Federal Court  Cour fédérale

Date: 20210617

Docket: T-538-19

Citation: 2021 FC 624

Ottawa, Ontario, June 17, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

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

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

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

I. Background

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

[5] While the key developments that set the stage for this motion were summarized in an earlier ruling (see *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020

FC 970 at para 3 [*GCT #3*]), it is necessary to provide a brief summary to set the context for this motion.

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

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

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

decision that the production of the record should be requested in the manner prescribed by Rule 317 of the *Rules*.

[9] GCT then submitted its Rule 317 request, in response to which VFPA produced documents on September 9, 2020. Unsatisfied with VFPA's disclosure, GCT brought a motion pursuant to Rule 318 seeking further documents. It then brought a motion under Rule 316, seeking leave of the Court to cross-examine Mr. Peter Xotta, VFPA's Vice President, Planning and Operations, in advance of the hearing on the Rule 318 motion. Mr. Xotta was the individual who had certified that the VFPA disclosure was complete. GCT argued that it needed to cross-examine him because he could provide evidence about VFPA's decision-making process and the documentation that it had relied on in making the two decisions. That motion was dismissed (see *GCT #3*).

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

[11] The first letter recounts the history of the VFPA's proposed expansion project (known as RBT2), and summarizes some perceived difficulties faced by the GCT proposal (known as DP4). The letter then states: "[t]he RBT2 Project is our preferred project for achieving the expansion of capacity to meet projected increases in demand" (March 2019 decision at p 4). The letter explains that the project rationale for RBT2 emphasized that the expansion of the existing Deltaport terminal as proposed by GCT would have resulted in a market concentration issue, because one terminal operator (namely GCT) would control a significant portion of traffic

through the port. It also noted that the proposed location for the Deltaport expansion was not an option due to environmental sensitivity. Based on all of this, the March 2019 decision concludes with the following passage:

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

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

[13] The problem is compounded, according to GCT, because in the September 2019 decision rescinding the March 2019 decision, VFPA reiterated its concerns about the DP4 project regarding its environmental impact and the "competitiveness and control question". However, having repeated its concerns, VFPA went on to state that it no longer considered either problem to be so significant as to warrant ruling out further consideration of the project. GCT argues that this is proof that the VFPA rescission of its March 2019 decision is illusory, because VFPA maintains its prior positions and has not taken any steps to resolve the core problem that it is acting as both regulator and competitor *vis-à-vis* GCT's DP4 project.

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

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

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

[17] The disclosure was accompanied by the following declaration:

> I, Peter Xotta, Vice President, Planning and Operations, Vancouver Fraser Port Authority, certify that, with the exception of the portions redacted for solicitor-client privilege and relevance, or documents identified as privileged, the materials listed in the attached index, and attached thereto, are true copies of the

> documents before the decision maker in making the decision of March 1, 2019 to refuse to process GCT's PER application and the September 23, 2019 [decision] to rescind that decision which are challenged in the applicant's Amended Notice of Application.

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

[19] During the course of submissions on the motion, GCT raised a more general concern regarding the lack of detail included in VFPA's description of the documents over which it asserted solicitor-client privilege. At the hearing on the motion, I directed that VFPA disclose a more particularized list for its solicitor-client privileged materials, resembling the level of detail expected in documentary discovery. The parties were then invited to make written submissions on the solicitor-client privilege claims. In connection with that, I also ordered VFPA to provide this material to the Court on a confidential basis so that I could review it, if needed. I will deal with this issue below, following an analysis of the arguments about the more general issue of disclosure.

II. Issue

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

III. Analysis

A. *The principles guiding Rule 317 disclosure*

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

Material from tribunal	**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 writing, of the reasons for the objection.	**318 (2)** Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
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	**(4)** La Cour peut, après avoir entendu les observations sur

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.	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.
>
> [Citations omitted.]

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

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

B. *Rule 317 disclosure in cases involving allegations of bias*

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

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

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

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

[32] VFPA submits that it has made a fulsome disclosure, and that GCT is actually seeking documents that go to the merits of the decisions on the project, which VFPA argues are not relevant for the judicial review. VFPA denies that it has been seeking to immunize itself from

judicial review; instead, it says that it is simply trying to keep the focus of the review where it should be – namely, on the decision-making process and reasons, rather than the merits of the decision.

C. *The GCT disclosure demands*

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

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

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

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

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

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

(2) Competition and market share analysis

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

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

[40] GCT argues that the VFPA analysis is based on the wrong definition of market share, and therefore its concern about market dominance is misplaced. GCT wants further disclosure of the documents in support of its argument that VFPA's conclusion about market share and

competition reflects VFPA's overall bias against GCT. In essence, GCT argues that VFPA "cooked the books" by choosing the wrong definition of the relevant market and by using data that supported its pre-ordained conclusion. It seeks all materials relating to VFPA's analysis of competition and market share considerations that relate, directly or indirectly, to the March 2019 decision.

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

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

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

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

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

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

[47] The Rule 317 disclosure requirement normally involves transmitting a certified copy of the documents in their original format to the parties and the Court, unless there is some valid

reason for changing it. Rule 318(1)(b) provides that "where the material cannot be reproduced, the original material [shall be transmitted] to the Registry". In this case, VFPA did not disclose these documents in their original format, and it did not explain why. In the circumstances, I am persuaded that the change in format could deny GCT the ability to meaningfully analyze the underlying data and thereby deprive it of evidence that could show that VFPA's conclusion is evidence of bias against GCT.

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

(3) Communication with experts

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

[50] I am not persuaded that GCT has provided a basis in the evidence for this request. VFPA does not dispute that it relied on certain external experts and the disclosure includes several

reports and analyses prepared by these companies. To the extent that these are relevant to the bias claim, GCT can refer to them and the reviewing judge will be in a position to review them. I am not persuaded that it is necessary to examine the instructions provided to these experts in order to assess the claim of bias. In my view, this would amount to a fishing expedition.

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

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

(4) Agreements with third parties

[53] GCT seeks all agreements between VFPA and third parties that relate, directly or indirectly, to GCT's DP4 project. It explains that it has consistently heard of agreements between VFPA and nearby Indigenous communities that contractually bind those groups to support

VFPA's RBT2 project and prevent them from supporting DP4. No such agreements have been produced, nor is there any other evidence that points to their existence.

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

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

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

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

(6) Board documents and minutes

[57] The VFPA production includes board agendas, minutes, and meeting materials in respect of certain meetings of the VFPA Board of Directors (Board). However, materials relating to

Board meetings near the time when VFPA made the decision to refuse to consider the GCT project were not included.

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

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

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

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

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

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

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

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

[66] I agree.

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

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

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

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

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

[72] At a minimum, VFPA must complete the disclosures it has already made, including the Board agenda, minutes, and any other materials that mention the DP4 project for the meeting of March 21, 2018. VFPA must also disclose the contents of the .zip file attached to the e-mail that refers to the Project Board meeting on February 25, 2019 (VFPA Production 00028), as well as any minutes produced from that meeting which will confirm for the reviewing judge whether this is a reference to a meeting of the Board, or a Project Board as contended by VFPA. Prior case-law supports that where a disclosed document mentions an attachment, that document should also be disclosed (*1185740 Ontario Ltd v Minister of National Revenue*, 169 FTR 266, 1999 CanLII 8774 (FCA) at para 6).

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

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

(7) Communication with government officials

[75] The VFPA production includes several documents that involve communication with government officials and GCT argues that this is inadequate, because two of these documents are draft outgoing letters, but neither the final version of these letters nor the government's response

have been included. GCT seeks all correspondence between VFPA and Canadian government departments and agencies in relation to the DP4 project, on the basis that these documents may provide further proof of VFPA's bias against it.

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

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

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

[79] In addition, both the e-mail and one of the draft letters are from Robin Silvester, who VFPA asserts was the decision-maker for the September 2019 decision that is being reviewed.

This makes it even more important for the reviewing judge to have a fuller record regarding this category of communications.

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

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

(8) Documents concerning the September 2019 decision

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

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

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

[85] I will deal with the solicitor-client privilege claims below. At this stage, it is sufficient to point out that VFPA produced 478 documents in response to the Rule 317 request, but only 33 of these are dated between March 1, 2019, and September 23, 2019, which is the period between the two decisions. Most of these documents simply provide copies of the March or September 2019 decisions, or are the GCT responses to those decisions. Some of these documents may provide some insight into VFPA's reasons for reaching the September 2019 decision (*e.g.*, VFPA Production 00384), but it is not evident whether or how these were considered in reaching the decision.

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

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

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

(9) Internal Correspondence related to DP4

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

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

[91] On February 5, 2019, GCT submitted its PPE for the DP4 project and the disclosure includes an e-mail from a senior VFPA official indicating that his staff would be doing an initial review of the proposal (VFPA Production 00174). However, no e-mails or other documents related to this review have been produced. On February 7, 2019, another senior VFPA official sent an e-mail to GCT, acknowledging receipt of its PPE and stating "[s]taff will undertake a review of this submission to better understand the project and determine if our submission criteria has been satisfied in order to continue processing" (Exhibit KK to Affidavit of Todd Croll, GCT Motion Record at pp 528-59). Four days later, VFPA cancelled a planned meeting with GCT on the basis that "[s]taff are continuing with the review of the information submitted" (Exhibit LL to Affidavit of Todd Croll, GCT Motion Record at pp 531-33). No documents containing the results of that review have been disclosed.

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

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

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

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

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

D. *Claims of solicitor-client privilege*

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

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

(1) General Principles

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

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

[101] This doctrine applies to communications between legal counsel and government Ministers or departmental officials, including administrative decision-makers, who are entitled to seek and rely on legal advice in reaching their decisions (*Pritchard* at paras 19-21). However, in *Pritchard*, the Supreme Court of Canada noted that in-house legal counsel may have both legal and non-legal responsibilities, and therefore it is necessary to examine the situation on a case-by-

case basis. Ultimately, "[w]hether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered" (*Pritchard* at para 20).

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

[103] In addition, where a solicitor-client relationship is found, the privilege "applies to a broad range of communications between lawyer and client" (*Pritchard* at para 21). It has been found to apply to "all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity" (*Blood Tribe* at para 10). Once a solicitor-client relationship is established, there is a rebuttable presumption that all communications between the client and the lawyer are to be considered *prima facie* confidential in nature (*Blood Tribe* at para 16).

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

Commissioner]). It is a reflection of the concept that the privilege protects the necessary degree of confidentiality that is essential to the relationship between client and solicitor.

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

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

(2) Applying the principles to the facts

[107] It is important to note at the outset that GCT did not seriously dispute that VFPA had a solicitor-client relationship with its internal counsel, insofar as its lawyers were providing legal advice, or with its external counsel (originally Lawson Lundell LLP, more recently McMillan LLP). Rather, GCT argued that the claim of privilege must be considered within the context of

the relationship between the record before the reviewing court and that court's ability to meaningfully review the decisions. It also argued that VFPA took an overly broad view of the privilege.

[108] GCT notes that case law establishes that where a tribunal abdicates the decision-making to its lawyers, it cannot expect to protect this as confidential because it calls into question the fairness and integrity of the decision-making process. Furthermore, a decision maker is not entitled to immunize its decision-making process, or to shield the key documents from disclosure, simply by turning them over to its legal counsel. It cites *Lafond v Ledoux*, 2008 FC 1369 [*Lafond*], where Justice Michael Phelan held, at paragraph 16, that "the cloak of solicitor-client privilege is not an invitation to play 'hide the pea' with the documents at issue" (see to the same effect, *Information Commissioner* at para 55).

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

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

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

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

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

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

[114] It is neither necessary nor appropriate to engage in a lengthy discussion of the documents. It is sufficient to state that the vast majority of them clearly involve a client (VFPA) either seeking or receiving legal advice from its in-house or external legal counsel. That is sufficient to bring these documents within the privilege. The documents were intended to be confidential (most are marked solicitor-client and confidential) and there is no basis to find that the advice

was for the purpose of furthering unlawful conduct. Therefore, I find that VFPA has properly claimed solicitor-client privilege over these documents.

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

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

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

[118] Similarly, the balancing of the factors to consider under Rule 318 are not said to be a basis for overriding solicitor-client privilege. If it is not possible to redact portions of documents to protect certain information, then "confidentiality must be upheld absolutely against all,

including the Court. Legal professional privilege is an example of that" (*Lukács* at para 16). In this case, I am satisfied that it is not possible to redact portions of any of the documents, because whatever remained would indirectly make public aspects of the legal advice that was sought or delivered.

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

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

[120] As a final point, I should note that the documents do not support a conclusion that VFPA abdicated its decision-making to its lawyers. Therefore, without pronouncing on the question of whether this itself would be a basis to override solicitor-client privilege, I simply find that this is not the case on the evidence before me.

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

[122] This concludes my analysis of the Rule 318 objections.

IV. Conclusion

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

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

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

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

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

[128] In respect of communications with government officials, VFPA shall conduct a search of its records to confirm whether final versions of either draft letters (VFPA Production 00296, 00297, and 00385) were prepared and/or sent, and if so, to produce these. If these letters were sent, VFPA shall disclose any return correspondence from any government official regarding them. In addition, VFPA shall also review its records and disclose any correspondence, both incoming and outgoing, with federal government Ministers or officials and staff members (including e-mails) regarding the DP4 project.

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

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

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

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

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

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

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

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

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

[138] Second, at the end of the day, if VFPA cannot defend its decisions as reasonable based on the record it has (and/or will) disclose, the decisions will be quashed. If those decisions could be defended based on something over which solicitor-client privilege is claimed or which was

otherwise not disclosed, then VFPA has only itself to blame, in the sense that it could have constructed a decision-making process that would have allowed it to disclose a better record.

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

ORDER in T-538-19

THIS COURT'S ORDER is that:

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

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

3. The disclosure of the following documents is ordered:
    a. Competition and Market Share Analysis:
        i. VFPA shall disclose VFPA Production 00031 and 00086, and in their native Excel format.
        ii. GCT will identify any other spreadsheets in the VFPA production other than VFPA Production 00031 and 00086 that fall within this category within seven (7) days of this Order, and VFPA will disclose these documents in .xlsx format within seven (7) days thereafter.
    b. Communication with External Experts:
        i. VFPA shall disclose VFPA Production 00132 in a format so that the comments can be viewed.

c. Board Materials and Minutes:

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

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

d. Documents Relating to the September 2019 decision:

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

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

    a. Board Materials and Minutes:

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

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

    b. Communications with Government Departments:

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

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

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

c. Documents Related to the September 2019 decision:

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

d. Internal Correspondence Related to DP4:

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

5. There is no order as to costs.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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