" information to the Canadian Visa Office in New Delhi who then inquired of the Indian authorities as to the genuineness of the passport.

8 The Government of Indian Regional Passport Office in July or August 2005 stated that the passport was issued after a CID clearance (presumably a police clearance). The advice from the Indian Passport Office contained a caveat that the verification was performed without a photograph.

9 On November 25, 2005, the Officer advised the Applicant that she was satisfied that the passport was legitimately issued and that the Indian government considered her a citizen of India. The Officer then invited the Applicant to make submissions on the matter.

10 Prior to receipt of the submissions the Officer went back to the Appeals and Hearings section of the Canadian Border Services Agency (CBSA), the organization responsible for bringing motions to vacate a Board finding that a person was a refugee. The CBSA had earlier advised that there was insufficient evidence to seek to vacate the Board decision because "the genuineness of a passport is not determinative of citizenship".

11 Armed with the new information from the Indian Passport Office, the Officer again raised the issue of vacating the refugee finding. The CBSA advised that it would take another look at the file — that was 10 months ago and no follow-up action has been taken.

12 In response to the Officer's invitation to make submissions, the Applicant's then counsel outlined the proper steps to be taken to confirm whether the Applicant is truly a citizen of India

including the use of forensic study of the passport and/or submitting the passport itself to Indian authorities for verification. The submissions as to the proper method of verification were supported by affidavit evidence.

13 Without further inquiry, including affording the Applicant an interview, the Officer confirmed the finding that the Applicant was a citizen of India and refused the application for permanent residence.

III. Analysis

14 There are three matters which must be addressed in this judicial review:

- the claim of solicitor-client privilege over, principally, e-mails contained in the certified tribunal record;
- the finding that the Applicant is an Indian citizen and is precluded from permanent resident status; and
- the fairness of the process by which the Respondent reached its decision.

A. Solicitor-Client Privilege

15 The certified tribunal record contained documents for which all or a portion of the information was blacked out on the grounds of solicitor-client privilege. The Applicant brought a motion challenging this claim of privilege.

16 The motion was filed late but in order to avoid potential adjournment of this judicial review, the Court directed that the matter be heard at regular motions some 10 days in advance of the scheduled judicial review hearing.

17 The Respondent's counsel objected to the matter being heard then citing a busy schedule, inability to secure assistance in her office and other personal matters which prejudiced the ability to fully respond to the motion. Therefore, this motion was heard immediately preceding the judicial review.

18 At the motion hearing the Respondent tendered to the Court and served on the Applicant a letter of the Officer explaining her reasons for claiming privilege including an assertion of litigation privilege as well as solicitor-client privilege. No affidavit evidence was filed. It was curious that there was sufficient time to prepare a letter but insufficient time or unwillingness to file an affidavit.

19 This procedure of filing a letter from the client unsupported by an affidavit on the day of the hearing is unacceptable practice. The government enjoys no special status as a litigant as regards proof and is bound by the same rules as are private litigants in this Court.

20 As I advised counsel, the excuse for the postponement of the motion was tenuous and the failure to file an affidavit would be taken as the failure to file any evidence. The Court was left with only the review of the records upon which to base its decision, the Applicant having waived the right to cross-examination so that this matter could proceed as scheduled. Fortunately for the Respondent, the contents of the records over which privilege was claimed was so clearly solicitor-client advice that the Applicant's motion had to be dismissed.

B. Indian Citizenship

21 As a general rule, the findings as to citizenship in another country are a factual inquiry for which the standard of review is patent unreasonableness (*Adar v. Canada (Minister of Citizenship & Immigration)*, [1997] F.C.J. No. 695 (Fed. T.D.)). This was the standard accepted by the parties and the one which the Court will use for its purposes because nothing turns on the standard of review on this issue.

22 However, in this case, the conclusion that the Applicant was an Indian citizen was based on the conclusion that the passport was genuine and that it was determinative of citizenship under a foreign law. This analysis is clearly a matter of mixed law and fact which should attract a standard of reasonableness *simpliciter* (*Canada (Minister of Citizenship & Immigration) v. Choubak*, 2006 FC 521, [2006] F.C.J. No. 661 (F.C.)).

23 In reaching her conclusion, the Officer relied on the verification of the Indian passport which came with a caveat from the Indian Passport Office as to the absence of a photograph; clearly an important point if the very subject is raised by the verifying authority. It must have been taken as a warning that any such verification was tentative.

24 The reliance on this verification is undermined by the affidavit evidence of the Applicant as to the proper procedure for verification as related by an official of the Indian government. The Respondent neither challenged the evidence in cross-examination nor did it file rebuttal evidence.

25 The Officer's conclusion is directly contrary to a finding by the Board that the Applicant is a Tibetan refugee and which the CBSA has so far refused to challenge by way of an application to vacate the Board decision. The CBSA specifically concluded that the genuineness of a passport is not determinative of citizenship; a conclusion which is directly at odds with the Officer's own conclusion.

26 The Officer's decision does not address the evidence which contradicts her findings. There is no mention of the Tibetan identity document nor of the conclusions of the Board nor of the CBSA or even the veracity of the Applicant's story of bribery.

27 The Respondent filed an affidavit in which the Officer tries to elaborate on what issues she considered. However, the notes in the file and the e-mail traffic being contemporaneous with the events are a more reliable source of evidence and generally lack the *ex post facto* justification nature of the affidavit. That affidavit is of questionable weight.

28 In the face of all the other evidence contrary to the Officer's conclusion and absent better evidence against the Applicant, this decision is patently unreasonable. This patently unreasonable finding is compounded by the manner in which the decision was made.

C. Fairness

29 The decision is essentially a finding that the Applicant falsely secured refugee status and that her explanation of how she secured an Indian passport is a lie.

30 At no time was the Applicant confronted with the challenge to her story of how she secured the Indian passport. At the time the Applicant's counsel was invited to make submissions, the issue raised was the genuineness of the Indian passport - only one aspect of the issue of the Applicant's citizenship.

31 It is unfair to now say, as was argued and referred to in the Officer's affidavit, that counsel should have reiterated the story of the bribery and given further and better details of the event. At no time was the Applicant alerted to a challenge to this facet of the case and nothing in the invitation to make submissions would have reasonably alerted counsel that the matter of the bribery was being challenged.

32 While an applicant is not entitled to an interview as of right, where the circumstances of fairness dictate that an interview should have been accorded, the failure to do so is a fatal flaw of natural justice and fairness (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)).

33 In this instance the Respondent was directly challenging the Applicant's credibility and notice of that challenge and an opportunity to be heard was denied. An interview would have eliminated this breach of natural justice if the Respondent still had an open mind.

34 However, the record confirms that in this instance, the Officer's conclusions about the Applicant had been reached prior to any submission, not just in some preliminary fashion. The invitation to make submissions was form over substance. Not only was the Applicant misled as to the issue being challenged, there is little likelihood that any submissions would have altered the ultimate result.

35 The Applicant asks that the Respondent be ordered to approve the application for permanent residence. That application is almost seven years old and by now the Respondent must have (or

should have) considered all the steps for approval. Further, the Respondent has not indicated that there are any other issues which would hold up or prevent the issuance of the necessary authorization. The Court expects that the approval will follow shortly after this decision unless there is some legal impediment to approval.

IV. Conclusion

36 The application for judicial review will be granted, the decision of the Board must be quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court will remain seized of this matter if either party has difficulty with implementation of this Court's decision.

Judgment

IT IS ORDERED THAT the application for judicial review is granted, the decision of the Board quashed and the matter remitted to the Respondent for approval within thirty (30) days by a different decision maker without the involvement of the Officer or the other immigration official mentioned in this decision. The Court remains seized of this matter to address any difficulties with implementation of this Judgment.

2021 FCA 217
Federal Court of Appeal

Berenguer v. Sata Internacional - Azores Airlines, S.A.

2021 CarswellNat 6080, 2021 FCA 217

DORA BERENGUER (Appellant) and SATA INTERNACIONAL - AZORES AIRLINES, S.A. (Respondent)

K.A. Siobhan Monaghan J.A.

Judgment: November 9, 2021
Docket: A-138-21

Counsel: Simon Lin (writen), Jérémie John Martin (writen), Sébastien A. Paquette (written), for Appellant
Carlos P. Martins (written), Andrew Macdonald (written), Emma Romano (written), for Respondent

***K.A. Siobhan Monaghan J.A.*:**

1 The appellant has brought two motions in connection with her appeal of the Federal Court's order in Berenguer v. SATA Internacional - Azores Airlines, S. A., 2021 FC 394 (per Lafrenière J.) [*Berenguer*]. That order both dismissed the appellant's motion to certify her action as a class action and granted the respondent's motion to dismiss the action on the basis that it was outside the Federal Court's statutory jurisdiction. The appellant has appealed both aspects of the order.

I. Motion to Determine Contents of Appeal Book

2 Under Rule 343(3) of the Federal Court Rules, SOR/98-106, the appellant must bring a motion seeking the Court's determination concerning the contents of the Appeal Book if the parties have not agreed on the contents within the prescribed time period.

3 The parties to this appeal have not agreed. The dispute concerns two affidavits that were part of the motion record before the Federal Court. The appellant's position is that neither affidavit should be included, although she objects to them for different reasons. The respondent's position is that both affidavits should be included in the Appeal Book.

4 For the reasons that follow, I agree that both affidavits should be included in the Appeal Book.

A. The De Oliveira Affidavit

5 An affidavit sworn by Rodrigo Vasconcelos De Oliveira (the De Oliveira Affidavit) was part of the respondent's motion record before the Federal Court. The respondent engaged Mr. De Oliveira as an expert on matters of foreign law. Before the Federal Court, the appellant objected to the De Oliveira Affidavit on the basis that the expert was biased and that the evidence was not relevant. The Federal Court found the De Oliveira Affidavit did not meet the threshold admissibility requirements and therefore that it should not be taken into account.

(1) Positions of the Parties

6 The appellant submits the respondent did not appeal the Federal Court ruling that the De Oliveira Affidavit did not meet the threshold admissibility requirements. Moreover, once the appellant appealed, the respondent did not cross-appeal. Having both failed to appeal the Federal Court's ruling on the De Oliveira Affidavit, and not filed a cross-appeal, the respondent cannot use the affidavit on the appeal.

7 The respondent argues that because its motion to dismiss was successful and the appellant's certification motion was not, it had no reason to appeal. It agrees with the Federal Court's order with regard to both motions. Although the Federal Court decided it should not take the De Oliveira Affidavit into account, that decision did not remove the affidavit from the motion record. The appellant did not bring a motion to have the De Oliveira Affidavit removed from the file, as it was entitled to do under Rule 74. Thus, the De Oliveira Affidavit remains part of the record.

8 The respondent states that on the appeal it wishes to advance an additional argument in support of the Federal Court's decision on the certification motion. The De Oliveira Affidavit is relevant to that additional argument. Moreover, statements in the Federal Court's reasons reflect information that was found in the De Oliveira Affidavit and not otherwise before the Federal Court. Thus, the respondent argues, the Federal Court must have relied to some extent on the De Oliveira Affidavit.

(2) Analysis

9 Before the Federal Court issued its order, the respondent was not permitted to appeal the evidentiary ruling. Had it done so, it faced the prospect that the appeal would have been premature: Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp., [1978] 1 FC 523, 24 N.R. 377 (C.A.), and authorities that cite it, including the recent decision of this Court in Munchkin, Inc. v. Angelcare Canada Inc., 2021 FCA 169.

10 Once the Federal Court issued its order, the respondent had no reason or need to appeal the evidentiary ruling. It was the successful party on both motions. While the respondent may dispute the Federal Court's treatment of the De Oliveira Affidavit, it does not seek a different order than the one the Federal Court made. It takes no issue with the result of the two motions.

11 This is also why a cross-appeal is not appropriate. A notice of cross-appeal is appropriate where the respondent "seeks a different disposition of the order appealed from": Rule 341(1)(b). The respondent seeks to uphold the appealed order, not a different disposition of it: Froom v. Canada (Minister of Justice,)2004 FCA 352, [2005] 2 F.C.R. 195, at para. 11, leave to appeal to SCC refused, 2005 CarswellNat 685 (SCC) [*Froom*]; Kligman v. Minister of National Revenue, 2004 FCA 152, [2004] 4 F.C.R. 477, at para. 10; and Teva Canada Limited v. Canada (Health), 2012 FCA 106, [2013] 4 F.C.R. 391, at paras. 43-47.

12 Does the Federal Court's determination that the De Oliveira Affidavit should not be taken into account mean it should not be included in the Appeal Book?

13 Rule 343(2) limits what may be included in an Appeal Book to documents required to dispose of the issues on appeal. As has been observed by this Court before, it is difficult for a motion judge to assess what might be relevant and material to the issues on appeal: West Vancouver v. British Columbia, 2005 FCA 281 [, at para. 4. If relevancy is in doubt, it is preferable to include the material and ask the panel hearing the appeal to determine the relevance: Loba Limited v. Canada (National Revenue), 2007 FCA 317, [2008] 2 C.T.C 38, at para.5.

14 On the certification motion, the respondent argued there are two preferable procedures for addressing the claims of the class: a specially designated enforcement body in Portugal (ANAC) and the facilitative and adjudicative processes of the Canadian Transportation Agency (the CTA). The Federal Court did not accept ANAC as preferable, but agreed that the CTA procedure is. On the appeal, the appellant challenges that conclusion. The respondent seeks to advance ANAC as an alternative in the event this Court agrees that the CTA procedure is not preferable. It may do so: *Froom* , at para. 11, and *TPG Technology Consulting Ltd v. Canada*, 2016 FCA 279.

15 From the motion record, I cannot determine the source of the information about ANAC leading the Federal Court to conclude ANAC was not a preferable procedure. Notably the Federal Court does not appear to ground that conclusion on evidence from the appellant but rather on a finding that "ANAC's opinions are not final or enforceable the way a Portuguese court's order would be": *Berenguer* , at para.115. This exact phrase is found in paragraph 49 of the De Oliveira Affidavit, which describes ANAC in paragraphs 41-53. This may suggest that the Federal Court relied on that affidavit for a limited purpose.

16 The appellant cites Mcue Enterprises Corp. v. Entral Group International Inc., 2006 FCA 289, 354 N.R. 29 [, as a complete answer to the respondent's submission that the De Oliveira Affidavit should be in the Appeal Book. *Mcue* is distinguishable. The document in question there was not part of the motion record filed with the Federal Court. Moreover, the Court excluded it on the basis of relevance.

17 *West Vancouver* , cited in *Mcue*, also is distinguishable. There the appellant sought to include affidavits that were not before the decision maker whose decision was challenged on judicial review. The application judge excluded them from consideration in coming to his decision to dismiss the application for judicial review. The appellant appealed that decision but not the application judge's decision to exclude the affidavits. The Court agreed they should not be included in the Appeal Book because they were not before the decision maker or applications judge and the Court saw nothing in the reasons or notice of appeal that raised the matters dealt with in the affidavits — again the affidavits were not relevant: *West Vancouver* , at paras. 6-7.

18 I acknowledge that in *West Vancouver* the Court appears to have been influenced by the fact that the decision to exclude the affidavits was not appealed. However, there the appellant sought to include the affidavits while not challenging the application judge's decision to exclude them in its notice of appeal. In this case, it is the respondent who seeks to include the De Oliveira Affidavit. I have already explained why it could not appeal the Federal Court's decision to treat it as inadmissible.

19 I am satisfied the De Oliveira Affidavit meets the relevancy test in Rule 343(2): it is relevant to the Federal Court's conclusion about ANAC and to an argument in support of the Federal Court's order that the respondent wishes to advance. It was in the respondent's motion record before the Federal Court.

20 A decision to include a document in an Appeal Book does not by itself make the document evidence to be considered on an appeal. That decision is left to the panel hearing the appeal: Athabasca Chipewyan First Nation v. British Columbia Hydro & Power Authority, 2001 FCA 20, 267 N.R. 133, at para. 3. The appellant can raise her concerns about the De Oliveira Affidavit before the panel.

21 Accordingly, I agree with the respondent that the De Oliveira Affidavit should be included in the Appeal Book.

B. The Romano Affidavit

22 The respondent's motion record before the Federal Court included an affidavit sworn by Emma Romano (the Romano Affidavit), a lawyer employed by respondent's counsel in the appeal. The Romano Affidavit contains information from the CTA website.

(1) Positions of the Parties

23 The appellant asserts that the Romano Affidavit should be excluded because it was not admissible before the Federal Court by virtue of Rules 82 and 334.15(5). She raised this objection in a footnote in her written memorandum at the Federal Court. Moreover, the appellant suggests

that because the Federal Court did not cite it in its reasons, the Romano Affidavit may be irrelevant and may be excluded on that basis.

24 The respondent argues the Federal Court did not exclude the Romano Affidavit. Moreover, the two Rules cited by the appellant do not have the effect suggested by the appellant. Rule 82 is not an absolute bar to a solicitor deposing an affidavit; the information in the Romano Affidavit is not controversial. As to Rule 334.15(5), the respondent agrees that the requirements of Rule 334.15(5) must be met, but not in every affidavit. The respondent complied with those requirements in the affidavits deposed by its employees and so has satisfied the requirements of Rule 334.15(5).

(2) Analysis

25 The appellant's position that the Romano Affidavit should be excluded is quite surprising, given her position that the De Oliveira Affidavit should be excluded because the respondent did not appeal the Federal Court's ruling on its admissibility. She seeks to exclude the Romano Affidavit although the Federal Court did not rule it inadmissible, and the appellant's notice of appeal does not expressly challenge the admissibility of the Romano Affidavit.

26 The appellant further suggests the Romano Affidavit should be excluded because it is not clearly relevant. I disagree. One of the appellant's grounds of appeal is that there "was no evidentiary founding for the Federal Court to find that the CTA could be a viable alternative to resolving the common issues or [...] could, or would actually inquire into the claims". The Romano Affidavit contains information from the CTA website, which may have been the evidentiary basis for the Federal Court's finding. How can it be said the Romano Affidavit is not relevant to the issues in appeal? While the Federal Court does not expressly cite the Romano Affidavit, citation does not determine relevance to the issues under appeal and the Romano Affidavit was evidence before the Federal Court.

27 My comments on the De Oliveira Affidavit apply equally here — inclusion in the Appeal Book is not a determination of admissibility. The appellant can raise any concerns about the Romano Affidavit before the panel hearing the appeal.

28 Accordingly, I agree with the respondent that the Romano Affidavit should be included in the Appeal Book.

II. Motion to Admit New Evidence

29 The appellant seeks to admit two pieces of evidence that were not before the Federal Court (the new evidence): an article from the CBC website dated May 31, 2020 (the Article) and a document described as the CTA's "response on May 25, 2020 to an order paper tabled by a member of Parliament, which details and describes the number of complaints received" by the CTA (the CTA Response). The impetus for the Article appears to be the CTA Response.

30 The parties agree that the relevant criteria for the admission of new evidence are derived from Palmer v. R., [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, at para. 22:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this general principle is applied less strictly in a criminal case.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(1) Position of the Parties

31 The appellant argues the new evidence meets the *Palmer* criteria. She submits that because it did not exist at the conclusion of the oral hearing, it "would be implausible to require the appellant to exercise due diligence in finding a non-existent exhibit."

32 The appellant also argues the new evidence is credible and "potentially decisive of the third ground of appeal."

33 The respondent disagrees. The respondent does not suggest the CTA Response is not credible but does object to it on the basis that it is not relevant and does not contain any explanation of the significance or meaning to be drawn from the information in it. Its objection to the CBC Article goes further — it is hearsay and cannot be adduced for the truth of its contents.

34 The respondent also argues that the appellant has not demonstrated that with due diligence the new evidence could not have been adduced before the Federal Court. The respondent points out that the appellant has not explained how or when she discovered the new evidence. While the Federal Court heard the motions in October 2019, it did not issue its order until May 3, 2021. During the intervening period, the appellant made additional written submissions, including one on February 19, 2021 that advanced reasons why the CTA could not provide a reasonable alternative procedure. Yet neither that submission, nor another made on March 2, 2021, referred to the new evidence that arose the prior May.

35 The appellant submits that there is a difference between bringing new evidence and new jurisprudence to the attention of the Federal Court following the hearing and before the final decision; the respondent has confused the "standard practice of providing further legal submissions to the court upon release of a new case, versus the formal reopening of the evidence on a motion (or trial) after the hearing concluded."

36 The respondent has a further objection to the new evidence. The appellant made assertions before the Federal Court regarding the suitability of the CTA but led no evidence to substantiate them, although she knew the respondent intended to raise the CTA as one of two alternative available procedures. The respondent submits that the appellant now seeks to put in evidence "to make up for the fact that she led no evidence relating to the CTA on the motion" before the Federal Court. The respondent argues that permitting the appellant to adduce new evidence in these circumstances suggests parties are free to continue to search for and adduce new evidence after the hearing, rather than make their case at the hearing.

(2) Analysis

(a) The Palmer Criteria

37 The Article and the CTA Response (the new evidence) came into existence almost a full year before the Federal Court's order dismissing the motion to certify the action as a class proceeding.

38 Until the Federal Court issued its order on May 3, 2021, the decision on certification was not final. Nothing precluded the appellant from bringing a motion to the Federal Court to submit the new evidence as relevant to the suitability of the CTA as an alternative process to the class action. Rule 312 permits a party to seek the Federal Court's permission to file additional affidavits and a supplementary record. The appellant could have done so between June 1, 2020 and May 2, 2021.

39 While a motion to admit new evidence before the Federal Court might have required a more formal process than seeking leave to make further legal submissions, the appellant cites no authority for the proposition that that difference is relevant to the due diligence criteria. Frankly, I am not sure how it could be. I agree that "the only reasonable way to interpret the first part of the *Palmer* test is that it requires an examination of whether the proposed evidence could have, with due diligence, been adduced prior to the time at which the presiding judge was *functus officio* [...] when the order was issued and entered": Slmsoft.Com.Inc. v. Rampart Securities Inc78 OR (3d) 521, [2005] O.J. No 4847, (OSCJ), at para. 56.

40 Moreover, the appellant's affidavit does not explain how or when she learned of the new evidence. The appellant has chosen to rely solely on the new evidence coming into existence after the oral argument on the motions. That is not sufficient. I have no information to suggest the appellant was duly diligent or about her reasons for failing to bring the new evidence to the attention of the Federal Court. Thus, the appellant has not satisfied the due diligence criteria for admission of the new evidence.

41 The appellant argues the CTA Response is potentially decisive to her third ground of appeal. I find little merit to this position.

42 The appellant's third ground of appeal is that the Federal Court erred in not concluding that the class action was the preferable procedure for resolving the common issues. In support of that proposition, the appellant advances four arguments.

43 The first is that the Federal Court did not consider all the relevant factors under Rule 334.16(2), but rather considered only one, *i.e.*, whether the other means of resolving the claims are less practical or efficient as required by Rule 334.16(2)(d). The CTA Response has no relevance to a submission that relevant factors were not considered, and in her written submission on the motion the appellant has not suggested it does.

44 The appellant's second argument in support of the third ground is that the respondent did not meet the evidentiary burden required in presenting the CTA as a preferable procedure for resolving claims. In her written submissions, the appellant asserts that Federal Court's conclusion that the class procedure was not the preferable one is mainly premised on the appellant bearing the onus to prove some basis in fact for her position that the CTA would not act on complaints. The appellant proposes to argue that the respondent, not the appellant, bore this onus. Again, if the appellant is correct, and the onus is on the respondent, the CTA Response has no relevance. It has nothing to do with who bears the onus of proof.

45 Similarly, the CTA Response has no relevance to the appellant's third argument: that there was no evidentiary foundation at the Federal Court for concluding that the CTA could be a viable alternative, and specifically no evidence the CTA would or could make inquiries about the claims. It is obvious that an argument there was no evidentiary foundation for a finding must be grounded in the evidence before the Federal Court, not new evidence the Federal Court never saw.

46 Finally, in support of the third ground, the appellant submits that the Federal Court should have exercised its discretion under Rule 60 to allow the appellant to address potential gaps in the evidence. Rule 60 is entirely discretionary. The motion record does not suggest the appellant asked the Federal Court to permit her to address potential gaps. Indeed, the motion record is clear that the appellant made additional submissions on the suitability of the CTA after the hearing, albeit based on jurisprudence; she did not raise the CTA Response. However, even if she had sought an opportunity to address potential gaps, and the Federal Court denied it, the CTA Response is not relevant to whether the Federal Court erred in failing to exercise a discretion.

47 It goes without saying that the Article is on shakier ground than the CTA Response because it is obviously hearsay. While hearsay evidence that meets the tests of reliability and necessity may be admissible, the Article clearly meets neither test.

48 The Article reports on the CTA Response and contains statements of opinion about the CTA process made by a small number of people. It might be said to raise more questions than answers. How were the people whose opinions are expressed chosen? What questions were posed

to elicit the comments? Were other inquiries made that were not reported? What other comments did those interviewed make that might be relevant? The Article expresses a viewpoint about the CTA process; it is not reliable in the sense required to be admissible.

49 Necessity is founded on the need to get at the truth; in substance, it is a form of the "best evidence" rule. "[T]he rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function": R. v. Khelawon2006 SCC 57, [2006] 2 SCR 787, at para. 2. How can an article reporting on the CTA Response be the best evidence of what is found in the CTA Response itself?

(b) Should new evidence nonetheless be admitted?

50 While I agree with the respondent that the appellant has not met the criteria in *Palmer* for admission of the new evidence, that does not end the matter. The Court has the residual discretion to admit the new evidence, although it does so "only in the clearest of cases", where the interests of justice so require: Shire Canada Inc. v. Apotex Inc., 2011 FCA 10, 414 N.R. 270 [, at para. 18; and Coady v. Canada (Royal Mounted Police), 2019 FCA 102, at para. 3.

51 I share the respondent's concern that the appellant is attempting to admit evidence on appeal that she chose not to present before the Federal Court. The following passage from the Federal Court's reasons is informative:

> [116] In terms of the CTA procedure, the Plaintiff submits as follows:
>
> > 121. With respect to SATA's assertion for making a CTA complaint, there is also no evidence that the CTA will review all 176 flights in question, which again raises concerns whether there can be effective behavioural modification. There is also no evidence that they will adjudicate the claims for all passengers on the same flight, and there will be no access to justice. Furthermore, the CTA is not equipped to handle 28,000 individual complaints brought by the Class, and would overwhelm the CTA.
> >
> > . . .
>
> [117] For the reasons that follow, I am not satisfied that a class action would be a preferable to the informal facilitation process and formal adjudicative process offered by the CTA.
>
> [118] First, the Plaintiff bears the onus to prove some basis in fact for her position that the CTA will fail to act on complaints. She cannot rely on the absence of evidence to prove a fact; facts without evidence are bald assertions. The Plaintiff engages in speculation and conjecture when she claims that the CTA will be overwhelmed and is not equipped to handle voluminous complaints. [Emphasis added.]

52 I accept that the appellant disagrees with the Federal Court's opinion on onus, but it is clear the appellant presented no evidence to support her claims that "the CTA is not equipped to handle 28,000 individual complaints brought by the Class, and would overwhelm the CTA." She now seeks to present that evidence in the form of the new evidence. This Court has previously refused to exercise its discretion to admit new evidence where the alleged facts for which the new evidence is presented are not new and where the appellant, like this one, provided no explanation as to why she could not present evidence of the alleged facts at the time the motion was made: *Shire* , at paras. 18-22.

53 This is not a case where the interests of justice warrant admitting the new evidence.

(3) Judicial Notice

54 The appellant suggests that the CTA Response is a document of which a Court may take judicial notice. I disagree. The Supreme Court of Canada described the doctrine of judicial notice in R. v. Find, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48, as follows:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [...]

R. v. Spence2005 SCC 71, [2005] 3 S.C.R. 458 , is to the same effect (at para. 65):

> When asked to take judicial notice of matters [...], I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

55 Here the ability of the CTA to address the complaints is something about which the parties disagree, and is close to the issues in dispute. So it appears both controversial and not so generally accepted as to be something about which reasonable people may not disagree. But more importantly, the CTA Response is a document that requires explanation before the Court could safely interpret it or draw reasonable inferences from it: Bell v. Canada, 2000 CanLII 15330, 54 DTC 6363, at paras. 25 and 31.

56 For the above reasons, the motion to admit the new evidence is dismissed.

III. Conclusion

57 The De Oliveira Affidavit and the Romano Affidavit shall be included in the appeal book. The appellant shall file the appeal book within 30 days of today's date. The appellant's motion to admit new evidence is dismissed. There shall be no costs of the motions.

2021 FC 229, 2021 CF 229
Federal Court

Constantinescu c. Canada (Service correctionel)

2021 CarswellNat 2469, 2021 CarswellNat 944,
2021 FC 229, 2021 CF 229, 332 A.C.W.S. (3d) 184

CECILIA CONSTANTINESCU (Applicant) and CORRECTIONAL SERVICE OF CANADA (Respondent)

Peter G. Pamel J.

Heard: September 24, 2020; October 1, 2020; November 12, 2020
Judgment: March 16, 2021
Docket: T-1125-19

Counsel: Cecilia Constantinescu, for the Applicant (on Her Own Behalf)
Marilou Bordeleau, for the Respondent

***Peter G. Pamel J.*:**

[ENGLISH TRANSLATION]

I. Overview

1 Pursuant to paragraph 10(1)(a) of the *Access to Information Act*, RSC 1985, c A-1 [ATIA], one of the grounds for which a government institution may refuse access to a record is the non-existence of the record. While some case law from this Court and the Federal Court of Appeal has raised the possibility that a requester may successfully challenge the alleged non-existence of a record, it does not yet provide a remedy for such situations.

2 In this case, by way of a notice pursuant to paragraph 7(a) of the ATIA, and in accordance with paragraph 10(1)(a) of the same Act, the Correctional Service of Canada [CSC] advised Cecilia Constantinescu [Ms. Constantinescu] that no records existed in response to her access request.

3 Ms. Constantinescu is now challenging that response, and pursuant to section 41 of the ATIA, asks this Court to order CSC to provide her with the information sought in her access request or, failing that, to order a search of its premises for the information.

4 For the reasons that follow, I dismiss the application for judicial review.

II. Facts and proceedings

5 This is a complex case, so it is best if I provide a detailed summary.

6 Ms. Constantinescu was a CSC recruit. In the fall of 2014, she attended the Correctional Training Program [CTP] at the CSC Staff College in Laval, Quebec [Staff College] with a view to becoming a correctional officer.

7 According to Ms. Constantinescu, during the months of October and November 2014, she was the victim of several acts of assault, harassment, intimidation, and abuse during the CTP professional training courses. Among the individuals involved, Ms. Constantinescu complained in particular about inappropriate behaviour of a sexual nature and intimidation by another recruit at the Staff College, the late Pierre-Louis Durdu. The events complained of allegedly occurred on October 22, 2014, during one of the training courses. Mr. Durdu has since passed away — a fact that Ms. Constantinescu did not discover until April 16, 2020, during a conference call with CSC lawyers in connection with her complaint before the Canadian Human Rights Tribunal [CHRT].

8 Based on the allegations made by Ms. Constantinescu and after a preliminary review of the facts, by convening order dated November 28, 2014, the Acting Director of the Staff College convened a board of disciplinary investigation to look into the late Mr. Durdu's alleged behaviour toward Ms. Constantinescu.

9 The report regarding the disciplinary investigation was issued on March 26, 2015 [Investigation Report]. The members of the disciplinary board of investigation found that the investigation [TRANSLATION] "did not lead to a finding of misconduct by Mr. Pierre-Louis Durdu with respect to the Code of Discipline (CD 060), the Values and Ethics Code for the Public Sector, the Professional Standards or any other CSC policy". As a result, the board concluded that [TRANSLATION] "Ms. Constantinescu's allegations could not be supported by collateral facts and cannot be considered likely to have occurred".

10 I would simply mention that for reasons that may be controversial but are unrelated to the matter before me, Ms. Constantinescu did not provide any testimony during the disciplinary investigation.

11 In October 2015, Ms. Constantinescu filed a complaint with the Canadian Human Rights Commission [CHRC] based on the same allegations of assault, harassment, intimidation, and abuse that she claims to have experienced during the CTP professional training.

12 The CHRC recommended that Ms. Constantinescu's complaint be rejected, but on May 31, 2017, it nevertheless referred the matter to the CHRT to have her complaint heard (File number T2207/2917).

13 In the context of her case before the CHRT, on December 8, 2017, Ms. Constantinescu received documents from CSC, including:

> i. Document 20 - Pierre-Louis Durdu's written statement [Statement of Mr. Durdu].
>
> ii. Document 28 - Pierre-Louis Durdu's comments dated April 28, 2015, in connection with the disciplinary investigation report.

14 It is Document 20 — Statement of Mr. Durdu — that is at the heart of this application for judicial review. This document is not dated or signed.

15 On December 11, 2017, Ms. Constantinescu emailed CSC's legal counsel and posed a series of questions regarding the documents received, including the following:

> [TRANSLATION]
>
> On what date was Durdu's statement (your attached Exhibit 20) produced and what were the conditions of its production: the place, was he accompanied by counsel or a union representative? Is this document the result of an examination or did he write it at home, for example?

16 On January 8, 2018, following a series of email "reminders" from Ms. Constantinescu, one of which asked CSC attorneys to [TRANSLATION] "stop obstructing me in obtaining documents", they responded as follows to that particular question:

> [TRANSLATION]
>
> Mr. Durdu's comments were received by CSC on April 29, 2015. We do not know under what circumstances these comments were produced.

17 It is clear that the response from CSC's counsel was referring to Document 28, while Ms. Constantinescu's question was in relation to Document 20. However, what may have been simple carelessness on the part of the counsel for CSC has been elevated to the level of an epic Cecil B. DeMille movie.

18 Dissatisfied with the response she had received and hearing nothing more from CSC, on January 31, 2018, Ms. Constantinescu wrote to the Minister of Justice recounting her story, specifically the history of her accusations against CSC and her frustration with CSC's counsel, whom she accused of manipulating records and submitting questionable documents into evidence.

19 It appears that Ms. Constantinescu did not hear back from CSC's counsel or the Minister of Justice. On February 20, 2018, she therefore filed a complaint with the CHRT reiterating the

request she had made to CSC's counsel on December 8, 2017, which was aimed at obtaining a number of clarifications from CSC regarding the Statement of Mr. Durdu, namely:

a) documents attesting to the creation date of the Statement of Mr. Durdu;

b) documents attesting to the place where the Statement of Mr. Durdu was created;

c) the conditions of the creation of the Statement of Mr. Durdu and the identities of the persons present at the time of its creation; and

d) a copy of the written notes or a transcript of the audio recording that led to the creation of the Statement of Mr. Durdu.

20 On March 13, 2018, the CHRT dismissed Ms. Constantinescu's motion (2018 CHRT 8) on several grounds, but nevertheless observed that it "is important to understand that the disclosure of documents process is different from the admissibility of evidence process at the Tribunal hearing ...". Ms. Constantinescu did not seek judicial review of that decision.

21 On April 16, 2018, Ms. Constantinescu filed a motion asking the CHRT to suspend the proceedings indefinitely, until all the documents and information she had requested were provided by CSC. She also asked the CHRT to order CSC to provide her with all documents related to her case.

22 On April 26, 2018, the CHRT dismissed that motion (2018 CHRT 10). On May 24, 2018, Ms. Constantinescu applied for judicial review of that decision (T-976-18). On November 22, 2018, this Court granted CSC's motion for dismissal and ordered that Ms. Constantinescu's application for judicial review be dismissed with costs. That decision was not appealed.

23 On July 26, 2018, following two conference calls with the parties, the CHRT concluded that CSC had fulfilled its disclosure obligations regarding, in particular, the Statement of Mr. Durdu and the testimony given by Mr. Durdu. On August 27, 2018, Ms. Constantinescu sought judicial review of that decision (T-1571-18). On November 22, 2018, this Court granted CSC's motion for dismissal and ordered that Ms. Constantinescu's application for judicial review be dismissed with costs. Ms. Constantinescu's appeal was dismissed with costs by the Federal Court of Appeal on December 17, 2019 (*Constantinescu v Canada (Attorney General)*, 2019 FCA 315).

24 Incidentally, on September 27, 2019, Ms. Constantinescu filed a motion to amend 17 interlocutory decisions previously rendered by the CHRT, including the March 13, 2018, decision regarding the Statement of Mr. Durdu (2018 CHRT 8). She also asked the CHRT to order a search of CSC offices if certain documents were not complete in order to access the requested documentation. It is interesting to note that Ms. Constantinescu is making the same request before me in this application for judicial review.

25 CSC objected to the motion, considering it an abuse of process.

26 On December 16, 2019, the CHRT dismissed Ms. Constantinescu's motion (2019 CHRT 49). In issuing its ruling, the CHRT noted "that some of these [17 interlocutory decisions] were given particular attention by [the CSC] in its submissions (e.g. the application regarding Mr. Durdu's written statement)". The CHRT also observed at paragraph 121 of its decision:

> I would add that it seems that Ms. Constantinescu is duplicating processes in multiple venues because she wants certain documents at all costs. For example, following the Tribunal's decision regarding Mr. Durdu's statement (2018 CHRT 8), she also filed a complaint with the Office of the Information Commissioner of Canada to obtain the same documents that had been refused by the Tribunal. The OICC rejected her application and concluded that the Respondent's searches were reasonable and that no documents matching this request were found.
>
> [Emphasis added.]

27 Indeed, approximately 18 months earlier, on June 27, 2018, Ms. Constantinescu had submitted an access to information request [Access Request] to CSC seeking all documents related to the Statement of Mr. Durdu containing the following elements:

> a) the date on which it was created;
>
> b) the institution before which Mr. Durdu made it;
>
> c) the place where Mr. Durdu made it; and
>
> d) the individuals who were present when Mr. Durdu made it.

28 It should be noted that what Ms. Constantinescu is seeking is information concerning the Statement of Mr. Durdu. However, since the ATIA only provides for access to records, the Access Request is specifically for any record that confirms or contains the information she is seeking (subsection 4(1) of the ATIA).

29 On August 22, 2018, after searching for the requested information, the CSC Access to Information and Privacy Division [CSC ATIP Division] informed Ms. Constantinescu that it had no records related to her access request [CSC Decision of August 22, 2018].

30 On August 27, 2018, Ms. Constantinescu filed a complaint with the Information Commissioner of Canada pursuant to subsection 30(1) of the ATIA as it then read, alleging that CSC's search in response to the Access Request was incomplete [Complaint].

31 On February 19, 2019, Ms. Constantinescu also submitted an ATIP request to the Department of Justice that was similar to the one submitted to CSC. On March 27, 2019, the Department of Justice informed Ms. Constantinescu that it had no records responsive to this second access request. No application for judicial review was filed with respect to that decision.

32 On May 27, 2019, the Acting Director of Investigations for the Office of the Information Commissioner of Canada [OIC], pursuant to subsection 37(2) of the ATIA as it then read, informed Ms. Constantinescu of the outcome of her investigation into the Complaint and reported that the OIC had concluded that CSC had conducted a reasonable search and that no records responsive to the Access Request had been located [OIC Decision of May 27, 2019].

33 On July 11, 2019, Ms. Constantinescu filed this application for judicial review of the OIC Decision of May 27, 2019. Pursuant to a direction from this Court, Ms. Constantinescu amended her application for judicial review on October 28, 2019, to clarify that the subject of the application was in fact the CSC Decision of August 22, 2018.

34 On November 7, 2019, Prothonotary Steele also denied the respondent's motion to dismiss that had been filed on September 9, 2019, prior to the amendment of Ms. Constantinescu's application for judicial review. It is therefore indeed the CSC Decision of August 22, 2018, that is the subject of this application for judicial review.

35 A hearing was scheduled for this matter on September 24, 2020. Two weeks before the hearing, Ms. Constantinescu filed a motion for an order directing two Department of Justice lawyers to testify at the hearing scheduled for September 24, 2020. I denied her motion on September 15, 2020.

III. Issue

36 Is there any evidence, beyond mere suspicion, that the information sought through the Access Request exists and is in the possession of CSC?

IV. Preliminary questions

37 The respondent contends that paragraphs 1 to 4, 17 to 19, 21(e) to 21(n), 22, 26, and 27 of Ms. Constantinescu's amended affidavit contain either opinions or facts not supported by the evidence or not relevant to this proceeding. The respondent therefore requests that we not consider all of these facts and the exhibits in support of these allegations.

38 To a large extent, I agree with the respondent. Most of the facts and opinions set out in these paragraphs by Ms. Constantinescu, while they add colour to the record, are not necessary to the resolution of this case. I will therefore not consider them in my assessment of the issues, except possibly in presenting the facts to put the issues in context.

39 The respondent also asks this Court to amend the style of cause to list CSC as respondent rather than the Attorney General of Canada. In the absence of an objection from Ms. Constantinescu, I will grant this request.

V. Applicable law and jurisdiction of the Court

40 Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, received Royal Assent and came into force on June 21, 2019 [the June 21, 2019, amendments], approximately three weeks prior to the filing of this application for judicial review, on July 11, 2019.

41 Neither party has suggested that the June 21, 2019, amendments would affect Ms. Constantinescu's rights in this case. From my perspective as well, these recent amendments have no impact on the analysis or outcome of this application.

42 To simplify the Court's analysis, therefore, given that the entire procedural history pertaining to the Access Request occurred prior to the ATIA amendments, I will refer to the provisions of the ATIA that were in effect prior to the June 21, 2019, amendments. I have cited the relevant sections of the ATIA, both before and after the June 21, 2019, amendments, in the appendix to my decision.

43 It should be noted that CSC has not invoked an exemption in this case to refuse to disclose records, and that no discretionary decision on the part of the government institution is at issue. This is purely and simply a refusal to disclose based on the non-existence of the requested record (paragraph 10(1)(a) of the ATIA).

44 The scope of the Court's jurisdiction must be considered in all applications under section 41 of the ATIA, and in the case of a refusal pursuant to paragraph 10(1)(a) of that Act, must be addressed under section 49. This Court's only authority to compel the disclosure of government records is found in the ATIA.

45 On the other hand, this Court has jurisdiction to hear an application for review under section 41 of the ATIA, including a refusal to disclose based on the allegation of non-existence of documents (paragraph 10(1)(a) of the ATIA). In *Canada (Information Commissioner) v Canada (Minister of Environment)*, 2000 CanLII 15247 (FCA) [*Ethyl Canada*] (leave to appeal refused in *Canada (Information Commissioner) v Canada (Minister of the Environment)*, [2000] SCCA No 275), the Federal Court of Appeal observed at paragraph 14:

> Indeed, the Minister refused to disclose the Discussion Papers on the ground that such documents did not exist and gave to Ethyl notice to that effect pursuant to paragraph 10(1)(*a*) of the Act. Under paragraph 42(1)(*a*) of the Act, the Commissioner may apply for judicial review of "any refusal" to disclose a record requested under the Act. Thus, the Court

has jurisdiction to review a refusal to disclose based on the allegation of non-existence of documents.

[Emphasis added.]

46 The Information Commissioner's remedies under section 42 of the ATIA are for all intents and purposes equivalent to the remedies available to Ms. Constantinescu in this case under section 41. Moreover, under the ATIA, the fact that the record does not exist is a specific reason justifying refusal to disclose.

47 The case law of this Court is consistent to the effect that in the absence of a refusal to disclose and pursuant to section 41 of the ATIA (now subsection 41(1)), this Court does not have jurisdiction to review a decision of a government institution on a matter relating to an ATIA request; the refusal to disclose information is a condition precedent to an application under section 41 of the ATIA (*X v Canada (Minister of National Defence)* (1991), 41 FTR 73 at para 10 [*Re X*]). As Justice Barnes observed in *Friesen v Canada (Health)*, 2017 FC 1152 at para 10 [*Friesen*], "[w]ithout exception, those decisions have held that the Federal Court can only provide relief to an applicant where there has been an unlawful refusal to disclose an identified record".

48 The jurisdiction conferred on the Court by section 41 of the ATIA relates to the power to grant remedies under sections 49 and 50 of that Act (*Re X* at para 10; *Wheaton v Canada Post Corp.*, [2000] FCJ No 1127, 2000 CanLII 15912 (FC) at para 8 [*Wheaton*]; *Blank v Canada (Department of the Environment)*, 2000 CanLII 16437 (FC) at para 15 [*Blank 2000*]; *Doyle v Canada (Human Resources and Skills Development Canada)*, 2011 FC 471 at p 9 [*Doyle*]).

49 In *Olumide v Canada (Attorney General)*, 2016 FC 934, [2016] 6 CTC 1 [*Olumide*], this Court stated at paragraphs 18 and 19:

> [18] To the extent the application is an application pursuant to s 41 of the *ATIA* for judicial review of the CRA's refusal to disclose the telephone records requested, I am satisfied that it is plain and obvious that it cannot succeed. Our Court has made it clear on a number of occasions that where, in response to a request for information (whether under the *ATIA* or the *Privacy Act,* RSC 1985 c P-21), a department responds that a record does not exist, such a response does not constitute a refusal of access. Absent a refusal, the Court does not have jurisdiction in judicial review pursuant to s 41 of the *ATIA* or the *Privacy Act*, unless there is some evidence, beyond mere suspicion, that records do exist and have been withheld. See *Clancy v Canada (Minister of Health)*, 2002 FCJ No 1825, *Wheaton v Canada Post Corp*, 2000 FCJ No 1127, *Doyle v Canada (Minister Human Resources Development)*, 2011 FC 471, *Blank v Canada (Minister Environment)*, 2000 FCJ No 1620.
>
> [19] As mentioned, it is plain that the "refusal" here is based on the CRA's conclusion that no records such as those requested exist, and the Information Commissioner's report of

> investigation agrees with that conclusion. No evidence, or even cogent argument, has been submitted by the Applicant to support a conclusion that the records exist or are being withheld. It is plain and obvious that this Court can have no jurisdiction in this matter pursuant to s 41 of the *ATIA*.
>
> [Emphasis added.]

50 I accept the principle established in *Olumide* that in the absence of a refusal, this Court has no jurisdiction in judicial review under section 41 of the ATIA. However, with respect to the suggestion that a response from the government institution that the records do not exist "does not constitute a refusal of access", further clarification is required.

51 In my view, a distinction must be made between, on the one hand, a refusal to disclose based on the allegation of non-existence of documents within the meaning of paragraph 10(1)(a) of the ATIA and, on the other hand, the case where the government institution has in fact disclosed records to the individual in response to a request and either the individual is not satisfied with the disclosure and suspects that other records are being withheld by the government institution, or the individual objects to the redaction of the records and to the exemptions to the disclosure of the information by the government institution.

52 As Justice Strayer observed in *Re X* at paragraph 13, "unless there is a genuine and continuing refusal to disclose, and thus an occasion for making an order for disclosure or its equivalent, no remedy can be granted by this Court" [emphasis added].

53 The government institution's assertion that the non-existence of additional records is due to the fact that it has already disclosed all relevant records to the requester and there are no further records responsive to the access request, or that the requested records had been previously destroyed, or where there has been a delay in releasing records in response to the access request but the requested records were nevertheless released to the requester prior to the hearing of the application for judicial review, do not constitute refusals allowing for an application for review under section 41 of the ATIA (*Creighton v Canada (Superintendent of Financial Institutions)*, [1990] FCJ No. 353 (TD) [*Creighton*]; *X v Canada (Minister of National Defence)* (1991), 41 FTR 16; *Re X* at pp 76 and 77; *Wheaton* at para 16; *Blank 2000* at para 19; *Clancy v Canada (Minister of Health)*, 2002 FCT 1331 at para 17 [*Clancy*]; *Doyle*; *Albatal v Canada (Citizenship and Immigration)*, 2014 FC 1026); *Friesen*; *Tomar v Canada (Parks Canada Agency)*, 2018 FC 224 at para 49 [*Tomar*].

54 The aforementioned cases did not involve a refusal of access based on the alleged non-existence of records as provided for in paragraph 10(1)(a) of the ATIA; they are therefore not cases of a "genuine and continuing" refusal giving rise to a remedy under section 41 of the ATIA. Rather, the Court is called upon to examine the evidence to verify the government institution's assertion that there are no other records in the context of determining whether the Court has jurisdiction to

hear the case. Part of this test is whether the suspicions are supported by evidence, or whether they are simply unfounded suspicions that "do not stand up to scrutiny" (*Tomar* at para 46; *Creighton*).

55 If there is no valid reason to question the government institution's assertion that there are no other records beyond those already disclosed, there is no "genuine and continuing" refusal on the part of the government institution to disclose records since records have already been disclosed. Without such refusal, this Court does not have jurisdiction under section 41 of the ATIA.

56 *Wheaton* and *Blank 2000* did not raise the issue of refusal of access based on the alleged non-existence of records. In fact, the applicants did not even plead refusal of access. However, they were equally unable to refute the assertion that they had received all the records in the possession of the government institutions in response to their access to information requests. The Court concluded that the unrefuted evidence indicated that the applicant had received all relevant records in the possession of the government institution, and therefore dismissed the application for review given that the condition precedent for filing it under section 41 of the ATIA had not been met.

57 In *Doyle* as well, documents were disclosed in response to the access request, but some pages of a report were missing. However, there was no reason to believe there was anything suspicious about the absence of these pages. The applicant even acknowledged that there was no obvious reason for the government institution to delete the parts of the record that had not been produced, and the Court was satisfied with the government institution's explanation regarding its unsuccessful efforts to locate the records.

58 As in *Wheaton* and *Blank 2000*, the *Doyle* case involved evidence accepted by the Court as to why the records sought did not exist following the disclosure of other records by the government institution in response to the access request. Citing *Creighton*, Justice Barnes confirmed that mere suspicion of abuse and bad faith is insufficient to overcome strong evidence to the contrary, namely that all of the records that are the subject of the access request have been disclosed. Again, with respect to this case law, there was no question, at the time of the hearing and after consideration of the evidence before the Court, of a refusal within the meaning of section 41 of the ATIA.

59 In *Clancy*, the applicant received the following response to her access request: the records she sought no longer existed after a period of more than ten years, and such records are destroyed every six years according to law. The Court considered this response, as well as the evidence adduced by the applicant to support her argument that the government institution was withholding records, and struck her application for review "since there was no 'refusal' to provide information as required by s. 41" of the ATIA. The Court found that "[t]he fact that the applicant has in her possession the above noted documents — the list of chemicals and government inspection reports dating from the 1970s — does not constitute proof of her allegation that the department is withholding information".

60 In *Tomar*, the applicant had also received records in response to her access request but, suspecting that others existed, asked this Court to order the government institution to conduct another search of its records. As to whether the Court even had jurisdiction to make such an order, Justice Elliott concluded that "[n]one of Ms. Tomar's beliefs or suspicions that further records should exist are supported by the evidence. They also do not stand up to scrutiny" (*Tomar* at para 46).

61 I do not believe that this case law teaches that a statement by a government institution that a record does not exist will in all cases preclude any remedy from this Court under section 41 of the ATIA. In my view, this would be contrary to paragraph 10(1)(a) of the ATIA, as well as the decision in *Ethyl Canada*.

62 Rather, I am of the view that this case law supports the specific proposition that confirmation by a government institution that no further records exist after an initial disclosure of records is not, in the words of the Federal Court of Appeal in *Ethyl Canada*, a "refusal to disclose based on the allegation of non-existence of documents". This case law teaches that in such cases, and where there is evidence that the records in question do not exist or where there is only an unsupported suspicion that the records do exist, the assertion that the records in question do not exist does not constitute a refusal and is not subject to any remedy before this Court under section 41. The Court therefore has no jurisdiction to review the government institution's decision in these circumstances.

63 In short, a refusal to disclose records under paragraph 10(1)(a) in response to an access request, accompanied by a notice under paragraph 7(a) that the record does not exist, is indeed a refusal to disclose, and the Court has jurisdiction to hear the application for review under section 41 of the ATIA. However, there is no refusal where, following disclosure of records in response to an access request, the government institution states that no further records exist. In the latter case, this Court has no jurisdiction under section 41 of the ATIA unless there is evidence, beyond a bald suspicion, that the records exist and have been withheld.

64 In other words, a refusal to disclose on the basis that the requested record does not exist is still a refusal that gives rise to a remedy under section 41 of the ATIA when the refusal is made pursuant to paragraph 10(1)(a) and communicated under paragraph 7(a) of the ATIA, as in this case.

65 In *Re X*, the issue was resolved prior to the Court hearing; the documents that did exist and were responsive to the request were eventually released to the applicant. In *Wheaton*, *Blank 2000*, *Doyle*, *Clancy* and *Friesen*, the documents themselves were found to be unavailable, either because they no longer existed or because additional documents had never existed.

66 That said, the applicant must still demonstrate that the assertion that the requested records do not exist is in fact a pretext for refusing disclosure. If the applicant does not meet her burden of proof in this regard, the application for review must nevertheless be dismissed. Moreover, as

the Federal Court of Appeal observed in *Ethyl Canada* at paragraph 14, "Parliament cannot have intended that the Court would have the relevant evidence to exercise its supervisory function only in the case of refusals based on statutory exemptions, but not in the case of refusals based on non-existence".

67 If the evidence shows that a record responsive to the access request does exist, the Court can order its disclosure under section 49 of the ATIA. That said, how can the Court access the evidence when it does not have before it the record that is the subject of the refusal to disclose or even any document ancillary to that record? The Federal Court of Appeal has enshrined the following approach to refusal of access based on the non-existence of the requested records, also at paragraph 14 of *Ethyl Canada*:

> However, where documents are alleged by the head of an institution not to exist, the reviewing Court obviously cannot resort to its ordinary method of reviewing a refusal decision. Unlike the situation where an exemption from disclosure is claimed, it cannot review the withheld documents to establish whether these documents truly fall within the exempt category. In such a case, we believe it is proper for the applicant or the Commissioner to proceed to file ancillary documents that are relevant to the existence of the requested documents and that can assist the Court in its independent review function of the government's refusal to disclose. In our view, Parliament cannot have intended that the Court would have the relevant evidence to exercise its supervisory function only in the case of refusals based on statutory exemptions, but not in the case of refusals based on non-existence.
>
> [Emphasis added.]

68 When we are dealing with a refusal under paragraph 10(1)(a) of the ATIA, there is no longer any question as to the Court's jurisdiction. The Court always has jurisdiction to hear an application for review arising from a refusal under paragraph 10(1)(a). It then becomes a question of evidence, and in order for the Court to review a refusal decision based on the alleged non-existence of documents, admissible evidence may be produced, including ancillary documents. The judge may then be in a position to conclude that the documents sought do exist and are being withheld. A mere suspicion or belief on the part of the applicant as to the possibility that such documents exist is generally not sufficient, as such suspicions and beliefs must be capable of standing up to scrutiny (*Tomar* at para 46), and a cogent argument is required (*Olumide* at para 19).

VI. Standard of review

69 In order to determine the appropriate standard of review, the Court must look to the intention of the legislature (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 at para 22). However, the standard of review for refusing to disclose records based on their non-existence has never been clear (see *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 330 at paras 28 and 29 [*Yeager*]).

70 This issue was recently discussed by Justice Elliott in *Yeager*. There is no doubt that in such cases, the judge is called upon to make an independent assessment of the evidence (section 44.1 of the ATIA). With respect to the applicable standard of review, Justice Elliott observed that the question of whether an independent assessment of the evidence is equivalent to the correctness standard of review may not be that important, as the result will invariably be the same. She observed:

> [26] In my view, the outcome in this case is the same regardless of the standard of review. This is not the usual case of a refusal to disclose a record based on an exemption under the ATIA ....
>
> [27] There is no exemption relied upon here. This is a true "no records" case. Under section 10(1)(a) of the *ATIA*, where a record does not exist, that fact is required to be stated as a ground of refusal in the response provided pursuant to section 7. In keeping with those requirements, the response to Prof. Yeager clearly stated that there were no relevant records. That is, to some extent, a binary question: either the records exist or they do not ....
>
> . . .
>
> [29] In my view, whether this is considered a correctness review or whether it is an independent assessment of the evidence by this Court, it leads to the same result: the question of whether or not Public Safety controls the records. ...
>
> [Emphasis added.]

71 It therefore appears to me that since this is a "binary" question with a refusal based on the non-existence of documents, like questions of procedural fairness, even if the standard of review is "best reflected in the correctness standard" ..., strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54). The Court must simply consider whether "the records exist or they do not" (*Yeager* at para 27).

VII. Discussion

72 Ms. Constantinescu argues that CSC is supposed to be in possession of the documents in question, particularly because a [TRANSLATION] "government institution ... cannot claim that it does not know when, where and in whose presence a written statement was given by an active employee who is the subject of allegations of assault ... ", and because CSC is "supposed to be in possession of the documents that I requested through my access request for a statement given by one of its employees who is the subject of allegations of assault, harassment and intimidation". She adds that she has made every effort to obtain the information requested in the Access Request and that CSC continues to refuse to provide her with this information.

73 CSC argues that this is only speculation on the part of Ms. Constantinescu, and that this application for review is simply the latest in a long line of attempts to obtain records that do not exist. It argues that it is clear from CSC's uncontradicted evidence that it has made every effort to locate any records that are the subject of the Access Request. In short, Ms. Constantinescu has failed to demonstrate, through evidence or ancillary documents, that the records sought exist within the institution or that the search conducted by CSC was incomplete.

74 Indeed, as appears from the affidavit of the Director of the CSC Access to Information and Privacy Division [the Director's Affidavit] filed in support of its response in this case, CSC conducted an internal investigation (considered reasonable as per the Commissioner's June 21, 2019, Decision), and then a more thorough search of its Québec City Division one year later, following the July 11, 2019, filing of this application for judicial review, to find the requested information.

75 Mrs. Constantinescu, representing herself before me, did not cross-examine the Director with regard to his affidavit.

76 At first glance, I must confess that I found CSC's response that there is no record responsive to Ms. Constantinescu's request strange, particularly given the nature of the information she was seeking. We must bear in mind that Ms. Constantinescu was asking for information regarding the circumstances in which the Statement of Mr. Durdu was prepared, a document that is neither dated nor signed, and provided by CSC to Ms. Constantinescu in the context of her case before the CHRT.

77 Therefore, CSC has control over the Statement of Mr. Durdu, so to argue that it had no other documents in its possession relating to the circumstances in which this document was prepared, *without further explanation*, is incomprehensible. It does not seem farfetched to me that a party in control of what appears to be an important and relevant internal document should be able to produce information relating to the preparation of that document, absent a reasonable explanation.

78 As I indicated to the CSC attorney, I am asked to believe that the Statement of Mr. Durdu simply fell out of the sky and magically landed on the desk of the person in charge of this file at CSC.

79 Contrary to the conclusions of most of the previous decisions of this Court when considering evidence presented to them on an issue involving supposedly non-existent documents, the Director's affidavit did not dispel my concerns.

80 The Director stated that on June 27, 2018, CSC Human Resources [Human Resources] was identified as the unit responsible for searches in response to Ms. Constantinescu's access request. At some point, Human Resources notified CSC's Access to Information Division that it did not have any records responsive to Ms. Constantinescu's request, and on August 22, 2018,

CSC's Access to Information Division informed Ms. Constantinescu that it was apparent from a [TRANSLATION] "thorough search of the files" that CSC did not have any records related to her request.

81 As previously indicated, the Director's affidavit confirms that on August 20, 2019, one year after CSC's Access Division informed Ms. Constantinescu that it did not possess any records related to her request, and following the filing of this application for review, the Quebec Region was consulted by CSC's Access Division and also confirmed on October 25, 2019, that it did not possess any records responsive to Ms. Constantinescu's access request.

82 Ms. Constantinescu asserts that the fact that the Quebec Region was consulted after this application for review was filed is evidence that little, if any, actual research was conducted prior to the issuance of the CSC Decision of August 22, 2018. However, I have no evidence before me to seriously suggest that the request for a further document search was not made merely on a precautionary basis given the heightened level of scrutiny engendered by her application for review; there is no reason to assume bad faith on the part of CSC on this ground.

83 The difficulty I have with the Director's affidavit is that it does not in any way discuss the circumstances of the preparation of the Statement of Mr. Durdu, or even how CSC came into possession of it. The appearance of this document in the hands of CSC remains a mystery. All we know is that the Statement of Mr. Durdu was provided to Ms. Constantinescu by CSC in the context of her case before the CHRT.

84 It would have been preferable for Ms. Constantinescu to cross-examine the Director, but as an unrepresented litigant, this may not have occurred to her. It should be recalled that Ms. Constantinescu had also made a similar access to information request to the Department of Justice and the response was the same, namely that there were no records responsive to her request.

85 The recent amendment to section 41 of the ATIA did not resolve the problem raised by the Federal Court of Appeal in *Ethyl Canada*: the Court hearing the application for review can obviously not follow its usual method of reviewing a refusal when there is no record to be examined in reviewing the decision of the government institution.

86 Ms. Constantinescu is also unable to produce any ancillary documents that are relevant to the existence of the requested records that could assist the Court in exercising its independent review function in respect of the refusal to disclose, as referred to in *Ethyl Canada*. As Ms. Constantinescu has pointed out, CSC controls all the ancillary documents. In *Ethyl Canada,* the OIC had the ancillary records in its possession as they had been provided by the government institution pursuant to section 36(2) of the ATIA, and the OIC was therefore able to introduce them into evidence under section 46 of the ATIA. Given that the OIC has not intervened in this proceeding, it cannot provide the clarification it provided in *Ethyl Canada*.

87 Without satisfactory evidence, and without any explanation from CSC in this case, I find that Ms. Constantinescu's suspicions that the documents to which she is seeking access do exist and that they may have escaped the attention of CSC in its search clearly do stand up to scrutiny (*Tomar* at para 46). In any event, I find that she has made cogent arguments in the circumstances (*Olumide* at para 19).

88 The question then becomes how the Court should exercise its function as a reviewing Court when all the ancillary documents are in the hands of the respondent, and its denial of the existence of the document, without further explanation, defies logic.

89 Parliament has explicitly stated one of the key purposes of the ATIA: independent review of government decisions on disclosure is necessary (paragraph 2(2)(a) ATIA). This explains the clear and broad authority section 46 of the ATIA gives to judges to review all relevant records in the context of an application for judicial review. As the Federal Court of Appeal observed in *Ethyl Canada* at paragraph 15:

> Where documents that are ancillary to an access request are the only kind of relevant evidence available in a judicial review of a refusal based on non-existence of records, there is no doubt that these documents, if they are not privileged, are admissible if they relate to the issue of existence of the requested documents.

90 I recognize that *Ethyl Canada* did not involve documents covered by the remedy that the Information Commissioner may exercise under subsection 42(1) of the ATIA. The documents at issue in that case were ones that the Information Commissioner had already obtained in the course of his investigation and that he seeking to file with the Court in support of the main application. Further, I recognize that it was the applicant, the Information Commissioner, who was seeking to introduce the ancillary documents.

91 However, given the Court's mandate in an application for review, I see no inconsistency with the principle enshrined by the Federal Court of Appeal in *Ethyl Canada*: ancillary documents, if they exist, must be produced by the party holding them, in this case, CSC.

92 At the September 24, 2020, hearing, I asked counsel for CSC if she could shed light on the circumstances surrounding the Statement of Mr. Durdu, as well as what appeared to be confusion surrounding documents 20 and 28 in the January 8, 2018, email from counsel for CSC to Ms. Constantinescu regarding what information Ms. Constantinescu was looking for.

93 It appears that counsel for CSC confirmed that documents 20 and 28 are indeed two separate documents. In addition, CSC has stated that the Statement of Mr. Durdu is not dated or signed, and asserts that a contextual element is found in the reference section of the Statement of Mr. Durdu that appears just below the name "Pierre-Louis Durdu" and reads as follows:

[TRANSLATION]

Subject: Convening order / board of inquiry into allegations of inappropriate behavior of a sexual nature and intimidation of another recruit during the CTP-05 course at the Staff College.

94 In addition, CSC argues that the CSC disclosure list provided to Ms. Constantinescu in her case before the CHRT provides additional context to the Statement of Mr. Durdu, and that Ms. Constantinescu need only consult this list to understand the context in which that statement was prepared. However, I still do not see, in the documents listed in the disclosure list, the elements that would provide the answers that Ms. Constantinescu is seeking through her access request.

95 According to counsel for CSC, Ms. Constantinescu will have the opportunity to obtain the information she seeks at her hearing before the CHRT. However, what may or may not happen before the CHRT does not in any way inform the Court at this time with respect to its mission to independently review the CSC Decision of August 22, 2018.

96 Counsel for CSC submit that her client has no information beyond what has already been given to Ms. Constantinescu, and that CSC can only repeat what was communicated in the CSC Decision of August 22, 2018. She adds that the Department of Justice lawyers defending CSC before the CHRT were not involved in the disciplinary board investigation into the late Mr. Durdu but concedes that the Statement of Mr. Durdu was under the control of CSC. In her view, it is possible that there were no other documents responsive to Ms. Constantinescu's access request; we can only speculate today about the factual matrix surrounding the creation and use of the Statement of Mr. Durdu, even assuming that the document was in fact prepared by him.

97 The Court must have evidence to fulfill its role. In this case, I simply did not have that evidence before me.

98 I therefore adjourned the hearing to October 1, 2020, and issued a direction that CSC serve on Ms. Constantinescu an affidavit of documents, together with the documents identified in Part 1 thereof, containing all ancillary documents relevant to the existence of the records requested by Ms. Constantinescu in her access request, including documents referring to the Statement of Mr. Durdu. A copy of the affidavit of documents, together with the documents listed in Part 1, was to be emailed to the Registry of the Court, without being filed or placed in the Court file.

99 Issuing a direction that an affidavit of documents be served by CSC on Ms. Constantinescu seemed to me to be the most efficient way to proceed in this case. While such a procedure would normally be reserved for actions under Part 4 of the *Federal Courts Rules*, SOR/98-106 [FCR], rather than applications under Part 5 of the FCR, I see no reason why the Court could not draw on a procedure normally provided for in one part of the FCR and apply the principles of section 3

of the FCR to another part of the FCR. In the end, the Court has the inherent power to apply the FCR in a manner that allows for the just, most expeditious and least expensive determination of the dispute (section 3 FCR; *Hryniak v Mauldin*, [2014] 1 SCR 87; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 84 and 101).

100 I also directed that the affidavit of documents and the documents identified in it not be filed with the Registry in order to preserve their confidentiality. First of all, affidavits of documents are normally only served and not filed with the Court (subsection 223(1) FCR). Furthermore, since the nature of the documents to be disclosed could not be foreseen, I considered subsection 47(1) of the ATIA, which requires the Court to take precautions against disclosing documents of a certain nature. It was not necessary to issue a confidentiality order (*Blank v Canada (Justice)*, 2007 FCA 101).

101 On September 30, 2020, the Court received CSC's affidavit of documents [Affidavit of Documents].

102 In the letter accompanying the Affidavit of Documents, CSC argued that by directing it to identify ancillary documents regarding the existence of the documents requested by Ms. Constantinescu, I was reversing the burden of proof in that it should be up to the applicant, not the respondent, to "file ancillary documents that are relevant to the existence of the requested documents and that can assist the Court in its independent review function of the government's refusal to disclose" (*Ethyl Canada* at para 14)

103 First, that is not my reading of *Ethyl Canada*. It is clear that in that decision, the Federal Court of Appeal was concerned with the manner in which the powers of this Court to independently review the decisions of a government institution are exercised in the context of an application for judicial review where the government institution "refused to disclose the Discussion Papers on the ground that such documents did not exist".

104 It was this very concern that prompted me to issue a direction ordering the only party able to produce the ancillary documents to do so.

105 That said, I am mindful of the observations of the Federal Court of Appeal in *Blank v Canada (Justice)*, 2016 FCA 189 at paragraph 36 [*Blank 2016*]:

> Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith.

106 In *Blank 2016*, however, the Federal Court of Appeal had the opportunity to review the unredacted version of the documents on which the applicant relied to assert the respondent's bad faith, under the seal of confidentiality, before concluding that the evidence on the record did not provide a reasonable basis to conclude that there was an attempt to tamper with the integrity of the records (*Blank 2016* at paras 34 and 36).

107 In *Friesen*, Justice Barnes echoed the concerns expressed by the Federal Court of Appeal in *Blank 2016*, observing at paragraph 13:

> Ms. Friesen's concern about the potential existence of further records amounts to speculation which could only be remedied by an order compelling the Department to conduct a further search of its records - an authority this Court does not enjoy: see the Federal Court of Appeal decision in *Blank*, above, at para 36.

108 However, as was the case in many of the decisions of this Court cited above, the applicant had already received what the government institution claimed to be all the records in its possession in response to her access request. Ms. Friesen was simply not satisfied that all the relevant records had been provided to her, so she filed an application for review. In the end, Justice Barnes was satisfied by the evidence presented to him that the refusal to disclose was not "unlawful".

109 It seems to me that the case law of this Court teaches that it is essential for the Court to have sufficient evidence to be able to exercise its review role, particularly when the refusal on the basis of non-existence of records defies logic.

110 As already noted, in the circumstances of this case, I concluded that there were reasonable grounds for further investigation into the existence of ancillary documents relevant to the existence of the requested records that may assist this Court in its review function in respect of the refusal to disclose (*Ethyl Canada* at para 14 — which was not the case in *Yeager*, *Olumide* or *Tomar*).

111 In any event, it seems to me that Ms. Constantinescu has already met her burden by establishing logical and sufficient reasons for the Court to seek the evidence she requires, particularly given the absence of any reasonable explanation by CSC in the circumstances.

112 That being said, the issue in this case is not truly the burden of proof; rather, it involves allowing the Court to obtain from the parties the evidence that they control and that will allow it to exercise its independent review function. As I have already noted, I do not see how this is inconsistent with the principle enshrined by the Federal Court of Appeal in *Ethyl Canada* regarding the production of ancillary documents by the party in possession of them.

113 Furthermore, and contrary to CSC's contention, I did not order CSC to conduct a further search of the records in question. I am mindful that the Federal Court's power under sections 41 and

49 of the ATIA does not include authority to make an order compelling a government institution to conduct a further search for unidentified documents (*Friesen* at para 12). My direction was not aimed at the Statement of Mr. Durdu, but rather at ancillary records that would reasonably have included documents referring to the Statement of Mr. Durdu and that should have already been identified and reviewed by CSC prior to providing Ms. Constantinescu with CSC's Decision of August 22, 2018, assuming of course that the initial inquiry was properly conducted.

114 Nor, therefore, did the direction have the effect, as CSC argues, of rendering Ms. Constantinescu's application for review moot by granting her the relief she sought, namely, that CSC conduct a new search of its records. Again, the direction was not aimed at the Statement of Mr. Durdu. The CSC can only have it one way: either the ancillary documents allowing CSC to have validly produced the CSC Decision of August 22, 2018, were subject to a [TRANSLATION] "thorough search" or they were not.

115 As to whether my direction was consistent with one of the purposes of the ATIA, at the time the direction was issued, the Court was not yet in a position to determine that the government institution "is not authorized to refuse to disclose the record" (section 49 ATIA). Had it ultimately been found that CSC had improperly refused access to information, the Court could have made such other order as it deemed appropriate (section 49 ATIA; see also *Canada (Information Commissioner) v Canada (Minister of External Affairs)*, T-1042-86, T-1090-86, T-1200-86, unreported decision of Justice Muldoon, cited in *Re X* at para 12).

116 In any event, CSC's disclosure of ancillary documents allowed the Court to properly appreciate the context of CSC's Decision of August 22, 2018, by providing an explanation rendering that decision understandable.

117 The evidence shows that the Statement of Mr. Durdu is held at the Staff College in the written record on the disciplinary investigation into the late Mr. Durdu, in a folder identified as [TRANSLATION] "Documents Filed by P. L. Durdu". This section contains two documents: the Statement of Mr. Durdu, and a legal opinion provided to the late Mr. Durdu by his lawyer. We now understand that the late Mr. Durdu had retained outside counsel in connection with the investigation into his conduct towards Ms. Constantinescu. This helps to explain why CSC has no documents responsive to Ms. Constantinescu's access request, and how the Statement of Mr. Durdu, which is included in the written record of the disciplinary investigation, came into the possession of CSC.

118 The Investigation Report confirms that the late Mr. Durdu arrived at his hearing with his personal notes in hand (identified in the [TRANSLATION] "List of Documents" section of that report) as well as other documents, including a letter from his lawyer. CSC has demonstrated to this Court that the Statement of Mr. Durdu was in fact the same document as his [TRANSLATION] "personal notes" in the Investigation Report.

119 The legal opinion addressed to the late Mr. Durdu was not mentioned in Part 1 of the Affidavit of Documents, except in the declaratory portion of it. It is not clear why the legal opinion was disclosed in this manner by CSC, but since a copy of the legal opinion was not provided to Ms. Constantinescu with the documents listed in Part 1 of the Affidavit of Documents, I must assume that she remains free to request access to it. As Mr. Durdu is now deceased, the problems with disclosure due to solicitor-client privilege may be less significant.

120 With this clarification, the Court can better understand how CSC could reasonably assert that it had no documents in its possession that responded to Ms. Constantinescu's access request.

121 It may well be that this whole matter could have been avoided had it not been for this alleged lack of attention on the part of counsel for CSC when he responded on January 8, 2018, to the request for information filed by Ms. Constantinescu regarding what was clearly a very important document in her complaint before the CHRT, but again, it is hard to say.

122 In the end, therefore, Ms. Constantinescu's logical argument can be defeated by the lack of evidence to support her claims; there is no evidence, beyond mere suspicion, that the information sought in the Access Request exists and is in the possession of CSC. Accordingly, this application for judicial review must be dismissed.

VIII. Issues related to my direction

123 During the October 1, 2020 session, Ms. Constantinescu sought to cross-examine the affiant of the Affidavit of Documents on the basis that the affidavit in question was evasive and misleading. CSC objected to that request. I therefore adjourned the hearing to November 12, 2020, and asked the parties to make written submissions on this issue.

124 Section 227 of the FCR states:

> **Sanctions**
>
> **227** On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that
>
> (a) the deponent of the affidavit be cross-examined;
>
> (b) an accurate or complete affidavit be served and filed;
>
> (c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or
>
> (d) that the party on behalf of whom the affidavit was made pay costs.
>
> **Sanctions**

227 La Cour peut, sur requête, si elle est convaincue qu'un affidavit de documents est inexact ou insuffisant, examiner tout document susceptible d'être pertinent et ordonner:

a) que l'auteur de l'affidavit soit contre-interrogé;

b) qu'un affidavit exact ou complet soit signifié et déposé;

c) que les actes de procédure de la partie pour le compte de laquelle l'affidavit a été établi soient radiés en totalité ou en partie;

d) que la partie pour le compte de laquelle l'affidavit a été établi paie les dépens.

125 The onus is on Ms. Constantinescu to provide the Court with persuasive evidence that existing documents were not listed in the Affidavit of Documents (*Pharmascience inc. v Glaxosmithkline inc.*, 2007 FC 1261 at paras 17 to 19). Ms. Constantinescu has not persuaded me of this, and I cannot conclude that the Affidavit of Documents is inaccurate or insufficient.

126 In seeking examine the affiant of the Affidavit of Documents, Ms. Constantinescu is also attempting to learn more about the documents produced during the investigation of the late Mr. Durdu, including the Investigation Report, in particular whether they were in fact all gathered together in a binder and given to the affiant of the Affidavit of Documents.

127 At this point, I find that Ms. Constantinescu's intent is beyond the scope of this application for review. There is no doubt that the affiant consulted the documents in question in order to prepare the Affidavit of Documents. Further, and more importantly, the purpose of directing CSC to serve an Affidavit of Documents was to allow the Court to better appreciate the context surrounding its refusal to disclose documents; it was not to give Ms. Constantinescu more leverage to pursue avenues of inquiry in the proceedings before the CHRT.

128 In this case, I am of the view that the Court now has the necessary evidence to rule on this application for review, and while Ms. Constantinescu continues to speculate as to whether the personal notes referred to in the Investigation Report are in fact Document 20, the Statement of Mr. Durdu, that inquiry should be conducted at the hearing before the CHRT. At this time, I am not persuaded that allowing Ms. Constantinescu to cross-examine the affiant of the Affidavit of Documents will shed any further light on this issue.

129 Ms. Constantinescu also asked whether the documents listed in Part 2 of the Affidavit of Documents to which a claim of solicitor-client privilege is alleged to attach are properly excluded from disclosure. I have reviewed the documents and find that they are. They should not be disclosed to Ms. Constantinescu (*Blank v Canada (Minister of the Environment)*, 2001 FCA 374 at para 17).

IX. Conclusion

130 The Court has an obligation, where appropriate, to give some latitude to self-represented litigants, who often have not had the benefit of legal advice, so that they understand that they were entitled to a fair hearing. Ms. Constantinescu has come a long way in this case, and given that the circumstances surrounding the Statement of Mr. Durdu were apparently the source of great distress for her, I hope that she will now be able to turn the page.

131 Ms. Constantinescu was constantly informed, including by the CHRT, that she would have the opportunity to obtain information regarding the circumstances surrounding the preparation of the Statement of Mr. Durdu when she cross-examined Mr. Durdu at the hearing before the CHRT. Mr. Durdu has since passed away, and Ms. Constantinescu therefore turned to me.

132 I sympathize with Ms. Constantinescu to the extent that things have changed with respect to the Statement of Mr. Durdu in light of his death. I can only repeat what the CHRT had previously pointed out to her, that it "is important to understand that the disclosure of documents process is different from the admissibility of evidence process at the Tribunal hearing...". Procedural solutions may be available to Ms. Constantinescu when the Statement of Mr. Durdu is introduced into evidence in the context of her complaint to the CHRT.

133 For the above reasons, I dismiss this application for judicial review.

X. Costs

134 Finally, CSC relies on section 53 of the ATIA to request that Ms. Constantinescu be ordered to pay costs. It describes her application as frivolous, vexatious and abusive and argues that it does not raise any important new principles. An example of the abusive nature of the application would be Ms. Constantinescu's persistence after Prothonotary Steele indicated to her in her November 7, 2019, order that her evidence might be insufficient, particularly after the respondent conducted further research to find the information following the filing of the application for review.

135 CSC adds that Ms. Constantinescu has only sullied the reputation of numerous individuals within CSC and the Office of the Commissioner with spurious allegations of abuse and falsification and destruction of documents in her single-minded pursuit of documents that do not exist. Therefore, the only way to put an end to Ms. Constantinescu's ongoing abusive behaviour would be to order her to pay costs in the amount of $2,000.

136 For her part, Ms. Constantinescu remains convinced that every allegation and assertion she has made is supported by evidence. She insists that the information she was seeking could very easily have been gathered by CSC from Mr. Durdu before his death. When I reminded her that the obligation of government institutions under the ATIA was to disclose documents, not to gather information or explain the documents that have been disclosed, she pointed out that it was only in the course of this application for review that she first understood CSC's position that the document

described as Mr. Durdu's personal notes in the Investigation Report is the same document as the Statement of Mr. Durdu.

137 As previously noted, I am satisfied that the outcome of this proceeding now allows Ms. Constantinescu to accept the CSC decision of August 22, 2018, as correct. This proceeding will therefore not have been in vain.

138 I have examined section 53 of the ATIA, in particular subsection 53(2). Although not initially obvious, this case has raised an important issue that, in my view, has not been fully addressed by this Court in the past. For that reason, I would have been inclined to award costs in favour of Ms. Constantinescu, regardless of the fact that her application was dismissed. However, I cannot agree with the manner in which Ms. Constantinescu has consistently, both in her written submissions and orally before me, made accusations of impropriety, deceit and bad faith against those involved in processing her access request. I must consider her conduct throughout the proceedings with respect to the awarding of costs.

139 On balance, there is no basis for awarding costs. While I understand that Ms. Constantinescu feels cheated by the applicant, this does not justify her personal attacks. Ms. Constantinescu could have better served her cause by focusing on the real issues rather than fanning the flames with caustic language, regardless of her feelings. As I have noted, I hope that Ms. Constantinescu now understands that CSC does not have any documents responsive to her access request, and that she will likely have the opportunity, in the course of pursuing her complaint before the CHRT, to obtain any relevant information from CSC at the appropriate time. My decision with respect to costs is strictly a reflection of the record before me and should in no way prejudice how another judge may rule on costs should the issues relating to this application for judicial review be raised and discussed at a later date.

JUDGMENT in T-1125-19

THIS COURT'S JUDGMENT is as follows:

1. The respondent in the style of cause is hereby amended to the Correctional Service of Canada.

2. The application for judicial review is dismissed.

3. Without costs.

AppendixA

Before Bill C-58

Purpose

2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Where access is refused

10(1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a):

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

. . .

Review by Federal Court

41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

. . .

Access to records

46 Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

. . .

Access to records

Burden of proof

48 In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Order of Court where no authorization to refuse disclosure found

49 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

. . .

Costs

53(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

AppendixB

Amendment after Bill C-58

Purpose of Act

2(1) The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

Specific purposes of Parts 1 and 2

(2) In furtherance of that purpose,

> (a) Part 1 extends the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) Part 2 sets out requirements for the proactive publication of information.

. . .

Where access is refused

10(1) Where the head of a government institution refuses to give access to a record requested under this Part or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

> (a) that the record does not exist, or
>
> (b) the specific provision of this Part on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Part or a part thereof within the time limits set out in this Part, the head of the institution shall, for the purposes of this Part, be deemed to have refused to give access.

. . .

Receipt and investigation of complaints

30(1) Subject to this Part, the Information Commissioner shall receive and investigate complaints

(a) from persons who have been refused access to a record requested under this Part or a part thereof;

(b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(d.1) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(e) in respect of any publication or bulletin referred to in section 5; or

(f) in respect of any other matter relating to requesting or obtaining access to records under this Part.

Review by Federal Court - complainant

41(1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

. . .

De novo review

44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.

. . .

Access to records

46 Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, the Court may, in the course of any proceedings before it arising from an application under section 41 or 44, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

. . .

Burden of proof - subsection 41(1) or (2)

48(1) In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned.

Order of Court if authorization to refuse disclosure found

50.1 The Court shall, if it determines that the head of a government institution is authorized to refuse to disclose a record or a part of a record on the basis of a provision of this Part not referred to in section 50 or that the head of the institution has reasonable grounds on which to refuse to disclose a record or a part of a record on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to the matter that is the subject of the proceedings, or shall make any other order that it considers appropriate.

Order of Court - other decisions or actions

50.2 If the subject matter of the proceedings before the Court is the decision or action of the head of a government institution, other than a decision or action referred to in any of sections 49 to 50.1, the Court shall,

(a) if it determines that the head of the institution is not authorized to make that decision or to take that action, make an order declaring that the head of the institution is required to comply with the provisions of the Information Commissioner's order that relate to that matter, or make any other order that it considers appropriate; or

(b) if it determines that the head of the institution is authorized to make that decision or to take that action, make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to that matter, or make any other order that it considers appropriate.

. . .

Costs

53(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Part shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Costs - important new principle

(2) If the Court is of the opinion that an application for review under section 41 has raised an important new principle in relation to this Part, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

2018 CAF 204, 2018 FCA 204
Federal Court of Appeal

Frame v. Riddle

2018 CarswellNat 6310, 2018 CarswellNat 8969, 2018 CAF 204, 2018 FCA 204, 298 A.C.W.S. (3d) 451, 430 D.L.R. (4th) 138

JOAN FRAME, PETER CHRISTOPHER VAN NAME, PRISCILLA MEECHES, NOELINE VILLEBRUN, ROSE SICCAMA, GUNARGIE O'SULLIVAN, COLLEEN RIJOTT, MARK HANDLEY, SARAH RAIN, VIOLET CHRISTINE DAVID, MELANIE MORRISSEAU, JOSEPHINE DENIS (Applicants) and JESSICA RIDDLE, WENDY LEE WHITE, CATRIONA CHARLIE and HER MAJESTY THE QUEEN (Respondents)

J.B. Laskin J.A.

Judgment: November 9, 2018
Docket: 18-A-40

Counsel: Jai Singh Sheikhupura (written), for Applicants
Celeste Poltak (written), Kirk Baert (written), Garth Myers (written), David A. Klein (written), Douglas Lennox (written), Angela Bespflug (written), E.F. Anthony Merchant, Q.C. (written), Evatt Merchant, Q.C. (written), for Respondents, Jessica Riddle, Wendy Lee White and Catriona Charlie

***J.B. Laskin J.A.*:**

1 This motion arises out of the settlement of the "Sixties Scoop" class proceedings — litigation seeking redress for the practice by Canadian child welfare authorities for many years of taking Indigenous children into care and placing them with non-Indigenous parents, where they were not raised in accordance with their cultural traditions or taught their traditional languages.

2 Some background is necessary to put the motion in context.

3 In total, 23 proposed class proceedings were commenced in relation to the Sixties Scoop. The first of these was commenced in Ontario in 2009. Other proposed class actions followed in four other provinces. The first Federal Court proceeding was commenced in 2016. Two further proceedings were commenced in 2017. The proposed class was said to comprise approximately 22,000 individuals.

4 In February 2017, the federal Minister of Indigenous and Northern Affairs publicly announced the federal government's interest in settling the Sixties Scoop litigation. Following this announcement, further proposed class proceedings were commenced in two provinces and the Federal Court.

5 In November 2017, after lengthy negotiations and a dispute resolution process overseen by the Federal Court, counsel in the first Ontario proceeding and the first Federal Court proceedings concluded a final settlement agreement covering all of the pending actions. The settlement agreement was conditional on the approval of both the Ontario Superior Court of Justice and the Federal Court. It provided for, among other things, the establishment and initial funding by the federal government of a foundation for the purpose of continuing efforts towards change and reconciliation, and a claims-based compensation scheme. The agreement included a right to opt out. It called for the payment of legal fees to class counsel of $75 million. It specified an implementation date for the settlement, ending with the date of final determination of any appeal in relation to the approval orders.

6 Notice of the settlement approval hearings was given to class members in January 2018. They were provided with an opportunity to object to the terms of settlement, the proposed counsel fees, or both. The approval hearing in the Federal Court was held before Justice Shore over two days in May 2018. Some 373 objections were received and filed with the Court. Oral submissions by objectors were also heard. The objectors included four of the 12 applicants in this motion. Many objectors expressed concerns about the amount of class counsel fees.

7 At the conclusion of the hearing, Justice Shore announced his approval of the settlement. The formal approval order was issued a few days later, followed in turn by lengthy reasons. The order stated that the settlement agreement was fair, reasonable and in the best interests of the class. It set fees payable to class counsel in the Federal Court of $37.5 million, and allocated $12.5 million to each of three law firms. It stated that the order would be null and void if the settlement agreement was not approved by the Ontario court in substantially the same terms.

8 Later in May 2018, the Ontario settlement approval hearing proceeded before Justice Belobaba. He released his reasons in June. He stated that he would approve the settlement, with the exception of the legal fees, which he regarded as excessive and unreasonable. He advised that counsel in the Ontario proceeding had agreed to de-link the legal fees provision from the other settlement provisions, and in effect asked Federal Court class counsel to do the same.

9 After further negotiations, an agreement was reached to provide separately for fees for Ontario class counsel and for Federal Court class counsel, in an amount not to exceed $37.5 million each, on the basis that each court would approve only payment of the fees of counsel before it. The settlement agreement was amended accordingly. Justice Belobaba approved the amended settlement agreement in July 2018. His order has not been appealed.

10 In the meantime Justice Phelan had been assigned as case management judge in the Federal Court proceeding. Federal Court class counsel made him aware of the amendment and provided a draft approval order, which was in substance the same as the order of Justice Shore, with the exception of provisions reflecting the amendment. Justice Phelan granted the order on August 2, 2018. Like Justice Shore's approval order, it approved fees payable to class counsel in the Federal Court of $37.5 million, and allocated $12.5 million each to the three law firms.

11 On August 8, 2018, Justice Phelan issued a direction requesting submissions on what he described as "the current motion for the payment of fees." He asked in particular, "[i]n light of Justice Shore's decision approving fees, what jurisdiction does the Court have to reconsider the issue and specifically is the matter res judicata or otherwise subject to any estoppel principles?" In response, class counsel submitted that both Justice Shore and Justice Phelan had approved the fees, and there was no motion for fee approval outstanding.

12 On September 10, 2018, after a case conference and further submissions, Justice Phelan issued reasons in which he concluded that, "in accordance with the principles of issue estoppel, [the] Court does not have jurisdiction to review, let alone reverse, Justice Shore's decision." He stated that "[i]n hindsight, it might have been preferable to title the August 2 Order '1st Amended Order of Justice Shore's Order of May 11, 2018'." He ordered that Justice Shore's May 2018 order and June 2018 order (accompanying his reasons and reproducing the May 2018 order), and his own August 2, 2018 order, "remain in full force and effect and Federal class counsel fees are to be paid accordingly."

13 The applicants now wish to appeal both Justice Phelan's August 2, 2018 order and his order of September 10, 2018. They move for an order under rule 334.31(2) of the *Federal Courts Rules*, SOR/98-106, by which a class member may seek leave to exercise the right of appeal of a representative plaintiff. It reads as follows:

> (2) If a representative plaintiff or applicant does not appeal an order, or does appeal and later files a notice of discontinuance of the appeal, any member of the class for which the representative plaintiff or applicant had been appointed may apply for leave to exercise the right of appeal of that representative within 30 days after
>
> (a) the expiry of the appeal period available to the representative, if the representative does not appeal; or
>
> (b) the day on which the notice of discontinuance is filed, if the representative appeals and later files a notice of discontinuance of the appeal.
>
> (2) Si le représentant demandeur n'a pas interjeté appel ou s'en est désisté, un membre du groupe peut demander l'autorisation d'exercer le droit d'appel du représentant demandeur dans les trente jours suivant:

a) l'expiration du délai d'appel ouvert au représentant demandeur, si celui-ci n'a pas interjeté appel;

b) le dépôt de l'avis de désistement, si le représentant demandeur s'est désisté de l'appel.

14 In their notice of motion, the applicants assert that they are all members of the class. They allege, among other things, that

- they were not given notice of the amendment to the settlement agreement;
- court files relating to it were improperly sealed, depriving them of access, without a confidentiality motion or order;
- they became aware of the amendment and its approval only through a newspaper article;
- approval required a new notice and a new fairness hearing;
- Justice Phelan's August 2, 2018 order rendered Justice Shore's approval order null and void;
- Justice Phelan's September 10, 2018 order was made without jurisdiction;
- some of the applicants wrote to Justice Phelan seeking permission to participate in the case conference that led to his September 10, 2018 order, but this request was denied;
- this denial was despite their direct interest in the issue of payment of legal fees, since if fees were reduced the amount of the reduction could be used to the benefit of the class;
- Justice Phelan erred by reviving Justice Shore's order without due process;
- Federal Court class counsel breached procedural fairness rules in amending the settlement agreement to remove Justice Belobaba's oversight of their fees;
- alternatively, Justice Phelan was not *functus officio* because what Justice Shore ruled on was significantly different from what Justice Phelan ruled on in his August 2, 2018 order;
- the amendment to the settlement agreement, and the provision for separate approval of fees, makes it impossible now to determine that the counsel fees payable to Federal Court class counsel are fair and reasonable; and
- the actions of Federal Court class counsel have been motivated by their interest in maximizing their fees, and their actions have brought the administration of justice into disrepute.

15 The evidence filed by the applicants in support of their motion consists only of Justice Phelan's August 2 and September 10, 2018 orders and the affidavit of a legal assistant. Her affidavit merely exhibits five documents. There is no affidavit of any of the applicants.

16 Despite the want of evidence, both the applicants' memorandum and their reply memorandum purport to recount in detail the relevant facts, including facts said to substantiate the allegations referred to above. They elaborate on their allegations against class counsel, stating, among other things, that class counsel "deceived" Justice Belobaba, acted without instructions, breached court rules, circumvented due process, and sought deliberately to work an injustice.

17 The applicants also rely on the test applied by this Court in motions for leave to appeal under rule 352. That test requires that the applicant for leave to appeal establish some arguable ground upon which the proposed appeal might succeed: see, for example, *Kurniewicz v. Canada (Minister of Manpower & Immigration)* (1974), 6 N.R. 225 (Fed. C.A.) at para. 9, [1974] F.C.J. No. 922 (Fed. C.A.).

18 The respondents have filed an extensive evidentiary record supported by affidavit. They too rely on the leave to appeal test under rule 352. They also submit, among other things, that the motion was brought out of time, that the applicants have no standing to bring it, and that there is no right to appeal a consent settlement approval order. They also point to the absence of evidence to support the proposition that, if leave were granted, the applicants would fairly or adequately represent the interests of the class.

19 Since the material on the motion was filed, counsel for the applicant Colleen Rijotte (whose last name is apparently misspelled in the style of cause) have filed a motion to be removed from the record based on a breakdown in the solicitor-client relationship, and advised that they have withdrawn from the motion. Counsel for the applicant Priscilla Meeches have advised the Court that they have been instructed to withdraw from participation in the motion, because their client does not wish there to be any delay in implementing the settlement.

20 This appears to be the first motion brought under rule 334.31(2). Only a very few motions have been brought under the similar provisions in the class proceedings statutes of other Canadian jurisdictions: see *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 36(3); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 36(2); *The Class Proceedings Act*, S.M. 2002, c. 14, s. 36(5); *Class Actions Act*, S.N. 2001, c. C-18.1, s. 36(4); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 38(4); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 39(4); *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 30(5); *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, art. 602; *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 39(4).

21 However, though the language of the Ontario provision differs somewhat from that of rule 334.31(2), the decisions of the Ontario Court of Appeal in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (Ont. C.A.) , and *Sino-Forest Corp., Re*, 2013 ONCA 456 (Ont. C.A.) , leave to appeal refused, [2013] S.C.C.A. No. 395 (S.C.C.), are helpful in considering how the discretion granted by the rule should be exercised.

22 In *Dabbs* , a class member sought leave to act as a representative party for purposes of appealing a judgment that certified a class proceeding and approved its settlement. In refusing leave, the Court stated (at 103) that "[its] discretion to grant leave under [the Ontario provision] is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class." It noted that there was "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement." It added that courts in three jurisdictions had approved the agreement, and that the class member was the only one, in a class of some 400,000, who was seeking to set it aside. "The wishes of one class member," it stated, "ought not to govern the interests of the entire class." If he was dissatisfied with the settlement, his recourse was to opt out and pursue his individual claim.

23 In the same vein, in *Sino-Forest* the Court dismissed a motion for leave to represent prospective class members in appealing an approved settlement where there was no basis on which to interfere with the approval order (at paras. 14-15).

24 In my view, similar considerations should govern the exercise of discretion under rule 334.31(2). To obtain leave to exercise the appeal right of a representative plaintiff, a class member must show that he or she will fairly and adequately represent the class on appeal, and that the appeal is itself in the best interests of the class. A focus on the best interests of the class is entirely consistent with the nature of the courts' supervisory role in class proceedings, particularly in relation to settlements: see *Bancroft-Snell v. Visa Canada Corp.*, 2016 ONCA 896 (Ont. C.A.) at para. 40, (2016), 133 O.R. (3d) 241 (Ont. C.A.) .

25 The parties have described a rule 334.31(2) motion as a motion for leave to appeal. That is not quite correct. Rather, as the text of the rule makes clear, it is a motion "for leave to exercise the right of appeal" of the representative plaintiff. The availability of an order under the rule therefore depends on whether the representative plaintiff (or applicant) has a right of appeal: see The Rules Committee, *Class Proceedings in the Federal Court of Canada: a discussion paper* (Ottawa: Federal Court of Canada, 2000) at 91-92.

26 The respondents submit that a representative plaintiff has no right to appeal an order approving a settlement of a class proceeding. They argue that an order of that kind is a consent order, and a party has no right to appeal an order to which it consented.

27 It is true that in other Canadian jurisdictions, appealing a consent order requires leave of the court: see, for example, *Alberta Rules of Court*, Alta. Reg. 124/2010, rule 14.5(1)(d); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(a); *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 65 (Ont. C.A.) at paras. 59-66, (2012), 348 D.L.R. (4th) 64 (Ont. C.A.) . Whether this is so for an order of the Federal Court may be questionable in light of subsection 27(1) of the *Federal Courts Act*,

R.S.C. 1985, c. F-7, which provides for appeals to this Court as of right from final and interlocutory judgments of the Federal Court (though it does not address who has standing to appeal).

28 In any event it is not at all clear that an order approving the settlement of a class proceeding is a consent order. The basis for a consent order is the parties' agreement, not a judge's determination of the merits or what is fair and reasonable in the circumstances. It therefore seems wrong to characterize a settlement approval order, which requires a judicial determination that the settlement is fair and reasonable and in the best interests of the class, as an order made on consent: *Bodnar v. Cash Store Inc.*, 2011 BCCA 384 (B.C. C.A.) at paras. 37-38, (2011), 23 B.C.L.R. (5th) 93 (B.C. C.A.) . That characterization could also foreclose a class member's ability to seek leave to challenge an approval order on appeal, even when an appeal might be in the best interests of the class.

29 However, I need not decide this issue. Nor need I consider whether the motion has been brought out of time, as the respondents submit. That is because the motion fails in any event for another, basic reason: the applicants have not adduced sufficient evidence on which an order granting leave could justifiably be made.

30 It is fundamental that, with very limited exceptions, a motion must be supported by evidence. Rule 363 requires that "[a] party to a motion [...] set out in an affidavit any facts to be relied on by that party that do not appear on the Court file." This is no mere technicality: see *Kurniewicz* at paras. 9-10.

31 Here the evidence filed by the applicants is inadequate in the extreme. First, in circumstances in which the applicants are seeking to step into the shoes of the representative plaintiffs, the Court would expect to see evidence of the kind typically submitted on a certification motion, going to, among other things, the applicants' interest, their understanding of the position they seek to advance, their role in the proceeding, and their competence to instruct counsel: see *R. v. Horseman*, 2016 FCA 238 (F.C.A.) , affirming 2015 FC 1149 (F.C.) and citing *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 (Alta. Q.B.) at paras. 54-57. Otherwise, as stated in *Sullivan* , the applicants "cannot be anything more than an empty vessel controlled by the litigation lawyer." And otherwise, there is no basis for exercising the discretion whether to grant leave in a manner that takes into account the first set of factors identified in *Dabbs* .

32 But here there is, as in *Dabbs* "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement." There is, indeed, nothing to establish that the applicants are even members of the class (though this is conceded in relation to one of the applicants). In the absence of evidence going to the applicants' ability to adequately represent the class on appeal, their motion must fail.

33 Nor have the applicants adduced evidence to show that an appeal of Justice Phelan's orders would be in the best interests of the class, on the bases that they assert. There is a virtual absence of

evidence to substantiate the various allegations made by the applicants against class counsel and in relation to the events that preceded Justice Phelan's orders. Although the applicants need not necessarily prove their allegations at this stage in order to be granted leave, it is not sufficient, for example, to make assertions about the applicants' state of knowledge, or to impugn class counsel's conduct, without any evidence in support.

34 For these reasons, the motion is dismissed.

35 On the basis that the appellants' memorandum contains serious and unsupported allegations of misconduct against class counsel and the representative plaintiffs, the respondents ask the Court to order costs against the applicants' counsel personally. The applicants did not respond to this request in their reply memorandum.

36 Rule 404(2) requires that no costs order may be made against a solicitor unless the solicitor has been given an opportunity to be heard. To ensure compliance with rule 404, I will give applicants' solicitors until November 19, 2018 to file submissions in response to this request. If they do so, the respondents will have until November 26, 2018 to file brief submissions in reply. Both submissions should address the applicability of rule 334.39. Costs of the motion are reserved pending receipt and consideration of these submissions.

Motion dismissed.

2021 FC 624, 2021 CF 624
Federal Court

GCT Canada Limited Partnership v. Vancouver Fraser Port Authority

2021 CarswellNat 6740, 2021 CarswellNat 6741, 2021 FC 624, 2021 CF 624

GCT CANADA LIMITED PARTNERSHIP (Applicant) and VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA (Respondents)

William F. Pentney J.

Heard: November 24, 2020
Judgment: June 17, 2021
Docket: T-538-19

Counsel: Matthew B. Lerner, Christopher Yung, Margaret Robbins, for Applicant
Joan Young, Grace Shaw, for Respondent, Vancouver Fraser Port Authority
Gwen MacIsaac, Jordan Marks, for Respondent, Attorney General of Canada

***William F. Pentney J.*:**

1 The Applicant, GCT Canada Limited Partnership (GCT) brings a motion under Rule 318 of the Federal Courts Rules, SOR/98-106 [Rules] seeking further disclosure of the record, in addition to that already provided by the Respondent, Vancouver Fraser Port Authority (VFPA) in response to its Rule 317 request for the "record". The Attorney General of Canada did not file any submissions or otherwise participate in this motion.

2 For the reasons that follow, I am allowing this motion, in part. As explained below, I find that VFPA's disclosure falls short in regard to several categories of documents and because certain documents were not disclosed in their original format.

3 I am therefore ordering VFPA to review its records and to disclose any further documents that fall within these categories for the relevant period. VFPA must provide an affidavit from a senior official that outlines the nature and scope of the search conducted and explains why any documents that fall within the relevant categories and time frame are not disclosed. I am also ordering VFPA to provide certain documents in their original format. Pursuant to Rule 318(4), VFPA will be ordered to provide certified copies of such documents to the Registry, as well as to deliver them to GCT and the Attorney General of Canada.

I. Background

4 The history and context for GCT's application for judicial review is set out in previous decisions dealing with other motions or appeals (see 2019 FC 1147, 2020 FC 348, 2020 FC 970, and 2020 FC 1062). In summary, GCT wishes to expand its facilities at the Deltaport container terminal at Roberts Bank, which it operates under a long-term lease with VFPA. It challenges decisions made by VFPA, which is seeking to advance its own port expansion project. The primary claim advanced by GCT is that VFPA demonstrated actual bias when it decided not to proceed with the approval process for the GCT project because VFPA was pursuing its own project instead.

5 While the key developments that set the stage for this motion were summarized in an earlier ruling (see *GCT* Canada Limited Partnership v Vancouver Fraser Port Authority, 2020 FC 970 at para 3 [), it is necessary to provide a brief summary to set the context for this motion.

6 GCT originally challenged the refusal by VFPA to consider its Preliminary Project Enquiry (PPE) (March 2019 decision). Following several procedural steps in the litigation, and certain changes to the background context, including legislative reform affecting the environmental approval process, VFPA communicated to GCT that it was rescinding the March 2019 decision (September 2019 decision). Despite the rescission, GCT refused to discontinue its litigation and to pursue the approval of its project because it took the position that VFPA continued to be biased against it.

7 GCT then brought a motion to amend its original Notice of Application for Judicial Review because it wanted to challenge both the original refusal and the subsequent rescission decisions. VFPA and the Attorney General of Canada both brought motions to strike, claiming that the matter was now moot because the original refusal had been rescinded, and that the legal context for consideration of the projects had fundamentally changed because of legislative amendments. Both motions were denied by the Case Management Judge. Justice Michael Phelan denied VFPA's appeal on November 17, 2020 (GCT Canada Limited Partnership v Vancouver Fraser Port Authority, 2020 FC 1062). VFPA has appealed that decision to the Federal Court of Appeal, but the appeal has not yet been heard.

8 In its motion for leave to amend its Notice of Application for Judicial Review, GCT included a request for an Order that VFPA produce documents relating to both its March and September 2019 decisions, as well as any documents relating to the decision-making process. This request was rejected by the Case Management Judge, who ruled at paragraph 73 of her decision that the production of the record should be requested in the manner prescribed by Rule 317 of the Rules.

9 GCT then submitted its Rule 317 request, in response to which VFPA produced documents on September 9, 2020. Unsatisfied with VFPA's disclosure, GCT brought a motion pursuant to Rule 318 seeking further documents. It then brought a motion under Rule 316, seeking leave of

the Court to cross-examine Mr. Peter Xotta, VFPA's Vice President, Planning and Operations, in advance of the hearing on the Rule 318 motion. Mr. Xotta was the individual who had certified that the VFPA disclosure was complete. GCT argued that it needed to cross-examine him because he could provide evidence about VFPA's decision-making process and the documentation that it had relied on in making the two decisions. That motion was dismissed (see *GCT #3*).

10 The core of GCT's Amended Notice of Application for Judicial Review is its claim that VFPA's actual bias against GCT is evident from the decision letters regarding both the refusal to consider its project proposal in March 2019, as well as the subsequent rescission in September 2019.

11 The first letter recounts the history of the VFPA's proposed expansion project (known as RBT2), and summarizes some perceived difficulties faced by the GCT proposal (known as DP4). The letter then states: "[t]he RBT2 Project is our preferred project for achieving the expansion of capacity to meet projected increases in demand" (March 2019 decision at p 4). The letter explains that the project rationale for RBT2 emphasized that the expansion of the existing Deltaport terminal as proposed by GCT would have resulted in a market concentration issue, because one terminal operator (namely GCT) would control a significant portion of traffic through the port. It also noted that the proposed location for the Deltaport expansion was not an option due to environmental sensitivity. Based on all of this, the March 2019 decision concludes with the following passage:

> We emphasize these points to ensure that you are fully aware that the RBT2 Project is our preferred project for expansion of capacity at Roberts Bank. You must understand that your DP4 proposal, even if it is able to receive the necessary environmental and regulatory approvals, could only be considered as subsequent and incremental to the RBT2 Project. We note that your proposed development timeline would conflict with the implementation of RBT2 capacity. Taking all of the above factors into consideration, we will not be processing your Enquiry through our project and environmental review process at this time. We would be prepared to review development plans for Deltaport with GCT at a point when we can more accurately project the need for incremental capacity beyond RBT2.

12 GCT argues that this statement provides a clear indication that VFPA refused to consider the DP4 project because it gave a preference to its own project and that this demonstrates the bias in VFPA's decision-making.

13 The problem is compounded, according to GCT, because in the September 2019 decision rescinding the March 2019 decision, VFPA reiterated its concerns about the DP4 project regarding its environmental impact and the "competitiveness and control question". However, having repeated its concerns, VFPA went on to state that it no longer considered either problem to be so significant as to warrant ruling out further consideration of the project. GCT argues that this is proof that the VFPA rescission of its March 2019 decision is illusory, because VFPA maintains

its prior positions and has not taken any steps to resolve the core problem that it is acting as both regulator and competitor *vis-à-vis* GCT's DP4 project.

14 Having traced the route that brought the parties to this point, the matter before the Court is the GCT motion for further disclosure subsequent to its initial Rule 317 request. It seeks production of all documents related to or forming part of the decision-making process for the March and September 2019 decisions.

15 GCT made its Rule 317 request on March 12, 2020, the day after the World Health Organization declared the outbreak of COVID-19 a global pandemic, and the day before many public health authorities in Canada instituted measures to stem the spread of the virus. On March 13, 2020, the Court announced that its facilities would be closed pending further clarification of the situation, and this was followed by a series of Practice Directions and Orders that suspended the time limits for filing certain documents with the Court. Public health measures implemented in provinces also caused many businesses and services - including law firms - to close their premises for a period of time. This caused some delay in VFPA's response to the Rule 317 request, which was provided on September 9, 2020.

16 The disclosure comprises 478 documents, some of which are described in more detail below. Broadly speaking, these documents include material that was placed before VFPA's Board of Directors, some internal correspondence, as well as exchanges with outside entities, including external consultants and certain government officials. In addition, VFPA provided a list of documents over which it claimed solicitor-client privilege.

17 The disclosure was accompanied by the following declaration:

> I, Peter Xotta, Vice President, Planning and Operations, Vancouver Fraser Port Authority, certify that, with the exception of the portions redacted for solicitor-client privilege and relevance, or documents identified as privileged, the materials listed in the attached index, and attached thereto, are true copies of the documents before the decision maker in making the decision of March 1, 2019 to refuse to process GCT's PER application and the September 23, 2019 [decision] to rescind that decision which are challenged in the applicant's Amended Notice of Application.

18 GCT is dissatisfied with the extent of disclosure, and has brought this motion pursuant to Rule 318 seeking an order for further production.

19 During the course of submissions on the motion, GCT raised a more general concern regarding the lack of detail included in VFPA's description of the documents over which it asserted solicitor-client privilege. At the hearing on the motion, I directed that VFPA disclose a more particularized list for its solicitor-client privileged materials, resembling the level of detail expected in documentary discovery. The parties were then invited to make written submissions on

the solicitor-client privilege claims. In connection with that, I also ordered VFPA to provide this material to the Court on a confidential basis so that I could review it, if needed. I will deal with this issue below, following an analysis of the arguments about the more general issue of disclosure.

II. Issue

20 The only issue is whether GCT has established that it is entitled to further disclosure from VFPA.

III. Analysis

A. The principles guiding Rule 317 disclosure

21 Rule 317 provides a means by which a party can request a record to support its application for judicial review, and Rule 318 sets out the process for objecting to such a request. The relevant portions of these rules for the purposes of this decision are:

> **Material from tribunal**
>
> **317 (1)** A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
>
> . . .
>
> **Objection by tribunal**
>
> **318 (2)** Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.
>
> **Directions as to procedure**
>
> **(3)** The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).
>
> **Order**
>
> **(4)** The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.
>
> **Matériel en la possession de l'office fédéral**
>
> **317 (1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral

dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[...]

Opposition de l'office fédéral

318 (2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

22 The general principles governing the extent of the decision-maker's obligation to disclose under Rule 317 are well-established. These were summarized by the Federal Court of Appeal in Tsleil-Waututh First Nation v Canada (Attorney General), 2017 FCA 128 at paras 86-115 [, and more recently in Lukács v Swoop Inc, 2019 FCA 145 [and Canadian National Railway Company v Canada (Transportation Agency), 2019 FCA 257 [.

23 Decisions of the Federal Court of Appeal confirm four core elements of the disclosure obligation set out in Rule 317:

i. it only requires disclosure of material that is "relevant to an application" defined with reference to the wording of the application for judicial review (*Tsleil-Waututh* at paras 106-10; *Canadian National* at para 14);

ii. it only requires disclosure of material that is "in the possession" of the administrative decision-maker, not others (*Tsleil-Waututh* at para 111);

iii. in most cases, it is limited to material that was before the decision-maker when it made the decision under review. 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 []); and

iv. it does not serve the same purpose as documentary discovery in an action and cannot be used on a fishing expedition (*Tsleil-Waututh* at para 115).

24 The decision in *Canadian National* reminds us that the interpretation of Rule 317 must be grounded in the fundamental role that the evidentiary record plays in ensuring that courts can conduct meaningful review of administrative decision-makers:

> [12] Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; certiorari means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision. The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.
>
> [Citations omitted.]

25 The Court of Appeal in *Tsleil-Waututh* sets the rule regarding disclosure of the record into the wider context of the constitutional foundations of judicial review:

> [78] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action". Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever — *i.e.*, there is not even a summary or hint of what was before the administrative decision-maker — or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.
>
> [Citations omitted.]

26 The overarching consideration is whether the disclosure will permit meaningful judicial review of the decision, and "[i]t is important that neither party's ability to advance arguments... be constrained or prejudiced by an inadequate record. There is also an interest in ensuring that the Court has the necessary evidence, or lack of evidence, to decide the matter" (*Canadian National* at para 23). This will generally tip the balance in favour of production, if the material is relevant to a ground of review.

27 In reviewing an objection to disclosure under Rule 318, a court must seek to balance, as much as possible, three objectives: (i) providing meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient to proceed with the review; (ii) procedural fairness; and (iii) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (Girouard v Canadian Judicial Council, 2019 FCA 252 at para 18, citing *Lukács* at para 15 [*Girouard*])

B. Rule 317 disclosure in cases involving allegations of bias

28 There are exceptions to the general rule that disclosure is limited to the material that was before the decision-maker, and one of these arises when an application for judicial review involves a claim that the decision-maker was biased against the claimant. As explained in *Tsleil-Waututh* at paragraph 98, the exception is based on the need to ensure that the judicial review can be meaningful, and so "where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted".

29 The jurisprudence makes it clear, however, that a bare allegation of bias made to engage in a fishing expedition will not trigger a wider disclosure obligation (*Tsleil-Waututh* at para 99; Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour), 2019 CanLII 9189 (FC) at para 23 [*Right to Life*]). As set out in *Right to Life* at paragraph 23, "[t]he party demanding more complete disclosure has the burden of advancing the evidence justifying the request".

30 In this case, the core of GCT's claim is that VFPA displayed actual bias against it when it favoured its own port expansion project and refused to consider the GCT proposal. GCT argues that its bias argument supports its claim that the disclosure made by VFPA is inadequate, and that without an order forcing VFPA to provide more documents, the reviewing court will be unable to assess the merits of its claim. GCT argues that the disclosure should not be limited to documents that were before the decision-maker when the decision was actually made, but rather should include other documents that would show that VFPA had pre-determined the matter and was motivated by an ongoing bias against it.

31 Further, GCT claims that VFPA has consistently sought to shield its decisions from meaningful scrutiny, including by filing affidavits in support of its motion record from law clerks employed by its external counsel's law firm rather than from senior VFPA officials, thereby making cross-examination useless. GCT portrays this as part of an ongoing pattern, which it argues should support a finding in favour of greater disclosure.

32 VFPA submits that it has made a fulsome disclosure, and that GCT is actually seeking documents that go to the merits of the decisions on the project, which VFPA argues are not relevant

for the judicial review. VFPA denies that it has been seeking to immunize itself from judicial review; instead, it says that it is simply trying to keep the focus of the review where it should be - namely, on the decision-making process and reasons, rather than the merits of the decision.

C. The GCT disclosure demands

33 GCT seeks further disclosure of seven categories of documents: (i) board materials and minutes, (ii) competition and market share analysis, (iii) communications with experts, (iv) communications with government departments, (v) agreements with third parties, (vi) documents related to the September 2019 decision, and (vii) non-privileged internal communications.

34 For reasons explained below, I find that several of the categories of documents do not merit extensive discussion because GCT has failed to establish that further disclosure is warranted. These will be dealt with first, followed by an analysis of the areas where further disclosure is required. I will then deal with the claims of solicitor-client privilege.

(1) Categories of documents where no further disclosure will be ordered

35 As noted earlier, a key question in assessing the adequacy of disclosure is whether the documents that were not provided are necessary to allow the parties to advance their arguments and to enable the Court to engage in meaningful judicial review. This starts with the grounds for the challenge set out in the application for judicial review. Where bias is alleged, the question is whether there is some basis in the record to make that a tenable claim' (*Right to Life* at para 23; *Humane Society* at para 10). If the moving party establishes that bias a "tenable ground of review", an obligation to disclose more than the documents that were before the decision-maker may arise (see *Tsleil-Waututh* at para 98).

36 In regard to the request for the competition and market share analysis, the communication with experts, and agreements with third parties, I do not find a sufficient factual foundation to warrant further disclosure on the grounds of bias, and I find that the disclosure made by VFPA is sufficient to enable meaningful judicial review. I find, however, that some of the documents should have been disclosed in their original formats.

37 I will briefly describe the GCT argument for disclosure and my rationale for not ordering it for each of these categories of documents.

(2) Competition and market share analysis

38 GCT's Amended Notice of Application for Judicial Review contains specific references to the VFPA market share analysis. GCT states that the VFPA analysis is "cursory, lacking in analysis and not credible", mainly on the basis that the VFPA conclusion is based on the wrong conception of the relevant market (Amended Notice of Application for Judicial Review at paras 31-34).

39 The issue of market share arises because VFPA's March 2019 decision mentions that one of its concerns with the GCT project is that "expanding Deltaport [the GCT port facility] would mean one terminal operator would control a significant majority of the market for container terminal services" (March 2019 decision at p 4). This concern is reiterated in the September 2019 decision.

40 GCT argues that the VFPA analysis is based on the wrong definition of market share, and therefore its concern about market dominance is misplaced. GCT wants further disclosure of the documents in support of its argument that VFPA's conclusion about market share and competition reflects VFPA's overall bias against GCT. In essence, GCT argues that VFPA "cooked the books" by choosing the wrong definition of the relevant market and by using data that supported its pre-ordained conclusion. It seeks all materials relating to VFPA's analysis of competition and market share considerations that relate, directly or indirectly, to the March 2019 decision.

41 Additionally, VFPA's disclosure includes several presentations and charts relating to projected container traffic, including analyses of the proportion of containers handled by GCT relative to other terminal operators in British Columbia under various market scenarios. GCT submits that there has been almost no production of the data or spreadsheets underlying these presentations and that the documents in the disclosure are PDFs and not in their original Excel format, so it is impossible to analyze the underling data within the spreadsheets. GCT argues that by disclosing the documents as PDFs rather than in the format they would have been in when presented to the decision-maker, VFPA is seeking to hide the assumptions that lie behind the analysis, which GCT says would reveal its bias.

42 GCT argues that it needs the productions in their original format because that was what would have been before the decision-maker. It also submits that it needs to be able to look behind the spreadsheet data in order to challenge any biases inherent in the methodology used or in the data selected. It argues that the data underlying the spreadsheets disclosed in VFPA Production 00031 and 00086 as well as other Excel spreadsheets should be disclosed in .xlsx form, not .pdf.

43 I am not persuaded that disclosure of new documents is warranted in relation to this question. I do find, however, that VFPA should provide the documents already disclosed in their original format, which will be ordered.

44 The competition and market share analysis issue is clearly one element of an overall mosaic through which GCT seeks to demonstrate VFPA's bias against it. There are many documents in the record that confirm that market share and its impact on overall competition was a consideration for VFPA, and the decisions reflect VFPA's conclusion based on the analysis of the question that was done by its officials and consultants. The September 2019 decision confirms that this remains a continuing concern.

45 GCT's claim does not attack the reasonableness of the decision, and thus whether this conclusion was based on the right definition of the relevant market is not a question to be determined on the application for judicial review. Rather, the only issue will be whether VFPA's analysis and conclusions reflect its bias against GCT. I am not persuaded that further disclosure of new documents is needed to allow GCT to make its argument on this point, or to enable the Court to conduct a meaningful review of it.

46 I do, however, agree with GCT that it should receive the documents in the same format as they were in when they were before the decision-maker. This relates to the fact that VFPA disclosed the documents in image format (as PDFs) rather than in the format that they would have been in when considered by the decision-maker (as Excel Spreadsheets).

47 The Rule 317 disclosure requirement normally involves transmitting a certified copy of the documents in their original format to the parties and the Court, unless there is some valid reason for changing it. Rule 318(1)(b) provides that "where the material cannot be reproduced, the original material [shall be transmitted] to the Registry". In this case, VFPA did not disclose these documents in their original format, and it did not explain why. In the circumstances, I am persuaded that the change in format could deny GCT the ability to meaningfully analyze the underlying data and thereby deprive it of evidence that could show that VFPA's conclusion is evidence of bias against GCT.

48 Accordingly, VFPA Production 00031 and 00086 as well as other Excel spreadsheets must be disclosed in .xlsx form, not .pdf. GCT will identify the spreadsheets in the VFPA production other than VFPA Production 00031 and 00086 that fall within this category within seven (7) days of this Order, and VFPA will disclose these documents in .xlsx format within seven (7) days thereafter.

(3) Communication with experts

49 GCT argues that it needs access to VFPA's communications with external expert advisors in order to demonstrate that VFPA's instructions reflected its bias. VFPA has provided some materials relating to reports that experts provided about the DP4 project. However, GCT says that it needs all communications between VFPA and any experts and consultants who produced such reports to allow the reviewing court to determine whether these experts were directed to reach particular conclusions or based their analysis on data that VFPA had skewed to support the result it wanted.

50 I am not persuaded that GCT has provided a basis in the evidence for this request. VFPA does not dispute that it relied on certain external experts and the disclosure includes several reports and analyses prepared by these companies. To the extent that these are relevant to the bias claim, GCT can refer to them and the reviewing judge will be in a position to review them. I am not persuaded that it is necessary to examine the instructions provided to these experts in order to assess the claim of bias. In my view, this would amount to a fishing expedition.

51 If there are documents in the record that have been disclosed that support GCT's argument that VFPA directed the experts to particular conclusions or provided biased information to taint their analysis, GCT can point these out, and the reviewing court can assess them. To the extent that VFPA has failed to disclose other documents in its possession that could dispel such an inference, this is a consequence of VFPA's own choices regarding its adjudicative process and resultant disclosure.

52 However, as with the previous category, I am persuaded that VFPA should be ordered to disclose, in its native format, one specific document that already forms part of the disclosure. VFPA Production 00132 is a draft document that appears to have been annotated with comments. However, it has been disclosed in such a way that it is possible to see where comments have been made, but not the substance of those comments. It must be disclosed in a format so that the comments can be viewed.

(4) Agreements with third parties

53 GCT seeks all agreements between VFPA and third parties that relate, directly or indirectly, to GCT's DP4 project. It explains that it has consistently heard of agreements between VFPA and nearby Indigenous communities that contractually bind those groups to support VFPA's RBT2 project and prevent them from supporting DP4. No such agreements have been produced, nor is there any other evidence that points to their existence.

54 This claim is not supported in the record, and GCT can go no further than stating that it has "heard" that such agreements exist. In my view, this falls into the very definition of a bald assertion that amounts to a fishing expedition, and no order for further disclosure will be made.

(5) Categories of documents for which further disclosure will be ordered

55 Further disclosure of certain categories of documents is warranted, in my view, because they relate directly to the core of the GCT application for judicial review, and there is a sufficient basis in the evidence already in the record to justify requiring VFPA to review its information holdings and to disclose more documents if it has any.

56 As I will explain, this will require VFPA to conduct a search for any documents in these categories during the relevant period. It must document its search parameters, and disclose further documents, if the search reveals any. VFPA must name a senior official to supervise this search, and this official will provide an affidavit to describe the nature and scope of document review that was conducted, and the rationale for excluding any documents that fall within these categories for the relevant period from the production.

(6) Board documents and minutes

57 The VFPA production includes board agendas, minutes, and meeting materials in respect of certain meetings of the VFPA Board of Directors (Board). However, materials relating to Board meetings near the time when VFPA made the decision to refuse to consider the GCT project were not included.

58 GCT claims that it is entitled to receive this information on two grounds. First, it argues that the materials would show whether the Board was involved in the decision-making process. GCT submits that the Board would be expected to be involved in a decision of this magnitude, and the materials would show what was discussed. In addition, GCT argues that these materials would be relevant to assessing the nature or degree of bias exhibited by VFPA, which would be revealed in the presentations management made to the Board and any discussion of these.

59 VFPA contends that this is all speculation on the part of GCT, and it maintains that it has made full disclosure of the relevant material.

60 As discussed earlier, the grounds set out in the application for judicial review dictate the scope of disclosure required by Rule 317. Where bias is alleged, the burden is on the aggrieved party to provide a basis for that claim.

61 The GCT claim of bias lies at the core of its Amended Notice of Application for Judicial Review. It argues that the bias tainted the VFPA decision-making to date, and that it will continue to influence VFPA's decision-making in the future. GCT notes that it has made presentations about its DP4 project at a meeting with VFPA officials and the majority of the VFPA Board. It says that the Board would normally be expected to be involved in, or at the least informed about, the decision to not proceed with the GCT project.

62 GCT points out that VFPA's productions do not include several meetings where the DP4 project was discussed or that were close in time to the decision about the DP4 project. GCT also says that no materials for any Board meeting in 2019 were produced.

63 Some material in the record indicates that the project was discussed at the March 21, 2018 Board meeting, but the agenda, full Board materials and minutes for this meeting were not produced (see VFPA Production 00230 at p 5).

64 Further, VFPA produced an e-mail indicating that there was a Board meeting on February 25, 2019, one week prior to the decision to refuse to process the GCT project enquiry, yet the materials for that meeting were not produced (VFPA Production 00028). On this point, VFPA says that the e-mail in question refers not to the Board of Directors, but rather to an internal project board that was overseeing the RBT2 project.

65 GCT submits that these omissions will prevent it from assessing whether the Board was involved in the decision-making either directly or by way of its instructions to management. In response to the VFPA argument that the decisions were taken by senior officials, GCT contends that these officials were accountable to the Board, and anything said by the Board would presumably influence their decision. Further, the documents would reveal whether VFPA had closed its mind to a fair consideration of the GCT project. GCT argues that further disclosure is needed to enable it to make its case, and to allow the reviewing judge to conduct a meaningful review.

66 I agree.

67 The bias claim is clearly asserted in the Amended Notice of Application for Judicial Review, and it is a "tenable" claim (to borrow the language of Justice Stratas in *Tsleil-Waututh* at para 98) based on the wording of the decisions. The evidence in the record shows at least two instances where the Board or Board members were engaged with the project.

68 The first reference to the Board's involvement is in the affidavit of Doran Grosman, the President and Chief Executive Officer of GCT. Mr. Grosman states that he attended a meeting on October 5, 2018, with VFPA senior officials as well as a majority of its Board (including the chairperson, vice-chairperson and chair of the major capital projects committee) where there was a presentation regarding the DP4 project.

69 In addition, the VFPA productions include an e-mail chain from late October 2018 between Mr. Xotta and other senior VFPA staff regarding the preparation of slides for the "DP4 conversation with the Board" (VFPA Production 00036, duplicated at VFPA Production 00377). VFPA also produced a presentation to the Board about the RBT2 project dated March 21, 2018, which refers to the GCT opposition to the proposal, and describes GCT as a "competitor" (see VFPA Production 00233). Finally, the VFPA production includes a variety of other Board materials that it presumably thought were relevant to the judicial review.

70 This is more than sufficient to warrant a review of what VFPA told the Board about the two projects, how it described GCT and the DP4 project, and what, if anything, the Board's discussions reveal about its views on the matter or its instructions to management.

71 In light of this, I find that the disclosure of Board materials is incomplete, and it is troubling that there is no material provided for the entire 2019 year, given that the decisions being challenged were taken during that year.

72 At a minimum, VFPA must complete the disclosures it has already made, including the Board agenda, minutes, and any other materials that mention the DP4 project for the meeting of March 21, 2018. VFPA must also disclose the contents of the .zip file attached to the e-mail that refers to the Project Board meeting on February 25, 2019 (VFPA Production 00028), as well as

any minutes produced from that meeting which will confirm for the reviewing judge whether this is a reference to a meeting of the Board, or a Project Board as contended by VFPA. Prior case-law supports that where a disclosed document mentions an attachment, that document should also be disclosed (*1185740* Ontario Ltd v Minister of National Revenue, 169 FTR 266, 1999 CanLII 8774 (FCA) at para 6).

73 In addition, I would direct that a senior official in VFPA review the Board agendas, materials, and minutes for the 2019 year to identify any reference to the RBT2 or DP4 projects, and to disclose these materials.

74 Any confidential material that is not related to these projects can be redacted from any of these Board materials, as has been done for the production already filed.

(7) Communication with government officials

75 The VFPA production includes several documents that involve communication with government officials and GCT argues that this is inadequate, because two of these documents are draft outgoing letters, but neither the final version of these letters nor the government's response have been included. GCT seeks all correspondence between VFPA and Canadian government departments and agencies in relation to the DP4 project, on the basis that these documents may provide further proof of VFPA's bias against it.

76 VFPA maintains that it has disclosed all relevant documents, and it argues that the GCT request is based on speculation. It also submits that this is more akin to a request for document production than a demand for the record under Rule 317.

77 In assessing this category of documents, it is pertinent that VFPA itself decided to disclose certain documents in its initial Rule 317 production. This includes drafts of letters to the Minister of Transportation and the Deputy Minister of Fisheries and Oceans (VFPA Productions 00296, 00297, and 00385), as well as an e-mail to a staff member in the office of the Minister of Finance (VFPA Production 00370).

78 I am persuaded that further disclosure of this category of documents should be ordered, on two main grounds. First, the production of drafts of letters naturally raises the question of whether final versions were ever prepared and sent. VFPA has not explained this. Second, the e-mail to the staff member in the Minister of Finance's office begins with "[f]urther to our brief discussion about the idea GCT have been raising around an extension of Deltaport..." (VFPA Production 00370). The wording of this suggests that there had been a discussion, but it is not evident whether any internal documents showing the nature of this conversation have been disclosed, and it is also not clear whether VFPA received a reply to this message.

79 In addition, both the e-mail and one of the draft letters are from Robin Silvester, who VFPA asserts was the decision-maker for the September 2019 decision that is being reviewed. This makes it even more important for the reviewing judge to have a fuller record regarding this category of communications.

80 In light of this, I will order VFPA to conduct a search of its records to confirm whether final versions of either letter were prepared and/or sent and if so, to produce these. VFPA will also need to search its records to confirm whether any response to this correspondence, or to the e-mail dated May 11, 2018, was received and if so, to disclose it.

81 In addition, I will order VFPA to review its records and to disclose any incoming and outgoing correspondence with federal government Ministers or officials and staff members (including e-mails) regarding the DP4 project. This search should include incoming and outgoing correspondence, and the senior official who will swear an affidavit regarding this and other searches should provide details as to the nature and scope of the search that was done, as well as an explanation for any documents that are not disclosed.

(8) Documents concerning the September 2019 decision

82 As noted earlier, GCT's Amended Notice of Application for Judicial Review challenges both VFPA's March 2019 decision to refuse to process its PPE for the DP4 project, as well as the September 2019 decision that purported to rescind the original decision. However, the VFPA has not produced any documents regarding the September 2019 decision. The only document that provides any insight into this decision is an e-mail dated August 15, 2019, from a VFPA communication advisor to the VFPA Chief Financial Officer, which encloses a memorandum on the subject of market dominance (VFPA Production 00183). The memorandum enclosed to the e-mail was not produced, however, it should have been.

83 GCT seeks all documents or communications relating to, or forming part of the decision-making process for the September 2019 decision.

84 VFPA submits that it has fully met this request by producing all non-privileged documents. VFPA noted that GCT's Amended Notice of Application for Judicial Review, which was filed with the Court on July 3, 2020, did not seek to quash the September 2019 decision. Both parties made submissions on this point. In the end, nothing turns on this regrettable procedural squabble, because the error in the filing was quickly corrected and VFPA was fully aware that GCT challenged both decisions long before the hearing.

85 I will deal with the solicitor-client privilege claims below. At this stage, it is sufficient to point out that VFPA produced 478 documents in response to the Rule 317 request, but only 33 of these are dated between March 1, 2019, and September 23, 2019, which is the period between

the two decisions. Most of these documents simply provide copies of the March or September 2019 decisions, or are the GCT responses to those decisions. Some of these documents may provide some insight into VFPA's reasons for reaching the September 2019 decision (*e.g.*, VFPA Production 00384), but it is not evident whether or how these were considered in reaching the decision.

86 Despite Mr. Xotta's certification that the VFPA production included all documents that were before the decision-maker for the September 2019 decision, the disclosure does not include a single document that is labelled as such, or that is obviously the basis for the rescission decision. I address below the documents over which solicitor-client privilege is claimed.

87 Therefore, I order VFPA to conduct a further review of documents in its possession to identify and disclose any that discuss the decision whether or not to rescind the original March 2019 decision, including any staff analysis, recommendations or proposals. If any non-privileged documents are found, they must be disclosed. As with the other categories, the senior official who will swear an affidavit must document the search parameters, the nature of the search undertaken, and the rationale for excluding any documents that fall within this category for the relevant time frame, namely 2019.

88 In addition, VFPA must produce the market dominance memorandum that was attached to VFPA Production 00183. There appear to be two versions of the same memorandum attached to the e-mail, just in different formats; either format can be included in the further production.

(9) Internal Correspondence related to DP4

89 GCT seeks all non-privileged internal communications of VFPA related to DP4 and the March and September 2019 decisions. It says that this is the most important category of documents, noting that virtually no internal correspondence reflecting how or why the decisions were made was included in VFPA's disclosure.

90 GCT underlines that it had a very active engagement with VFPA in the lead-up to the March 2019 decision. It arranged for a pre-PPE meeting with VFPA officials on January 24, 2019, but at that meeting, VFPA expressed the view that the requirements for holding such a meeting about the PPE had not been met. VFPA therefore suggested a meeting at a later date. None of the internal documents in the disclosure explain why VFPA came to the conclusion that the requirements for a PPE meeting had not been met.

91 On February 5, 2019, GCT submitted its PPE for the DP4 project and the disclosure includes an e-mail from a senior VFPA official indicating that his staff would be doing an initial review of the proposal (VFPA Production 00174). However, no e-mails or other documents related to this review have been produced. On February 7, 2019, another senior VFPA official sent an e-mail to GCT, acknowledging receipt of its PPE and stating "[s]taff will undertake a review of

this submission to better understand the project and determine if our submission criteria has been satisfied in order to continue processing" (Exhibit KK to Affidavit of Todd Croll, GCT Motion Record at pp 528-59). Four days later, VFPA cancelled a planned meeting with GCT on the basis that "[s]taff are continuing with the review of the information submitted" (Exhibit LL to Affidavit of Todd Croll, GCT Motion Record at pp 531-33). No documents containing the results of that review have been disclosed.

92 VFPA argues that GCT is simply repeating its Rule 317 request, and it says it has produced all relevant, non-privileged documents.

93 I agree with GCT's main point, which is that the record itself tends to support the view that there are more internal documents that should be disclosed. For example, I note that GCT has produced e-mails from VFPA that were not included in the disclosure, including the February 5, 2019, and February 7, 2019 e-mails referenced above. Although Rule 317 only requires disclosure of documents that are not in the possession of the requester, and therefore VFPA was not bound to disclose any e-mails it sent to GCT, the fact remains that these e-mails state that staff are undertaking a review and analysis of the GCT PPE, yet no documents regarding that review have been produced.

94 I agree with VFPA that the GCT request is too broadly worded, but I am not persuaded that it should therefore be rejected in totality. Instead, I would order VFPA to conduct a search and to produce any internal documents relating to the analysis that VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and prior to the March 2019 decision. As with the other categories, a senior VFPA official must include in his or her affidavit an explanation of the search conducted, a description of the search parameters used, and an explanation of any omissions.

95 These documents are relevant to determine whether VFPA had closed its mind to a fair consideration of GCT's PPE, or was otherwise biased against it. As explained above, in light of the documents that VFPA has already disclosed that explicitly state that VFPA was doing an analysis of the PPE submission, these records should be before the Court so that the reviewing judge can consider them.

96 This completes the review of the categories of documents for which further disclosure is ordered. I now turn to the claim of solicitor-client privilege.

D. Claims of solicitor-client privilege

97 As indicated earlier, along with the 478 documents in the record, VFPA also produced a list of 30 documents over which it asserted solicitor-client privilege. Following the hearing, VFPA provided a more particularized and detailed log of these documents, as well as confidential versions for review by the Court. The parties made written submissions in respect of the claims.

98 Before addressing the specifics of VFPA's claims of solicitor-client privilege, it will be helpful to summarize the key principles that guide this analysis. Neither party seriously disputes the law that sets out these general principles; the debate is about their application to the facts of the case, in the context of a judicial review alleging actual bias.

(1) General Principles

99 Solicitor-client privilege, which includes both legal advice and litigation privilege, is now recognized as a rule of substantive law that is "fundamental to the proper functioning of our legal system" (Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44 at para 9 [).

100 The criteria for determining whether a communication qualifies for solicitor-client privilege are that: (i) it must have been between a client and solicitor; (ii) it must be one in which legal advice is sought or offered; (iii) it must have been intended to be confidential; and (iv) it must not have been for the purpose of furthering unlawful conduct (R v Solosky, [1980] 1 SCR 821 at 837; Pritchard v Ontario (Human Rights Commission), 2004 SCC 31 at para 15 [; Slansky v Canada (Attorney General), 2013 FCA 199 at para 74 [; *Right to Life* at para 70).

101 This doctrine applies to communications between legal counsel and government Ministers or departmental officials, including administrative decision-makers, who are entitled to seek and rely on legal advice in reaching their decisions (*Pritchard* at paras 19-21). However, in *Pritchard*, the Supreme Court of Canada noted that in-house legal counsel may have both legal and non-legal responsibilities, and therefore it is necessary to examine the situation on a case-by-case basis. Ultimately, "[w]hether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered" (*Pritchard* at para 20).

102 Solicitor-client privilege is a "class" privilege, so once the relationship is established and the criteria set out above are met, the court is not to engage in a further balancing of interests (*Pritchard* at para 18). The Supreme Court of Canada has repeatedly affirmed how strong the protection of this privilege must be, in order to preserve the capacity of individuals to seek legal advice knowing that it will be kept confidential. In *Pritchard*, the Court stated that the "privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction" (at para 17). In other words, solicitor client privilege "must be nearly absolute and... exceptions to it will be rare" (*Pritchard* at para 18).

103 In addition, where a solicitor-client relationship is found, the privilege "applies to a broad range of communications between lawyer and client" (*Pritchard* at para 21). It has been found to apply to "all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or

in some other non-legal capacity" (*Blood Tribe* at para 10). Once a solicitor-client relationship is established, there is a rebuttable presumption that all communications between the client and the lawyer are to be considered *prima facie* confidential in nature (*Blood Tribe* at para 16).

104 This is sometimes described as the "continuum of communication" reflecting the fact that there may well be many exchanges between the client and the lawyer and the privilege covers both the seeking and obtaining of legal advice (see *e.g.*, Canada (Office of the Information Commissioner) v Canada (Prime Minister), 2019 FCA 95 at paras 51-54 [). It is a reflection of the concept that the privilege protects the necessary degree of confidentiality that is essential to the relationship between client and solicitor.

105 The procedure to be followed when assessing a claim of solicitor-client privilege in the context of a request for documents under Rule 317 was confirmed by the Federal Court of Appeal in *Girouard*. In that decision, the Federal Court of Appeal noted that a court faced with a Rule 318 objection to disclosure based on an assertion of solicitor-client privilege need only review all of the documents if it concludes that it is unable to decide on the claimed privileges solely on the basis of the parties' representations, including, for example, any affidavit put forward to explain the basis and context for the privilege claim in relation to specific documents (*Girouard* at paras 22-24). It is relevant to consider whether the documents are so lengthy that reviewing each of them would impose an undue delay or otherwise prejudice the parties (*Girouard* at para 27).

106 In light of this guidance, I decided to review each of the documents for two main reasons: (i) VFPA did not provide a detailed affidavit explaining the nature of the documents nor the basis for the claim of privilege; and (ii) there were only thirty documents to review, and so this did not impose an undue delay.

(2) Applying the principles to the facts

107 It is important to note at the outset that GCT did not seriously dispute that VFPA had a solicitor-client relationship with its internal counsel, insofar as its lawyers were providing legal advice, or with its external counsel (originally Lawson Lundell LLP, more recently McMillan LLP). Rather, GCT argued that the claim of privilege must be considered within the context of the relationship between the record before the reviewing court and that court's ability to meaningfully review the decisions. It also argued that VFPA took an overly broad view of the privilege.

108 GCT notes that case law establishes that where a tribunal abdicates the decision-making to its lawyers, it cannot expect to protect this as confidential because it calls into question the fairness and integrity of the decision-making process. Furthermore, a decision maker is not entitled to immunize its decision-making process, or to shield the key documents from disclosure, simply by turning them over to its legal counsel. It cites Lafond v Ledoux, 2008 FC 1369 [, where Justice Michael Phelan held, at paragraph 16, that "the cloak of solicitor-client privilege is not an invitation to play

'hide the pea' with the documents at issue" (see to the same effect, *Information Commissioner* at para 55).

109 In this case, GCT submits that since VFPA claims privilege over the only documents that are contemporaneous with the decisions under review, the claim of privilege cannot be sustained because otherwise VFPA's decisions would be effectively shielded from judicial review.

110 The crux of GCT's argument on this point is set out in the following paragraph from its written submissions:

> 27. Administrative decision-makers cannot attempt to immunize their decisions from proper review. Decision-makers cannot reach decisions based on considerations not apparent within the Tribunal Record filed with the Court. Where a decision-maker tries to shield its decision by providing nothing in its record which goes to an essential element of its decision, the only options available to the Court are to order production or to quash the decision.
>
> [Footnotes omitted.]

111 In the case at bar, GCT submits that the only evidence of the decision-making process followed by VFPA are contained in the communications over which solicitor-client privilege is claimed. The record is otherwise empty, particularly in regard to the September 2019 decision. In light of this, GCT submits that "VFPA cannot claim that it had any expectation of confidentiality over the very documents which form the actual basis for the decision being reviewed" (GCT's Factum Addressing Solicitor-Client Privilege, filed December 28, 2020, at para 32). This extends both to VFPA exchanges with its internal counsel and its communications with external counsel.

112 Based on the description of the documents in the more particularized privilege log filed by VFPA, GCT asserts that the abundance of communication with external counsel in advance of the September 2019 decision is a clear indication that the rescission decision was itself a litigation strategy designed by counsel to shield VFPA's decisions from judicial scrutiny. GCT submits that this is "precisely the mischief of the September 23rd Decision identified by Justice Phelan in his decision. In a pending bias case against a public body, there can be no expectation of confidentiality in such communications" (GCT's Factum Addressing Solicitor-Client Privilege, filed December 28, 2020, at para 40).

113 Having reviewed the documents submitted by VFPA, I am not persuaded that GCT's arguments warrant overriding the near-absolute bar of solicitor-client privilege.

114 It is neither necessary nor appropriate to engage in a lengthy discussion of the documents. It is sufficient to state that the vast majority of them clearly involve a client (VFPA) either seeking or receiving legal advice from its in-house or external legal counsel. That is sufficient to bring these documents within the privilege. The documents were intended to be confidential (most are marked

solicitor-client and confidential) and there is no basis to find that the advice was for the purpose of furthering unlawful conduct. Therefore, I find that VFPA has properly claimed solicitor-client privilege over these documents.

115 It bears repeating that the Supreme Court of Canada has emphasized that solicitor-client privilege is "nearly absolute" and that it "must be as close to absolute as possible to ensure public confidence and retain relevance" (*Pritchard* at para 18, citing *Lavallee, Rackel & Heintz v* Canada (Attorney General), 2002 SCC 61 at para 36).

116 The authorities that GCT relies on are distinguishable on their facts. This is not a case where a decision-maker has given its key documents to its lawyers in an attempt to shield them from scrutiny, and so the *Lafond* decision does not assist.

117 While the Federal Court of Appeal in *Slansky* addresses the issue of solicitor-client privilege, the decision does not support overriding the privilege in order to ensure an adequate record for judicial review. Justice Evans, for the majority, specifically finds that the search for truth in litigation "should not be taken to be the one 'true' principle, to which claims for the confidentiality of a communication on the basis of solicitor-client privilege are subsidiary and 'a necessary evil to be tolerated only in the clearest of situations'" (*Slansky* at para 72). The issue of disclosure for the purposes of the adequacy of the record is only dealt with by Justice Stratas in dissent (at para 276), and that discussion focuses on public interest privilege rather than solicitor-client privilege.

118 Similarly, the balancing of the factors to consider under Rule 318 are not said to be a basis for overriding solicitor-client privilege. If it is not possible to redact portions of documents to protect certain information, then "confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of that" (*Lukács* at para 16). In this case, I am satisfied that it is not possible to redact portions of any of the documents, because whatever remained would indirectly make public aspects of the legal advice that was sought or delivered.

119 Finally, the Supreme Court of Canada explicitly recognized in *Pritchard* that a claim of procedural fairness does not, in itself, warrant overriding solicitor-client privilege:

> 31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

120 As a final point, I should note that the documents do not support a conclusion that VFPA abdicated its decision-making to its lawyers. Therefore, without pronouncing on the question of

whether this itself would be a basis to override solicitor-client privilege, I simply find that this is not the case on the evidence before me.

121 Therefore, I reject GCT's arguments that the documents over which VFPA claims solicitor-client privilege must be disclosed to it.

122 This concludes my analysis of the Rule 318 objections.

IV. Conclusion

123 Based on these reasons, I am granting GCT's motion for further disclosure, in part.

124 As I noted in *GCT #*3 at paragraph 31, "[t] he jurisprudence makes clear that a Court has much remedial flexibility' in crafting a remedy in relation to a motion seeking greater disclosure under Rule 318(2)" (citing *Lukács* at para 13 and *Girouard* at para 18). In view of the history of this case thus far, and in order to provide as much clarity to the parties as possible so as to dispose of this and move the case further towards a hearing, it is necessary to provide a detailed and specific order that addresses each category of documents.

125 VFPA shall undertake a review of its document holdings, including its electronic and paper records and archives, in order to determine whether there are any other documents relating to GCT's DP4 proposed port expansion project within the categories and time frames described below.

126 If further records are identified, certified copies of such documents shall be deposited with the Registry and copies provided to GCT and the Attorney General of Canada, pursuant to Rule 318(4). Additionally, VFPA must serve and file an affidavit prepared by a senior official of VFPA. The affidavit shall set out, in respect of each category of documents, the nature and scope of the document search that was undertaken, the search parameters used, and an explanation for any documents that are not disclosed even though they fall within these categories during the relevant periods.

127 In respect of the board materials and minutes, VFPA must complete the disclosures it has already made, including the Board agenda, minutes, and any other materials that mention the DP4 project for the meetings of March 21, 2018, and February 25, 2019. VFPA must also review the Board agendas, materials, and minutes for the 2019 year and identify any reference to the RBT2 or DP4 projects, and disclose these materials, subject to redactions for confidentiality.

128 In respect of communications with government officials, VFPA shall conduct a search of its records to confirm whether final versions of either draft letters (VFPA Production 00296, 00297, and 00385) were prepared and/or sent, and if so, to produce these. If these letters were sent, VFPA shall disclose any return correspondence from any government official regarding them. In

addition, VFPA shall also review its records and disclose any correspondence, both incoming and outgoing, with federal government Ministers or officials and staff members (including e-mails) regarding the DP4 project.

129 In respect of documents related to the September 2019 decision, VFPA shall disclose documents relating to discussions as to whether or not to rescind the original March 2019 decision, including staff analysis, recommendations, or proposals.

130 In respect of internal correspondence relating to the DP4 project, VFPA shall conduct a search and produce any internal documents relating to the analysis that VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and prior to the March 2019 decision.

131 In addition to the search that is to be carried out by the senior official of VFPA as outlined above, I am ordering the following specific disclosures.

132 First, VFPA shall disclose VFPA Production 00031 and 00086 in their native format. Within seven (7) days of this Order, GCT will identify any Excel spreadsheets in the VFPA production other than VFPA Production 00031 and 00086 that fall within the category of competition and market share analysis, and VFPA will disclose these documents in .xlsx format within seven (7) days thereafter.

133 VFPA shall also disclose VFPA Production 00132 in a format so that the comments can be viewed.

134 Further, VFPA shall produce the .zip file enclosure to VFPA Production 00028, as well as the market dominance memorandum attached to VFPA Production 00183.

135 If VFPA has any issues in giving effect to this Order, it may request a Case Management Conference to discuss these.

136 A few final comments. First, as a general matter in this Court, the disclosure of certified tribunal records under Rule 317 is a daily, routine occurrence. This may be because some decision-makers are so accustomed to having their decisions reviewed that this has become engrained in their administrative procedures. It may be driven by a set of higher principles reflecting the decision-maker's desire to fulfil its role in ensuring that public power is exercised responsibly and in recognition that an independent judiciary is a fundamental and necessary bulwark of the rule of law that can only operate when the records before decision-makers are disclosed to permit effective judicial review of the decisions. It may be for more prosaic reasons, namely that disclosure of the record may assist in demonstrating the reasonableness of the decision, thereby relieving the decision-maker of the burden of having to do it over.

137 Whatever the reasons, it must be observed that Rule 318 objections are not common. In this case, GCT launched such an objection and has been partially successful.

138 Second, at the end of the day, if VFPA cannot defend its decisions as reasonable based on the record it has (and/or will) disclose, the decisions will be quashed. If those decisions could be defended based on something over which solicitor-client privilege is claimed or which was otherwise not disclosed, then VFPA has only itself to blame, in the sense that it could have constructed a decision-making process that would have allowed it to disclose a better record.

In this sense, this situation is comparable to that which governments sometimes face when claims of Cabinet confidence are asserted. If the only rationale for the decision is contained in documents that are not disclosed because of Cabinet confidence, the decision may be quashed and the government will then have to construct a process that will leave it with documents that can be disclosed without breaching the privilege (see *e.g.*, RJR - MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 101; Babcock v Canada (Attorney General), 2002 SCC 57).In recognition of the divided success on the motion, there shall be no order as to costs.

ORDER in T-538-19

THIS COURT'S ORDER is that:

1. The motion by GCT for an Order pursuant to Rule 318 for further disclosure by VFPA is granted, in part.

2. VFPA will provide certified copies of the documents specifically identified below, as well as any further documents it finds as a result of the searches specified below, and such documents shall be deposited with the Registry and copies provided to GCT and the Attorney General of Canada, pursuant to Rule 318(4).

3. The disclosure of the following documents is ordered:

a. Competition and Market Share Analysis:

i. VFPA shall disclose VFPA Production 00031 and 00086, and in their native Excel format.

ii. GCT will identify any other spreadsheets in the VFPA production other than VFPA Production 00031 and 00086 that fall within this category within seven (7) days of this Order, and VFPA will disclose these documents in .xlsx format within seven (7) days thereafter.

b. Communication with External Experts:

i. VFPA shall disclose VFPA Production 00132 in a format so that the comments can be viewed.

c. Board Materials and Minutes:

i. VFPA shall disclose Board agenda, minutes, and any other materials that mention the DP4 project for the meetings of March 21, 2018, and February 25, 2019.

ii. VFPA shall also disclose the contents of the .zip file attached to the e-mail that refers to the project board meeting on February 25, 2019 (VFPA Production 00028).

d. Documents Relating to the September 2019 decision:

i. VFPA shall disclose the market dominance memorandum attached to VFPA Production 00183. There appear to be two versions of the same memorandum attached to the e-mail, just in different formats; either format can be included in the further production.

4. VFPA is ordered to identify a senior official to supervise a review of its document holdings, including paper and electronic documents (including current holdings and any archives), to search for the following categories of documents:

a. Board Materials and Minutes:

i. VFPA shall review the Board agendas, materials, and minutes for the 2019 year and identify any reference to the RBT2 or DP4 projects, and to disclose these materials.

ii. Any confidential material that is not related to these projects can be redacted from any of these Board materials.

b. Communications with Government Departments:

i. VFPA shall conduct a search of its records to confirm whether final versions of either draft letters (VFPA Production 00296, 00297, and 00385) were prepared and/or sent, and if so, to produce these.

ii. If these letters were sent, VFPA shall disclose any return correspondence from any government official regarding them.

iii. VFPA shall review its records and disclose any correspondence, both incoming and outgoing, with federal government Ministers or officials and staff members (including e-mails) regarding the DP4 project.

c. Documents Related to the September 2019 decision:

i. VFPA shall disclose documents relating to discussions as to whether or not to rescind the original March 2019 decision, including staff analysis, recommendations, or proposals.

d. Internal Correspondence Related to DP4:

i. VFPA shall conduct a search and produce any internal documents relating to the analysis that VFPA officials undertook of GCT's PPE after it was submitted on February 5, 2019, and prior to the March 2019 decision.

5. There is no order as to costs.

2004 FC 208, 2004 CF 208
Federal Court

Laliberté c. R.

2004 CarswellNat 2915, 2004 CarswellNat 332, 2004 FC 208, 2004 CF 208, [2004] A.C.F. No. 234, [2004] F.C.J. No. 234, 133 A.C.W.S. (3d) 234

Michel Laliberté Corrections Officer, Applicant and Her Majesty the Queen, Respondent

Noël J.

Judgment: February 9, 2004
Docket: T-1890-02

Counsel: Michel Laliberté, pour demandeur
Marc Ribiero, pour défenderesse

***Noël J.*:**

1 This is a motion by the applicant appealing an order by Prothonotary Morneau dated December 16, 2003, made pursuant to Rule 369 of the *Federal Court Rules, 1998* (the Rules).

2 The applicant represented himself and in his motion maintained that Prothonotary Morneau:

- should have remained impartial, thus insinuating that he was not;
- made a value judgment on the applicant's intentions when he wrote that the application to amend was a [TRANSLATION] "disguised attempt to ..."

and he added with respect to the respondent, the Attorney General of Canada:

- [TRANSLATION] "the Attorney General of Canada tried to manipulate the Court by his subversive remarks".

3 The applicant's statements regarding the prothonotary and the Attorney General of Canada are serious and could damage their reputations.

4 Additionally, I find that the statements are contained in the motion but are not supported by an affidavit as required in Rule 363.

5 The motion is vitiated *prima facie*, as there is no affidavit providing evidence of the applicant's statements. Accordingly, it is inadmissible and should be dismissed for this reason alone.

6 Having said that, I note that the applicant by his motion of December 4, 2003, wished to amend his statement of claim to include Charter provisions, without specifying the amendments to be made.

7 In his order dated December 16, 2003, Prothonotary Morneau dismissed the application to amend for vagueness, but further noted that it was an indirect means of reopening another of his orders (dated October 6, 2003) which disposed of the application. The applicant appealed the order of October 6, 2003 and, in a judgment dated November 4, 2003, Lemieux J. dismissed the appeal, concluding that the matter was *res judicata*.

8 Having reviewed the memorandums of the parties and the documents in support thereof, and in particular the judgment of my colleague Lemieux J., I can only come to the same conclusion, namely that the motion is an indirect means of reopening matters discussed at the pre-trial conference and that the application to amend is vague and unspecific. The applicant has once again raised the same question which was already decided by my colleague in the instant motion on appeal: the matter is therefore *res judicata*.

Order

THE COURT ORDERS THAT:

The motion on appeal from the decision of Prothonotary Morneau dated December 16, 2003 is dismissed with costs.

Appeal dismissed.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

And

CANADA TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the "Annotated Dispute Adjudication Rules" (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

> 41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.
>
> 41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

(a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;

(b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and

(c) which, as part of the disclaimer at the beginning thereof, includes the statement that:

"This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***" (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.

[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

> 12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
>
> 13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
>
> 14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
>
> 15. The Annotation is also intended to be an evergreen document, to be updated as needed.
>
> 16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
>
> a. The Agency's continued commitment to providing reasons for its decisions;

b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and

d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz,* [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

> 59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.
>
> 60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).	(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that "since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary". No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADA TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 23, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPELLANT
Barbara Cuber	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

2003 CAF 391, 2003 FCA 391
Federal Court of Appeal

Pfeiffer & Pfeiffer Inc. v. Canada (Deputy Superintendent - Programs Standards & Regulatory Affairs)

2003 CarswellNat 3502, 2003 CarswellNat 4971, 2003 CAF 391, 2003 FCA 391, [2003] F.C.J. No. 1608, 127 A.C.W.S. (3d) 22

Pfeiffer & Pfeiffer Inc. and Sydney H. Pfeiffer, Appellants and Alain Lafontaine, Deputy Superintendent - Programs Standards and Regulatory Affairs, Respondent

Létourneau J.A., Nadon J.A., Pelletier J.A.

Heard: October 22, 2003
Judgment: October 22, 2003
Docket: A-607-02, A-609-02

Counsel: *Mr. Aaron Rodgers*, for Appellants
Mr. Vincent Veilleux, *Mr. Robert Monette*, for Respondent

***Pelletier J.A.*:**

1 These are appeals of two orders of Pinard J. in which he allowed the respondent's motion to strike the appellants' motion seeking among other things a review of *ex parte* order granting the respondent access to the appellants' premises.

2 The elucidation of the underlying issues was made more complex by the fact that the appellants' motion to review the *ex parte* orders claimed relief which was not available in the appellants' motions namely mounting a collateral attack on the conservatory orders made by the respondent.

3 That overreaching, however, would not justify the dismissal of the motions, though it might support an order striking the relief which is not available.

4 The relief which the appellants were entitled to seek was an order setting aside the *ex parte* orders. The grounds which they alleged support such a motion were that 1) the respondent did not make full disclosure when he obtained the original order; and 2) the order was made without jurisdiction.

5 The difficulty which the appellants have created for themselves is that there is no affidavit in support of their motions. Rule 363 requires that a party to a motion must set out in an affidavit facts which do not appear in the court record. In this case, the court record contains two affidavits submitted in support of the *ex parte* motion.

6 Those are the facts in the court record. If the appellants wish to contradict them, they must do so by affidavit. They may well uncover further proof of the facts alleged in their affidavit by cross-examining the respondent's affiants but this does not detract from the obligation to provide an affidavit.

7 As for second ground, lack of jurisdiction, this question was decided by the Quebec Court of Appeal in *National Fruit 2000 inc., Re* (2001), [2002] R.J.Q. 1 (Que. C.A.).

8 In the end, the Motions Judge was entitled to strike the appellants' motion as he did.

9 The appeal will be dismissed with one set of costs and disbursements in both files.