Federal Court  Cour fédérale

Date: 20240124

Docket: T-2256-22

Citation: 2024 FC 119

Toronto, Ontario, January 24, 2024

PRESENT: Associate Judge Trent Horne

BETWEEN:

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

Applicants

and

VANCOUVER FRASER PORT AUTHORITY

Respondent

and

ATTORNEY GENERAL FOR SASKATCHEWAN
AND ATTORNEY GENERAL OF MANITOBA

Interveners

ORDER AND REASONS

I. Overview

[1] This is a motion for production of documents in an application for judicial review.

[2] There were two phases in the decision-making process. A team within the respondent gathered information from multiple sources over a period of years. This information was used to create a summary report and recommendation for the respondent's board of directors. The board approved the recommendation, and in so doing, did not consider any documents other than the summary report and recommendation.

[3] The respondent served and filed a certified tribunal record in response to the applicants' broad Rule 317 request. The certified tribunal record was not limited to the materials considered by the board, and included thousands of pages of "background" documents created or obtained during the process leading to the recommendation.

[4] This is a situation where a preliminary recommendation is subsumed in a final decision, and Rule 317 production is not limited to the two documents that were before the board. In any event, having included a wide range of materials in the certified tribunal record, the respondent cannot now argue that it is only obliged to disclose what was reviewed and considered by the board. Permitting the respondent to selectively disclose documents created or obtained during the recommendation process could limit meaningful judicial review of the administrative decision.

[5] The respondent also resists production on the basis of confidentiality. The fact that a document may include confidential information is not a valid reason to refuse production.

A motion for a confidentiality order may be brought, but that was not done here, other than to informally request such an order during the hearing of the motion. It is now too late to bring a motion for that relief. Since the respondent's evidence is insufficient to conclude that including the disputed documents in the public certified tribunal record would present a serious risk to an important commercial interest, a confidentiality order will not be made.

[6] Excepting certain documents that are irrelevant, and one that is protected by deliberative privilege, the applicants' motion is granted.

II. Background

[7] This application for judicial review challenges a decision ("Decision") of the Vancouver Fraser Port Authority ("VFPA") made on September 13, 2022 establishing fees payable in respect of the Gateway Infrastructure Fee 2022 ("GIF2022"), effective January 1, 2023. The decision was made pursuant to section 49 of the *Canada Marine Act*, SC 1998, c 10 ("CMA").

[8] The applicants each own and operate terminals which handle bulk commodities, and which have been assigned to one or more of the trade areas identified in the Decision.

[9] In general terms, a port authority may engage in "port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and other activities that are deemed in the letters patent to be necessary to support port operations" (CMA, subsection 28(2)).

[10] A port authority will necessarily incur operating costs. Section 49 of the CMA addresses fixing of fees, and permits a port authority to fix fees to be paid in respect of ships, vehicles, aircraft and persons coming into or using the port; goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port; and any service provided by the port authority, or any right or privilege conferred by it, in respect of the port.

[11] Of particular importance to this proceeding is subsection 49(3) of the CMA, which requires that the fees fixed by a port authority shall be at a level that permits it to operate on a self-sustaining financial basis, and shall be fair and reasonable.

[12] In their notice of application, the applicants assert that VFPA acted beyond its jurisdiction and erred in law by establishing fees that are not fair and reasonable to the applicants. The notice of application is lengthy, and I will not reproduce all of the grounds raised. Among other things, the applicants assert that the fee structure established by GIF2022 has the effect of requiring the applicants to fund railway infrastructure and costs that the railways have an obligation to furnish. On this motion, the applicants highlight that one of the infrastructure projects is a rail project located inland on a railway line in Abbotsford, British Columbia, more than 50 kilometers from the port. The notice of application also alleges that the fees are not proportionate to the applicants' use of certain infrastructure, and that it gives unreasonable preference to certain groups or classes of users.

[13] The notice of application further alleges that VFPA ignored or misapprehended the evidence, acted beyond its jurisdiction, and erred in law by establishing a fee structure which has

the effect of allocating to the applicants the costs of infrastructure that have little or no ostensible connection to the applicants, and allocates costs of infrastructure projects to the applicants that primarily benefit other users. It is also alleged that the fees exceed the amount that is required in order for VFPA to operate on a self-sustaining financial basis, and that the Decision unreasonably assumes that the applicants will be able to recover GIF2022 from their customers.

[14] It is further alleged that VFPA failed to observe principles of procedural fairness, and deprived the applicants of the opportunity to meaningfully consult and to present their cases in respect of GIF2022.

[15] The proceeding is in its early stages. The applicants' evidence has not been served.

III. The Decision

[16] There were two separate phases that resulted in the Decision. Over a period of years, a team within VFPA gathered a significant amount of information and prepared a "Summary Report" and draft resolution for consideration by VFPA's board of directors ("Board").

[17] The applicants' evidence on the motion is an affidavit of Jennifer Dunn, a legal assistant employed by the applicants' solicitors of record. This affidavit attaches a series of documents, correspondence, and print-outs from websites.

[18] One of the documents attached to Ms Dunn's affidavit is a letter dated March 6, 2017 from VFPA addressed to "Dear Port of Vancouver stakeholder." The letter advises that input

would be sought from industry that would be considered in determining which priority projects to advance to federal funding applications. The affidavit also attaches documents that speak to three consultation phases with industry stakeholders between 2017 and 2021, and consultations with and submissions from third parties.

[19] VFPA's evidence on the motion is an affidavit affirmed by Katherine Bamford, the director of customer engagement at VFPA. The affidavit provides general information about VFPA, the authority of the Board to make decision, the general process to make Board decisions, and the process leading to the Decision.

[20] According to Ms Bamford's affidavit, a "GIF2 Fee Team" was established in 2018. The team had three members: Ms Bamford, Larry Sawrenko, and Kirk Zhou. The mandate of the GIF2 Fee Team was to consider the various studies conducted by other VFPA employees and consultants and the result of engagement feedback studies in order to:

> (a) determine possible infrastructure projects to be funded through the GIF2;
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> (b) consider the benefits the infrastructure projects would offer and compare them to the costs of the projects;
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> (c) consider the availability of the external funding sources at the time;
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> (d) determine how much of the cost of the infrastructure projects would be funded through GIF2, if it was adopted;
>
> (e) determine a fair method to allocate the costs to be recovered from port users through the GIF2; and
>
> (f) finally, along with the other VFPA employees, to assist in preparing and submitting a report to the Board setting out a recommendation on whether to enact the GIF2 and if so the mechanics of how the GIF2 should be implemented.

[21] Other employees and departments were also involved in preparing a recommendation to the Board. The process of considering options and making a recommendation to the Board involved several departments at VFPA.

[22] In addition to its own employees, VFPA hired outside consultants to provide independent perspectives on this issue. Information was also obtained from industry members.

[23] After years of work, the GIF2 Fee Team prepared the Summary Report and draft resolution for the Board. According to Ms Bamford, only the Board had the authority to make the Decision; the authority could not be delegated.

[24] In general terms, Board members receive decision packages in advance of a Board meeting. These packages would contain a summary report of the recommended decision and a draft resolution. After considering a proposed resolution at the meeting, the Board may adopt the resolution as proposed, adopt a modified resolution, request further information, request further consultation or studies be completed, or reject the resolution.

[25] For GIF2022, the decision package provided to the Board contained the Summary Report and draft resolution. Ms Bamford’s unchallenged evidence is that the Board relied solely on the Summary Report and draft resolution to reach the Decision. While the Board had the ability to request further information or additional studies, it did not.

IV. The Applicants' Rule 317 Request

[26] The notice of application makes the following request:

> 5. The Applicants request that VFPA send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of VFPA to the Applicants and to the Registry:
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> (a) All materials considered by VFPA in making the Decision that were not also provided to the Applicants including, in particular:
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> (i) the Mott MacDonald Study and any other studies or cost/benefit analyses obtained or completed by VFPA;
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> (ii) the "Input and Assumptions Summary Sheets related to GIF2022 projects" by Mott MacDonald, as listed in the Summary Report;
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> (iii) the proposals for project funding submitted by VFPA, CN and/or any other applicable project proponents under the National Trade and Corridors Fund;
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> (iv) all materials listed by VFPA in the Summary Report which have not already been provided to the Applicants;
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> (v) all materials considered by VFPA in determining the link between each Applicant and the applicable trade area(s) assigned by VFPA to that Applicant for the purpose of implementing the Decision; and
>
> (vi) all materials considered by VFPA in determining the link between each gateway infrastructure project and the applicable trade area(s) to which VFPA assigned those infrastructure projects, for the purpose of implementing the Decision.

[27] In addition to the Rule 317 request, the applicants sent correspondence to counsel for the respondent on December 13, 2022 requesting production of documents.

[28] In response to the Rule 317 request, VFPA filed a certified tribunal record ("CTR") on February 17, 2023. There are two covering documents. The first is titled "Decision Record", and states that "the Respondent Vancouver Fraser Port Authority encloses its certified copy of the material relevant to the application pursuant to Rule 318(1)(a)." It is signed by one of the lawyers representing VFPA. The second is a "Certification", and states that "these documents constitute the certified decision record of the Respondent Vancouver Fraser Port Authority in the above proceeding, pursuant to Rule 318(1)(a) of the *Federal Court* [sic] *Rules*, SOR/98-106." This document was signed by another of the lawyers representing VFPA. Neither of these documents raise any kind of objection to the applicants' request pursuant to Rule 317 of the *Federal Courts Rule*s, SOR/98-106 ("Rules"). The CTR contains scores of documents, and exceeds 4,000 pages. The content of the CTR goes far beyond what was before the Board.

[29] Also on February 17, 2023, VFPA wrote to the applicants and provided responses to the requests for documents. It was asserted that the requested documents were not considered when the Decision was made, do not exist, or are irrelevant. Contrary to subrule 318(2), VFPA did not communicate reasons for any objection to the Administrator.

[30] The applicants now move for production of certain documents that are in the possession of VFPA, but were not before the Board when the Decision was made. VFPA opposes the motion on the grounds that the documents were not before the decision-maker (the Board), and are therefore not producible under Rule 317. Alternatively, VFPA says that the requested documents are irrelevant to the merits, or that disclosure would violate privilege. The interveners did not participate in the motion.

V. Rules 317 and 318

[31] The principles guiding Rule 317 disclosure were recently summarized by Justice Pentney in *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2021 FC 624 ("*GCT Canada*"):

> [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** | **Matériel en la possession de l'office fédéral** |
> |---|---|
> | **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. | **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. |
> | … | […] |
> | **Objection by tribunal** | **Opposition de l'office fédéral** |
> | **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 | **318 (2)** Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et |

writing, of the reasons for the objection.	l'administrateur des motifs de leur opposition.
Directions as to procedure	**Directives de la Cour**
(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).	**(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.
Order	**Ordonnance**
(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.	**(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 [*Tsleil-Waututh*], and more recently in *Lukács v Swoop Inc*, 2019 FCA 145 [*Lukács*] and *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 [*Canadian National*].

[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 [*Humane Society*]); 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.
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> [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*])

VI. Analysis

A. *The administrative decision-maker is the Board*

[32] The parties are divided on the identity of the decision-maker for the purposes of the Rule 317 request. The applicants assert that the statutory decision-maker for the purposes of Rule 317 is the VFPA, and rely on section 49 of the CMA. That section provides that a port authority may fix fees to be paid in respect of (among other things) ships, vehicles, aircraft and persons coming into or using the port. Therefore, the applicants argue, the decision was made by the VFPA (not just the Board), and documents within the possession of both VFPA, including its Board, are the proper subject of a Rule 317 request.

[33] VFPA takes a narrower view, and asserts that the administrative decision-maker for the purposes of Rule 317 is the Board. VFPA relies on section 20 of the CMA, which provides that the board of directors is responsible for the management of the activities of a port authority. VFPA also relies on the evidence of Ms Bamford, which states that only the Board had the authority to make the Decision, and such authority could not be delegated. Since the only documents that were before the Board was the Summary Package and the draft resolution, VFPA argues that only these two documents could be the subject of a proper Rule 317 request.

[34] I cannot agree with the applicants for three reasons. First, *Tsleil-Waututh First Nation v Canada (Attorney General)*, 2017 FCA 128 ("*Tsleil-Waututh*") consistently refers to the "administrative decision-maker" – *ie* the person(s) who made the challenged decision – not the entity as a whole (see paragraphs 20, 52, 66, 68-71, 73, 74, 78, 79, 85-93, 96-99, 105-107, 112,

114, 116-118, 128, and 143). The specific person(s) who make a decision are usually a narrower sub-set of the persons who comprise an organization.

[35] Second, *Tsleil-Waututh* (para 115) states that Rule 317 "does not in any way 'serve the same purpose as documentary discovery in an action'" (emphasis added). Interpreting Rule 317 in a manner that compels production of documents that are in the possession, power or control of a party (VFPA), but were not were not before the persons who made the decision (the Board) would be consistent with discovery practice, but inconsistent with the more limited production that Rule 317 requires.

[36] Third, VFPA refers to *0769449 BC Ltd (Kimberly Transport) v Vancouver Fraser Port Authority*, 2015 FC 252. There, the applicant was a trucking company. VFPA suspended the license that permitted it to enter the port to pick up and drop off containers. The identity of the decision-maker was not disclosed. The applicant successfully brought an application for *mandamus* to compel disclosure of the identity of the decision maker, and an extension of time to commence an application for judicial review. While this decision does not consider Rule 317, it is apparent that the identity of the specific decision-maker was a condition precedent to commencing an application to challenge the decision. This does not support a conclusion that VFPA as a whole was the decision-maker in that matter, or on this motion.

[37] I therefore conclude that the administrative decision-maker is the Board.

B. *The Decision includes a recommendation that was subsumed in the Decision*

[38] Concluding that the Board is the administrative decision-maker is not the end of the inquiry. The notice of application must also be considered. "The grounds of review are to be read in order to obtain a 'realistic appreciation' of their 'essential character' by reading them holistically and practically without fastening onto matters of form" (*Tsleil-Waututh* at para 110). As set out in *GCT Canada* above, 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."

[39] The nature of the specific decision-making process must also be considered. "[M]ultiple decisions that constitute a continuing course of conduct may be challenged in a single application for judicial review where the decisions were linked either by virtue of the statute, the decision-makers, the applicable legal questions, the timing of their issuance, or the commonality of facts or allegations and relief sought. … there may be situations where a preliminary decision or recommendation is subsumed in a final decision" (*China Mobile Communications Group Co, Ltd v Canada (Attorney General)*, 2023 FCA 202 at para 47 ("*China Mobile*")).

[40] Here, the notice of application does not expressly refer to a course of conduct, but a holistic reading of it reveals that certain actions of the VFPA prior to the Board meeting are being challenged, particularly in respect of procedural fairness.

[41] The result in *China Mobile* can be distinguished on its facts. In that case, the applicants challenged a decision of the Governor in Council, but also sought production of documents that

were before a preceding decision-maker, the Minister of Innovation, Science and Industry. Pursuant to the *Investment Canada Act,* RSC 1985, c 28 (1st Supp), the Minister's decision could have been judicially reviewed, but was not. Since the applicants did not challenge the Minister's decision, documents that were before the Minister were not the proper subject of a Rule 317 request in a proceeding that only challenged a decision of the Governor in Council.

[42] In this proceeding, it does not appear that the recommendation by the GIF2 Fee Team is a "decision" that is amenable to judicial review. A "decision" affects legal rights, imposes obligations, or prejudicially affects a party (*Gitxaala Nation v Canada*, 2016 FCA 187 at para 83). The recommendation itself had no affect on the applicants' rights.

[43] The applicants were affected when the recommendation was approved by the Board, and became the Decision. This is the kind of circumstance described in *China Mobile* where a preliminary decision or recommendation is subsumed in a final decision (para 47). I therefore cannot agree with VFPA that only the materials that were before the Board are the proper subject of a Rule 317 request. The scope of relevant materials includes documents that were before the GIF2 Fee Team.

C. *Rule 317 and procedural fairness*

[44] In the event I am incorrect in my determination that Rule 317 production must go beyond what was before the Board because the GIF2 Fee Team's recommendation was subsumed in the final decision, VFPA's approach to procedural fairness documents also supports production of documents in addition to what was before the Board.

[45] As a general rule, only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. There are exceptions. One of these exceptions is the ability for a Court to receive evidence to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness (*Tsleil-Waututh* at paras 97-98).

[46] *Tsleil-Waututh* describes how this further evidence is to be admitted – by way of affidavit, and not as part of Rule 317 production:

> [116] As a result of the foregoing, it is hard to see Rule 317 being used to obtain exceptional evidence. The only circumstance I can imagine is where the exceptional evidence happens to be in the possession of the administrative decision-maker—quite rare, I suspect.

[47] As set out above, the administrative decision-maker is the Board, not the VFPA. This gives the initial impression that Rule 317 is not the mechanism to obtain documents relevant to the allegations of procedural fairness.

[48] On this point, the applicants rely on the Court of Appeal's decision in *Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201 ("***Air Passenger Rights***"). *Air Passenger Rights* was decided after *Tsleil-Waututh*, and contemplates using Rule 317 for production of documents relevant to allegations of procedural fairness:

> [21] Turning to the first of the foregoing assertions, as the applicant rightly notes, the breadth of materials that are subject to disclosure under Rules 317 and 318 of the *Federal Courts Rules* is broader where bias or breach of procedural fairness is alleged, particularly where, as here, relief in the nature of prohibition is

> sought. In such circumstances, disclosure is not limited to the materials that were before the tribunal when an order was made. Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure. Indeed, were it otherwise, this Court would be deprived of evidence necessary for the disposition of an applicant's claims of bias or breach of procedural fairness and the availability of relief in the nature of prohibition would be largely illusory: see, e.g., *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, 289 A.C.W.S. (3d) 875 at paras. 5-6; *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program & Advertising Activities)*, 2006 FC 720, 293 F.T.R. 108 at para. 50, aff'd 2007 FCA 131; *Majeed v. Canada (Minister of Employment & Immigration)*, 1997 CarswellNat 1693, [1993] F.C.J. No. 908 (F.C.T.D.) at para. 3, aff'd [1994] F.C.J. No. 1401 (F.C.A.). Thus, the first assertion advanced by the AGC as to the scope of permitted disclosure under Rules 317 and 318 is without merit.

[49] The greatest difficulty I have with VFPA's position is the manner in which it responded to the Rule 317 request. VFPA did not express any objection to the applicants' Rule 317 request to the Administrator, and produced thousands of pages of documents that were not before the Board.

[50] Simply put, VFPA cannot have it both ways. By including within the CTR a significant amount of material that was not before the Board, and *certifying* that these documents were the "certified decision record" in this proceeding, VFPA cannot now take the position that other, similar, or related documents are immune from disclosure. Having, in effect, conceded in its Rule 318 certificate that materials that were not before the Board are the proper subject of a Rule 317 request, VFPA cannot now resist production on that basis.

[51] In these circumstances, I agree with the applicants' assertion that if the record before the Court was confined to only the two documents that were before the Board, the Court would be prevented from completing meaningful review of the Decision, or fairly evaluating the grounds for judicial review that are set out in the notice of application. Having opened the door to production of documents that were not before the Board (whether described as "background" or otherwise), VFPA cannot now resist production of documents other than those considered by the Board.

[52] While not requested by any of the parties, an option open to me is to order that the CTR be removed from the Court file under Rule 74, and be replaced with a CTR that only includes the Summary Report and draft resolution. Such an outcome may hew more closely to the approach taken in *Tsleil-Waututh* to procedural fairness documents and Rule 317, but would be unreasonable in these circumstances, disregard my conclusion that a preliminary recommendation was subsumed in the final decision, and contrary to the guiding principles of Rule 3. I am not at all inclined to give VFPA an opportunity to remove from the CTR the very material it certified was properly included. Taking such a step would surely result in the parties arguing about the same documents and issues in the context of the affidavits and cross-examinations. The parties have submitted evidence and argument on the issues; it would be more efficient to resolve the dispute now, and move the matter towards a hearing.

VII. The Requested Documents

[53] The fact that certain documents were created or considered by the GIF2 Fee Team does not necessarily result in a conclusion that they must be produced. The process leading to the

creation of the recommendation took place over a period of years. While the applicants have raised allegations relating to procedural fairness, this does not permit a fishing expedition. The documents sought must be relevant.

[54] The documents requested by the applicants are enumerated in schedule A to the notice of motion. Six documents or categories of documents are requested.

A. *A Complete Copy of the Mott MacDonald Study*

[55] This document was also referred to as the "Gateway Rail Assessment 2030" study. The applicants assert that Mott MacDonald (a consultancy) was commissioned by VFPA to understand forecasted growth to 2030, model the rail network to identify and prioritize infrastructure investments, and provide a usage breakdown of infrastructure improvements by trade area.

[56] The executive summary of this document was included in VFPA's "decision record" (the CTR). The CTR also includes other documents stated to be authored by or related to Mott MacDonald. These are (the numbers in parentheses are the last three digits from the column "BegDoc" in the index to the CTR):

a) second narrows bridge capacity analysis, summary report (012);

b) summary of rail capacity analysis methodology (013);

c) draft notes from 2017 LM6 rail analysis study to Mott MacDonald for review (532);

d) Gateway Rail Assessment, summary of engagement questionnaires, north shore trade area (533);

e) Gateway Rail Assessment, summary of engagement questionnaires, south shore trade area (534);

f) Gateway Rail Assessment, summary of engagement questionnaires, Fraser River trade area (535); and

g) Gateway Rail Assessment, summary of engagement questionnaires, Roberts Bank trade area (536).

[57] VFPA does not resist production of the Gateway Rail Assessment 2030 on the basis of relevance, rather because it contains proprietary and confidential information. Ms Bamford's evidence in this respect is:

> 71. The executive summary of the Gateway Rail Assessment has been disclosed. The full study has not been disclosed as the full study contains proprietary and confidential information of the VFPA and various industry members. It was not feasible to apply redactions.
>
> 72. In particular, as set out in the Summary Report, the study relied upon and contains information provided by terminals and railways on volumes, peak traffic, rail car use, and train counts. The information included:
>
> (a) Terminal throughput records;
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> (b) Terminals operating and theoretical capacity; and
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> (c) Terminals future investment and growth plans.
>
> 73. This information is commercially sensitive and was provided to the VFPA in confidence.
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> 74. When preparing the Summary Report, the full report was reviewed by the GIF2 Fee Team, and the information relied

> upon in preparing the Summary Report was summarized accurately in the disclosed executive summary
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> 75. The full report was not disclosed to or considered by the Board. Further, the executive summary, which has been disclosed, was not provided to or considered by the Board in making the Decision.

[58] Ms Bamford's affidavit also states that the additional documents in the CTR, beyond the Summary Report, were provided to provide background context. The affidavit further states that VFPA did not include documents that were irrelevant, commercially sensitive or confidential, or which were not reviewed and considered directly by the various VFPA employees in preparing the Summary Report.

[59] In written argument, VFPA asserts that documents or information may be privileged on the basis that they were conveyed under conditions of confidence, and in circumstances where it would not be in the public interest to breach that confidentiality, under the application of the "Wigmore privilege".

[60] Certain communications that are not protected by traditionally-recognized class privileges (like solicitor-client privilege) may be determined to be privileged on a case-by-case basis. Privilege may be found to exist where:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

R v McClure, 2001 SCC 14 at para 29 ("*McClure*").

[61] This was not pursued in oral argument, and I am not satisfied that VFPA has established that the communications included in the Gateway Rail Assessment 2030 are privileged. It is not self-evident that the contents of this document meets the test in *McClure*, and the evidence of Ms Bamford is limited to general statements of commercial sensitivity without particulars.

[62] Ms Bamford states that information was provided to VFPA in confidence. It is not apparent if this means an implied expectation of confidence, or an express confidentiality agreement. In any event, the existence of the confidentiality agreement is no bar to production. "A tribunal cannot contract itself or others out of its obligation to produce documents in accordance with this Court's Rules" (*Lafond v Ledoux*, 2008 FC 1369 at para 18; see also *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 at para 25).

[63] I am therefore not satisfied that production of the Gateway Rail Assessment 2030 can be resisted on the basis of privilege or confidentiality.

[64] Documents submitted under Rule 318 are "subject to the open court principle and are accessible to the public as soon as they are received at the Registry" (*Rémillard v Canada (National Revenue)*, 2022 FCA 63 para 8). A party who is obliged to include commercially

sensitive documents in a certified tribunal record may move for a confidentiality order under Rule 151.

[65] The open court principle is jealously guarded, and confidentiality orders are only granted in limited circumstances. The default position is that court proceedings are open. “Any secrecy must be necessary, justified and minimized” (*Ontario Addiction Treatment Centres v Canada (Attorney General)*, 2023 FCA 236 at para 11).

[66] The Supreme Court of Canada held in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 (“*Sierra Club*”) that a confidentiality order under Rule 151 should only be granted where:

> A. Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> B. The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[67] The first branch of the *Sierra Club* test requires that all three of the following elements be satisfied:

A. The risk claimed must be real and substantial, in that the risk is well grounded in evidence, and poses a serious threat to the commercial interest in question.

B. The importance of the commercial interest must be one which can be expressed in terms of a public interest in confidentiality. If there is no general principle at stake,

there can be no important commercial interest for the purpose of the *Sierra Club* test.

C. The Court must consider reasonably alternative measures and limit the order as much as is reasonably possible while preserving the commercial interest in question.

(*David Suzuki Foundation v Canada (Health)*, 2017 FC 625 at para 41).

[68] More recently, the Supreme Court of Canada stated in *Sherman Estate v Donovan*, 2021 SCC 25:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[69] In oral argument, VFPA requested that a confidentiality order issue for any documents that are ordered to be disclosed.

[70] There is no motion before the Court for a confidentiality order. It is not apparent what terms VFPA requests in such an order (eg whether documents should only be shielded from public view, or also designated as solicitor's eyes only). In any event, I am not satisfied that the limited and general evidence of Ms Bamford reproduced above satisfies the test in *Sierra Club* or *Sherman Estate*. In particular, I am not satisfied that it has been demonstrated that including the Gateway Rail Assessment 2030 in the public certified tribunal record would present a serious risk to an important commercial interest.

[71] I am also not satisfied that VFPA should be given a further opportunity to move for a confidentiality order. VFPA had clear notice of the applicants' production request, opportunity to introduce evidence addressing the test in *Sierra Club* and *Sherman Estate*, and opportunity to obtain relief under Rule 151 as part of this motion. Judicial review is meant to be a timely, summary proceeding allowing the state to implement its administrative decisions with minimal delay if the decision is challenged and found lawful or, if found unlawful, to quickly make corrective measures so that the decision complies with law and can take effect (*Wildchild Stockholm, Inc v Canada (Attorney General)*, 2019 FC 874 at para 50). A further motion would add delay to the proceeding, and effectively permit VFPA to present the same issue to the Court twice.

[72] The Gateway Rail Assessment 2030 will be ordered produced.

B. *The Input and Assumptions Summary Sheets related to GIF 2022 projects*

[73] Appendix 3 to the Summary Report includes a list of "five input and assumptions summary sheets related to GIF 2022 projects by Mott MacDonald." The applicants assert that these documents are relevant to the assessment of whether the GIF2022 is reasonable, and whether the applicants will receive direct or indirect benefits from the infrastructure projects commensurate with the quantum of fees being levied, and whether the projects being funded will be necessitated by the operations of the applicants.

[74] Ms Bamford's affidavit states that, when creating the Summary Report, this underlying data was not considered other than to confirm its accuracy, as appropriate. The results of the various studies were considered, but the level of detail being requested by the applicants was not. Production of these documents is also resisted on the basis of confidentiality, and the fact that these documents were not considered by the Board.

[75] The principles for assessing relevance on a Rule 317 motion were recently addressed by the Federal Court of Appeal in *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 ("*Canadian National*"):

> [17] In assessing relevance, the Court must also remember that Rule 317 is not a summary judgment provision. It is not meant to be a tactical opportunity for a respondent to nip in the bud a judicial review or statutory appeal before complete disclosure is made and analyzed. If there is an arguable case that the documents sought might well be relevant to the grounds or relief set out in the pleading, they should be disclosed. Fine, precise and final determinations of relevance are for the judge or panel hearing the merits of the application or appeal. By then, the judge or panel will have the benefit of the parties' submissions on the complete

> evidentiary and legal picture and, thus, will be empowered to make the best possible decision on relevance.

[76] I am satisfied that there is an arguable case that the five documents in this category are relevant to the grounds of review in the notice of application, particularly any correlation between any benefit to the applicants and the fees levied, and whether the infrastructure projects funded in connection with GIF2 are necessitated by the operations of the applicants. Even if for a limited purpose, this material appears to have been considered by the GIF2 Fee Team.

[77] Ms Bamford's evidence in respect of the confidentiality of these documents is:

> 81. These requested documents contain terminal-by-terminal data, including train projections and volume projections. This information is confidential and commercially sensitive as it consists of dis-aggregated terminal data, which would allow the reader to identify the specific business plans and projections of individual terminal operators, who are commercial competitors.

[78] As set out above, production cannot be refused on the basis of confidentiality. While these documents may be of a confidential nature, the evidence in this respect is limited. I do not know if the information was provided under an express or implied obligation of confidence to VFPA, and I am not satisfied that the single paragraph in Ms Bamford's affidavit is sufficient to meet the test in *Sierra Club* and *Sherman Estate*. The "five input and assumptions summary sheets related to GIF 2022 projects by Mott MacDonald" listed in appendix 3 to the Summary Report will be ordered produced.

C. *Funding Applications*

[79] The Summary Report (page 16) states that most projects included in GIF2022 received their primary funding from the National Trade Corridors Fund ("NTCF"), a $4.2B fund for Canadian infrastructure projects. The Summary Report states that if a project submitted for NTCF funding was unsuccessful, it was not included in the final list of GIF2022 projects.

[80] Page 19 of the Summary Report lists 11 projects that were funded by the NTCF. The applicants request production of the funding applications submitted by VFPA or any other applicable project proponent to the NTCF in respect of each of the GIF2022 projects.

[81] Ms Bamford's unchallenged evidence is that the *results* of the various funding applications were considered by the GIF2 Fee Team, but the applications themselves were not. Since the funding applications were not considered by the team that prepared the recommendation or the Board, I am not satisfied that these documents should be ordered produced. If this was an action, the documents may be "relevant" as that term is used in Rule 222, but in the narrower context of judicial review, they are not subject to production.

D. *Agreements between VFPA and other funding partners*

[82] Page 17 of the Summary Report states that, in December 2020, VFPA released the final list of projects to be cost recovered through GIF2022. The Summary Report lists 13 projects.

[83] The applicants request production of agreements and memoranda of understanding between VFPA and other funding partners, such as Canadian National Railway Company, the

Canadian Pacific railway, and municipalities with respect to these projects. Any such agreements or memoranda of understanding are not mentioned in the Summary Report.

[84] One of the columns on page 17 of the Summary Report is “funding application”, with an indication of “yes” or “no”. Where there is a “no”, the applicants expect that there is a funding agreement. This would apply to two projects, numbers 9 and 11.

[85] Ms Bamford’s unchallenged evidence is that the GIF2 Fee Team did not consider the terms of the funding agreements in preparing the Summary Report; the agreements set out the terms under which committed funding would be provided. Ms Bamford states that the only information considered by the GIF2 Fee Team was the amount of expected funding from each source.

[86] As with the previous category of documents, since these agreements were not considered by the team preparing the recommendation or the Board, I am not satisfied that these documents should be ordered produced. If this was an action, the documents may be “relevant” as that term is used in Rule 222, but in the narrower context of judicial review, they are not subject to production.

E. *Second Narrows Bridge Capacity Analysis*

[87] This report has been disclosed, but with redactions. The applicants seek an unredacted copy.

[88] Ms Bamford's evidence in respect of the redactions is:

> 78. The redactions were made as the underlying information was confidential and commercially sensitive. In particular, the redacted information relates to confidential terminal-by-terminal data, provided by competing terminal operators, including train capacity and demand projections, volume projections, and other projections used by individual terminal operators in their business strategies and plans.

[89] As I stated in *Boehringer Ingelheim (Canada) Ltd v Pharmascience Inc*, 2023 FC 584 at para 8, the Rules "do not contemplate or authorize redactions to documents that are otherwise relevant. Where a document contains relevant information, it should be produced in its entirety and unredacted (*Janssen Inc v Apotex Inc*, 2018 FC 407 at para 9)."

[90] VFPA did not seek a confidentiality order when the CTR was filed. As set out above, assertions of confidentiality do not justify withholding all or part of a document.

[91] As with the Gateway Rail Assessment 2030 and Mott Macdonald Studies, I am not satisfied that it has been demonstrated that including an unredacted copy of the Second Narrows Bridge Capacity Analysis in the public certified tribunal record would present a serious risk to an important commercial interest. A complete copy will be ordered produced.

F. *Materials listed in the Summary Report*

[92] In the final category of documents, the applicants seek production of all materials listed by VFPA in the Summary Report which have not already been provided. This is divided into four categories.

(1) Submissions received by VFPA during Phase 1 Consultation

[93] The Summary Report, at page 35, states that from January 2017 to April 2022, VFPA engaged in consultations with customers and industry stakeholders on the selection of infrastructure projects to support the gateway, the anticipated cost of the projects, and the fees to recover the costs. The Summary Report indicates that submissions were received from 16 organizations. The applicants seek production of these 16 submissions.

[94] There is no dispute that the GIF2 Fee Team had access to these submissions. Production is resisted on the basis of confidentiality.

[95] Ms Bamford's evidence on this category of documents is:

> 94. When engaging industry in a consultation process, the VFPA generally does not disclose the submissions received. This promotes more candid submissions, which may contain sensitive commercial information, which the party would not wish to have shared with its competitors.
>
> 95. The consultation process is not in the nature of a public hearing and the VFPA considers the responses received confidential, as they contain company specific information and were only addressed to the attention of the VFPA, with the reasonable expectation that they would not be disclosed.

[96] As discussed below, VFPA has already produced certain written submissions received during the Phase 3 consultations, and has agreed to produce others as part of this motion. It is not apparent why the expressed confidentiality concerns for the Phase 1 submissions do not apply to the Phase 3 submissions, or why the Phase 1 and Phase 3 submissions should be treated differently.

[97] In the absence of more specific evidence as to the express or implied expectations of parties providing submissions and VFPA during the Phase 1 consultations, I cannot conclude that production of the submissions listed on page 36 of the Summary Report would present a serious risk to an important commercial interest if included in the public certified tribunal record. Copies will be ordered produced.

(2) Submissions received by VFPA during the Phase 2 Consultation

[98] In late 2017, VFPA consulted customers and industry stakeholders regarding certain cost recovery mechanism options. This Phase 2 consultation process included a discussion guide and feedback form. The Summary Report (page 39) states that 43 stakeholders attended 5 meetings, 14 submissions were received, and six on-line feedback forms were received. The applicants move for production of these submissions.

[99] The analysis and evidence for the Phase 2 consultation documents is the same as for Phase 1. Copies of these documents will be ordered produced.

(3) Submissions received by VFPA during the Phase 3 Consultation

[100] This is not opposed. At paragraph 105 of Ms Bamford's affidavit, she states that VFPA agrees to produce the additional written submissions received in Phase 3 consultations.

(4) Documents in Appendix 3

[101] Appendix 3 to the Summary Report lists documents that were considered. The applicants move for production of 18 documents that are set out in Schedule 3, but were not included in the

CTR. For each paragraph that follows, the first sentence is the description of the document in Appendix 3 to the Summary Report.

[102] (6) Mountain Highway Underpass Business Case – December 23, 2019 – by HDR. Production is resisted on the basis of confidentiality, not relevance. I am not satisfied on the evidence that production would present a serious risk to an important commercial interest if included in the public certified tribunal record. It will be ordered produced.

[103] (10) New Building Canada Fund – National Infrastructure Component – Business Case – Burrard Inlet Road and Rail Improvement Project – May 18, 2016 by VFPA. Production is resisted on the basis of confidentiality, not relevance. I am not satisfied on the evidence that production would present a serious risk to an important commercial interest if included in the public certified tribunal record. It will be ordered produced.

[104] (14) Email from Kirk Zhou to Dennis Bickel and Marcus Siu re GIF2022 business case – December 2, 2021 – October 4, 2020. Production of this document is resisted on the basis of relevance and deliberative secrecy. Deliberative privilege covers internal documents, often prepared by the administrator's staff, that individual decision-makers use to assist their deliberations in the case. For example, staff might prepare evaluations of the evidence, legal advice and recommendations for the individuals deciding the case, much like a law clerk does for a judge on a court. The individuals deciding the case might make personal notes setting out their tentative reflections. These sorts of things are covered by deliberative privilege (*Canadian National* at para 29). While the evidence in respect of this document is not robust, Ms Bamford's

affidavit states that this email includes internal discussions regarding the GIF2. Production will not be ordered on the basis of deliberative privilege.

[105] (19) Gateway Rail Assessment 2030 Phase 1 Project Funding Breakdown (By Throughput). Production is resisted on the basis of confidentiality, not relevance. I am not satisfied on the evidence that production would present a serious risk to an important commercial interest if included in the public certified tribunal record. It will be ordered produced.

[106] (23) Proposal for Project Funding Under the National Trade and Corridors Fund Upgrades along the Burrard Inlet Line Project – Phase 1 by Canadian National Railway Company Limited November 6, 2017. Production is resisted on the basis of confidentiality, not relevance. I am not satisfied on the evidence that production would present a serious risk to an important commercial interest if included in the public certified tribunal record. It will be ordered produced.

[107] (7) 2021-02-24 17 47 PM – Bamford, Katherine – Basto, Kristina – Fwd [External] – Letter re Infrastructure Consultations. Ms Bamford's affidavit states that this email involved an inquiry regarding the date the notice for the Phase 3 Consultation was sent. I am not satisfied that this email is relevant, and it will not be ordered produced.

[108] (8) 2021-03-01 14 53 PM – Bamford, Katherine – Bickel, Dennis; Basto, Kristina – RE Info for Mike Henderson. Ms Bamford's affidavit states that this email was about arranging

for an information package for the GIF2 to be sent. I am not satisfied that this email is relevant, and it will not be ordered produced.

[109] (9) 2021-03-12 19 51 PM – Bamford, Katherine – Basto, Kristina – RE Response to BCMTOA GIF2022 Feedback. Ms Bamford's affidavit states that this email was about filing instructions. I am not satisfied that this email is relevant, and it will not be ordered produced.

[110] (10) 2021-03-12 19 51 PM – Bamford, Katherine – Chris Chok; Basto, Kristina – FW [External] – WGEA Letter – GIF2022. Ms Bamford's affidavit states that this email was about filing instructions. I am not satisfied that this email is relevant, and it will not be ordered produced.

[111] (15) 2021-04-29 14 57 PM – Bamford, Katherine – Basto, Kristina – FW Trans Mountain comments GIF 2022 Industry Consultation – Fee Language. Ms Bamford's affidavit states that this email was about filing instructions. I am not satisfied that this email is relevant, and it will not be ordered produced.

[112] (31) 2022-04-06 Imperial Letter to the VFPA April 6, 2022. Ms Bamford's affidavit states that this letter was a request by Imperial to be excluded from the GIF2, and that the request was considered and denied. I am not satisfied that this letter is relevant to the issues raised in the notice of application; it will not be ordered produced.

[113] (38) Master Correspondence Log for Comment Periods – 2021 and 2022. Ms Bamford's affidavit states that this log of communications was not included because it was deemed irrelevant. I am not satisfied that a correspondence log is relevant to the issues raised in the notice of application. The fact that a document is mentioned in Schedule 3 does not automatically mean it should be disclosed. Pursuit of this document more closely resembles fishing; it will not be ordered produced.

[114] (39) Master Correspondence Log for Comment Periods – 2021-2022 Updated 2022-04-07. For the same reasons as the preceding item, this will not be ordered produced.

[115] The remaining five items in this category of the notice of motion (input assumptions and summary sheets) are the same as item 2 in schedule "A" to the notice of motion, and have been addressed above.

VIII. Costs

[116] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[117] In light of the divided success on the motion, costs will be in the cause.

ORDER in T-2256-22

THIS COURT ORDERS that:

1. Within 45 days of the date of this order, the respondent shall serve and file a supplementary certified tribunal record that includes:

    a) a complete and unredacted copy of the Gateway Rail Assessment 2030;

    b) the "five input and assumptions summary sheets related to GIF 2022 projects by Mott MacDonald" listed in appendix 3 to the Summary Report;

    c) a complete and unredacted copy of the Second Narrows Bridge Capacity Analysis;

    d) the following documents listed in the Summary Report which were not included in the certified tribunal record:

        i. submissions received by VFPA during Phase 1 Consultation (Summary Report, page 36);

        ii. submissions received by VFPA during Phase 2 Consultation (Summary Report, page 39);

        iii. submissions received by VFPA during Phase 3 Consultation from BC Marine Terminal Operators Association; the Canadian International Freight Forwarders Association; Univar Solutions; and Wallenius Wilhelmsen Solutions;

        iv. Mountain Highway Underpass Business Case – December 23, 2019 – by HDR;

v. New Building Canada Fund – National Infrastructure Component – Business Case – Burrard Inlet Road and Rail Improvement Project – May 18, 2016 by VFPA;

vi. Gateway Rail Assessment 2030 Phase 1 Project Funding Breakdown (By Throughput); and

vii. Proposal for Project Funding Under the National Trade and Corridors Fund Upgrades along the Burrard Inlet Line Project – Phase 1 by Canadian National Railway Company Limited November 6, 2017.

2. The applicants' motion is otherwise dismissed.

3. Costs of the motion are in the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2256-22
STYLE OF CAUSE:	PACIFIC COAST TERMINALS CO. LTD.,VITERRA CANADA INC., CASCADIA PORT MANAGEMENT CORPORATION, FRASER GRAIN TERMINAL LTD. AND ALLIANCE GRAIN TERMINAL LTD. v VANCOUVER FRASER PORT AUTHORITY AND ATTORNEY GENERAL FOR SASKATCHEWAN AND ATTORNEY GENERAL OF MANITOBA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 28, 2023
ORDER AND REASONS:	HORNE A.J.
DATED:	JANUARY 24, 2024

APPEARANCES:

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