Federal Court  Cour fédérale

Date: 20190312

Docket: T-1252-17

Citation: 2019 FC 301

Ottawa, Ontario, March 12, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

TIM GRAY AND MUHANNAD MALAS

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicants, Tim Gray and Muhannad Malas, appeal the Order of Prothonotary Mandy Aylen, dated September 10, 2018, [the Order] pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*]. Prothonotary Aylen is the Case Management Judge [CMJ] for the underlying Application for Judicial Review. The CMJ's Order dismissed the Applicants' Rule 318 motion for production of additional documents, which were not included in the Certified Tribunal Record [CTR] produced in accordance with Rule 317 of the *Federal Courts Rules*.

[2] The issue on this Appeal is whether the CMJ erred in her primary finding that the material requested by the Applicants for production pursuant to Rule 317 was not relevant to the grounds alleged in the Notice of Application or in her alternative finding that the material requested was not otherwise producible because the material was not in the possession of the decision-maker and was not part of the record before the decision-maker.

[3] For the Reasons that follow, I find that the CMJ did not err in her primary or her alternative finding.

[4] The Applicant, Kim Perrotta, has discontinued her application and as a result, the style of cause is amended to remove her name.

I. Background

[5] In 2015, the United States Environmental Protection Agency issued a Notice of Violation against Volkswagen AG, alleging that some models of Volkswagen, Audi and Porsche diesel cars included a “defeat device” allowing the cars to circumvent emissions standards. Shortly after, Environment and Climate Change Canada [ECCC] announced an investigation into the matter in Canada. The ECCC Press Release dated September 22, 2015 announcing the investigation stated that Canadian legislation prohibits vehicle manufacturers from equipping vehicles with such “defeat devices” and that if sufficient evidence of violation is uncovered, enforcement action will be taken in accordance with the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 [*CEPA*].

[6] The Applicants note that Volkswagen's conduct in developing the "defeat device" caused serious damage to the environment and, more importantly, to the health of individuals. The Applicants also note that decisive action was taken in Germany and in the US. The convictions in the US resulted in enormous financial and other penalties.

[7] In 2017, Mr. Gray and Mr. Malas separately requested that ECCC open investigations into the alleged violations by Volkswagen and related entities [Volkswagen], pursuant to section 17 of *CEPA*. The requests alleged that Volkswagen:

1. Unlawfully imported non-compliant diesel cars;
2. Unlawfully applied the National Emissions Mark to non-compliant diesel cars and sold those cars;
3. Knowingly provided false and misleading information; and
4. Unlawfully resumed sales of 2015 model cars after only completing a "half-fix".

[8] The Director General of the ECCC Environmental Enforcement Directorate, Heather McCready, responded to each request as the Minister's Delegate. Ms. McCready declined to open an investigation into allegations 1 to 3 and agreed to investigate allegation 4 and report the investigation's progress to the Applicants every 90 days, as required under section 19 of *CEPA*.

[9] The decision letter from Ms. McCready states:

> *With respect to allegations 1-3, an investigation has already been opened by Environment and Climate Change Canada (ECCC) Enforcement Branch and continues to be conducted into potential violations resulting from the importation into Canada of vehicles equipped with a defeat device. The offences alleged in your application are covered by the current investigation. In light of*

> *this, a Ministerial investigation will not be opened for these allegations.*
>
> *With respect to allegation 4, ECCC will investigate all matters considered necessary to determine the facts relating to the alleged offence. As required under CEPA, I will keep you informed of the progress of this investigation every 90 days.*

[10] In August 2017, the Applicants served and filed Notices of Application for Judicial Review, which were later consolidated. The Notice of Application describes Mr. Malas and Mr. Gray as representatives of environmental or public health organizations concerned about the conduct of Volkswagen, notes that the Applicants invoked their rights pursuant to *CEPA* to request the Minister to investigate, asserts that the decision of the Minister set out in the letter is "boilerplate", and notes that ECCC staff clarified that the Minister would not provide progress reports to the Applicants with respect to the three allegations for which investigations were not opened.

[11] The Applicants seek an order to set aside the decision, to direct the Minister to open investigations into allegations 1 to 3 in accordance with section 17 of *CEPA*, and to provide progress reports, among other relief.

[12] The Applicants allege that the refusal to open investigations is *ultra vires* the *CEPA*. Paragraph 11 of the Notice of Application states:

> 11. The Minister's decision to acknowledge Mr. Malas's allegations and request for investigations, but to refuse to open investigations for three of the allegations, is *ultra vires*. Under *CEPA* ss.17-21, Mr. Malas has the right to request Ministerial investigations, and once the Minister acknowledged his requests, the Minister must provide him regular progress reports and/or reasons to refuse *ab initio* to open the investigations that he

> requested, whether or not ECCC has an allegedly similar investigation currently underway.

[13] At paragraph 12, the Applicants allege that the Minister's decision is highly prejudicial to their other *CEPA* rights, stating that by refusing to open an investigation and provide progress reports, the Minister "sets those public participation rights at naught which is inconsistent with a purposive reading of CEPA, unaccountable to Canadians, and illegal."

[14] The Notice also includes a request for production of material pursuant to Rule 317 as follows:

> 22. Having regard to the ratio on R317 in *Cooke v. Canada*, 2005 FC 712, all material possessed by the Respondent respecting ECCC's "current investigation" referred to in the impugned decision; and
>
> 23. Any other records possessed by the Respondent respecting [the Applicants'] s.17 requests and the Minister's decisions to open or not to open Ministerial investigations.

[15] On October 5, 2017, the Respondent produced a certificate listing 20 documents. These documents constitute the CTR. Items 1 to 15 were appended. Items 16 to 20 of the CTR were withheld on the basis of solicitor-client privilege and also on the basis of investigative privilege, in relation to item 20. The Applicants note that only one page of the documents produced was new; all others were already in the Applicants' possession.

[16] The Respondent objected to producing further material on the basis that:

(i) the request is in the nature of discovery and improper under Rule 317;

(ii) additional materials are irrelevant to the applications;

(iii) additional materials were not used by the decision-maker in her deliberations nor do they form part of the record in relation to the decisions;

(iv) the request is too broad, vague or general to permit a focused search for records potentially relevant to the decisions subject to the applications;

(v) the requested documents are subject to investigative privilege as they form part of an on-going investigation; and

(vi) certain documents are subject to solicitor-client privilege.

[17] The Applicants then filed a motion for production of materials pursuant to Rule 318. They sought material related to the existing investigation not included in the CTR, as well as items 16 to 20.

[18] The Respondent's responding motion record included an affidavit from Mr. Michael Enns, the Executive Director of Environmental Enforcement at ECCC. Mr. Enns was extensively cross-examined by the Applicants.

[19] The CMJ directed that the Applicants' Rule 318 motion be bifurcated. The first phase of the motion would address whether the Court should order that a certified copy of all or part of the requested material be forwarded to the Registry. The second phase of the motion would proceed only in the event that material was ordered to be forwarded to the Registry and would determine whether that material contains Volkswagen Group Canada Inc.'s confidential information warranting the Court's protection or any other limitation.

[20] One business day before the hearing of phase one of the Rule 318 motion, the Respondent provided the Applicants with a partially redacted copy of item 20, a memorandum

that appears to have been prepared for Ms. McCready, which provided background, summarized the Applicants' section 17 *CEPA* request and the ECCC's obligations, and set out three options to respond to the request.

II. The Case Management Judge's Decision Under Review

[21] The CMJ denied the Applicants' motion. A summary of her decision at para 5 of her Order states:

> For the reasons that follow, I find that the additional material requested by the Applicants beyond the material included in the Certified Tribunal Record is not relevant to the application as pleaded and need not be produced. Even if I am wrong in that regard, I am not satisfied that the additional material would otherwise be producible under Rule 317. Further, I find that the claims of solicitor-client privilege were properly asserted by the Respondent in relation to items 16 through 20 of the Certified Tribunal Record. Phase two of the Rule 318 motion shall therefore only proceed in relation to the remaining redactions to item 20 of the Certified Tribunal Record.

[22] With respect to the production of additional documents, the CMJ relied on *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, [2017] FCJ No 601 (QL) [*Tsleil-Waututh*]. The CMJ noted that the only material accessible under Rule 317 is material which is relevant to the Application, is actually in the possession of the administrative decision-maker and was before the decision-maker when making the decision. The CMJ also noted that relevance is determined with regard to the grounds of review alleged in the Notice of Application, read holistically. The CMJ emphasized that not everything which is admissible can be obtained under Rule 317, as these are separate concepts, citing *Tsleil-Waututh* at para 117.

[23] The CMJ concluded that the material requested by the Applicants is not relevant to the grounds of review set out in the Notice of Application. The CMJ noted that the Applicants argued that they need the additional material to test the decision-maker's claim that the existing investigation covers their allegations. However, the Notices of Application allege that the refusal to open investigations is *ultra vires* "whether or not ECCC has an allegedly similar investigation currently underway". The CMJ added that the Applicants' assertion that the scope and status of the investigation is at issue "is entirely contradicted by the Applicants' own pleading".

[24] The CMJ also rejected the Applicants' assertion that they had challenged the currency and coverage of the investigation by stating in their pleadings, "the Minister refused to open investigations for three of the four applications, because *ostensibly* these were 'covered by [ECCC's] current investigation'". The CMJ found that this was a factual allegation.

[25] The CMJ also considered, in the event that she was wrong in finding that the material requested is not relevant to the grounds alleged in the Notice of Application, whether there was other material in the possession of the decision-maker, Ms. McCready, which was before her when the decision was made. The CMJ concluded that there was no such material.

[26] The CMJ found that the evidence was clear that Ms. McCready relied on the documents included in the CTR, oral advice that she had received from Mr. Enns and from the regional director of the Ontario region, and on her own personal knowledge of the existing investigation. The CMJ accepted that Ms. McCready had sufficient existing knowledge, based on her position and her involvement in the investigations.

[27] The CMJ rejected the Applicants' submission that the investigation file was technically before the Minister (characterized by the Applicants as the administrative decision-maker as a whole) and should be imputed to be before Ms. McCready.

[28] With respect to the Applicants' arguments related to Mr. Enns' credibility and Ms. McCready's failure to file an affidavit, the CMJ was satisfied that Mr. Enns' credibility was not impugned and that an adverse inference due to the lack of any direct evidence from Ms. McCready was not warranted.

[29] The CMJ concluded that the material requested was not before Ms. McCready when she rendered her decision and is not *prima facie* producible under Rule 317.

[30] The CMJ then considered whether the requested material should be produced on the basis that it meets an exception to the general rule that only documents that were before the decision-maker should be produced. She concluded that this was not the case, noting that the Notices of Application do not raise allegations falling within any exception.

[31] The CMJ also noted concerns about the breadth of the Applicants' request and the lack of precision.

[32] With respect to the production of items 16 to 20, the CMJ reviewed unredacted copies that were provided by the Respondent to her under seal and agreed that the claims of solicitor-client privilege asserted by the Respondent in relation to each document were properly made.

[33] The CMJ awarded the Respondent $1500 in costs on the motion. The CMJ rejected the Applicants' assertions that they were partially successful to the extent that the Court directed the Respondent to produce items 16 to 20 to the Court under seal and because the Respondent disclosed a partially unredacted version of item 20 to the Applicants. The CMJ noted that this was a common practice where claims of solicitor-client privilege were asserted.

III. The Applicants' Overall Position

[34] The Applicants allege that the CMJ made both errors of law and palpable and overriding errors of mixed law and fact and that no deference is owed. The Applicants made detailed arguments on all the issues that were addressed by the CMJ.

[35] The Applicants note that the Minister's decision provided only one reason for refusing to launch an investigation: "[T]he offences alleged in your application are covered by the current investigation. In light of this, a Ministerial investigation will not be opened for these allegations." The Applicants submit that the decision letter raises the issue of the currency and coverage of ECCC's investigation. They submit that they require the documents to test the reason given, otherwise the decision will be immunized from judicial review. The Applicants argue that the CMJ lost sight of the fact that the judicial review would be determined on the standard of reasonableness.

[36] The Applicants argue that the documents requested are relevant within the meaning of Rule 317. The Applicants submit that the CMJ erred in determining what was relevant to the

judicial review by misinterpreting the jurisprudence and by reading the Notice of Application technically and formalistically, rather than in a holistic and practical manner.

[37] The Applicants further submit that Rule 317 does not restrict production to documents that were possessed and considered by Ms. McCready. Rather, it extends to documents that should have been before her, particularly given that she was at the top of the "chain of command" of the Volkswagen investigation.

[38] The Applicants also argue that the CMJ erred in her assessment of the evidence regarding what was actually in the possession of Ms. McCready when she rendered her decision and that the evidence does not support the CMJ's finding.

IV. The Respondent's Overall Position

[39] The Respondent submits that the CMJ did not err in her understanding of the law with respect to Rule 317 or in finding that the documents requested were not relevant to the grounds pleaded in the Notice of Application and, alternatively, were not otherwise producible because the documents requested were not before the decision-maker, Ms. McCready. Nor did the CMJ err in finding that the request was overbroad.

[40] The Respondent notes that the production of documents for judicial review differs from the broader discovery in the context of an action. The Respondent disputes the Applicants' submission that they need a broader record to test their suspicion that the ECCC investigation is

not current and does not cover their allegations. The Applicants' submission that their case will be stronger with a bigger record is not the test under Rule 317.

[41] The Respondent notes that the Notice of Application alleged only that the decision to refuse to open an investigation was *ultra vires*, not that the existing investigation was not duplicative of the allegations.

[42] The Respondent disputes that documents must be produced regardless of whether they were considered by the decision-maker. The Respondent argues that the CMJ did not err in relying on the affidavit evidence, which established what was and what was not considered by Ms. McCready.

[43] The Respondent adds that the CMJ did not err in declining to draw an adverse inference from the use of affidavit evidence on information and belief, noting that this is specifically permitted on such motions and that it is entirely within the CMJ's discretion whether to draw any inferences.

V. The Issues

[44] The Applicants raised several arguments on this appeal which I have restated to align with the CMJ's findings.

[45] With respect to the CMJ's key finding that the documents requested are not relevant given the grounds alleged in the Notice of Application, the Applicants argue that:

- The CMJ erred in law in her interpretation of the governing jurisprudence with respect to relevance—in particular, by relying on the summary set out in *Tsleil-Waututh*, rather than on primary jurisprudence, including that which establishes that a broad interpretation should be given to "relevance" within the meaning of Rule 317;

- The CMJ erred in law by reading the Notice of Application in a formalistic manner and not considering the overall allegations, which resulted in the CMJ's incorrect finding that the documents were not relevant; and

- The CMJ erred by failing to appreciate that the Application for Judicial Review would be conducted on the reasonableness standard, which also resulted in the CMJ's error in determining whether the documents requested were relevant.

[46] With respect to the CMJ's alternative or additional finding that the documents are not otherwise producible because the documents were not in the possession of the decision-maker and not considered by the decision-maker, the Applicants argue that:

- The CMJ erred in law in her interpretation of the governing jurisprudence regarding possession—again by relying on general principles summarized in *Tsleil-Waututh* rather than primary jurisprudence; and

- The CMJ erred in law and made a palpable and overriding error of mixed law and fact in her assessment of the evidence regarding what was in the possession of the decision-maker—in particular, by accepting inadmissible hearsay in the affidavit of Mr. Enns, which was not demonstrated to be necessary or reliable, and by failing to draw an adverse

inference from the failure of the Respondent to provide an affidavit from Ms. McCready, who was otherwise available and had first-hand knowledge.

[47] The Applicants clarified that they are not pursuing their appeal of the costs awarded by the CMJ. However, the Applicants emphasize that awarding costs against them is not in the interests of justice given that they are acting in the public interest.

VI. The Standard of Review

[48] The parties agree that the applicable test for reviewing discretionary orders of motions judges, including case management judges, is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 66, [2017] 1 FCR 331 [*Hospira*]. Such orders are to be reviewed on the ordinary civil appellate standard established in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 19-37 [*Housen*]. Questions of law are to be reviewed on a correctness standard, and questions of fact are owed deference unless there is a palpable and overriding error. Questions of mixed fact and law are also owed deference absent palpable and overriding error, unless the analysis contains an extricable error of law or legal principle. If so, no deference is owed (*Hospira* at para 66).

[49] The Parties disagree on whether certain issues are questions of law, fact or mixed fact and law or whether there is an extricable question of law in some issues of mixed fact and law. They also disagree on the meaning of “palpable and overriding error”.

[50] The distinction between the three types of questions was explained in *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, [2017] 1 SCR 688 at para 43 [*Teal Cedar*]:

> In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[51] With respect to the meaning of palpable and overriding error, the Applicants submit that the description in *Hospira* governs, since *Hospira* was a decision of a five member panel of the Federal Court of Appeal. The Applicants submit that *Hospira*, at para 68, equates palpable and overriding error to situations where a motions judge has misapprehended the facts or failed to give weight to relevant circumstances.

[52] I do not view the Court of Appeal's statements in *Hospira* as defining what a palpable and overriding error is. The passage relied on by the Applicants at para 68 is in the context of the Court's finding that the standard of review for a discretionary decision of a prothonotary and that of a motions judge amounts to the same thing. The Court noted that the jurisprudence had used different language in setting out the standards and that simplicity and clarity should prevail and, therefore, that only the *Housen* standard should apply to discretionary decisions of both judges and prothonotaries.

[53] Palpable and overriding error is a higher standard than a misapprehension of the facts or a failure to properly weigh relevant circumstances. The Court of Appeal has provided a consistent

definition of palpable and overriding error in its jurisprudence both before and after *Hospira*. For example, in *Canada v South Yukon Forest Corp*, 2012 FCA 165 at para 46, [2012] FCJ No 669 (QL), Justice Stratas stated:

> [46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[54] More recently in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2017] FCJ No 726 (QL), Justice Stratas provided the same definition of palpable and overriding error (at paras 61-64). Justice Stratas provided examples of a palpable error at para 62:

> Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[55] Justice Stratas further explained at para 64 that an overriding error is "an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place."

[56] In *Housen*, the Supreme Court of Canada provided examples of an extricable question of law or legal principle at para 36, noting that this would include the "application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle". In *Teal Cedar*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting at para 45 that "mixed questions, by definition, involve aspects of law", adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

[57] One final principle applies in the present circumstances. A Case Management Judge is familiar with the circumstances and issues in a particular case and is owed deference, absent a reviewable error (*Hospira* at para 103).

VII. Did the Case Management Judge err in determining that the material requested was not relevant?

A. *The Applicants' Submissions*

[58] The Applicants submit that the CMJ erred by: misreading the jurisprudence and ignoring other jurisprudence which calls for a liberal interpretation of relevance pursuant to Rule 317; reading the Notice of Application in a formalistic, rather than holistic, manner; and failing to understand that reasonableness governs the judicial review.

[59] First, the Applicants submit that the CMJ erred in law by interpreting relevance too narrowly. They argue that a decision-maker is obliged to produce relevant documents and that the jurisprudence has established that "relevant" should be interpreted liberally. The Applicants

submit that relevant documents are those which may affect the Court's decision on the application. The Applicants submit that documents related to the investigation's currency and coverage are relevant and necessary to the Court's determination of their Application for Judicial Review.

[60] The Applicants argue that the CMJ erred in relying on the summary of principles stated in *Tsleil-Waututh* rather than assessing the original jurisprudence and other jurisprudence, which has not been overruled, including *Canada (Attorney General) v Telbani*, 2014 FC 1050, 251 ACWS (3d) 457 [*Telbani*]; *Norwegian v Canada (Minister of Environment)*, 2005 FC 374, [2005] FCJ No 474 (QL) [*Norwegian*]; *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)* (1997), 130 FTR 206, [1997] FCJ No 557 (QL) (TD) [*Friends of the West*]; and *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455, [1995] FCJ No 555 (QL) (CA) [*Pathak*]. The Applicants submit that these cases support a more expansive view of what is relevant and should be provided in the record of the decision-maker. The Applicants also argue that the main issue in *Tsleil-Waututh* was whether exceptional evidence—i.e. evidence beyond what was before the decision-maker—could be produced and that the comments of Justice Stratas regarding Rule 317 more generally are *obiter*.

[61] Second, the Applicants submit that the CMJ erred by reading the Notice of Application in a narrow and formalistic, rather than holistic, manner which led her to conclude that the currency and coverage of the existing investigation do not relate to the grounds of review. Although the CMJ noted the guiding principle from *Canada (National Revenue) v JP Morgan Asset*

Management (Canada) Inc, 2013 FCA 250, [2013] FCJ No 1155 (QL) [*JP Morgan*], she failed to apply it.

[62] The Applicants argue that the CMJ's failure to read the pleading holistically is an error of law or alternatively an error of mixed fact and law with an extricable legal principle and no deference is owed to the CMJ's reading of the Notice.

[63] The Applicants point to para 9 of their Notice of Application, which states, "Again the Minister refused to open investigations for three of the four allegations because ostensibly these were "covered by [ECCC's] current investigation"". The Applicants argue that the use of the word "ostensibly" signalled that they challenged the currency and coverage of the ECCC investigation—in other words, the reasonableness of the decision.

[64] Third, the Applicants submit that the CMJ failed to understand that their Application for Judicial Review will be reviewed on the reasonableness standard as articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[65] The Applicants submit that although they assert in the Notice of Application that the Minister's decision to refuse to open an investigation for three allegations is *ultra vires*, this does not invite only a correctness review on the jurisdictional issue. They submit that it is clear that they are challenging the reasonableness of the decision which stated that the ECCC's existing investigation "covered" the Applicants' request. They submit that the CMJ focused on their allegation of *ultra vires* and failed to appreciate that the judicial review would proceed on the

standard of reasonableness, which should have informed her determination of relevance for the purpose of production under Rule 317.

[66] The Applicants acknowledge the CMJ's comment that the sufficiency of the record is an issue for judicial review. However, they argue that their case would be stronger if they had the relevant documents produced to inform whether the decision is reasonable.

B. *The Respondent's Submissions*

[67] The Respondent notes that document production is more limited on a judicial review than in an action. Material must be actually relevant to fall within Rule 317 and material which *could* be relevant is not covered by this rule. Relevance is defined by the grounds of review in the Notice of Application, which must be read holistically.

[68] The Respondent notes that the Notice of Application alleges only that the Minister's decision to refuse to open investigations into the Applicants' allegations was *ultra vires* and submits that the CMJ did not err.

C. *Rules 317 - 318*

[69] The Rules applied by the CMJ regarding production of documents are set out below:

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	**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

possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

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.

…

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

(a) a certified copy of the requested material to the Registry and to the party making the request; or

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

(b) where the material cannot be reproduced, the original material to the Registry.

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(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.

(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.

(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.

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels

requested be forwarded to the Registry.	soient transmis, en totalité ou en partie, au greffe.

D. *The CMJ did not err in finding that the documents were not relevant within the meaning of Rule 317*

(1) The CMJ did not err in law in her interpretation of Rule 317

[70] The CMJ did not err in her reliance on or understanding of the law that governs the determination of relevance pursuant to Rule 317.

[71] I disagree with the Applicants' submission that the CMJ erred in relying on the principles summarized in *Tsleil-Waututh* to the exclusion of other original jurisprudence. I also disagree with the Applicants that *Tsleil-Waututh* is about exceptional evidence and that Justice Stratas' summary of the law regarding Rule 317 more generally is *obiter*. Contrary to the Applicants' view, in *Tsleil-Waututh* the Court of Appeal responded to the applicants' motion for further disclosure pursuant to Rule 317. Several issues were identified, beginning with the importance of the record on judicial review, the function of and limits on Rule 317 and the admissibility of evidence other than that which was before the decision-maker (i.e. the exceptions to the general rule of admissibility). Justice Stratas noted, at paras 64-66, the need to see the forest from the trees in matters where procedural rules were relied on and to consider the basis for the rules and the general principles. He noted that this approach was necessary to place Rule 317 in context. Justice Stratas explained the importance of the record of the decision-maker to the Court on judicial review. He then set out the principles governing Rule 317 at paras 88-93 and 106-119,

and addressed the exceptions to the Rule. These principles were derived from Court of Appeal jurisprudence and were elaborated upon.

[72] The principles set out in the *Tsleil-Waututh* decision are not, as the Applicants suggest, *obiter*. The principles reflect the law that is binding on this Court and was binding on and applied by the CMJ.

[73] The jurisprudence preferred by the Applicants is, with the exception of *Pathak*, not appellate jurisprudence. In addition, it must be considered in its proper context. Focusing on isolated passages or without referring to the cases cited therein may lead to extrapolation and misinterpretation. On the whole, the jurisprudence relied on by the Applicants, while suggesting a broad or liberal interpretation of relevance within Rule 317, does not contradict the principle that relevance is determined with regard to the grounds pleaded. It is also notable that the jurisprudence relied on by the Applicants cites the same passage of *Pathak* as does *Tsleil-Waututh*.

[74] With respect to the Applicants' reliance on *Telbani* at para 40 to support their argument that relevance is a broad concept and that the record extends to documents that should have been before the decision-maker, the context in *Telbani* should be noted. In *Telbani*, the Attorney General had withheld documents from the tribunal record relying on section 38.01 of the *Canada Evidence Act* (claiming that the information was potentially injurious to national security). In determining whether the documents should be excluded from disclosure or redacted, the Court

noted that the first step is to determine whether the information sought to be excluded is relevant. Of note, the Respondent conceded that most documents withheld were relevant.

[75] In *Telbani*, the Court cited one line in *Pathak*, that relevance means any document that "may affect the decision that the Court will make on the application", rather than the whole passage.

[76] In *Pathak*, the Federal Court of Appeal considered the predecessor to Rule 317. The motions judge had found that all documents relied on by the investigator in preparing a report for the Canadian Human Rights Commission should be produced to the applicant because the investigator conducted the investigation as an extension of the Commission. The Court of Appeal disagreed.

[77] Justice Pratte, with Justice Décary concurring, held that the Rule provides that the material to be produced must be relevant to the application for judicial review. Relevance is determined in relation to the grounds of review set out in the Notice of Motion. If the material is not relevant, it need not be produced. Justice Pratte found that there was nothing in the notice of motion to cast doubt on the investigator's report and that the report must be taken as complete summary of the evidence before him. As a result, the documents requested would not be useful. The line that was cited in *Telbani* is part of the following paragraph of *Pathak* at page 460:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds

> of review set forth in the originating notice of motion and the affidavit filed by the respondent.

[78] Justice MacGuigan agreed with Justice Pratte on this key finding, and made additional comments. Justice MacGuigan found at pages 463-464 that although the documents relied on by the investigator were in the Commission's custody, they were not all actually before the Commission when it made its decision and were, therefore, not producible.

[79] In *Friends of the West*, the Court noted that possession and relevance to the grounds for judicial review are the tests for the predecessor to Rule 317. The Applicants appear to rely on para 21 where the Court stated:

> If part of its case is that the scope was too restricted, the applicant must have all of the relevant documents which may tend to prove this in order to make out its argument, if it can. To hold otherwise would prejudice the applicant.

[80] In *Friends of the West*, the Court went on to review each request and objection, noting (at paras 31-33) that relevance must be determined with respect to the grounds set out in the originating notice of motion. The Court allowed some further production and refused other requests.

[81] In the present case, despite the Applicants' submission that the issue is the coverage of the investigation, the CMJ found that this was not pleaded as a ground of judicial review. The principle remains that relevance is determined in relation to the grounds pleaded. *Friends of the West* has also been characterized in subsequent jurisprudence as relying on an exception to the general rule, because procedural issues were raised.

[82] In *Norwegian*, also relied on by the Applicants, Prothonotary Hargrave noted that Rule 317 limits the production of documents to material relevant to an application that is in the possession of the decision-maker. He also cited *Pathak* and other cases that have emphasized that relevance must be determined in relation to the grounds of review. Prothonotary Hargrave also noted, at para 11, that the general rule which limits production to material before the decision-maker when the decision was made "precludes full and complete discovery of all documents that may [be] in the Minister's possession."

[83] Prothonotary Hargrave considered *Friends of the West*, noting that it was a departure from this general rule. He added that the decision had been distinguished in subsequent cases by limiting it to its specific facts.

[84] Prothonotary Hargrave found that material that may have been before the Minister when the decision was made should be produced, but he based this finding on the fact that the Minister had directly supervised the decision-making process and that procedural issues had been raised. In other words, an exception to the general rule applied. Contrary to the Applicants' submission, I do not find that *Norwegian* suggests any broader interpretation of relevance or possession than *Pathak*.

[85] The Applicants argue that the jurisprudence they rely on has not been overruled. They argue that this jurisprudence supports the proposition that what is relevant and what is "before" the decision-maker should be interpreted broadly and that documents that should have been before the decision-maker should also be produced. However, this proposition is not supported

by the cases relied on by the Applicants, with the exception of comments in *Friends of the West* and *Telbani*, which as noted above, arose in a distinct context and are not appellate jurisprudence. Moreover, the jurisprudence relied on by the Applicants all refers to *Pathak*, which establishes that what is relevant will be determined in relation to the grounds of review set out in the Notice of Application.

[86] The principles relied on by the CMJ as set out by Justice Stratas in *Tsleil-Waututh* reflect the established appellate jurisprudence.

[87] For example, in *Access Information Agency Inc v Attorney General of Canada*, 2007 FCA 224 at para 20, [2007] FCJ No 814 [*Access Information Agency*], the Court of Appeal noted the distinction between the discovery of evidence in an action and the production of documents for judicial review. The Court explained the purpose of Rule 317, at para 21, as being to limit discovery to the documents that were in the hands of the decision-maker when the decision was made and requiring that the requested documents be precisely described. The Court of Appeal added:

> 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.

[88] In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, [2012] FCJ No 93, the Court of Appeal again confirmed, at para 19, the general rule that the evidentiary record before the court on judicial review is restricted to the evidentiary record that was before the decision-maker.

[89] In *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4, [2014] FCJ No 1167, the Court of Appeal noted a judicial review must be decided "on the basis of the information in the decision-maker's possession at the time the decision is made". The Court noted that to gain other information, the applicant must raise a ground for review that falls within an exception—for example a breach of procedural fairness or bias.

[90] In *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, [2015] FCJ No 1397 at paras 13 and 14 [*Access Copyright 2015*], the Court recognized the need for the reviewing Court to have a sufficient record in order to detect a reviewable error, but also noted that Rule 317 entitles requesting parties to "everything that was before the decision-maker at the time it made its decision". The Court of Appeal did not, in my view, suggest a departure from the general rule of relevance and possession.

[91] In setting out a summary regarding the interpretation of Rule 317, which the Applicants mischaracterize as *obiter*, Justice Stratas cited the original or primary appellate jurisprudence that has established the governing principles.

[92] Justice Stratas elaborated at paras 107-108:

> [107] Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.
>
> [108] The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. v. Canada*

> *(Attorney General)*, 2007 FCA 224, 66 Admin L.R. (4th) 83 at para. 21. The principles canvassed above—particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews—discourage fishing expeditions.

[93] Justice Stratas reiterated, at para 109, that relevance is defined by the grounds of review in the notice of application, citing *Pathak* at page 460, which is the same passage relied on in the jurisprudence preferred by the Applicants.

[94] Without meaning to belabor this point, the current and binding appellate jurisprudence in *Tsleil-Waututh* confirms the general rule that Rule 317 provides for production of relevant material, determined with reference to the grounds stated in the Notice of Application, that is in the possession of the decision-maker when making the decision "and nothing more" (at para 112). The CMJ did not err in law in her reliance on this jurisprudence.

(2) The CMJ did not err by reading the Notice of Application too narrowly

[95] Contrary to the Applicants' submission that the requirement to read the pleadings holistically includes an extricable principle of law, the jurisprudence has established that characterization of pleadings, which includes a notice of application, is an issue of mixed fact and law (*Apotex Inc v Canada (Minister of Health)*, 2012 FCA 322 at para 9, [2012] FCJ No 1659 (QL)). The CMJ's assessment of the grounds asserted for judicial review is owed deference unless there is a palpable and overriding error. No such error has been demonstrated.

[96] The CMJ correctly noted and applied the principle that the Court must gain a realistic interpretation of an application for judicial review's essential character by reading it holistically and practically, without fastening onto matters of form (*Tsleil-Waututh* at para 110; *JP Morgan* at para 50).

[97] As noted by the CMJ, the Notice of Application alleges that the refusal to open investigations is *ultra vires*. The Notice of Application states that individuals have the right to request Ministerial investigations and that "*CEPA* does not give the Minister statutory discretion to refuse *ab initio* to open the investigations that he requested "whether or not ECCC has an allegedly similar investigation currently underway"".

[98] Although the Applicants argue that it is apparent that they question the coverage and currency of the investigation and the reason for refusing to open the investigation and that they seek documents to determine the reasonableness of the decision, the Notice of Application does not say this. As the CMJ found, this assertion is "entirely contradicted by the Applicants' own pleading".

[99] The Applicants' use of the word "ostensibly" in the Notice of Application does not signal that the Applicants challenge the coverage or currency of the investigation or that the reason cited in the decision is not justified (i.e., not reasonable). "Ostensibly" means apparently or purportedly, not unreasonably, as the Applicants now submit. As the CMJ found, the allegation that the investigation ostensibly (or apparently) covers allegations 1 to 3 is a factual allegation. This is not set out as a ground for review.

[100] There is no palpable and overriding error in the CMJ's finding at para 21 that the Notice of Application does not include an assertion that the existing investigation is not duplicative of the requested investigation requests or that the ECCC investigation is not ongoing. In other words, it does not assert that the ECCC's investigation is not current or that it does not cover the Applicants' allegations 1-3.

[101] The CMJ understood that on judicial review, the standard of review could be reasonableness. There is no support for the Applicants' submission that the CMJ overlooked that on judicial review, the standard of review could be reasonableness, and that this led her to err in determining what was relevant and should be produced.

[102] The CMJ's determination that the Notice of Application alleged that the refusal to open the investigations was *ultra vires* did not lead the CMJ to make any conclusions on the ultimate standard of review, nor did it limit her consideration of the relevance of the documents requested. In addressing this same argument that the decisions cannot be *justified* based on the CTR because there is no evidence of the currency and coverage of the ECCC investigations, the CMJ specifically noted at para 30 of her decision, "Whether or not the Certified Tribunal Record provides sufficient evidence to demonstrate the reasonableness of the decisions at issue is not the applicable test on this motion. In any event, decisions-makers whose decisions cannot be fairly evaluated on judicial review due to a lack of evidence in the Certified Tribunal Record on an essential element may find their decisions quashed" [emphasis added]. The CMJ clearly contemplated that on judicial review, the reasonableness of the decision could be raised. Moreover, even where issues of *vires* are raised, the standard of review is generally

reasonableness unless there is a true question of *vires* (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] SCJ No 31 (QL) at para 31).

[103] The Applicants' argument that the reasonableness standard for judicial review expands production and entitles them to any documents relating to the decision's justification is not supported by the jurisprudence (*Access Information Agency* at para 21).

[104] In addition, Rule 301(e) of the *Federal Courts Rules* requires that an application for judicial review set out a complete and concise statement of the grounds intended to be argued. This means all the legal bases and material facts that will support the application (*JP Morgan* at para 39). In order to challenge a decision, the material facts and legal bases must be set out, which in turn will determine the relevance of documents sought for production.

[105] With respect to the Applicants' submission that the CMJ is out of touch with how pleadings are drafted and that it is unnecessary to specifically plead each issue, I do not agree that there is a new way to draft pleadings. A CMJ is not required to go beyond a holistic reading and read-in words that are not in the pleadings, but that in hind sight, an applicant argues were intended.

[106] In conclusion, the CMJ did not err in her primary finding that the requested material is not relevant to the grounds of review pleaded.

VIII. Did the CMJ err in finding that the material requested was not in the possession of and considered by the decision-maker?

A. *The Applicants' Submissions*

[107] The Applicants submit that the CMJ erred in law by interpreting Rule 317 as limited to what is physically in the decision-maker's possession. The Applicants argue that this narrow interpretation would immunize decisions from judicial review and would fail to reflect how complex decisions are made in government.

[108] The Applicants argue that relevant documents include those that should have been before the decision-maker and are required to be produced, noting that there is no limit on the size of the record. The Applicants reiterate that they are entitled to the documents in the control of the administrative decision-maker—not simply those in her physical possession. They submit that Ms. McCready made the decision as the head of the chain of command regarding the existing Volkswagen investigation and had access to the investigative file, which is relevant to the issues on judicial review and should, therefore, be produced.

B. *The Respondent's Submissions*

[109] The Respondent submits that the CMJ did not err in finding that Rule 317 is generally restricted to the actual material that an administrative decision-maker had before it when making the decision. The CMJ then considered if any exceptions applied—for example where documents relating to allegations of procedural fairness or bias may be relevant—and found that there were not.

C. *The CMJ did not err in finding that the material requested was not in the possession of and considered by the decision-maker*

[110] Whether documents requested pursuant to Rule 317 are in the possession of a decision-maker is a question of mixed law and fact. The CMJ did not err in law by relying on binding jurisprudence that has interpreted Rule 317. Nor did the CMJ make a palpable and overriding error in applying the law to the facts and concluding that the documents sought were not producible.

[111] As noted in *Tsleil-Waututh*, the authoritative law relied on by the CMJ, Rule 317 allows applicants to obtain the record before a decision-maker (at paras 89, 91). The purpose is to allow parties to pursue their rights to challenge administrative decisions and to allow reviewing courts to consider the evidence that was presented to the decision-maker (*Access Copyright 2015* at paras 13-14).

[112] The weight of the jurisprudence supports a limited interpretation of what is meant by material "before" the actual decision-maker. The jurisprudence cannot be stretched to support the Applicants' argument that documents accessible through the "chain of command" of the ECCC's investigation into Volkswagen must be produced. Although there may be no limit to the size of the record, production is still limited to documents that are relevant and were in the possession of and considered by the decision-maker—unless an exception applies.

[113] In *Pathak*, Justice MacGuigan, in his concurring reasons, clarified that only the documents that were actually before the decision-maker had to be produced. Justice MacGuigan

concluded that even though documents consulted by the investigator were in the Commission's custody and accessible, they were not actually before the Commission when it made its decision (at pages 463-464).

[114] The general rule in *Pathak* was reiterated in *Tsleil-Waututh* at paras 111-114: Rule 317 cannot be used to obtain documents in the possession of others, only those documents that the administrative decision-maker had before it when making the decision, and "nothing more".

[115] The Applicants continue to rely on *Friends of the West*, which has been noted in subsequent cases to depart from the general rule of actual possession. It has also been distinguished on its facts in subsequent cases, including characterizing it as falling in an exception to the general rule. Otherwise, it is not consistent with the appellate jurisprudence, which is binding.

[116] The Applicants also point to *Norwegian* to support their view that "possession" throughout a chain of command should be captured by Rule 317. In that case, Prothonotary Hargrave found that the Minister and the Minister's assistants directly supervised the decision-making process, and concluded that documents leading to the final step were producible (at para 17). However, Prothonotary Hargrave reiterated the general principle regarding Rule 317 of relevance and possession, then found that an exception to the general rule in *Pathak* applied because procedural fairness was challenged (at paras 11, 13).

[117] The exceptions to the general rule were recently considered in *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at paras 5-6, 289 ACWS (3d) 875. The Federal Court of Appeal confirmed that documents beyond those that were before the decision-maker may be subject to disclosure where there is an allegation of a breach of procedural fairness or of a reasonable apprehension of bias.

[118] Since the Notices of Application in this case do not raise procedural fairness or bias as an issue, an exception to the general rule does not apply, as noted by the CMJ.

[119] The Applicants' view that the whole institution or government department should be regarded as the administrative decision-maker is not supported by the jurisprudence (*Ecology Action Centre Society v Canada (Attorney General)*, 2001 FCT 1164 at para 6, [2001] FCJ No 1588 (QL)). The Applicants' reliance on *Cooke v Canada (Correctional Service)*, 2005 FC 712 at para 20, 274 FTR 44 [*Cooke*], where the Court stated that the decision-maker for the purpose of Rule 317 "is not the specific individual who decided the case but the tribunal itself", is misplaced. In that case, the Court was addressing the issue of an investigator's report and recommendation which was adopted by the Canadian Human Rights Commission and as such, the record before the investigator was part of the record of the decision-maker. I am not aware of any jurisprudence where *Cooke* has been relied on to support the view that the documents held by the whole institution are "before" the decision-maker.

[120] In the present case, Ms. McCready actually made the decision. While she could have accessed documents in ECCC's custody, the evidence accepted by the CMJ is that the voluminous investigative file was not before her when she made the decision.

IX. Did the CMJ err in her assessment of the evidence?

A. *The Applicants' Submissions*

[121] The Applicants submit that the CMJ erred by admitting and relying on the affidavit and evidence of Mr. Enns, which included significant amounts of hearsay. The Applicants argue that Mr. Enns' affidavit cannot support the finding that Ms. McCready made the decision based on the CTR, oral advice received from Mr. Enns and the Ontario Regional Director, and her knowledge of the investigation—i.e. made without the investigation file. The Applicants submit that Mr. Enns could not know what was in Ms. McCready's head at the time.

[122] The Applicants submit that the CMJ made an error of law by admitting hearsay evidence without an analysis of necessity or reliability and made a palpable and overriding error of fact based on this unreliable evidence. The Applicants argue that the CMJ further erred by not drawing an adverse inference from the hearsay evidence tendered pursuant to Rule 81(2) of the *Federal Courts Rules*. The Applicants submit that this error of mixed law and fact includes an extricable legal principle, and as a result, that no deference is owed.

[123] The Applicants submit that the CMJ's finding that there was no basis to impugn Mr. Enns' credibility cannot be supported. The Applicants contend that Mr. Enns is not a reliable witness.

[124] The Applicants note that on cross-examination, Mr. Enns repeatedly either could not recall or was evasive in answering whether he had contact with Ms. McCready in a three-week period leading up to the preparation of his affidavit, then did a "flip-flop" and stated that they had met to discuss the preparation of the affidavit.

[125] The Applicants also argue that Mr. Enns' evidence was not necessary because better evidence could have been provided first hand by Ms. McCready.

[126] The Applicants add that Mr. Enns was not part of the "chain of command" in the Volkswagen investigation and suggest that he was put forward as the affiant to insulate others in the chain of command, including Ms. McCready, from cross-examination.

B. *The Respondent's Submissions*

[127] The Respondent notes that Rule 81(1) of the *Federal Courts Rules* provides that affidavits on belief are admissible on motions (other than motions for summary judgment or summary trial). Mr. Enns provided extensive evidence in his affidavit describing both his personal knowledge of the matter and information based on belief, for which he set out the grounds for the belief.

[128] The Respondent submits that Mr. Enns' evidence demonstrated his extensive knowledge about the Volkswagen investigation and the structure of ECCC. The fact that Mr. Enns is not formally part of the Volkswagen investigation's chain of command does not impact his knowledge of the investigation or relegate his evidence to hearsay. The Respondent submits that there is no issue with Mr. Enns having spoken to Ms. McCready while preparing the affidavit, as he identified when she was the source of his information and that she did not direct him on what to include.

[129] The Respondent adds that whether an adverse inference is warranted is highly discretionary and that there was no palpable and overriding error in the CMJ's finding that no adverse inference was warranted. Mr. Enns has detailed knowledge of the investigation and the documents and process leading to the decision, making direct evidence from Ms. McCready unnecessary.

C. *The CMJ did not err in admitting and relying on the affidavit of Mr. Enns to determine what was in the possession of the decision-maker*

[130] The CMJ did not err in law by admitting the affidavit which included hearsay evidence without an analysis of necessity or reliability and did not make a palpable and overriding error of fact based on the evidence.

[131] Mr. Enns' affidavit is admissible pursuant to Rule 81(1) of the *Federal Courts Rules* which states:

81 (1) Affidavits shall be confined to facts within the	**81 (1)** Les affidavits se limitent aux faits dont le déclarant a

deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[132] Rule 81(1) reflects the rule against hearsay by generally requiring affidavits to be based on personal knowledge. The reference to statements on "belief" in Rule 81(1) has been recognized as being synonymous with hearsay (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 32, [2018] FCJ No 21 (QL)).

[133] The prohibition of hearsay does not apply on "motions, other than motions for summary judgment or summary trial". Therefore, under Rule 81(1), affidavits with hearsay are presumptively admissible on interlocutory motions (*John Doe v R*, 2015 FC 236 at paras 21-22, 256 ACWS (3d) 782), which would include motions for production of documents. This evidence does not need to meet the necessity and reliability requirements in order to be admissible. Applying such requirements to hearsay in affidavits on motions would fail to give effect to the words of Rule 81(1). However, Rule 81(1) provides as a condition that the affiant state the grounds for their belief. Rule 81(2) also permits an adverse inference to be drawn where a party fails to provide evidence of persons having personal knowledge of material facts.

[134] Mr. Enns' affidavit does include statements based on his belief, i.e. hearsay. This includes his description of Ms. McCready's personal knowledge and of the documents before her

when she made her decision. However, Mr. Enns identified the grounds for this belief at paragraph 35 of his affidavit. He noted that, given his role in the Applicants' section 17 requests, which he described in detail in the earlier parts of his affidavit, that he had personal knowledge of the material relied on by Ms. McCready in making the decision at issue. He then noted that he had "been informed by Ms. McCready and verily believe" that she relied on the CTR, verbal advice from Mr. Enns and the Regional Director, legal advice and her own personal knowledge. He went on to again describe the categories of documents in the investigation file noting that they were not part of the record before Ms. McCready. He added, based on his direct knowledge, that neither he nor Ms. McCready has access to the investigation file documents, noting that these are located in the Burlington Office. In addition, he stated on cross-examination that Ms. McCready never accessed the investigation file. As a result, Mr. Enns' affidavit fulfills the requirements of Rule 81(1), which governs admissibility. The CMJ did not err in admitting it.

[135] Moreover, Mr. Enns' affidavit also included information based on his personal knowledge due to his role as Executive Director about the structure of the ECCC Enforcement Branch, the section 17 requests, how such requests are generally handled, the background of the Volkswagen investigation, his work related to the Volkswagen investigations, and his participation in briefings with Ms. McCready on the Volkswagen investigation. The Applicants' characterization of Mr. Enns as an unhelpful affiant is not justified.

[136] The CMJ did not make a palpable and overriding error in finding that the evidence she accepted established that the documents requested were not before or considered by Ms. McCready when she made her decision. Mr. Enns' evidence—on his information and

belief—explained what Ms. McCready had before her. In addition, based on his personal and direct knowledge, he explained that the investigation file was located in Burlington. On cross-examination, he reiterated that it was never accessed.

[137] The CMJ's finding that Ms. McCready could have accessed documentation, but that the "evidence is clear that she did not and I find that there is no basis to doubt the reliability of that evidence", is owed deference.

D. *The CMJ did not err in declining to draw an adverse inference from the Respondent's failure to provide an affidavit based on personal knowledge*

[138] The CMJ did not err in declining to draw an adverse inference from the Respondent's failure to provide an affidavit based only on personal knowledge. I disagree with the Applicants' contention that the CMJ's determination that no adverse inference was warranted raises a question of mixed fact and law with an extricable legal principle. As noted above, an extricable legal principle includes the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle.

[139] The drawing of an adverse inference is within the CMJ's discretion based on her consideration of the circumstances. The standard of review remains palpable and overriding error—which has not been demonstrated.

[140] Where hearsay evidence is admissible, an adverse inference under Rule 81(2) may be drawn and may affect the weight given to such evidence (*Ottawa Athletic Club Inc v Athletic*

Club Group Inc, 2014 FC 672 at para 119, [2014] FCJ No 743 (QL) [*Ottawa Athletic Club*]). As noted by the Applicants, this Court has found that "an adverse inference can be drawn where hearsay evidence is introduced instead of first-hand evidence and no adequate explanation is provided for why the best evidence is not available" (*Ottawa Athletic Club* at para 117). However, the permissive language of Rule 81(2) does not suggest that drawing an adverse inference is mandatory in such cases.

[141] In *Apotex Inc v Canada (Health)*, 2018 FCA 147, [2018] FCJ No 820 at para 67 [*Apotex*], the Federal Court of Appeal noted that the law with respect to the drawing of adverse inferences has evolved. Previously, it was accepted that adverse inferences had to be drawn where a party failed to call material evidence that was available to it. The inference was that the evidence would have been unhelpful to the party. However, more recent cases have treated adverse inferences as a matter of discretion, partly because the matter is bound up inextricably with the adjudication of the facts (*Apotex* at para 68; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221 at para 73).

[142] In: *O'Grady v Canada (Attorney General)*, 2016 FCA 221, 270 ACWS (3d) 648, the Court of Appeal explained that the applications judge may consider what inferences should be drawn from the affidavit evidence, noting at para 11,

> Whether or not evidence is within an affiant's personal knowledge under Rule 81(1) bears on the admissibility of the affidavit. However, whether an adverse inference should be drawn from otherwise admissible evidence is a matter better left for the application judge, who has the benefit of the complete record and the arguments of counsel. To this extent, we would clarify the reasons given by the Judge. The question of what inference,

> adverse or otherwise, is to be drawn remains open to the application judge hearing this matter on the merits.

[143] The CMJ found that "the circumstances of this case do not warrant any adverse inference", noting also that there was "no basis to impugn Mr. Enns' credibility". I acknowledge the Applicants' concerns that Mr. Enns was evasive on cross-examination regarding his regular contact with Ms. McCready in the weeks before the affidavit was filed. However, as noted above, Mr. Enns' evidence addressed much more than this issue. The information that he provided—including his direct knowledge and that provided on information and belief, for which he set out his grounds, and his evidence on the cross-examination—was sufficient to support the CMJ's finding. The CMJ may have overstated that there was "no basis" to impugn his credibility and could have restricted this comment to his credibility on specific aspects. However, there is no palpable and overriding error in the CMJ's finding that there was no basis to impugn his credibility. The CMJ could have declined to draw an adverse inference even if she had found some credibility concerns on specific parts of the affidavit.

[144] Moreover, the CMJ's key and determinative finding is that the documents requested were not relevant to the grounds as pleaded, which turned on her interpretation of the Applicants' Notices of Application, and which Mr. Enns' affidavit has no impact on. Hence, the failure to draw an adverse inference would not be overriding. The tree remains standing.

X. The CMJ did not err in awarding the Costs of the Rule 318 motion to the Respondent

[145] In written submissions, the Applicants acknowledge that the award of costs is discretionary but submit that it was not in the interests of justice. They note that the Respondent

gave them additional disclosure on the eve of the hearing of their motion, after resisting for months. The Applicants assert that the Respondent ignored their request for particulars of the documents in ECCC's investigation file, which prevented them from narrowing their request.

[146] At the hearing of this appeal, the Applicants clarified that they are not pursuing their appeal of the cost order. The Applicants emphasize that the Volkswagen investigation is of great public importance and that they have tried to use *CEPA*'s Public Participation process to defend the environment and health of all Canadians. In their view, no cost award is appropriate.

[147] The Respondent notes the general rule that costs follow the event and should be awarded to the successful litigant. Cost awards are discretionary and can only be set aside if the court has made an error in principle or the award is plainly wrong. The Respondent submits that it was entirely successful on the motion. The disclosure of one partially redacted document is insignificant and does not mean that the Applicants were partially successful. The Respondent also disputes the Applicants' claim that they tried to narrow the scope of their motion.

XI. The Alternative Remedies Cannot be granted

[148] In the alternative to an order directing the Respondent to produce the requested documents, the Applicants seek an order admitting documents, which they obtained under the *Access to Information Act*, RSC 1985, c A-1 [*ATIP*], into evidence as part of the CTR.

[149] The Applicants also seek an order granting leave to compel the attendance of Ms. McCready (the decision-maker) at the hearing of the Application or at another time to be questioned regarding the decision and the currency and coverage of ECCC's investigation.

[150] The Respondent submits that the alternative relief sought by the Applicants is improper noting that these are not related to the decision under appeal and raise new issues which were not raised before the CMJ.

[151] The Respondent submits that the *ATIP* documents are not part of the CTR because there is no evidence they were before Ms. McCready.

[152] First, there is no need to consider alternative remedies because no remedy is required. Having found that the CMJ did not err, the Order stands and the Applicants are not entitled to further production as requested.

[153] Second, contrary to the Applicants' characterization of the issues, they are indeed new and cannot be raised in the context of an appeal of the CMJ's decision. The CMJ is tasked with managing this litigation and to raise alternative remedies at this appeal suggests an "end run" around the case management role and the decision under appeal. Moreover, the alternative relief appears to be another attempt to gain a more expansive record for the judicial review despite that the record should be restricted to the documents in the possession of and considered by Ms. McCready at the time she made the decision.

[154] Third, the remedies requested—even if the appeal were allowed—would not remedy the lack of production of the documents requested pursuant to Rule 317. In particular, the issue of admissibility of evidence is distinct from the requirements of Rule 317 (*Tsleil-Waututh* at para 119). There is no evidence that the *ATIP* documents were part of the record before Ms. McCready when the decision was made. Whether the *ATIP* documents are admissible on the judicial review is a question that should be addressed by the Application Judge.

XII. Costs on this motion

[155] Costs generally follow the event and could again be ordered against the Applicants. The Respondent and Applicants agree that if costs are awarded, the costs should be set at $1000, not payable forthwith.

[156] In the present circumstances, and acknowledging the Applicants' submission that they are acting in the public interest and have nothing personally to gain, I decline to order Costs.

ORDER IN T-1252-17

THIS COURT ORDERS that

1. The style of cause is amended to remove Kim Perrotta as an Applicant.
2. The Appeal of the Order of Prothonotary Aylen dated September 10, 2018 is dismissed.
3. No Costs are ordered with respect to this Appeal.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1252-17
STYLE OF CAUSE:	TIM GRAY AND MUHANNAD MALAS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 4, 2019
ORDER AND REASONS:	KANE J.
DATED:	MARCH 12, 2019

APPEARANCES:

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Michael Roach Taylor Andreas	FOR THE RESPONDENT

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