Federal Court of Appeal | Cour d'appel fédérale

Date: 20170529

Dockets: A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17

Citation: 2017 FCA 116

Present: STRATAS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 29, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR ORDER

STRATAS J.A.

[1] These proceedings are governed by a comprehensive procedural order dated March 9, 2017. Under that order, the parties may object to the admissibility of all or part of any affidavits and, following the receipt of submissions, this Court may rule on the objections.

[2] A number of objections were made. This is the Court's ruling on the objections.

A. Background

[3] Before the Court are fifteen applications for judicial review. In these applications, the applicants seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and Order in Council PC 2016-1069 dated November 29, 2016 and published in a supplement to the *Canada Gazette*, Part I, vol. 150, no. 50 on December 10, 2016. More information concerning the proceedings can be found in this Court's reasons concerning two motions for intervention: *Tsleil-Waututh Nation et al. v. (Canada)*, 2017 FCA 102.

B. The comprehensive procedural order

[4] Aside from being numerous, the applications for judicial review, taken together, are large and complex. In order to allow the applications to proceed in an orderly, fair and expeditious way, this Court issued a comprehensive procedural order dated March 9, 2017. The order consolidates the applications and streamlines the usual procedures under the *Federal Courts Rules*, SOR/98-106, while ensuring fairness.

[5] Under the Rules, a party can challenge the admissibility of evidence tendered on an application for judicial review by bringing a motion under Rule 369. In the Court's experience, applications for judicial review of this size—let alone fifteen applications for judicial review—can stall if this is not regulated. To avoid this, the procedural order set a specific time for all parties to register their admissibility objections and exchange submissions by way of informal letter.

[6] The specific process for the determination of admissibility issues was set out in paragraph 8(5) of the procedural order:

> *Objections to affidavits.* An objection to an affidavit or any part thereof shall be made within seven days of service of the affidavit and:
>
> (a) an objection shall be made by serving a letter that sets out the precise nature of the objection and makes submissions on the objection;
>
> (b) an objection may be responded to by any party by serving a responding letter within seven days of the receipt of the objection;

(c) the objector may reply by serving a reply letter within four days of the receipt of the responding letter;

(d) forthwith upon receipt of the reply, the party serving the affidavit that is the subject of objection shall file the affidavit and all letters received under (a), (b) and (c) by delivering these by overnight courier to the Registry of the Federal Court of Appeal in Ottawa under a cover letter that lists the documents being delivered to the Court and proof that the cover letter has been served on all parties;

(e) an affidavit that is not subject to objection shall be added to the Electronic Record;

(f) an affidavit that is subject to objection shall not be added to the Electronic Record unless the Court dismisses the objection or otherwise orders.

[7] The procedural order also contained some initial legal guidance on admissibility for the parties to consider:

> …[C]oncerning the nature of the evidentiary record:
>
> (a) the general rule is that the only evidence admissible in applications for judicial reviews of administrative decisions is the record before the administrative decision-makers (see *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paras. 41-42);
>
> (b) the general rule is that new issues should not be raised in applications from administrative decisions (see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-29); this includes constitutional issues (*Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257);
>
> (c) however, one exception to (a) and (b) is where the administrative decision-maker did not have the power to receive full evidence on the issue or did not have full jurisdiction to deal with the issue: for this reason, issues relating to the duty to consult Indigenous peoples were permitted to be raised in this Court and evidence relating thereto was allowed to be filed in *Gitxaala Nation v. Canada*, 2016 FCA 187;

> (d) thus, provision in the schedule must be made for the parties to file evidence where legally permitted (in accordance with the legal principles in (a), (b) and (c) and any other legal principles the parties bring to the Court's attention) and to cross-examine that evidence;
>
> (e) further, provision in the schedule must be made for the Court to receive any interlocutory objections to admissibility and, where it is appropriate to be done on an interlocutory basis, to determine them (see, *e.g.*, *Collins v. Canada*, 2014 FCA 240 at paras. 6-7 and authorities cited therein)[.]

[8] The parties have had two opportunities to make submissions concerning this guidance, once when the procedural order was circulated in draft to them and again when making submissions concerning admissibility. By and large, the parties have agreed with this legal guidance.

C. The affidavits and the objections

[9] The applicants served a total of fourteen affidavits upon the respondents. The respondents did not object to the affidavits.

[10] The respondents served three affidavits. Several of the applicants have objected to them in various ways.

[11] Specifically, two affidavits served by the respondent, Trans Mountain Pipeline ULC, are under objection. In these reasons, they shall be called the Love Affidavit #1 and the Love Affidavit #2 or, collectively, the Love Affidavits.

[12] One affidavit served by the respondent, the Attorney General of Canada, is under objection. In these reasons, it shall be called the Gardiner Affidavit.

[13] In no particular order, the following parties have each registered objections to the Love Affidavit #1:

- The Raincoast Conservation Foundation and Living Oceans Society;
- The City of Vancouver;
- The Tsleil-Waututh Nation;
- Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Kwaw-Kwaw-Apilt (hereafter the "Stó:lō Collective");
- The Upper Nicola Band;
- The Squamish Nation and the Coldwater Indian Band;
- The Musqueam Indian Band; and
- The Stk'emlupsemc te Secwepemc of the Secwepemc Nation.

[14] In no particular order, the following parties have each registered separate objections to the Love Affidavit #2:

- The Tsleil-Waututh Nation;
- The Stó:lō Collective;
- The Upper Nicola Band;
- The Squamish Nation and the Coldwater Indian Band;
- The Musqueam Indian Band; and
- The Stk'emlupsemc te Secwepemc of the Secwepemc Nation.

[15] In no particular order, the following parties have each registered separate objections to the Gardiner Affidavit:

- The Tsleil-Waututh Nation;
- The Stó:lō Collective;
- The Upper Nicola Band;

- The Squamish Nation and the Coldwater Indian Band;

- The Musqueam Indian Band; and

- The Stk'emlupsemc te Secwepemc of the Secwepemc Nation.

[16] In the case of all three affidavits under objection, the objectors generally endorsed all or part of the objections of others.

[17] The Court has now received the three affidavits under objection. It has also received all submissions from the parties concerning the objections. It has reviewed and considered the affidavits, the objections and the submissions on the objections.

[18] Many of the grounds for objection can be grouped under certain categories. The reasons examine the grounds for objection category by category.

D. Analysis of the objections

(a) Various objections that do not go to admissibility

[19] Most of the objections can be dismissed because they do not go to the admissibility of evidence.

[20] A number of the applicants alleged that certain statements in the affidavits were inaccurate, unsupported by evidence, and recounted some relevant information but not all. Many applicants alleged inaccuracies concerning the affidavits' descriptions of what took place below and the positions various parties took. Some complained that the descriptions were self-serving and omitted relevant information. For example, Musqueam objects to paragraph 77 of the Love Affidavit #1 on the ground that it inaccurately and incompletely summarizes the oral tradition evidence offered by Musqueam below. Vancouver objects to statements made by Mr. Love concerning what was before the Board; it says that the Board failed to consider material it submitted.

[21] None of these sorts of objections go to admissibility. Instead, they go to the weight the panel hearing the consolidated applications should give to the evidence. If Mr. Love is wrong about what was before the Board or what the evidence was before the Board, his evidence will be rejected by the panel hearing the consolidated applications. As I shall explain in the context of background and orienting statements offered by Mr. Love concerning what took place before the Board, those matters will be proven by the actual record before the Board, not Mr. Love's say-so.

[22] The import or significance of documents is also something to be left for the panel hearing the consolidated applications. For example, Upper Nicola raises the relevancy of pages 10375 to 10498 of Exhibit W to the Gardiner Affidavit on the ground that the consultation was with other First Nations, not Upper Nicola. This seems to be more of a question about what import or significance can be drawn from the document. That is a matter for the panel hearing the consolidated applications.

[23] If they wish, the applicants can explore on cross-examination these matters of alleged inaccuracy, incompleteness, significance, import or spin. However, I do not think there is any reason to do so. Many of the complaints about inaccuracy, incompleteness, significance, import and spin are directed to the statements of background information and summaries concerning what took place below. As will be explained in more detail, the background information and summaries are admissible but only for a limited purpose: orienting the panel on a preliminary basis concerning what took place below.

[24] In any judicial review of an administrative decision where, as here, a complete record exists before the administrative decision-maker, if the Court needs to know what happened below it will look to that record, including transcripts of the administrative proceedings and documents filed before the administrative decision-maker. In this case, if what happened below—for example, the position a party advanced before the National Energy Board—actually bears upon any of the issues to be decided by this Court, this Court will not rely upon the present understandings and say-so of witnesses. It will go to the record. Thus, the background statements or summaries under objection will not factor into the Court's decision at all.

(b) Hearsay objections

[25] All of the applicants argued that a number of the paragraphs in the Love Affidavits were hearsay. For example, the applicants identify a number of statements made by Mr. Love in his affidavits and assert that he does not have first-hand information.

[26] However the Court simply does not know whether Mr. Love has first-hand information on these matters or, by virtue of his position, can testify in a non-hearsay way on these matters: see, *e.g.*, the discussion in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 78-103 and 105-108 and 115. Again, this is fodder for cross-examination. To the extent that the cross-examinations reveal that certain of Mr. Love's important statements are hearsay, the applicants may raise that before the Court hearing the consolidated applications.

[27] In the preceding paragraph, the Court referred to "important statements." The Court notes that some of the statements in the affidavits that are subject to objection are quite meaningless in the whole scheme of things. Many of the statements were background explanations and summaries that are admissible only to orient the Court. I will now say more about this.

(c) The inclusion of background information and summaries into the affidavits

[28] All parties accept that affidavits filed in a judicial review application can provide background explanations and summaries regarding the administrative proceedings below and the massive record of those proceedings. These are admissible for only one purpose: to assist the reviewing court and orient it.

[29] The applicants do not object to the fact that the affidavits filed by the respondents contain background explanations and summaries. After all, looking at the material before me, it seems that most of the affidavits filed by the applicants do that as well.

[30] Instead, the applicants object to the extent to which the respondents' affidavits provide background information and summaries, the argumentative nature of some of the statements, and the presence of hearsay and opinion. For example, counsel for the applicants Squamish and Coldwater take issue with paragraphs 22, 36, 49, 71, 80, 118, 119, 120, 125, 136, 140, 158, 166, 183, 184, 189, 190, 203 and 210-235 of the Love Affidavit #1. By way of further example, the Raincoast Conservation Foundation and the Living Oceans Society specifically take issue with paragraphs 95, 115-117, 156, 185-198 of the Love Affidavit #1. Other paragraphs in the affidavits are under objection by others on the same basis.

[31] The current law on providing background information or orienting summaries of information in an affidavit offered in an application for judicial review is set out in authorities such as *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 and *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189.

[32] According to these authorities, normally the evidentiary record before the administrative decision-maker is the only evidence admissible in the reviewing court. But in circumstances where the administrative decision-maker has developed an evidentiary record and the record is complex, voluminous or both, summaries or statements of general background in an affidavit are admissible in the reviewing court for orienting or introductory purposes and for no other purpose.

[33] Where, as here, the administrative decision-maker has developed an evidentiary record, general background statements or summaries are tendered not to supplement the evidentiary record, replace that evidence or wade into the merits of the matter decided by the administrative decision-maker. Instead, they are admissible for just one limited purpose: to explain the record and the proceeding below for the purpose of orienting the reviewing court. This is seen from the following passage in *Association of Universities* (at para. 20):

> Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

[34] In *Delios*, this Court amplified upon this (at para. 45), adding that the general background statements and summaries should avoid argumentation:

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy—that is the role of the memorandum of fact and law—it is admissible as an exception to the general rule.

[35] In *Delios* (at para. 46), this Court also reiterated the warning in *Association of Universities* to the effect that in providing background information, the affidavit must not go further and does not "go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider."

[36] The reference in *Delios* to "non-argumentative…statements" is a nod to the many cases in our Court and Rule 81(1) to the effect that affidavits are to be "confined to facts" without argument.

[37] A number of the applicants cited *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 and its admonition in para. 18 that facts should be presented without "gloss or explanation." This phrase should not be read out of context. *Quadrini* warns against controversial argumentation that steps over the line of permissibility. Sometimes a good, admissible summary of what took place below can contain explanations. But an affidavit is not supposed to be a memorandum of fact and law.

[38] In *Bernard*, this Court emphasized the primary rationale behind allowing an affidavit filed on judicial review to provide background information: it is to assist "this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task" without offering fresh evidence going to the merits of the matter before the administrative decision-maker (at para. 23). This "respects the differing roles of the administrative decision-maker and

the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers" (at para. 23). Again, the background information is merely for orienting the reviewing court, not to provide evidence as to what took place before the administrative decision-maker: the record before that decision-maker is the evidence of what took place.

[39] As many of the foregoing authorities note, it is very helpful to the reviewing court for it to receive background information and summaries in affidavits where the matter being reviewed is complex. In *Gitxaala Nation v. Canada*, 2016 FCA 187—the review of decisions pertaining to the Northern Gateway project—the background information in affidavits was extremely useful to the reviewing court. It was not left to grapple with hundreds of thousands of documents filed before it without a guide. It would not surprise me to learn that the number of documents in this consolidated proceeding is similar, if not more.

[40] I conclude that all of the background statements and summaries to which the applicants object are admissible for the limited purpose of orienting this Court as the reviewing court, not as evidence of what actually happened below. The evidence of what actually happened below is found exclusively in the record that will be filed with this Court.

[41] I considered carefully whether some of the background statements and summaries throughout the affidavits are too argumentative or contain statements of opinion.

[42] In some respects, some of the background statements and summaries in the affidavits could have been and should have been more clinically expressed.

[43] But much of what the applicants consider to be argumentative is not argumentative at all. For example, some of the applicants submitted that the opening sentence of paragraph 30 in the Gardiner Affidavit is too argumentative. That sentence reads: "To ensure that Indigenous peoples were meaningfully consulted and where appropriate accommodated, and in accordance with the Interim Principles, the MPMO led direct whole of government consultations with Indigenous groups during Phase III." I do not consider this argumentative. It is nothing more than an attempt to explain the purpose of the Phase III consultations.

[44] My impression is that the applicants' real complaint with the statements they describe as argumentative or statements of opinion is that the statements are wrong or incomplete. This is to be dealt with in cross-examination and in argument at the hearing. Again, I emphasize that the evidence on the merits of the issues decided by the decision-makers below is found in the evidentiary record before the decision-makers, not in the say-so, opinions or assessments of witnesses making general statements regarding that record.

[45] As well, I am certain that the panel hearing these consolidated applications will not be misled or swayed by argumentative statements or statements of opinion. The argumentative statements found in the Love Affidavits are akin to those in certain affidavits the Court had before it in the *Northern Gateway* matter: *Gitxaala Nation* (2016), above. There, the Court noted the existence of improper argumentation in affidavits but still admitted them, assuring the parties

that it did not consider the improper argumentation (paras. 90-91). That same assurance can be given here. The panel will also have the benefit of these reasons and the warnings contained in them.

[46] To provide further assurance, I will order that the objections filed by the applicants to all three of the respondents' affidavits form part of the electronic record. The panel will be able to read these and will exercise caution in taking the background statements and summaries as anything other than general statements offered from the respondents' perspective that have been adduced for the purpose of orienting the reviewing court and for no other purposes.

[47] Overall, I consider that the background information and summaries offered by the respondents' deponents fulfils the purpose of orienting the panel as to what happened below, at least from the respondents' perspective, without causing undue prejudice. Thus, I decline to strike out any of the background information and summaries in the respondents' affidavits.

(d) The evidence concerning Trans Mountain's engagement and consultations with the Aboriginal applicants and evidence concerning the duty to consult other than the evidence that was before the Governor in Council

[48] The Love Affidavits offer evidence concerning Trans Mountain's engagement with Indigenous applicants. Trans Mountain submits that this is relevant to whether the duty to consult with the Indigenous applicants was fulfilled. It adds that the Crown was informed by and explicitly considered Trans Mountain's engagement with the Indigenous applicants.

[49] The applicants respond that as a matter of law Trans Mountain's engagement with them is irrelevant; the duty to consult is upon the Crown and is a non-delegable duty.

[50] Having read the submissions, I do not consider the matter to be so clear-cut and obvious that I should determine the issue on an interlocutory basis. To some extent the outcome of this issue will depend on fact-finding and the facts on this issue seem to be contested. Thus, the matter should be left for the panel hearing this matter on the basis of full argument. See generally *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paras. 6-7; *Gitxaala Nation v. Canada*, 2015 FCA 27 at paras. 7 and 12; *Bernard*, above at paras. 9-12; *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 200 F.T.R. 94.

[51] The applicants Squamish and Coldwater, the Stó:lō Collective and the Stk'emlupsemc te Secwepemc object to certain evidence filed concerning activities pertaining to the duty to consult after the Order-in-Council was issued. They suggest that only material that was before the Governor in Council can be relied upon concerning the issue of duty to consult.

[52] But the duty to consult is owed by the Crown generally, not the Governor in Council. This may have ramifications for what is relevant and admissible concerning the duty to consult: *Gitxaala Nation v. Canada*, 2015 FCA 27. The evidence of activities after the Governor in Council's decision may also shed light on whether there were certain things not done that could have been done concerning consultation before the Governor in Council decided the matter. Later activities may also be relevant to whether there is any point in quashing the Governor in

Council's decision and ordering redetermination: *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45 at paras. 49-52; *Robbins v. Canada (Attorney General),* 2017 FCA 24; and authorities therein. There may be no point in quashing the Governor in Council's decision if any deficiencies in consultation at the time of the Governor in Council's decision have been repaired. I leave these legal points for the parties to address in their submissions to the panel and for the panel to consider.

(e) Canada's records of direct consultation activities: Exhibits "R" through "X" of the Gardiner Affidavit

[53] A number of the Indigenous applicants object to the inclusion of certain evidence in the Gardiner Affidavit. This evidence appears at Exhibits "R" through "X" of the Gardiner affidavit.

[54] The Attorney General of Canada agrees that the following portions of these exhibits are irrelevant because they do not relate to Crown consultation with the specific Indigenous applicant whose direct consultation records are otherwise included within the relevant exhibit: pages 1095-1184 and 1187-1200 of Exhibit "R"; pages 4779-4848, 4851-4884, 4944-4949, and 5222-5226 of Exhibit "S"; pages 6104-6111 and 6114-6209 of Exhibit "T"; pages 7526-7555 and 7558-7631 of Exhibit "U"; pages 8958-8959, 8962-8975, 8978-9011, 9014-9017, 9022-9025, 9028-9029, 9036-9049, 9052-9055, 9058-9059, 9062-9063, 9097-9099, and 9413-9424 of Exhibit "V"; pages 10391-10392, 10394-10493, and 10496-10499 of Exhibit "W"; pages 11550-11607, 11610-11631, and 11634-11655 of Exhibit "X".

[55] This Court's order will address this by excluding these pages from the Electronic Record that will be placed before the Court.

[56] Objections on the basis of relevance are made against the evidence at the following places: Exhibit "R" (pages 1648-62, 1675, 1678-79, 1683-98, and 1705-18), Exhibit "S" (pages 4885-4887), Exhibit "T" (pages 6213-6216, 6218-6219, and 6221-6222), Exhibit "V" (pages 9106-9108, 9406-9412), Exhibit "W" (pages 10375-10390 and 10393). For the reasons set out by the Attorney General in her letter responding to the objections concerning the Gardiner Affidavit, I consider this evidence to be admissible and relevant evidence of consultation that took place between Canada and the Indigenous applicants. The applicants are free to cross-examine on it. To the extent that other documents bear upon the issue, they can put these to the deponents.

[57] The applicants also submit that the British Columbia Environmental Assessment Office draft Summary Assessment Report found at various places in Exhibits "R" through "X" of the Gardiner Affidavit is inadmissible because it is irrelevant. I disagree.

[58] The Draft Environmental Assessment Office Report was appended to Crown correspondence sent to each of the Indigenous applicants during the course of Canada and British Columbia's coordinated Phase III consultations with the Indigenous Applicants. It also appeared within both the Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project (Exhibit "Y" to the Gardiner Affidavit at page 13283) and the Explanatory Note that was published alongside Order in Council P.C. 2016-1069 (Exhibit "AA"

to the Gardiner Affidavit at page 14901). Thus, the Draft Environmental Assessment Office Report is relevant.

[59] In saying this, I make no comment on the significance or weight to be given to this material or any other of the material appearing at Exhibits "R" to "X" of the Gardiner Affidavit. This is for the panel hearing the consolidated applications.

(f) Correspondence after the date of the Order in Council

[60] Objections have been made to certain correspondence written by Canada to the Indigenous applicants after the date of the Order in Council: Exhibits "CC" to "II" of the Gardiner Affidavit.

[61] A number of the Indigenous applicants submit that these documents are inadmissible. They invoke the general rule, mentioned above, that only documents and information forming the record before an administrative decision-maker are admissible in the reviewing court. Thus, in their view, only documents in existence before the decision was made are admissible.

[62] I agree that the general rule is that only documents and information forming the record before an administrative decision-maker are admissible in the reviewing court. But I do not agree that it automatically follows that only the documents and information in existence before the decision was made are admissible.

[63] Documents and information relevant to Crown consultation that post-date a decision under review may be relevant: see, *e.g.*, the discussion in paragraphs 51 and 52 above. The documents and information can also shed light on what procedures were followed and what the decision-maker considered up until the time of the administrative decision: *Gitxaala Nation* (2016), above at paras 66 and 318. Thus, for example, the correspondence under objection repeatedly states that the Joint Federal/Provincial Consultation and Accommodation Report for the Project was shared in full with federal Ministers. This sheds light on what procedures were followed and what the decision-maker considered up until the time of the administrative decision and, thus, it is admissible. In addition, correspondence concerning meetings that took place before the Governor in Council made its decision is relevant to Canada's consultation with the Indigenous applicants. And, as explained above, some documents can constitute background information to orient the reviewing court as to the content and import of the complex and voluminous record leading up to the administrative decision: *Delios*, at para. 45. In my view, Exhibits "CC" to "II" of the Gardiner Affidavit are all admissible on these bases.

[64] Caution should be exercised in considering documents that post-date an administrative decision. It is one thing for a document to record genuinely and accurately what took place in the lead up to a decision; it is quite another to try to paper the file after the fact in order to add justification for the administrative decision. This is fodder for cross-examination and, later, for careful assessment by the Court.

(g) Records relating to the negotiation of the Tsleil-Waututh Nation Engagement Protocol

[65] The Tsleil-Waututh Nation objects to certain records included in Exhibit "R" to the Gardiner Affidavit relating to the negotiation of an Engagement Protocol between it and Canada. These parties executed the Protocol. The Tsleil-Waututh Nation alleges that all negotiations leading up to the Engagement Protocol were "off the record." It adds that Mr. Gardiner has "inappropriately and selectively attached certain (but not all) of the confidential and without prejudice drafts of the Engagement Protocol and related correspondence."

[66] Having read the submissions, I do not consider the matter so clear-cut and obvious that I should determine the issue on an interlocutory basis. Cross-examination will be useful in clarifying the facts surrounding this issue and, if necessary, adding to the evidentiary record. The question of admissibility should be left for the panel hearing this matter on the basis of full argument. See generally *Collins*, above at paras. 6-7; *Bernard*, above at paras. 9-12; *Gitxaala* (2015), above at paras. 7 and 12.

(h) The inclusion of records contrary to a confidentiality agreement

[67] Upper Nicola submits that paragraphs 17(vii) and 66-68 of the Love Affidavit #2 should be struck because they violate a confidentiality agreement between it and Trans Mountain.

[68] Having read the submissions and in light of the principles set out in *Collins*, above at paras. 6-7, *Bernard*, above at paras. 9-12 and related cases, this should also be left for the panel

hearing the consolidated applications. Cross-examination will be useful in clarifying the facts surrounding this issue. The Court also encourages the parties to investigate the existence of any case law that might assist the Court in determining the issue of admissibility.

E. Reply Evidence

[69] Some of the applicants have raised the possibility that they may have to seek leave to file reply affidavits in response to the Court's ruling on evidentiary objections. Having reviewed the affidavits carefully, my preliminary view is that the only possible issue on which reply evidence might be necessary is the issue discussed at paragraphs 51-52 above. It seems to me that reply evidence is not necessary on the background statements and summaries contained in the affidavits due to the very limited orienting role played by those statements and the use of such statements in many of the applicants' affidavits.

[70] My order will seek submissions from the parties on whether reply evidence needs to be filed. In considering this, the applicants must consider whether cross-examining the respondents' deponents is sufficient; reply evidence will be allowed only if it is truly in reply and if it is absolutely necessary. Given the fact that the consolidated applications are proceeding under an order expediting them, the Court in its order must set very strict time limits for these submissions.

F. Postscript

[71] Nothing I have said in these reasons should be taken as a comment on the weight or significance of any of the evidence. The weight or significance to be assigned to the evidence is a matter for the panel hearing the consolidated applications.

[72] To the extent that the parties are unable to settle any of the remaining admissibility issues themselves and one or more parties still wishes to challenge the admissibility of certain evidence, the submissions on admissibility should appear in their memoranda of fact and law.

G. Disposition

[73] An order shall be issued in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	**A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17**
STYLE OF CAUSE:	**TSLEIL-WAUTUTH NATION *et al.* v. ATTORNEY GENERAL OF CANADA *et al.***

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 29, 2017

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Dyna Tuytel	FOR THE APPLICANTS, RAINCOAST CONSERVATION FOUNDATION AND LIVING OCEANS SOCIETY
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