Federal Court of Appeal  Cour d'appel fédérale

Date: 20170616

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 128

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 June 16, 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.

A. Introduction

[1] There are two motions before the Court:

- *The June 2, 2017 motion of the applicant, the Tsleil-Waututh Nation*. It objects to the inadequate state of the evidentiary record placed before the Court in these consolidated applications for judicial review. Among other things, it seeks production of relevant documents from Canada.

- *The June 6, 2017 motion of the Attorney General of Canada*. The Attorney General seeks leave to add a supplementary affidavit to the evidentiary record. The supplementary affidavit corrects errors and omissions in an earlier affidavit.

B. The judicial review proceedings before the Court

[2] Before the Court are fifteen applications for judicial review, now consolidated, in which, collectively, twenty-seven parties 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 the Order in Council, PC 2016-1069, dated November 29, 2016 and

made by the Governor in Council. It can be found in the *Canada Gazette*, Part I, vol. 150, no. 50, December 10, 2016.

[3] In brief, the Project—the capital cost of which is $7.4 billion—adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

[4] The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law and relevant statutory law. The Indigenous applicants also invoke section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to them, including Canada's duty to consult and, in some cases, to accommodate. The applicants also raise many issues concerning the Project's "environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[5] These consolidated applications have been progressing quickly. In the space of roughly three months, counsel have worked hard getting the matter ready for hearing, guided by 3 sets of detailed reasons, 8 orders and 14 directions (including the reasons and order on these motions). The hearing will take place in early October, 2017.

C. The motion of the Attorney General of Canada

[6] In response to the applications for judicial review and several affidavits filed in support of the applications, the Attorney General filed an affidavit of Mr. Gardiner. The aim of his affidavit is to supply evidence concerning what has taken place concerning the duty to consult and accommodate Indigenous groups.

[7] Mr. Gardiner has now sworn a supplementary affidavit to correct dates in his original affidavit and supply missing records. The errors and omissions are said to be inadvertent.

[8] The Attorney General of Canada now moves for leave to file the supplementary affidavit. Trans Mountain consents.

[9] The Indigenous applicants either take no position or do not oppose the Attorney General's motion. However, four Indigenous applicants noted that portions of the supplementary affidavit were irrelevant to the consolidated applications. The Attorney General has agreed to remove the irrelevant portions.

[10] The authority for allowing a party to file an additional affidavit on judicial review is Rule 312 of the *Federal Courts Rules*, SOR/98-106. The Rule merely permits such a filing with leave of the Court. It does not set out any criteria for the granting of that leave.

[11] However, case law under Rule 312 assists. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 at paras. 8-9. The case law shows that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);

- admitting the evidence will cause substantial or serious prejudice to the other side;

- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, 392 N.R. 248 at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule 369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19.

[12] On balance, these factors lie in favour of admitting Mr. Gardiner's supplementary affidavit into these consolidated applications.

[13] The dominant consideration underlying my exercise of discretion is that a fuller and more accurate record will promote the proper determination of the applications on their merits, consistent with Rule 3 of the *Federal Courts Rules*. Rule 3 provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

[14] The applicants have offered no evidence of prejudice and, in fact, do not oppose. Cross-examinations of Mr. Gardiner have not yet taken place. Corrections of errors and the supplementing of information likely would have taken place at those cross-examinations anyway. The Court will also be open to an extension of the period for cross-examinations should the applicants request it, as long as the consolidated applications are ready for hearing on the date set by the Court.

[15] No doubt more complete and more accurate information was available earlier and ideally should have appeared in Mr. Gardiner's first affidavit. This motion could have been brought sooner but it was delayed by Mr. Gardiner's absence from Canada. The Attorney General has brought this motion just before cross-examinations were to start. The delay is unfortunate—especially since this Court's Order of March 9, 2017 expedites these proceedings, sets a strict schedule, and warns all parties that "the schedule will be amended only if absolutely necessary." But the Attorney General's motion does not materially affect the progress of these proceedings.

[16] Thus, leave shall be granted to admit Mr. Gardiner's supplementary affidavit (with the irrelevant portions removed) into these proceedings.

D. The motion of the Tsleil-Waututh Nation

(1) Introduction

[17] The Tsleil-Waututh Nation has moved for an order to address what it says are serious deficiencies in the evidentiary record before this Court. The Indigenous applicants support the Tsleil-Waututh Nation.

[18] The Tsleil-Waututh Nation says that a request for disclosure under Rule 317 *Federal Courts Rules* has gone unfulfilled. It also says that the materials that the Governor in Council relied upon in making its decision to approve the Trans Mountain Extension Project are not all before the Court. And, more generally, it says that more evidence is in the possession of Canada and should be produced.

[19] Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed. Canada issued a section 39 certificate here. As we shall see, it also did this in the recent successful challenge in this Court to the Northern Gateway Pipeline Project: *Gitxaala Nation v. Canada*, 2016 FCA 187 ("*Gitxaala Nation (2016)*"). As a result, certain information the Governor in Council considered in making its decision will not be placed before the Court.

(2) The issues before the Court

[20] The motion brought by the Tsleil-Waututh Nation raises several issues concerning the record before the reviewing court in judicial review proceedings:

- The sufficiency of Canada's certificate under section 39 of the *Canada Evidence Act* and the effect of the certificate, which is to prohibit any disclosure of the evidence considered by the Governor in Council to the parties and to the reviewing court.

- The importance and role of the record before the reviewing court.

- The function and limits of Rule 317 of the *Federal Courts Rules*. This is the Rule that provides for an applicant to obtain the evidence that was before the administrative decision-maker. Related to this, though not in issue here, is how the applicant places the evidence, once obtained, before the administrative decision-maker.

- The admissibility in the reviewing court of evidence other than that which was before the administrative decision-maker.

- Whether, notwithstanding the above, an applicant in a judicial review may compel production of evidence from the administrative decision-maker or from others and

have it placed before the reviewing court. In what circumstances should the reviewing court make a production order?

- Where, in the end, there are gaps in the evidentiary record before the reviewing court, how, if at all, can the reviewing court go about its task of review?

The submissions before me address or touch on these issues—all of which bear to a varying degree on what the Tsleil-Waututh Nation seeks in this motion.

(3) Should this Court decide the motion now?

[21] This motion has been brought on an interlocutory basis. As is the normally the case for interlocutory motions raised on judicial review, the Court must consider whether the motions should be decided now or whether they should be left for the hearing panel.

[22] Before us are issues concerning the content and sufficiency of the evidentiary record before the reviewing court. On an application for judicial review, the reviewing court can handle these issues and often does.

[23] In my view, there is enough legal certainty surrounding this motion and its outcome on the facts for it to be determined now. As well, resolving a number of points raised by the motion and settling the parties' situations in this litigation will allow the parties to proceed in an orderly way with the pre-hearing cross-examinations and the hearing itself. Indeed, I expect that these

reasons may assist the parties in focusing the submissions that they will make to the panel hearing these consolidated applications. 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 v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at paras. 9-12 ("*Bernard (2015)*"); *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.

(4) Has Canada complied with section 39 of the *Canada Evidence Act*?

[24] Canada has issued a certificate under section 39 of the *Canada Evidence Act*. Section 39 "is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings": *Babcock v. Canada*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 21.

[25] Certificates are issued to protect Cabinet confidences and nothing more. A certificate cannot be issued to "thwart public inquiry" or "gain tactical advantage in litigation": *Babcock* at para. 25.

[26] According to the Supreme Court in *Babcock* (at para. 27), a certificate is valid if it is done by the Clerk or a Minister of the Crown, it relates to the information set out in subsection 39(2), it is done *bona fide*, and it is aimed at preventing disclosure of information that has been and is confidential.

[27] The role of this Court in reviewing a section 39 certificate is limited. We must refuse disclosure of the information covered by the certificate "without examination or hearing of the information": *Babcock* at para. 38. We only review to ensure that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised": *Babcock* at para. 39, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[28] In practice, this means the Court may consider whether the information for which immunity is claimed does not fall within subsection 39(2) or whether the Clerk or Minister has improperly exercised the discretion conferred by subsection 39(2): *Babcock* at para. 39. The Supreme Court amplified on this as follows (at para. 40):

> The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

[29] The certificate covers the following documents:

> #1: Letter to the Honourable Scott Brison, President of the Treasury Board, in November 2016 from the Honourable Jim Carr, Minister of Natural Resources, regarding the scheduling of consideration of a proposed Order in Council concerning the Trans Mountain Expansion Project.

> This information is a record reflecting communications between ministers of the Crown concerning agenda of Council. The information is therefore within the meaning of paragraphs 39(2)(c) and 39(2)(d) respectively of the *Canada Evidence Act*.
>
> #2: Submission to the Governor in Council in November, 2016 in English and French from the Honourable Jim Carr, Minister of Natural Resources, regarding a proposed Order in Council concerning the Trans Mountain Expansion Project, including signed Ministerial recommendation, summary and accompanying materials.
>
> This information, including all its attachments in their entirety which are integral parts of the document, constitutes a memorandum the purpose of which is to present proposals or recommendations to Council. The information is therefore within the meaning of paragraphs 39(2)(a) of the *Canada Evidence Act*.

[30] The Tsleil-Waututh Nation submits that Canada has not complied with section 39 of the *Canada Evidence Act*: the documents are not sufficiently described. It says that the certificate does not specify the exact dates on which Documents #1 and #2 on the certificate were delivered to their recipients. Further, it says that there is no itemized and specific description of the materials that are said to have accompanied Document #2.

[31] *Babcock* guides this Court in cases where, as here, the sufficiency of the description of documents is contested (at para. 28):

> It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s.

> 39(2) This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her. [emphasis added]

[32] In this passage, the Supreme Court says that the description should approximate "the kind of description required for claims of solicitor-client privilege under the civil rules of court." But it adds that "normally" the "date, title, author and recipient of the document" should be disclosed.

[33] These two statements conflict somewhat. To assert solicitor-client privilege successfully over a document, it is not always necessary to disclose the date, title, author and recipient of the document. Sometimes the disclosure of this information—especially the title of the document—can reveal privileged information. In my view, based on a complete reading of Babcock, the dominant consideration that overrides this potential conflict is that the certificate must provide enough information to allow a court to assess, from the face of the certificate, that the Clerk has listed documents that fit under section 39, and has not exceeded her or his statutory powers.

[34] Document #2 meets this overall test. A submission from a particular Minister to the entire Governor in Council during the month of its meeting (November, 2016) with "signed Ministerial recommendation, summary and accompanying materials"—attachments that are said to be

"integral parts of the document [i.e., the submission]"—qualifies for protection under paragraph 39(2)(*a*) ("a memorandum the purpose of which is to present proposals or recommendations to Council") and paragraph 39(2)(*d*) ("a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy").

[35] Would a description such as the one provided here be adequate for the assertion of a claim of solicitor-client privilege? In my view, yes.

[36] Suppose a lawyer writes a memorandum dated "November 2016" to her team of lawyers concerning litigation their client is defending. The litigation concerns breach of contract. The memorandum is for the team to consider in advance of a meeting at which the team will decide upon a course of action for their client. In the memorandum, the lawyer set out her recommendations and attached certain documents so that her team could consider the matter properly. On this description alone, the entire bundle of documents would be privileged. See, for example, the discussion of privilege in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81.

[37] This is not to say that individual documents that are attached are privileged for all time in all contexts. Suppose one of the documents considered by the lawyer team is a contract entered into between the client and the opposite party in litigation. In the bundle of documents supplied to the lawyer team, it is privileged. The opposite party has no right to see what the lawyer team

considered in its meeting about the client's affairs. However, the contract itself will be admissible in the litigation.

[38] The Tsleil-Waututh Nation complains that the exact dates and titles of documents are not disclosed and this triggers a consequence: under *Babcock* (at para. 28) when there is such non-disclosure, "the onus falls on the government to establish [the documents fall under section 39], should a challenge ensue." That may be so, but for the reasons set out above, that onus has been met, merely from the description provided on the face of the certificate: a description that has persuaded me that here there has not been any exceedance of statutory power.

[39] Further, concerning the undisclosed exact dates and titles, I note that in the solicitor-client context—one that *Babcock* invites us to use—disclosure of such information can reveal privileged information. In the above example, if the lawyer team were to disclose to the other side the title, the authors and the date of the contract, the other side would know that the lawyer team had the contract before them. If the lawyer team were to disclose the title, the authors, the dates and recipients of all the attachments, the other side might well be able to piece together what was placed before the lawyer team. Indeed, with that information, it might be able to take an informed guess regarding the subject matter of the issue the lawyer team was considering.

[40] The description of Document #2 says that "all its attachments in their entirety…are integral parts of the document" which is described as a "[s]ubmission to the Governor in Council." This suggests that a more particularized description of the attachments, such as their

exact dates, authors and titles—like the contract in the above example—would shed light on what the submission said and, thus, reveal a Cabinet confidence.

[41] In its reply submissions, the Tsleil-Waututh Nation asks the Court to draw an inference that the Clerk has selectively withheld disclosure of the exact dates to gain a tactical litigation advantage. On the material before me, I see no basis for drawing that inference, nor do I see any evidence of bad faith. As I have explained, the more likely reason why exact dates and some other specifying information have not been provided is that parties may be able to deduce exactly what was placed before and discussed by the Governor in Council, undercutting the protective purpose of section 39 of the *Canada Evidence Act*.

[42] In this case, I consider the description of Document #2 adequate. If more particularity in the descriptions were supplied, there would be a substantial likelihood that the information that lies at the heart of what section 39 exists to protect would be disclosed to some extent. Enough concerning Document #2 has been disclosed to convince me that the decision to make the certificate and the certificate itself, in the words of *Babcock*, "flow from statutory authority clearly granted and properly exercised."

[43] Document #1 stands in a different position. It is a letter in November 2016 from one Minister to another "regarding the scheduling of consideration" of a proposed order in council concerning the Project. We know that the Order in Council was made on November 29, 2016. Is a discussion of the timing of a meeting, without more, a confidence falling under subsection 39(2)? The Attorney General offered no cases on this specific point, nor could I find any myself.

[44] But the description does not stop with timing. It adds that the communication is "concerning [the] agenda" of the Council. This injects vagueness and inconsistency into the description. Does Document #1 go beyond the timing and shed light on substantive reasons that might affect the timing, such as the preparation of the submission to the Governor in Council? Does the mere fact there is a discussion of timing taking place reveal something that is covered within subsection 39(2)? Does the communication contain a discussion about the substance of the agenda, such as the topics that the Governor in Council should, could or will discuss? If the answer to any of those questions were "yes," I would have found that Document #1 falls under subsection 39(2) and there is no exceedance of statutory power. But I cannot tell.

[45] In short, the description of Document #1 does not lead me to conclude that it falls under subsection 39(2).

[46] As well, I am not satisfied that a document in November 2016 discussing only timing and nothing else—which is what the first part of the description of Document #1 suggests—falls within subsection 39(2). Going back to cases like *Babcock* and *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161, I am not persuaded on the evidence or the brief submissions presented by the Attorney General on this point that a document that merely asks, "Should we do this on November 22 or November 29?" without any argumentation, debate or reasons is a Cabinet confidence falling under the specific paragraphs of subsection 39(2).

[47] Although the description of Document #1 does not persuade me that it falls under subsection 39(2), I would not grant the Tsleil-Waututh Nation any relief. If Document #1

concerns only timing and nothing more, it is irrelevant and, thus, not admissible in the consolidated applications. Nothing in these consolidated applications turns on discussions of the timing of Cabinet's consideration of the matter. The only thing that matters is the legality of the Order in Council, which we all know is dated November 29, 2016.

[48] The Tsleil-Waututh Nation makes a wider argument against the certificate. It suggests that the certificate is defective because it "adversely impacts [the Tsleil-Waututh Nation's] ability to review the decision(s) being challenge[d]." In particular, the failure to identify the documents in question with specificity—and here I believe the Tsleil-Waututh Nation has the attachments to Document #2 front of mind—undercuts its ability to know whether certain matters raised by it as late as November 28, 2016, were considered by the Governor in Council when it approved the Project.

[49] I reject this submission. The Supreme Court in *Babcock*, above, makes it clear that the impact that a section 39 certificate might have on litigation is not a relevant factor for assessing the validity or sufficiency of a certificate.

[50] Putting this aside for a moment, the Tsleil-Waututh Nation's concern about immunization is a significant one and in no way do I minimize it. I wish to discuss this for a moment, as it will be relevant later in my reasons to the Tsleil-Waututh Nation's request for a production order against Canada and it may benefit the parties as they prepare for the hearing of the consolidated applications.

[51] As will be discussed below, under our law the exercise of public powers is not to be immunized from meaningful review. But I do not share the Tsleil-Waututh Nation's concern that this certificate necessarily has the effect of immunizing from review what the Governor in Council has done.

[52] In a sense, this sort of effect caused by a certificate is nothing new. Administrative tribunals can rely on deliberative secrecy and, thus, can withhold key information from an applicant for judicial review: see *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at page 965. Legal professional privilege can also apply even on key issues in the judicial review: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809. In these cases, the reviews of the administrative decision-makers still went ahead. The withholding of just some materials from the reviewing court does not, by itself, necessarily mean that the administrative decision-maker is being immunized from review.

[53] And while the impact of a section 39 certificate on litigation is not a relevant consideration in assessing the validity of the certificate, the issuance of a section 39 certificate may indeed impact the litigation to a challenger's benefit. The issuance of a certificate is no small thing. In *Gitxaala Nation (2016)*, this Court registered its concern about the issuance of a certificate as follows (at para. 319):

> The balance of the record that could shed light on this, *i.e.*, the staff recommendations flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act* and thus do not form part of the record. Canada was not willing to provide even a

> general summary of the sorts of recommendations and information provided to the Governor in Council.

[54] Can this sort of concern lead to an adverse finding? Arguably yes. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, a majority of the Supreme Court found that a tobacco advertising ban was contrary to the Charter and was of no force or effect. In finding that the ban was not justified under section 1 of the Charter, McLachlin J. (as she then was), writing in separate reasons for three Justices, appeared to take into account the issuance of the certificate (at paras. 165-166):

> These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.
>
> This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

[55] In its submissions, the Attorney General suggests that the section 39 certificate does not have the drastic effect the Tsleil-Waututh Nation suggests. Ultimately, this will be for the

hearing panel of the Court to assess, but there are certain matters raised by the Attorney General or consequent to what she has raised that are worth mentioning.

[56] First, in this case there is an evidentiary record, partly described below. It is growing. It seems to be at least equivalent to the one placed before this Court in *Gitxaala Nation (2016)*. And in that case this Court did not find that the issuance of a certificate improperly immunized the Governor in Council's approval of the Northern Gateway Project from review. In fact, in *Gitxaala Nation (2016)*, this Court was able to meaningfully review the Order in Council. It quashed it on account of inadequate consultation with Indigenous groups.

[57] Second, the Attorney General submits that the issue whether the Crown met its duty to consult Indigenous applicants "is determined on the basis of the evidence filed by the parties in relation to what actually took place during the consultation process" rather than by what the Governor in Council may have considered. This is seen from a Federal Court case where a section 39 certificate had been filed and the issue before the Court was whether the duty to consult had been fulfilled:

> The record does not reveal a lack of transparency; on the contrary, it shows that the Crown repeatedly shared information, replied to the [First Nation's] correspondence, met the [First Nation's] representatives, and made policy decisions in light of the [First Nation's] concerns. The applicant was not entitled to disclosure of the Minister's advice to Cabinet: as they acknowledge, the Minister properly asserted privilege (*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(2)). Furthermore, the duty to consult is determined by the actions that Canada took during the consultation process, not by what the Governor in Council may have considered.

(*Adam v. Canada*, 2014 FC 1185 at para. 79.)

[58] As well, in the same vein, this Court stated in *Gitxaala Nation (2016)* that the duty to consult arises in cases like this in two ways. Before the Governor in Council, it can be a basis for finding unreasonableness on the basis of the evidence before it. But, notwithstanding whatever was before the Governor in Council, if the duty to consult owed by the Crown has not been fulfilled, the approval cannot stand: *Gitxaala Nation (2016)* at para. 159; *semble*, *Adam*, above.

[59] No doubt the parties will make submissions on these and related matters at the hearing of these consolidated applications.

[60] This suffices to determine the portion of the Tsleil-Waututh Nation's motion dealing with section 39 of the *Canada Evidence Act*. I turn now to a consideration of the Rule 317 issue the Tsleil-Waututh Nation has raised in its motion and its request for an order requiring Canada to produce more material.

[61] To set the stage for this, it is necessary to offer some background legal discussion regarding the record before reviewing courts.

[62] First, I shall examine the role of the evidentiary record before the reviewing court in judicial reviews and the principles that govern the court's interpretation of relevant statutory provisions and procedural rules. I shall also review the basic principles of admissibility in judicial review proceedings.

[63] Then I shall descend into more practical and mechanical considerations concerning issues relating to the record before the reviewing court: how applicants can obtain evidence relevant to an application for judicial review and how all of the evidence is to be placed before the reviewing court. These two concepts, along with issues relating to the admissibility of evidence, are frequently confused. They must be kept separate.

[64] I do not apologize for starting at such a level of generality. As we journey through areas like this, we can get lost in a dense forest of case law, with multiple issues flying about and various procedural rules seeming like predators poised to strike. But if we step back and view things from above, we can see the whole forest and find our way.

[65] Here, the whole forest is an appreciation of the important role played by the record in judicial reviews, certain fundamental principles concerning judicial reviews, legislative provisions that bear on the problem, and how courts go about their task of review. With that appreciation in mind, we can better understand different things in the forest and their relationship to each other.

[66] Only by doing this can Rule 317—a rule about obtaining evidence from the administrative decision-maker—be placed in its proper context and understood. Only then can the Tsleil-Waututh Nation's complaint about non-compliance of Rule 317 be considered. And only then can its broader request for an order requiring Canada to produce further material be addressed.

(5) The evidentiary record before reviewing courts: some background

(a) The role of the evidentiary record before reviewing courts and relevant principles governing it

[67] Subject to constitutional considerations, we must follow the statutory provisions and rules that govern and define the content of the evidentiary record before the reviewing court. Properly interpreted in accordance with their text, context and purpose, they sometimes give reviewing courts some ambit for discretion. Thus, we must have front of mind the role that the evidentiary record plays in reviewing courts. It lies at the heart of meaningful judicial review. Its importance cannot be understated.

[68] First is the role the evidentiary record plays in the reviewing court's discernment of the reasons of the administrative decision-maker. Where the reasons of the administrative decision-maker are sparse or even non-existent on a key point, they can sometimes be deduced from comparing the result reached with the evidentiary record: see, *e.g.*, *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572.

[69] Even where the reasons are more fulsome, the record the administrative decision-maker had in front of them can play a key role in construing and interpreting its reasons. See generally *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 15; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 86 at para. 39.

[70] The reasons of the administrative decision-maker—and, thus, the evidentiary record intimately associated with them—are no small thing. They are the starting point and the focus for the reviewing court's judicial review analysis: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 48 and 56; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 26.

[71] And, quite apart from the foregoing, the evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and—most importantly for present purposes—the evidentiary record before the administrative decision-maker.

[72] For example, a key evidentiary finding made without anything in the evidentiary record in circumstances where evidence was necessary can render an administrative decision unreasonable: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at para. 100; *Delios*, above at para. 27. So can a finding that is completely at odds with the evidentiary record. In the case of reasonableness review, where a key part of the record—for example, any evidence on an essential element—is missing and, as a result, the reviewing court cannot assess whether the decision is within the range of acceptability and defensibility and, thus, reasonable, sometimes the reviewing court has no choice but to quash

the administrative decision: see, *e.g.*, *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766 at para. 137; *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paras. 31-39.

[73] Related to this is the role of the evidentiary record in preventing administrative decision-makers and their decision-maker from being immunized from review.

[74] Where the record placed before the reviewing court is deficient, certain grounds for setting aside an administrative decision can be foreclosed. To take an extreme example, if the evidentiary record of the administrative decision-maker is not before the reviewing court, how can a reviewing court evaluate whether the administrative decision-maker's decision was based on any evidence at all?

[75] This point has been expressed in different ways. The Saskatchewan Court of Appeal put it this way:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question.

(*Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24.)

[76] An academic commentator expressed it this way:

> Without knowing the reasoning behind a decision, it is impossible for a judge to determine if it is founded upon arbitrary reasoning. Thus, in order for a judge to determine whether a decision maker acted lawfully, the decision maker must provide reasons adequate to allow a reviewing judge to determine why the decision maker made the decision they did and whether it followed explicit statutory requirements [or the basis for the decision must be apparent in the record]. If the judge cannot ascertain how the decision was made [even in light of the evidentiary record], then the court cannot fulfill this role and decisions made in violation of the rule of law may be sanctioned by the court.

(Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113.)

[77] In support of its motion, the Tsleil-Waututh Nation forcefully and repeatedly makes the point about immunization. It cites the dissenting reasons of this Court in *Slansky*, above, correctly noting that the majority did not disagree with the propositions put on this point. *Slansky* put the point this way (at para. 276):

> If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the tribunal. In other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

[78] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Put another way, all holders of public power are to be

accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir*, above; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737 at para. 66; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180 at para. 38; *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720 at para. 140. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever—*i.e.*, there is not even a summary or hint of what was before the administrative decision-maker—or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.

[79] In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element—situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right"—have seen their decisions quashed: see, *e.g.*, *Leahy* above at para. 137; *Kabul Farms Inc.* at paras. 31-39; *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15 at para. 17. The test would seem to be that if a particular evidentiary record—even if bolstered by permissible inferences and any

evidentiary presumptions—disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like *Delios*, above and *Canada (Attorney General) v. Boogaard*, 2015 FCA 150), the decision must be quashed.

[80] There are a number of other principles that can affect the reviewing court's consideration of the adequacy of the evidentiary record before it.

[81] In an ideal world, in complicated cases like this, a judicial review should not go ahead until every available crumb of evidence has been placed before the reviewing court. But this is simply not possible.

[82] Subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 requires judicial reviews to be heard and determined "without delay and in a summary way." This is a Parliamentary commandment writ in law. Under the hierarchy of law, a statutory provision takes precedence over any subordinate Rules found in the *Federal Courts Rules* and the case law of this Court: Stratas, David, *The Canadian Law of Judicial Review: Some Doctrine and Cases*, at pp. 10-15 (April 20, 2017 version) (online: https://ssrn.com/abstract=2924049). The rationale for promptness was discussed by this Court in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at paras. 86-88 (albeit in the context of the short limitation period in subsection 18.1(2)).

[83] Further, Rule 3 of the *Federal Courts Rules* provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every

proceeding on its merits." The concepts in Rule 3 have been underscored by the Supreme Court's recent call for courts and litigants to embrace a new litigation culture: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[84] There are also certain general values and principles in administrative law—the rule of law, good administration, democracy and the separation of powers—that on occasion deserve voice in decisions concerning the content of the record before the reviewing court: see generally Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

[85] Finally, and perhaps most significantly, reviewing courts are not trial courts. Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers—not the reviewing courts—have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 14-19; *Bernard (2015)*, above at paras. 22-28. This consideration alone significantly affects the law of admissibility of evidence in the reviewing court, a topic I turn to now.

(b) The general rule of admissibility in judicial review courts: the record before the administrative decision-maker is the record on review

[86] As a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

[87] The main principle behind this general rule is the one just discussed: the distinction between the administrative decision-makers as the bodies designated by Parliament as the merits-deciders and the Federal Courts as merely reviewing courts, nothing more.

(c) How do applicants for judicial review obtain the record before the administrative decision-maker?

[88] Usually applicants for judicial review participated fully before the administrative decision-maker whose decision is under review. Sometimes they already will have the record in their possession.

[89] Sometimes, however, applicants for judicial review do not have the full record or are not certain that they do. This is where Rule 317 comes in. Under Rule 317, applicants can request the administrative decision-maker for "material relevant to an application that is in the possession of [the decision-maker]…and not in the possession of the [applicants] by serving on [the decision-maker] and filing a written request, identifying the material requested."

[90] Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 and *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35.

[91] Note that Rule 317 is only a mechanism by which applicants can obtain the record before the administrative decision-maker. It is not a means by which the record is placed before the reviewing court.

(d) How does the record before the administrative decision-maker get before the reviewing court?

[92] In the Federal Courts system, applicants can place the record of the administrative decision-maker—whether obtained through their own participation before the administrative decision-maker or obtained under Rules 317-318—before the reviewing court by offering an affidavit in support of their application for judicial review: Rule 306. The record of the administrative decision-maker is appended as one or more exhibits.

[93] Insofar as placing the record before the administrative decision-maker before the reviewing court is concerned, respondents who consider the affidavit of the applicant to be incomplete or inaccurate may offer their own affidavit material: Rule 307.

[94] Thereafter, cross-examinations on affidavits can take place: Rule 308.

[95] The parties place their affidavits, the transcripts of the cross-examinations and the exhibits from any cross-examinations into records that they file with the Court: Rules 309 and 310.

[96] The entire process of placing the record before the administrative decision-maker before the reviewing court is set out in more detail in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19.

(e) Exceptions to the admissibility of evidence on judicial review

[97] There are exceptions to the general rule that only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. These do not offend the distinction between the administrative decision-maker as the merits-decider and the reviewing court whose role is restricted to review. See, *e.g.*, *Association of Universities*, above; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116; *Bernard (2015)*, above; *Delios*, above at paras. 41-42.

[98] These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- 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.

- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.

- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

[99] Suppose, for example, that an administrative decision-maker received a payment from a party after a hearing. In the reviewing court, the applicant alleges, with some credence, that this payment was a corrupt bribe. The bribe can only be proven by adducing post-hearing evidence, *i.e.*, evidence that was not before the administrative decision-maker. Or suppose that in the reviewing court the applicant alleges an improper purpose on the part of the administrative decision-maker in circumstances where the allegation has some basis and is not just a bare allegation made to engage in a fishing expedition. Evidence of that improper purpose is often not in the record before the administrative decision-maker and must be proven by collateral evidence. This is another example where reviewing courts will admit evidence that was not before the administrative decision-maker. See, *e.g.*, *Roncarelli v. Duplessis*, above; *Re Multi-Malls Inc. and Minister of Transportation and*

Communications (1977), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.); *Doctors Hospital v. Minister of Health et al.* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.).

[100] For the purposes of these reasons, I shall refer to this sort of evidence—evidence admitted by way of exception to the general rule of admissibility—as "exceptional evidence."

(f) How does one obtain the exceptional evidence and place it before the Court?

[101] Exceptional evidence may be available from witnesses. The standard way and the way that allows judicial reviews to be heard and determined "without delay and in a summary way" (as required by subsection 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules*) is through an affidavit; because of subsection 18.4(1), this will always be the preferred way. The affidavits can be subject to cross-examination and are presented to the Court by including them in the records that are filed with the Court.

[102] Another way to gather exceptional evidence is to cross-examine a deponent in the course of the judicial review proceeding. Undertakings can be given that, in some circumstances, where appropriate, exceptional evidence will have to be produced.

[103] In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:

- the evidence is necessary;

- there is no other way of obtaining the evidence;

- it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and

- a witness is likely to have relevant evidence on the matter.

[104] As well, a judicial review may be treated and proceeded with as an action, thereby allowing for discovery and live witnesses: sections 18.4(2) and 28(2) of the *Federal Courts Act*. However, the situations where this is allowed are most rare: see, *e.g.*, the requirements set out in *Association des crabiers acadiens Inc. v. Canada (A.G.)*, 2009 FCA 357, 402 N.R. 123.

[105] Finally, rather than taking the foregoing steps to obtain exceptional evidence, the parties can agree to facts and submit them to the reviewing court. However, caution must be exercised: the reviewing court must always respect the fact that the administrative decision-maker has been designated under the administrative regime as the exclusive decider of the merits.

(g) The limits of a request under Rule 317

[106] Rule 317 plays a limited role. As mentioned above, it allows applicants to obtain from the administrative decision-maker "material relevant to an application that is in the possession of [the decision-maker]…and not in [their] possession."

[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.

[109] Relevance is defined by the grounds of review in the notice of application:

> 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.

(*Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 at page 460 (C.A.).)

[110] The grounds of review are to be read in order to obtain "a realistic appreciation" of their "essential character" by reading them holistically and practically without fastening onto matters of form: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA

250, [2014] 2 F.C.R. 557 at paras. 50 and 102; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 29.

[111] It is evident from the text of Rule 317 that it cannot be used to obtain material that is in the possession of others.

[112] It is often said in the case law that Rule 317 is restricted to the actual material the administrative decision-maker had before it when making the decision and nothing more: *Pathak*, above; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1998] 3 C.T.C. 215, 150 F.T.R. 60.

[113] This standard has been repeatedly applied by this Court. In *Quebec Port Terminals Inc.* v. *Canada Labour Relations Board* (1994), 164 N.R. 60 at page 66, this Court stated:

> The obligation which is imposed on the tribunal by rules 1612 and 1613 [now Rules 317 and 318] is "without delay" to "provide" or "forward" a "certified copy" of "material" which is "in its possession" and which is "specified". In my view, this presumes that it is material which already exists at the time when the request to obtain the material is made, which the tribunal used in its hearing, deliberations or decision, which is part of its record and of which it is in a [position] to provide a certified copy.

[114] In cases where some other government entity has information and supplied some of it to the administrative decision-maker, again only the information that was actually before the administrative decision-maker is obtainable under Rule 317:

> This surely has reference to "material" that was before the federal board, commission or other tribunal whose decision is the subject of an application for judicial review pursuant to section 18.1 of the [*Federal Courts Act*] and not to the contents of a Minister's file where no decision of his [or her] is the subject of the judicial review.

(*Eli Lilly and Co.* v. *Nu-Pharm Inc.*, [1997] 1 F.C. 3 (C.A.) at pages 28-29.) To the same effect, see *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 35 C.E.L.R. (2d) 1, 183 F.T.R. 267 at para. 27:

> To engage in such a review of all of the documents that were before the Responsible Authorities would in effect be a challenge to the comprehensiveness of the Comprehensive Study Report and indeed of the underlying science relied upon by the Responsible Authorities and of their expertise. This goes far beyond the judicial review of a Minister's decision which was based upon a report arising out of many months investigation by the Responsible Authorities.

[115] Rule 317 does not in any way "serve the same purpose as documentary discovery in an action": *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156 (T.D.) at para. 11.

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

[117] The Tsleil-Waututh Nation submits that materials other than those before the administrative decision-maker may be considered relevant and producible under Rule 317 where

it is alleged the decision-maker breached procedural fairness. Perhaps underneath this is a confusion of concepts of admissibility—exceptional evidence can sometimes be adduced to demonstrate procedural unfairness—with the substantive requirements of Rule 317. These must be kept apart. Not everything that is admissible can be obtained under Rule 317. For one thing, this submission overlooks the point, developed above, that the materials must be in the possession of the administrative decision-maker.

[118] In support of this submission, the Tsleil-Waututh Nation cites the Federal Court decisions in *Canadian National Railway Company v. Louis Dreyfus*, 2016 FC 101 and *Gagliano v. Canada (Commission of Inquiry)*, 2006 FC 720. In *Dreyfus*, the Federal Court suggests that materials that should have been before the administrative decision-maker are producible under Rule 317. In support of this, the Federal Court cites *Access Information Agency*, above and *Gagliano*, above. *Access Information Agency* nowhere says that materials that should have been before the administrative decision-maker are producible under Rule 317. And *Gagliano* is best construed as the rare case where exceptional evidence was admissible and happened to be in the possession of the administrative decision-maker.

[119] Both *Dreyfus* and this particular submission of the Tsleil-Waututh Nation underscore the need to keep analytically separate different concepts such as obtaining evidence, placing the evidence before the Court, the admissibility of evidence, the requirements for particular tools (*e.g.*, Rule 317), and how courts go about reasonableness review.

(6) Analysis of the Rule 317 request in this case

(a) Procedures followed concerning Rule 317 in this case

[120] The Tsleil-Waututh Nation placed its Rule 317 request in its application for judicial review.

[121] Under Rule 318(1), the Attorney General was to have responded to the request within twenty days.

[122] The Attorney General did not do so. And the Tsleil-Waututh Nation did not register a protest against the Attorney General's inaction for approximately two months.

[123] Neither can be faulted. In its Order dated March 9, 2017, this Court granted leave to apply for judicial review in nine cases, consolidated these nine applications with seven others, and then comprehensively scheduled the consolidated applications. The March 9, 2017 Order contemplated that the Attorney General would produce the record of the Governor in Council.

(b) The Rule 317 request in this case

[124] I have reviewed the grounds of review in the application for judicial review of the Tsleil-Waututh Nation.

[125] I am broadly summarizing, but in terms of the issues relating to the duty to consult and accommodate, the Tsleil-Waututh Nation is arguing that:

- the Governor in Council's decision cannot stand on the state of the evidence before it; and

- as the duty to consult and accommodate has not been fulfilled at the present time, the Governor in Council's decision must be quashed.

[126] This mirrors the grounds that were considered in *Gitxaala Nation (2016)*, above. In that case, this Court noted that the duty to consult arose in two potential ways. If the Governor in Council incorrectly or unreasonably held that the Crown's obligations had been fulfilled at the time of its decision, its Order in Council is liable to be quashed. But, more generally, "if that duty [owed by the Crown] were not fulfilled, the Order in Council cannot stand": *Gitxaala Nation (2016)* at para. 159.

[127] In its notice of application in file A-78-17, the Tsleil-Waututh Nation requested "any material that was before the [Governor in Council] or that it considered or relied on in making the Order."

[128] To assess whether Rule 317 has been satisfied, it is first necessary to examine what has been produced concerning the current state of the record on these issues. Has the Tsleil-Waututh Nation persuaded me that—excluding the material covered by the section 39 certificate—there is

still evidence in the hands of the administrative decision-maker, here the Governor in Council, that was before it and that is relevant to the grounds raised by the Tsleil-Waututh Nation?

(c) The current state of the record: has the Rule 317 request been satisfied?

[129] As far as consultation is concerned, the Order in Council that approved the Project and that is attacked in these proceedings provides as follows:

> Whereas, by Order in Council P.C. 2016-435 of June 3, 2016, the Governor in Council, pursuant to subsection 54(3) of the *National Energy Board Act*, extended the time limit referred to in that subsection by four months to allow for additional Crown consultation with potentially affected Aboriginal groups, public engagement, and an assessment of the upstream greenhouse gas emissions associated with the Project;
>
> Whereas the Governor in Council, having considered Aboriginal concerns and interests identified in the *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project* dated November 21, 2016, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated;

[130] Behind this is an explanatory note: *Canada Gazette*, vol. 150, no. 50, December 10, 2016, pp. 4-23. The explanatory note discusses the participation of Indigenous peoples before the National Energy Board, the concerns they raised and other views. In assessing the impact on Indigenous groups, the explanatory note says the following (starting on page 14):

> Both social and environmental issues raised by Indigenous groups were considered and addressed through the NEB review process. The 157 conditions recommended by the NEB will require Trans Mountain to implement all commitments it made through the review process, and further implement

> mitigation measures for impacts that might otherwise occur to people and the environment, including in relation to air quality and greenhouse gases; water quality; soil, vegetation and wetlands; wildlife and wildlife habitat; fish and fish habitat; and marine mammals. Several of the conditions specifically address Aboriginal interests, such as requiring the proponent to continue reporting on the availability and findings of traditional use studies, hiring of Aboriginal monitors during construction, and ongoing filing of Aboriginal engagement reports. There are also specific conditions tied to concerns by the Coldwater Indian Band and Stó:lō Collective.
>
> With respect to rights associated with subsection 35(1) of the *Constitution Act, 1982*, the Board concluded that, having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests, and Board imposed requirements for ongoing consultation, it was satisfied that the Board's recommendation and decisions with respect to the Project are consistent with subsection 35(1) of the *Constitution Act, 1982*.

[131] These paragraphs may shed light on what the Governor in Council had in mind when it approved the Project: submissions at the hearing before the panel in these consolidated applications will be required on that. Contextual materials such as the explanatory note may shed light on what was considered by the Governor in Council: *Re N.B. Broadcasting Co., Ltd. and CRTC*, [1984] 2 F.C.R. 410, 13 D.L.R. (4th) 77 (C.A.).

[132] In this regard, I note that none of the parties in their notices of application or in their affidavits has alleged bad faith in the sense that an explanatory note or any preambles or factual statements cannot be taken as true. Statements such as these often enjoy a rebuttable presumption of regularity and as best as I can tell no evidence has yet emerged that would suggest otherwise: see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, 41 D.L.R. (4th) 429 at para. 38 and authorities cited therein; *Ellis-Don v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 194 D.L.R. (4th) 385.

[133] As well, it is apparent from these paragraphs in the explanatory note that the Governor in Council was aware of the proceedings before the National Energy Board and its Report. Just how aware is a matter on which submissions should be made to the panel in these consolidated applications.

[134] Also of possible significance are an Amending Order to National Energy Board Order CPCN OC-49 and an Amending Order to Certificate of Public Convenience and Necessity OC-2 that the Governor in Council approved: *Canada Gazette*, vol. 150, no. 50, December 10, 2016 at pp. 23-247 and 248-501. These documents point to a body of information that must have been before the Governor in Council. Just what information is a matter on which submissions should be made to the panel in these consolidated applications.

[135] Mr. Gardiner's first affidavit points to other evidence of consultation before the Order in Council was made but whether this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion. His affidavit also points to post-Order in Council consultations. I have discussed the possible relevance of this evidence elsewhere: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116.

[136] There is now also the supplementary affidavit from Mr. Gardiner that corrects certain mistakes in his original affidavit and that adds additional information about consultative activities. Whether any of this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion.

[137] In various places in its submissions, the Tsleil-Waututh Nation appears to misunderstand the limits of Rule 317. For example, it appears to be under the misapprehension that Rule 317 can be used to access documents held by government departments other than the Governor in Council. For the reasons explained above, this is not so.

[138] Overall, I am not persuaded at this time that, aside from its section 39 certificate, Canada has withheld information responsive to the Rule 317 request that must be produced. This can be tested by the Tsleil-Waututh Nation on cross-examination.

[139] The Tsleil-Waututh Nation suggests that the fact that the Attorney General has adduced a supplementary affidavit from Mr. Gardiner to fix errors and omissions in disclosure shows that it and others have not taken care in the disclosure process both under Rule 317 and overall. This submission overlooks the scope and complexity of these proceedings. Although it is not desirable, at the best of times mistakes can be made. I believe that the offering of the supplementary affidavit shows that the Attorney General and her lawyers are cognizant of their ethical responsibilities and their responsibilities as officers of the Court and have stressed the importance of disclosure to those that hold documents. The evidence disclosed by the supplementary affidavit does not suggest to me otherwise. Below, at para. 151 of these reasons, I refer to a further commitment the Attorney General has made concerning disclosure. I conclude that the Attorney General is taking steps on an ongoing basis to ensure that any disclosure she is required to give is complete and accurate.

[140] By itself, this is not at all dispositive of the Tsleil-Waututh Nation's motion for enforcement of its Rule 317 request. But it affords the Court some comfort that a genuine effort has been made to ensure that, despite the section 39 certificate, the material responsive to the Rule 317 request has been produced.

[141] Under para. 7(3)(*b*) of this Court's Order of March 9, 2017, the Attorney General was obligated to produce "documents before the Governor in Council leading up to its determination." By necessary implication, this was subject to section 39 of the *Canada Evidence Act* if a certificate were to be filed. The Court is not satisfied on the evidence before it that the Attorney General has breached this Order.

[142] To the extent that material supplied by the Tsleil-Waututh Nation was not placed before the Governor in Council, counsel can make submissions to the panel hearing these consolidated applications. To the extent that the material was considered by others in various Ministries and only summaries provided to the Governor in Council, the sufficiency of that is a matter for argument before the panel hearing these consolidated applications.

(7) The Tsleil-Waututh Nation's request for production of evidence from Canada

[143] As mentioned, I am not persuaded that there is any evidence that has been improperly withheld under Rule 317. But, as I have explained, except in the rare circumstance explained above, Rule 317 allows for the obtaining of only materials relevant to the judicial review that

were in the possession of the administrative decision-maker and that it relied upon in making the decision.

[144] Here, more materials—materials not obtainable under Rule 317—are potentially relevant. As mentioned, quite aside from what the Governor in Council had before it to support the reasonableness of its decision, if the duty to consult has not been complied with overall, the decision of the Governor in Council (*i.e.*, its Order in Council) cannot stand. Thus, evidence other than that which was before the Governor in Council is relevant to this ground of review. This evidence is what I have called exceptional evidence.

[145] In this case, should the Court make an order requiring Canada to produce more evidence, including exceptional evidence? The Tsleil-Waututh Nation asks for just that. As mentioned, it seeks documents relevant to the grounds it has raised relating to the overall adequacy of Canada's consultation with it concerning the Project.

[146] In my view, on the material before me, such an order should not be made.

[147] First, to some extent, the Tsleil-Waututh Nation appears to be suggesting in its submissions that Rule 317 can be used to get exceptional evidence. As discussed, except for the rare situation described in paragraph 116, above, it cannot.

[148] Next, there is no such thing as a "production order" for exceptional evidence under the *Federal Courts Rules*. As I have explained above, exceptional evidence may be obtained through

cross-examination, by adducing an affidavit from a witness (which the Indigenous applicants have done), by a motion under Rule 41 or by converting the applications to actions under section 18.4(2) and section 28(2) of the *Federal Courts Act*.

[149] Even if the Tsleil-Waututh Nation were to pursue these methods by motion at this time, I would dismiss the motion.

[150] I understand that cross-examinations of Mr. Gardiner are about to be conducted. Plenty of exceptional evidence, if admissible, may be obtained in that way.

[151] Further, the Attorney General has made the following commitment:

> …Canada is willing to informally assist [Tsleil-Waututh Nation] in obtaining relevant consultation documents that may, by inadvertence, have been omitted from the affidavit and supplementary affidavit of Timothy Gardiner. Should [Tsleil-Waututh Nation] (or any other applicant) be aware of any such documents, counsel for Canada would welcome being advised as soon as possible in light of the impending deadline for completion of cross-examinations on affidavits.

[152] As well, I am not persuaded at this time that there is exceptional evidence that cannot be had as a result of cross-examination. The Attorney General has filed evidence from Mr. Gardiner that relates to Canada's consultative activities both before and after the Order in Council was made. This falls into the category of exceptional evidence. The Indigenous applicants have filed evidence about their consultative activities and Canada's consideration or non-consideration of things put to it and its responses or non-responses. All of this is also exceptional evidence going to the overall issue of the duty to consult.

[153] The Tsleil-Waututh Nation complains that Canada has not produced all of its evidence concerning its consideration of things put to it by the Indigenous applicants. One answer to that is that gaps in evidence do not always call for production orders. If there are gaps in the evidence Canada may suffer for that if, on the law and the state of the imperfect evidentiary record, it deserves to. In preparing their submissions for the panel hearing these consolidated applications, the parties may wish to consider when the Court can draw adverse inferences from missing evidence: see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 169-170 and authorities cited therein. If the Tsleil-Waututh Nation put something important to Canada and there is a gap in the evidence concerning what Canada did in reaction to it, Canada may have to explain the gap. Absent evidence of Canada's reaction, the panel may be driven to find that Canada did not react. As well, I have already mentioned some of the disadvantages that Canada might suffer as a result of its issuance of a section 39 certificate.

[154] It is also worth mentioning that gaps in the evidence concerning Canada's responses do not automatically determine the consultation issues against Canada. Errors and omissions in fulfilment of the duty to consult and accommodate can be tolerated—but only to a certain point. Put another way, compliance with the duty to consult and accommodate need not be exacting. As this Court said in *Gitxaala Nation (2016)* (at paras. 182-183):

> Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.

> In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, at paragraph 133; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, at paragraph 56; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA*, 2015 FCA 179, 474 N.R. 96, at paragraph 47.

[155] In support of its view that there are serious gaps in the evidence offered by the Attorney General, the Tsleil-Waututh Nation points to information requests it has made under the *Access to Information Act*, R.S.C. 1985, c. A-1. It has directed these requests to Natural Resources Canada, Transport Canada, Fisheries and Oceans Canada and Environment and Climate Change Canada. These departments have each asked for significant extensions of time to address the requests. Natural Resources Canada has sought the longest extension: 510 days.

[156] However, the requests are of exceptionally broad scope and seek every last crumb of information, even information that has absolutely no realistic bearing on this matter.

[157] All four requests are similar. To illustrate their scope, here is the request addressed to Natural Resources Canada:

> Please provide: any and all information, documents, or correspondence created between August and November, 2016 and shared between Major Projects Management Office (Natural Resources Canada) and Environment Canada, Fisheries and Oceans Canada, or transport Canada officials/staff in relation to Trans Mountain Expansion Project, including but not limited to: any meeting minutes and/or notes of representatives that attended any meetings; any draft Order in Council materials or information; any briefing notes that were prepared in advance of or after any meetings; and any correspondence, including emails in August, September, October, and November 2016 to or from Ms. Erin O'Gorman,

> Assistant Deputy Minister, Major Projects Management Office, and/or related emails in August, September, October, and November 2016 to or from Timothy Gardiner, Director-General – Strategic Projects Secretariat, Major Projects Management Office.
>
> Also, please provide: emails, documents and/or briefing notes related to any terms, conditions, migration measures or accommodation measures proposed or considered by Natural Resources Canada in relation to the Trans Mountain Expansion Project; any briefing notes to Minister Carr prepared by Major Projects Management Office official(s)/staff or the Deputy Minister of Natural Resources Canada in relation to the Governor in Council's decision under the National Energy Board Act and the Canadian Environmental Assessment Act, 2012 for the trans Mountain Expansion Project; any briefing notes to the federal cabinet, the prime minister, or the Governor in Council prepared by Major Projects Management Office official(s)/staff, the Deputy Minister of Natural Resources Canada, or Minister Carr in relation to the Governor in Council's decision for the Trans Mountain Expansion Project; and any briefing notes, emails or other documents in relation to Canada's engagement or consultation with the Tsleil-Waututh National in relation to the Trans Mountain Expansion.

[158] No doubt, some of this information is covered by the section 39 certificate. No doubt some is already on the table. And no doubt more will emerge from the cross-examinations. And at some point, materiality and proportionality—not just bare relevance—must come to bear on the matter.

[159] I have mentioned Rule 3 above: the need to "secure the just, most expeditious and least expensive determination of every proceeding on its merits" I have also mentioned subsection 18.4(1) of the *Federal Courts Act*: the Parliamentary commandment that judicial reviews be heard and determined "without delay and in a summary way." And there is the admonition of the Supreme Court of Canada in *Hryniak*, above.

[160] These concerns are significant in this case.

[161] Before the Court made its Order of March 9, 2017 scheduling these consolidated applications, it circulated a draft version of it to all parties. The draft contained the following recitals:

> **AND WHEREAS** it is appropriate that this Court issue an order to ensure that these proceedings are conducted in an orderly, fair and prompt manner;
>
> **AND WHEREAS** this Order is intended to give effect in these proceedings to the principles set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, which provides that proceedings are to be conducted in a manner that secures the just, most expeditious and least expensive determination of every proceeding on its merits;
>
> …
>
> **AND WHEREAS** concerning the issue of scheduling:
>
> (a) without expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;
>
> (b) therefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

[162] No party took issue with these recitals.

[163] The Order of March 9, 2017 also scheduled the proceedings on an expedited basis up until the filing of the overall electronic record and the memoranda of fact and law. Here again,

the schedule was circulated in advance and no objections were received. By direction on May 29, 2017, this Court sought the parties' input on a schedule it suggested for the rest of the proceedings and for the date of the hearing. Except for minor modifications, the parties accepted the proposed schedule.

[164] And in their submissions on these motions, all parties urged the Court to rule now on the motions so the schedule is not disrupted.

[165] For all these reasons, this Court will not delay or adjourn these consolidated applications so that every last crumb of information sought by the information requests, no matter how microscopic, can be gathered. Nor did I take any party to suggest seriously that this should happen.

[166] The paramount consideration for this Court is whether the state of the evidence is such that the spectre of immunization of public decision-making looms. I am not persuaded of this here. Even without having the benefit of the transcripts of cross-examinations and exhibits from the cross-examinations before me, I can conclude that the evidentiary record here is as great or greater than that which was before the Court in *Gitxaala Nation (2016)*. In *Gitxaala Nation (2016)*, faced with substantially similar arguments put by the Indigenous applicants, this Court was able to conduct a very meaningful review, one that was cognizant of the gaps in the evidentiary record and one that resulted in the quashing of the Governor in Council's Order in Council.

[167] Overall, this Court is satisfied that the record before it, including the exceptional evidence, will be sufficient and any gaps can be properly assessed and evaluated. This Court is not persuaded that its assistance is needed to augment the evidentiary record before the reviewing court at this time.

[168] As the parties enter the cross-examination phase of this litigation, it goes without saying that the Court continues to stand ready to continue to facilitate the parties' progress towards a just, most expeditious and least expensive determination of these consolidated applications on their merits.

E. Disposition

[169] The motion of the Attorney General shall be granted. The supplementary affidavit of Mr. Gardiner shall be admitted into the Electronic Record but the Attorney General shall first remove the portions that the parties agree are irrelevant. Costs in the cause.

[170] The motion of the Tsleil-Waututh Nation is dismissed. Costs in the cause.

"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.***

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JUNE 16, 2017

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