Federal Court  Cour fédérale

Date: 20160128

Docket: T-1599-15

Citation: 2016 FC 101

Ottawa, Ontario, January 28, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

LOUIS DREYFUS COMMODOTIES CANADA LTD

Respondent

ORDER AND REASONS

[1] The Applicant, Canadian National Railway Company ("CN"), brought a motion for:

1. an Order pursuant to Rules 317 and318 of the *Federal Courts Rules*, SOR/98-106:

(a) directing Thomas Maville (the "Arbitrator") to prepare and file an affidavit listing all of the materials requested by CN, namely, all of the materials provided to the Arbitrator in the context of the arbitration proceeding, or considered by the Arbitrator in making the arbitration decision dated August 25, 2015, that were not also provided to CN including, in particular:

i. copies of all emails, letters or other correspondence exchanged between the Arbitrator and the persons appointed pursuant to section 169.35 of the *Canada Transportation Act*, 1996 c. 10 (the "CTA") to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Canadian Transportation Agency (the "Agency"), between the dates of June 22, 2015 and August 25, 2015;

ii. copies of all documents, memoranda or other materials sent to or received from the persons appointed pursuant to section 169.35 of the CTA to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Agency, between the dates of June 22, 2015 and August 25, 2015;

iii. copies of all notes of conversations, meetings or discussions with the persons appointed pursuant to section 169.35 of the CTA to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Agency, between the dates of June 22, 2015 and August 25, 2015;

(b) directing the Arbitrator to produce to CN and the Registry a certified copy of each of the materials requested by CN, as set out in the preceding subparagraph, subject to any established claim for privilege;

(c) for the purposes of facilitating the Court's determination of any asserted claim for privilege, directing the Arbitrator to prepare and file a Response Record, including an affidavit listing all of the materials over which privilege is claimed and setting out sufficient details regarding each document to understand why privilege is being claimed, and to produce a copy of each of those documents for review by the Court; and

(d) granting CN leave to file a Reply to any Response Record filed by the Arbitrator or by the Respondent, Louis Dreyfus Commodities Canada Ltd. ("LDC");

2. an Order pursuant to Rule 401 of the *Federal Courts Rules* granting CN its costs of this motion; and

3. such further and other relief as this Court may deem just.

[2] Written representations were filed by the respective parties, including limited submissions from Counsel for the Arbitrator, and considering the additional submissions requested in reference to the Federal Court of Appeal's recent decision in *Taseko Mines Limited v Canada (Minister of the Environment)*, 2015 FCA 254 ("*Taseko*").

I. Background

[3] The CTA prescribes the statutory level of service that a railway company must provide to a party, or "shipper," who wishes to send or receive goods by way of railway:

> **113. (1)** A railway company shall, according to its powers, in respect of a railway owned or operated by it,
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> **(a)** furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;
>
> **(b)** furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
>
> **(c)** without delay, and with due care and diligence, receive, carry and deliver the traffic;
>
> **(d)** furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and
>
> **(e)** furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

[4] Generally speaking, railway companies and shippers are able to negotiate mutually beneficial level of service contracts defining the manner in which the railway company will fulfil its statutory service obligation to the shipper, as provided for by subsection 113(4) and subsection 126(1) of the CTA. However, where that level of service negotiations fail, a shipper may submit the matter to the Agency for arbitration in accordance with the rules outlined in Part IV, Division II of the CTA (Arbitration on Level of Services).

[5] In the present context, LDC is a merchandiser and shipper of grain operating in Western Canada. Among its extensive operations, the company has facilities located in Kegworth (Glenavon), Saskatchewan; Aberdeen, Saskatchewan; and, Dawson Creek, British Columbia (collectively, the "Facilities"). The Facilities are served by CN, the only railway company with direct access.

[6] In early 2015, a dispute arose between CN and LDC as to the level of service which CN was to provide to the Facilities. After giving notice to CN that it intended to make a submission for a level of service arbitration with the Agency, LDC filed its submission for arbitration with the Agency on June 8, 2015, pursuant to subsection 169.31(1) of the CTA:

> **169.31 (1)** If a shipper and a railway company are unable to agree and enter into a contract under subsection 126(1) respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may submit any of the following matters, in writing, to the Agency for arbitration:
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> **(a)** the operational terms that the railway company must comply with in respect of receiving, loading, carrying, unloading and delivering the traffic, including performance standards and communication protocols;
>
> **(b)** the operational terms that the railway company must comply with if it fails to comply with an operational term described in paragraph (*a*);
>
> **(c)** any operational term that the shipper must comply with that is related to an operational term described in paragraph (*a*) or (*b*);
>
> **(d)** any service provided by the railway company incidental to transportation that is customary or usual in connection with the business of a railway company; or
>
> **(e)** the question of whether the railway company may apply a charge with respect to an operational term described in paragraph (*a*) or (*b*) or for a service described in paragraph (*d*).

[7] On June 22, 2015, the Agency referred the matter to arbitration; pursuant to subsection 169.35(1) of the CTA, and the Arbitrator was appointed.

[8] The Arbitrator convened an initial pre-arbitration meeting by way of a teleconference on June 23, 2015. Two follow up calls took place on June 26 and June 29, 2015. In addition to the Arbitrator and representatives of CN and LDC, Agency employees Nina Frid, John Dodsworth, John Corey, David Gervin and Hasina Haq-Alam were present for the teleconference. John Dodsworth was introduced by the Arbitrator as "Legal Counsel," while John Corey was identified as "Rail Subject Matter Expert".

[9] A second pre-arbitration meeting was convened by the Arbitrator and held by way of teleconference on August 12, 2015. Once again, in addition to the Arbitrator and representatives of CN and LDC, Agency employees John Dodsworth, John Corey, and Hasina Haq-Alam were in attendance.

[10] The arbitration hearing was held on August 16, 17, and 18, 2015, in Ottawa. In addition to the Arbitrator and representatives of CN and LDC, John Dodsworth, Hasina Haq-Alam, Gerry Nera, John Corey and Graham Fyfe were in attendance for some or all portions of the hearing. <

[11] The Arbitrator issued his decision on August 25, 2015, setting out the terms binding CN in respect of future rail car supply for LDC's ongoing grain traffic requirements in connection with the Facilities.

[12] On September 21, 2015, CN filed an application for judicial review of the Arbitrator's decision, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[13] In the Notice of Application, CN alleged, among other grounds, that:

> The Arbitrator failed to observe the principles of procedural fairness, the *Rules of Procedure for Rail Level of Service Arbitration*, SOR/2014-94 ("*Arbitration Rules*"), and section 169.35 of the CTA, and acted without jurisdiction or beyond his jurisdiction by considering information, submissions or other materials from non-parties, which materials were not made available to CN and to which CN was not afforded the opportunity to respond.

[14] In support of its application for judicial review, CN made a request pursuant to Rule 317(1), which provides that:

> 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.

[15] Specifically, CN requested that the Arbitrator produce a certified copy of all material provided to the Arbitrator in the context of the arbitration proceeding, or considered by the Arbitrator in making the impugned Decision, that was not also provided to CN, including:

> a) Copies of all emails, letters or other correspondence exchanged between the Arbitrator and the persons appointed pursuant to section 169.35 of the CTA to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Agency, between the dates of June 22, 2015 and August 25, 2015;
>
> b) Copies of all documents, memoranda or other materials sent to or received from the persons appointed pursuant to section 169.35 of the CTA to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Agency, between the dates of June 22, 2015 and August 25, 2015;

> c) Copies of all notes of conversations, meetings or discussions with the person appointed pursuant to section 169.35 of the CTA to provide administrative, technical, and legal assistance to the Arbitrator, or any other staff or member of the Agency, between the dates of June 22, 2015 and August 25, 2015;
>
> [Emphasis added]

[16] In correspondence dated October 13, 2015, LDC objected to CN's request, pursuant to Rule 318(2), which provides that:

> 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.

[17] Specifically, LDC protested that the request was nothing more than "a fishing expedition," done in the hope of finding evidence to support its allegations, and claimed that even if the materials in question did exist, they would be privileged under the principle of deliberative secrecy.

[18] In correspondence dated October 19, 2015, John Dodsworth — acting in his capacity as legal counsel for the Arbitrator — objected to CN's request on behalf of the Arbitrator, stating that the materials in question were subject to solicitor-client privilege, as well as the principle of deliberative secrecy.

[19] On November 2, 2015, CN filed a Notice of Motion in Saskatoon that was accepted for filing in the Winnipeg Registry on November 10, 2015. The Notice of Motion indicated CN's intention to seek an order compelling the Arbitrator to deliver the requested materials so that they could be considered by the Court when determining CN's underlying application for judicial review. In the affidavit of Eric Harvey (the "Harvey Affidavit"), made on behalf of CN

and sworn in support of the motion, CN expressed its belief that the Arbitrator had improperly consulted with and/or relied on materials or information of materials from John Dodsworth, John Corey or other Agency staff. The Harvey Affidavit further indicated that this belief was supported by the fact that the Arbitrator's August 25, 2015 decision was inconsistent with the legal arguments and the evidence presented at the hearing. In its written representations, CN further claimed that the Arbitrator was obliged to produce the materials requested, as they are relevant to the underlying judicial review application, or in the alternative file affidavit evidence to establish a claim of privilege.

[20] On November 17, 2014, the Arbitrator filed his response to CN's motion, objecting to the request on the grounds that the material which CN had requested is not relevant for the purposes of Rule 317 and arguing that the motion before me seeks to violate the principle of deliberative secrecy.

[21] On November 18, 2015, LDC filed its response to CN's motion, objecting on largely the same grounds.

[22] On November 24, 2015, all three parties, including the Arbitrator in a limited role and without presenting evidence, were given the opportunity to provide oral submissions which they did at a specially convened sitting of this Court in Edmonton.

I. Analysis

[23] A decision of this Court concerning the production of documents under a Rule 317 request is discretionary in nature (*Jolivet v Canada (Minister of Justice)*, 2011 FC 806 ("*Jolivet*") at para 8). Assuming that the material in question is in the possession of the administrative decision-maker, this Court must then turn its focus to whether or not the material being sought is "relevant" to the underlying application for judicial review (Rule 317(1)). This is because an administrative decision-maker is not obliged to produce material that is not relevant (*Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 (FCA) ("*Pathak*") at para 9).

[24] For the purposes of Rules 317 and 318, the Federal Court of Appeal has instructed that a document is relevant to an application for judicial review if it may have affected the decision of the administrative decision-maker, or if it may affect the decision that this Court will make on the application for judicial review (*Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 ("*Maax Bath*") at para 9).

[25] In assessing whether the documents in question meet this criteria, the Court must necessarily turn its attention to the grounds of review set forth in the originating notice of motion and the affidavit filed by the applicant (*Pathak*, at para 10; *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities – Gomery Commission)*, 2006 FC 720 ("*Gagliano*") at para 49, aff'd 2007 FCA 131).

[26] As a starting point, it is a basic tenet of administrative law, and well-established in the jurisprudence of this Court, that a party requesting material under Rule 317 is entitled to

everything that was, or should have been, before the decision-maker at the time the decision at issue was made (*Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 ("*Access*") at para 7, citing *1185740 Ontario Ltd v Canada (Minister of National Revenue)*, [1999] FCJ No 1432 (FCA); *Gagliano*, at para 83). This presumption in favour of relevance exists because it is understood, as a general rule, that an application for judicial review must be decided on the basis of the information in the decision-maker's possession at the time the impugned decision is made (*Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 ("*Marchand*") at para 4; *Jolivet*, at para 27).

[27] However, the jurisprudence carves out exceptions to the rule; for example, materials beyond those before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness, committed jurisdictional error or where there is an allegation of a reasonable apprehension of bias (*Gagliano*, at para 50). In order to obtain the disclosure of material that was not before a decision-maker at the time the decision was made, an applicant must raise a ground of review that would allow the Court to consider evidence that was not before the decision-maker, and then demonstrate that this ground of review has a factual basis supported by appropriate evidence (*Marchand*, at para 4).

[28] In the present case, it is clear from the grounds raised in CN's Notice of Application, and the accompanying Harvey Affidavit, that CN believes that the Arbitrator received evidence and legal argument from third parties on which CN was not given the opportunity to comment or respond. CN alleges that this is a breach of procedural fairness and further contends that the Arbitrator committed a jurisdictional error.

[29] CN's position is that it has limited its Rule 317 request to material that was before the Arbitrator when he made the August 25, 2015 decision, and thus this motion is not a request for expanded disclosure of the sort identified in *Marchand*. In making this argument, CN submits that the material is presumed to be relevant, per *Jolivet* at para 27, and contends that it need not file affidavit evidence providing a factual basis for the allegations contained in its Notice of Application. Although of the view that it need not provide a factual basis in support of its position, the Harvey Affidavit indicates that CN's belief in this respect is informed by the fact that the Arbitrator identified John Dodsworth as his "Legal Counsel" and John Corey as his "Railway Subject Matter Expert," and further contends that the decision of the Arbitrator is at odds with the evidence presented at the arbitration hearing, alluding to the fact that information must have been before the decision maker that was not filed by the parties.

[30] Both LDC and the Arbitrator object to the request on the basis that CN has failed to establish that the documents being sought are relevant for the purposes of Rule 317, and secondly submit that that even if the documents in question were relevant, they would be protected by the principle of deliberative secrecy. LDC and the Arbitrator had also initially raised objections to the materials requested by CN on the basis of solicitor-client privilege, but these objections were not substantively canvassed in either LDC's or the Arbitrator's written submissions or advanced in either party's oral submissions.

[31] It bears mentioning here that a determination as to whether or not the Arbitrator breached the duty of procedural fairness owed to CN or committed a jurisdictional error in reaching his decision is an issue to be determined by the Application Judge; an issue that is distinct from the

motion before me. I make no findings in this regard and emphasize that my role is confined to deciding whether the materials requested by CN are relevant for the purpose of determining this question. In doing so, I must decide whether the materials identified by CN were, or should have been, before the Arbitrator when he made his decision and, if they were, whether they are privileged in light of the principle of deliberative secrecy.

[32] The materials requested by CN, if they exist, pertain to documents or communications between the Arbitrator and persons appointed pursuant to subsection 169.35(3) of the CTA to provide administrative, technical and legal assistance to him. Although not a tribunal, *per se*, any arbitrator appointed pursuant to subsection 169.35(1) of the CTA, is clearly entitled to rely on Agency staff in fulfilling his or her duties in relation to a matter that has been referred for arbitration. This is provided for by subsection 169.35(3) of the CTA:

> 169.35(3) The Agency may, at the arbitrator's request, provide administrative, technical and legal assistance to the arbitrator.

[33] I agree with LDC's submission that this provision expresses Parliament's recognition of the practical realities under which level of service arbitrators must reach their decisions, especially in light of the often extensive evidence presented in the arbitration proceedings and the tight timelines imposed under the legislative scheme. While it is true that the arbitration is not an Agency proceeding, it is difficult to foresee how an arbitrator could reasonably comply with the requirement set out in subsection 169.38(3) of the CTA that he or she issue a decision no more than 45 days (65 days at the outset) after a matter has been referred, without the assistance of Agency staff. Therefore, in my view, subsection 169.35(3) is merely the statutory embodiment of the long-standing administrative principle that decision-makers do not have to do

all the work themselves (*Syndicat des employés de production du Québec et de l'Acadie v Canada (Canada Human Rights Commission)*, [1989] 2 SCR 879, at page 898).

[34] Notwithstanding the fact that there is little indication that any of the documents requested by CN even exist, the simple observation that employees of the Agency were present for the pre-arbitration teleconferences and attended part, or all, of the arbitration hearing does not give rise to the presumption of interference. Even if the Arbitrator was provided assistance by the Agency employees in question, it is trite law that staff reports are generally not relevant to applications for judicial review (*Trans Quebec and Maritimes Pipeline Inc v National Energy Board*, [1984] 2 FC 432 (Fed CA) ("*Trans Quebec*")). As held in this Court's decision in *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System)*, [1996] 2 FC 668 at para 39, an administrative decision-maker will not be required to disclose documents produced by those who provide assistance unless an applicant is able to show that the impugned decision was based on documentation to which the parties were not given an opportunity to respond:

> The analysis and opinion in staff memoranda are irrelevant to the ascertainment of the tribunal's reasons for decision because they cannot be assumed to have been adopted by it as its reasons. It would have to be shown that they amounted to additional evidence.
>
> [Emphasis added]

[35] The principle was more recently endorsed by the Federal Court of Appeal and cited in *Maax Bath*, a case where the applicant argued that a tribunal's internal documents were part of the tribunal record because they may have had an effect on the tribunal's inquiry and thus were

relevant for the purposes of Rule 317. In rejecting the request, Madam Justice Trudel, writing for the Court, stated at para 12:

> In its reply to the response of the Tribunal, the applicant refers to the "summaries and/or compilations of the information contained in the record and… advice and/or analyses of market, financial or economic questions" in the Tribunal's internal documents […]. On the record as it stands, and in the absence of any reference, by the applicant to specific passages in the Tribunal's reasons from which it could reasonably be inferred that the Tribunal grounded its decision on material not available to the parties, or that inappropriate tampering with the decision occurred, one cannot assume that such information has been adopted by the Tribunal in its reasons, thereby making it relevant to the decision made by the Tribunal or to the decision that this Court will make (*Trans Quebec and Maritimes Pipeline Inc v National Energy Board*, [1984] 2 FC 432; *Telus*, supra at paragraph 3).
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> [Emphasis added]

[36] I am of the view that this principle is equally applicable here. Clearly, the materials requested, if they exist, pertain to documents or communications between the Arbitrator and persons appointed pursuant to subsection 169.35(3) of the CTA to provide administrative, technical and legal assistance to him. In the absence of any reference to specific passages in the Arbitrator's reasons from which it could reasonably be inferred that the Arbitrator grounded his decision on material not available to the parties, or that inappropriate tampering with the decision occurred, it cannot be assumed that information not provided to the parties was adopted by the Arbitrator in his reasons. Any such material is irrelevant for the purposes of this disclosure request unless it can be shown, on a factual basis, that it amounted to additional evidence.

[37] CN submits that this presumption of regularity cannot be used at this stage to deny CN access to this material, citing the decision of this Court in *Gagliano*, at paras 77 and 83. I am of the view *Gagliano* can be distinguished on its facts, and its application is of limited value in the

present case. In *Gagliano*, the applicants *were* able to show that the materials in question, namely emails sent by members of the public to the Commissioner of a public inquiry during the course of the investigatory stage, were before or ought to have been before the Commissioner, and thus were relevant for the purposes of the Rule 317 request. As Mr. Justice Teitelbaum wrote at para 83:

> To summarize, unless there is clear and convincing evidence to the contrary, when a Commissioner states that he did not use certain material, then this statement must be presumed to be true. This is a view that is supported by recent Supreme Court jurisprudence: *Société d'énergie Foster Wheeler ltée c Société intermunicipale de gestion & d'élimination des déchets (SIGED) Inc*, above. However, in determining the relevance of a document under Rule 317, the issue is not whether the decision-maker did not consider certain evidence, but rather whether the evidence was or should have been before the decision-maker. At this stage of the proceedings, the applicants have shown that the requested Phase I e-mails received between September 7, 2004 and August 25, 2005 are relevant to their grounds for judicial review. The Court makes no comment as to whether or not these claims will succeed. That is a task for the Applications Judge to determine.
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> [Emphasis added]

[38] That is not the case here, where CN has failed to establish that the documents they believe exist and in question are relevant. In this regard, CN has done little more than provide a bald assertion that there was a breach of procedural fairness. Other than these bald assertions, CN has not identified any passages in the arbitration decision, or identified any documentation, that shows that information was used that was not provided to them.

[39] As noted in *Pathak*, at para 9, an applicant cannot seek the judicial review of a decision only because he does not like it; he must know and indicate the irregularities which, according to him, vitiate the decision. Therefore in the absence of a factual basis justifying such a concern, the

Court "is not disposed to impose an obligation to disclose on the Arbitrator which goes beyond what the parties filed into evidence or in written submissions" (*Access*, at para 19).

[40] CN was clear that its Rule 317 request was made only in reference to those materials before the Arbitrator at the time that he made his decision, and thus it was not required to provide a factual basis for the request. However, simply asserting that there is a breach of procedural fairness without specifying more, while suggesting that the Respondent's objections on the basis of deliberative privilege are indicative of the existence of relevant documents in some form, will not suffice. A request made pursuant to Rule 317 does not entitle CN to everything that is in the Arbitrator's possession; they must show that the material is also relevant insofar as it may have affected the decision of the Arbitrator, or that it may affect the decision of this Court in considering the application for judicial review. Clarifying that this request is only in reference to documents that were before the Arbitrator, without pointing to any evidence that would rebut the presumption of regularity, is an attempt to work around the requirement for a factual basis. As noted by the Federal Court of Appeal in *Access*, at para 21:

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

[41] This view was recently reiterated by the Federal Court of Appeal in *Marchand*, at para 4, where the Court noted that the requirement for a factual basis is particularly important because it prevents an applicant from raising a breach of procedural fairness as grounds in its application for judicial review simply to gain access to material that the it could not otherwise access.

[42] As a result, CN has failed to persuade me that the documents sought to be produced are relevant and necessary (*Maax Bath*, at para 10). It follows that there is no basis for this Court to direct the Arbitrator to list and produce the materials CN seeks for review by the Court.

[43] I am satisfied that this issue is dispositive of the motion. However, in the event that my analysis of the relevant jurisprudence is wrong, I am satisfied that material in question would otherwise be shielded by the principle of deliberative secrecy and therefore be immune from production.

[44] As noted by CN, the concept of deliberative secrecy is fundamental to the constitutional principle of judicial independence; a judge has the right to refuse to answer questions as to how and why he or she arrived at a particular conclusion (*MacKeigan v Hickman*, [1989] 2 SCR 796, 61 DLR (4^{th}) 688 at 830-831). CN takes the position that deliberative secrecy is not applicable in this case, submitting that the principle can only be applied in the context of institutional decision making and arguing that the impugned decision is that of an individual arbitrator who was not entitled to deliberate with any other parties.

[45] In *Québec (Commission des affaires sociales) c Tremblay*, [1992] 1 SCR 952 (“*Tremblay*”), the Supreme Court examined how the principle of deliberative secrecy applied in the context of administrative tribunals. Writing for the majority, at page 966, Mr. Justice Gonthier noted that, although the principle was somewhat limited in its application, it was still relevant:

> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may none the less be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.
>
> [Emphasis added]

[46] While it is clear that administrative decision-makers cannot rely on the principle of deliberative secrecy to the same extent as judicial adjudicators, I do not agree that the doctrine is limited only to institutional decision-makers. In this respect, I accept LDC’s submission that the principle serves to protect the independence and impartiality of the decision-maker in the adjudication of an issue and is applicable to any adjudicative process, irrespective of the character of the decision-maker (*Noble China Inc v Lei* (1998), 42 OR (3d) 69, at paras 19-22). Although not on analogous grounds, this view is supported by the decision of the Federal Court of Appeal in *Maax Bath*, at para 14, which emphasizes that it is the broader notion of judicial impartiality in adjudication which the principle of deliberative secrecy serves to protect:

> There can be little question here that the applicant is seeking access to documents consulted by or prepared for the Tribunal members as they were engaged in their deliberative role to determine how and why the members reached their impugned conclusions. I agree with the respondent that this is a matter of privilege going to judicial impartiality in adjudication.
>
> [Emphasis added]

[47] Furthermore, I do not accept CN's submission that the Arbitrator, in seeking to rely on the principle of deliberative secrecy, has the onus of proving, with affidavit evidence, the relevant facts and circumstances necessary to establish such a claim. While it is true that the veil of deliberative secrecy may be pierced, the threshold for doing so is high and this Court has held that it is the party that is seeking the disclosure of material that needs to establish valid reasons for believing that the rules of natural justice were not followed (*Stevens v Canada (Attorney General),* [2001] 1 FC 156, at paras 36-42, aff'd [2002] FCJ No 142).

[48] I do not believe that the simple fact that individuals employed by the Agency were present at the pre-arbitration conferences and arbitration hearing is enough to pierce the veil of deliberative secrecy. In *Taseko*, the Federal Court of Appeal dealt with a similar matter. At issue was the applicant's suspicions that an independent Federal Review Panel, established in accordance with the *Canadian Environmental Assessment Act*, SC 1992 c 37, had relied too heavily on its secretariat to draft an environmental report assessing the impact of a mining proposal. At the heart of the allegations was the fact that secretariat personnel had spent approximately 3,000 hours working on the report. The applicant brought a motion pursuant to Rules 317 and 318, requesting production of all documents, including correspondence and notes, pertaining to the Federal Review Panel's instruction to its secretariat concerning responsibilities for the drafting of the report and any related responses.

[49] In dismissing the appeal, Mr. Justice Nadon found, at para 3, that "the fact that the Secretariat personnel spent approximately 3000 hours working on the Review Panel's report does not constitute, per se, a sufficient basis to conclude the existence of valid or good ground

justifying the lifting of the veil of secrecy" and refused to order the production of the documents in question.

[50] Just as in *Taseko,* I do not have any real evidence before me that would convince me to lift the veil of deliberative secrecy. Consequently, I find that CN's argument that the attendance of Agency employees for part or all of the pre-arbitration teleconference is indicative of a breach of procedural fairness to be insufficient.

[51] For this reason, I am of the view that it is unnecessary to make an order for the production of documents because at this point, and without straying into the territory of the Applications Judge, I find that there are "no valid reasons for believing that the process followed did not comply with the rules of natural justice" (*Taseko,* at para 2, citing *Tremblay*). The motion is dismissed.

[52] Both parties sought costs but due to the fact that this was the first time that the level of service arbitration provisions of the CTA have been before the Federal Court, the motion, though dismissed, was necessary so that parameters could be set for the future. For that reason no costs will be awarded.

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Parties will bear their own costs of this motion.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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John Dodsworth	FOR THE ARBITRATOR

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