

Federal Court



Cour fédérale

Date: 20170512

Docket: T-348-16

Citation: 2017 FC 496

Ottawa, Ontario, May 12, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

OCEANEX INC.

Applicant

and

**CANADA (MINISTER OF TRANSPORT) AND
MARINE ATLANTIC INC.**

Respondents

and

ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

Intervener

ORDER AND REASONS

[1] This is a motion brought by the Applicant, Oceanex Inc. (“Oceanex”), seeking an Order, pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106 (“Rules”), granting it leave to

serve and file the Supplementary Affidavit of Captain Sidney J. Hynes, sworn on February 28, 2017 (“Supplementary Affidavit”), with attached exhibits, most significantly, a report prepared by CPCS for Transport Canada, dated May 1, 2015, and entitled “Newfoundland Domestic Trade Routes and Competition Assessment” (“CPCS Report” or “Report”).

[2] By way of background, on February 26, 2016 Oceanex filed an application for judicial review of a decision of the Minister of Transport (“Minister”) to approve the 2016-2017 rates proposed for the provision by Marine Atlantic Inc. (“MAI”) of commercial freight services by that entity. Oceanex asserted that the Minister’s decision was inconsistent with allowing competition and market forces to be the prime agents in providing viable and effective transportation services and had the direct effect of unduly favouring competing modes of transportation, such as trucking, to and from the island of Newfoundland, and of reducing the inherent advantages of water transportation providers, such as Oceanex. Oceanex asserted that there was an absence of a legal basis for the Minister’s approval of the MAI freight rates as the Terms of Union (*An Act to approve the Terms of Union of Newfoundland with Canada*, SC 1949 (v I), c 1, p 1) do not mandate unduly injurious freight rate levels. Further, when making the decision the Minister failed to consider the National Transportation Policy, as set out in the *Canada Transportation Act*, SC 1996, c 10 and failed to consider, or acted contrary to, the *Financial Administration Act*, RSC 1985, c F-11 and the policy directives and guidelines issued by the federal Treasury Board. The Minister thereby erred in law and exceeded his jurisdiction by exercising his discretion unreasonably, contrary to public policy and failing to take into account all relevant considerations. In its Notice of Application, Oceanex requested, pursuant to Rule 317, that the Minister provide a certified record of all material relevant to the application.

[3] The Minister did not file a certified record within the period required by the Rules, being by March 20, 2016. Instead, by letter of May 3, 2016, counsel for the Minister objected to the request, pursuant to Rule 318(2), on the basis that the Minister is not a “Board, Commission or Tribunal” in respect of the issues raised in the application. Further, that the Minister did not make the decision to approve MAI’s 2016-2017 freight rates, rather, that MAI had the authority to approve those rates without requiring the Minister’s approval. By letter of May 12, 2016, counsel for the Minister took the position that because the Minister did not make the decision under review, there was no record for the Minister to produce.

[4] By letter of the same date, MAI took the position that while a Bilateral Agreement, dated March 31, 1987 between the Minister and MAI, includes a provision whereby Ministerial approval is required concerning any proposed change to the rates being charged by MAI, in 2010 those parties agreed that rate increases would be set by MAI’s Board of Directors to a maximum of 5% per year. Any higher rate increase must be submitted to the Minister for approval. Counsel for MAI asserted that the MAI Board of Director’s had the authority to set the rates. Further, as to Oceanex’s request that the Prothonotary, as the case management judge, exercise his discretion to order the Respondents to address the Rule 317 request, counsel for MAI asserted that until Oceanex amended its Notice of Application and identified some decision of the MAI Board of Director’s as the decision that it was seeking to review, there was no authority by which MAI could be ordered to make such disclosure.

[5] On July 20, 2016 Oceanex amended its Notice of Application to challenge, on an alternative basis, that: the Minister failed to approve the 2016-2017 rates proposed by MAI; the

decision of the Minister to pre-authorize the increase in the rates proposed by MAI, to allow MAI to approve the 2016-2017 rates, to allow MAI to approve those rates; and, the decision of MAI to approve the subject rates.

[6] On July 19, 2016 the Attorney General for Newfoundland and Labrador was granted leave to intervene in the application.

[7] On May 19, 2016, following a case management conference, a redacted version of a document entitled “Implementation of Budget 2010 Decision – Guidance for Corporate Plan of 2010/2011-2014/15” (“2010 Budget Decision”), the alleged 2010 agreement, was provided to Oceanex by counsel for MAI. In response, by letter dated May 26, 2016, Oceanex pointed out that the document did not appear, on its face, to be an agreement as it was not signed and that it only applied to 2014-2015. By email of June 1, 2016, counsel for MAI advised that MAI was not aware of any other documents exchanged between MAI and the Minister which constituted the alleged 2010 agreement. On August 9, 2016, this Court ordered that the Minister serve and file an affidavit enclosing as an exhibit the 2010 Budget Decision, this was done on September 29, 2016.

[8] By letter of August 8, 2016 the Minister continued to object to Oceanex’s Rule 317 request on the basis that the Minister did not make a decision with respect to the approval of MAI’s 2016-2017 commercial shipping rates. And, although Oceanex had amended its Notice of Application, by letter of August 9, 2016 MAI objected to the request on the basis that it was not a “tribunal” as defined in the Rules and, therefore, that Rule 317 had no application to it. By

correspondence of August 19, 2016, Oceanex advised that it reserved its right to challenge MAI's position and sought clarification from counsel for the Minister with respect to his response. By letter of August 24, 2016, counsel for the Minister refused to provide clarification on the basis that the Minister had complied with his obligations under the Rules. By correspondence of September 2, 2016, Oceanex advised that it reserved its right to challenge the Minister's position.

[9] On March 22, 2017 the Minister brought a motion seeking an order, pursuant to Rule 94(2), providing relief from the requirement to produce certain documents and materials as contained in the Direction to Attend of Ms. Michèle Bergevin, Director, Portfolio Management, within the Crown Corporation and Portfolio Governance Directorate in Transport Canada, sworn on December 7, 2016 ("December Bergevin Affidavit"). Among other things, in his Order of May 5, 2017 issued in response to that motion, the Prothonotary required that Ms. Bergevin bring with her to the cross-examination the documents that she viewed and relied upon in Transport Canada's file to make the statements in her affidavit. As to other documents sought, including studies, these were only generically referred to in the December Bergevin Affidavit. The Prothonotary noted that this could simply be a function of Ms. Bergevin's general knowledge and understanding of the way in which Transport Canada operates. But this did not mean that the documents were not relevant as on cross-examination the issue would likely be explored and she may identify specific studies that she had seen when she made the statements that she did. They would become producible if that were the case. As to the specific study that Oceanex sought (the CPCS Report), the Prothonotary noted that this was the subject of a motion before the hearings judge to determine its relevance and admissibility.

[10] In that regard, the Supplementary Affidavit sets out the background to the CPCS Report, which was commissioned by Transport Canada. Oceanex participated in the study, at Transport Canada's request, but was not provided with a copy of the Report. As a result of a July 2016 *Access to Information Act*, RS 1985, c A 1 ("ATIP") request made by Oceanex, and two follow up complaints to the Information Commissioner, Transport Canada was compelled to and provided a redacted copy of the CPCS Report to Oceanex on February 22, 2017. By its motion of February 28, 2017, Oceanex sought to submit the Report by way of the filing of the Supplemental Affidavit.

Oceanex's Position

[11] Oceanex submits that the Supplementary Affidavit meets the requirements for filing additional affidavits under Rule 312. As to admissibility, the CPCS Report was in the Minister's possession before the 2016-2017 freight rates were approved and, therefore, should have been considered by him if he made or, in any event, was obligated at law to make the freight rate decision. Alternatively, it should have been considered by MAI if somehow the Minister was in law entitled to delegate the making of the decision to MAI.

[12] Oceanex also submits that the CPCS Report is relevant to an issue properly before the Court. First, the presence of the CPCS Report in the Minister's file at a time when he claims he was not the federal decision-maker will be relevant to determining who in fact and/or law was, or should be, the decision-maker. The fact that the Minister commissioned the Report suggests that the Minister was or should have been, directly or indirectly involved in the setting of MAI's rates. Second, the CPCS Report is relevant to the question of whether the decision-maker

considered that MAI's commercial freight rates are distorting the market and have an unduly injurious effect on Oceanex in contravention of the National Transportation Policy and the *Canada Transportation Act*. Third, the Report is sufficiently probative that it could affect the result, in the sense that the Minister, having specifically commissioned it, was obligated to consider it prior to approving the rates or allowing MAI to approve the rates on his behalf. The Report was also commissioned by Transport Canada in response to the concerns raised by Oceanex over the years, it will therefore ensure that the Court has a complete record with all the necessary evidence to consider the issues raised.

[13] Having established the two preliminary grounds, Oceanex submits that the Court should exercise discretion and grant leave. In that regard, despite its requests, the Report was not available to Oceanex until February 22, 2017 by way of the ATIP request. The Minister also withheld the information on the basis that he is not the decision-maker, however, that position has yet to be determined by the Court. Moreover, even if MAI was entitled to and did make the decision, the Report is crucial to ascertain what information MAI should have considered. Oceanex also submits that the Report will assist the Court in that it is highly responsive to the very issues to be determined in the amended application. Further, the filing of the CPCS Report will not cause prejudice to the other parties. Any prejudice that exists is that suffered by Oceanex which only obtained a copy of the Report in February 2017 after having filed its evidence in chief and reply evidence.

The Minister's Position

[14] The Minister submits that the CPCS Report is not relevant or admissible evidence for the purposes of the judicial review as there is no evidence to suggest that it was before the decision-maker, MAI, and evidence on judicial review is limited to the record that was before the decision-maker. Further, even if the relevancy of the Report is viewed from the perspective of the Applicant's challenge to MAI's authority to set rates without the Minister's approval, the CPCS Report is dated May 1, 2015 thereby post-dating the 2007 and 2010 events that led to MAI's assumption of that responsibility.

[15] The Minister further submits that the Report is not admissible under the limited exceptions to the general rule that evidence not before the decision-maker is inadmissible, including the general background exception. This is because the Report goes beyond providing background information on the questions raised by the application. The Applicant's own statement in its written argument that the Report addresses the very basis upon which Oceanex claims in this proceeding to be injured by government action violates the principle that extrinsic evidence that goes to the merits of the decision cannot be admitted on judicial review.

[16] The Minister also submits that admitting the evidence which was not before the decision-maker would seriously prejudice the Respondents as it would invite the Court to examine issues that are far beyond those raised in the application. In seeking to enter the Report as evidence, the Applicant invites the Court to use the Report for an entirely different purpose than that for which it was commissioned.

[17] Finally, the Minister submits that it is incorrect for the Applicant to suggest that the Minister improperly withheld the Report when responding to the Rule 317 requests or improperly failed to include the Report as an exhibit to one of the affidavits of Ms. Bergevin. The Minister did not make the decision that is under review and properly objected to the Rule 317 requests on this basis. Further, it is improper for the Applicant to attempt by way of this motion to launch an indirect challenge to the Minister's Rule 317 objections, given that it has not brought a formal motion in this regard. Outside of Rule 317, there is no obligation on the Minister to produce any document in the context of an application for judicial review.

MAI's Position

[18] MAI submits that the CPCS Report is hearsay and contains opinion evidence which is not made admissible by attaching it to the Supplemental Affidavit. MAI submits that Oceanex is seeking to file the Report as an expert report without having to comply with the Rules pertaining to expert witnesses. Further, that Oceanex seeks to rely on the contents of the CPCS Report for the truth of its contents and for the opinions expressed by its authors, it is therefore hearsay and inadmissible. Additionally, the Respondents would suffer substantial and serious prejudice by placing in the record what is purportedly expert opinion evidence that will be immune from effective cross-examination.

The Attorney General for Newfoundland and Labrador

[19] The Attorney General for Newfoundland and Labrador, the Intervener, takes no position but submits that had the CPCS Report been available in September when Captain Hynes filed his

original affidavit, or if it were otherwise part of the record, then it would have had its expert, Dennis Bruce, consider it and address it. Further, while Oceanex submits that the Report is admissible as it provides context, the Intervener has serious reservations about the content of the Report. The Intervener also requests that if the Report is admitted, then that it be given an opportunity to respond to it.

Reasons

[20] Rule 312 states that with leave of the Court, a party may (a) file affidavits additional to those provided for in rules 306 and 307; (b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or (c) file a supplementary record.

[21] The requirements that must be satisfied to obtain an Order under Rule 312 were articulated by Justice Stratas of the Federal Court of Appeal in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88:

- 4** At the outset, in order to obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:
 - (1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitksan Treaty Society v. Hospital Employees' Union*, at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*.
 - (2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, (CanLII).

5 Assuming the applicants establish these two preliminary requirements, they must convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. The Court exercises its discretion on the basis of the evidence before it and proper principles.

6 In *Holy Alpha and Amega Church of Toronto v. Canada (Attorney General)*, at paragraph 2, this Court set out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:

- (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
- (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
- (c) Will the evidence cause substantial or serious prejudice to the other party?

(also see *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 6 (“*Connolly*”))

[22] In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (“*Access Copyright*”), Justice Stratas pointed out that, in determining the admissibility of an affidavit in support of an application for judicial review, the differing roles played by the Court and the administrative decision-maker must be kept in mind. Parliament gave the administrative decision-maker, and not the Court, jurisdiction to determine certain matters on their merits. Because of this demarcation of roles, the Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a reviewing Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the

decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. Justice Stratas listed three such exceptions and noted that the list may not be closed. The exceptions are an affidavit that provides: general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review; brings 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 fulfil its role of reviewing for procedural unfairness; and, highlighting the complete absence of evidence before the administrative decision-maker when it made a particular finding (at paras 19-20).

[23] Justice Stratas revisited the general rule in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 (leave to appeal to the Supreme Court of Canada refused in 2016 CarswellNat 2153 (WL)), referencing the Federal Court of Appeal's prior decisions in *Access Copyright, Connolly* and *Delios v Canada (Attorney General)*, 2015 FCA 117 (at paras 41-46) and elaborated on the three recognized exceptions (at paras 23 -28).

[24] In my view, in this case, the problem that arises with respect to assessing the admissibility and relevance of the Supplemental Affidavit in the context of Rule 312 is that the question of who was the decision-maker, as regards to the setting of the 2016-2017 MAI freight rates, is very much in dispute.

[25] In this regard, counsel for the Minister asserts that because there was no challenge by Oceanex to the Minister's objection to the Rule 317 request, and given the affidavit evidence of

Ms. Bergevin that the Minister was not directly involved in the decision setting the 2016-2017 rates, this Court is compelled to accept the uncontradicted fact that the Minister was not the decision-maker. Therefore, there was no record to produce and, accordingly, the CPCS Report was not before the Minister and is not admissible. The Minister suggests that Oceanex is casting dispersions on Rule 317 by not contesting it. For its part, Oceanex submits that it is not an accepted nor an uncontested fact that the Minister was not the decision-maker. Further, that if the failure to contest the Minister's Rule 317 refusal bound the Court to a certain conclusion then it is difficult to see why the Minister felt it necessary to subsequently file the December Bergevin Affidavit, which puts the fact of the Minister's role in issue and upon which she will be cross-examined. Further, it was not possible to cleanly carve out the Rule 317 issue without having the Court also decide the issues on the merits in the judicial review, which would be premature. Accordingly, Oceanex sought to submit the Report by way of the Supplemental Affidavit while reserving its right to take issue with the Minister's position that he was not the decision-maker.

[26] There is a certain paradox in this situation in that, on the one hand, the Minister asserts that because Oceanex did not challenge the Rule 317 refusal, it is compelled to accept that the Minister is not the decision-maker (and therefore need not produce a certified record), while on the other hand MAI asserts that it is not a federal board, commission or tribunal and is therefore not subject to the Court's jurisdiction (and therefore need not produce a certified record), yet MAI has not brought a challenge to the jurisdiction of the Court but asserts that the Court should exercise that jurisdiction and refuse Oceanex's motion.

[27] Regardless, the only issue before me in this motion is whether Oceanex should be permitted to now serve and file the Supplementary Affidavit. This issue is complicated by the fact that it must be determined in a circumstance where it is not agreed who the decision-maker was, or should have been, with respect to the setting of the 2016-2017 MAI freight rates and where it appears that this question will not be resolved until the hearing of the application for judicial review, at which time the record will be closed and cross-examination of affiants on their affidavits will be complete.

[28] I do not agree with the Minister's view that the Court is forced to accept, at this stage, that the Minister was not the decision-maker. The identity and authority of the decision-maker was brought into issue by the Minister and MAI. Oceanex responded by amending its Notice of Application to address that issue in the alternative. While the December Bergevin Affidavit does state that the Minister did not approve the rate change and had no role in MAI's decision to set the rates of 2016-2017, this must be viewed in the context of her other evidence, including that the 2010 Budget Decision, sent to MAI by email, communicated the intent of Canada and MAI to amend the terms and conditions of the Bilateral Agreement regarding the approval of rate increases but that the Bilateral Agreement has not yet been rescinded. Ms. Bergevin has yet to be cross-examined on her affidavit and, no doubt, the issue of the role of the Minister, MAI and the authority to delegate rate changes will be explored by Oceanex at that time, including the question of why the Minister commissioned the CPCS Report if the Minister was not directly or indirectly involved in the decision-making.

[29] If the Minister was the decision-maker, there is no evidence that the Minister was not aware of the CPCS Report. The affidavit of Karen Snook, Oceanex Chief Financial Analyst, sworn on March 8, 2017 and filed by Oceanex in support of this motion, deposes that over the years Oceanex has made ongoing efforts to raise its concerns about the detrimental impact of increasing federal subsidization of MAI to the attention of the Minister. Attached as Exhibit B of her affidavit is a presentation made by Patrick Gosselin of Transport Canada to Oceanex in May of 2015. This indicates that since 2011 Oceanex has raised concerns about MAI having an unfair advantage due to federal subsidies and has called upon the federal government to “level the playing field”. Further, since Oceanex’s complaint had been raised Transport Canada’s approach had been narrow, examining commercial traffic trends and pricing, and that a broader analysis on the issue was required. Accordingly, that a consultant was to undertake a broad study to understand the full breadth of competition in Newfoundland’s freight transportation services market. The objectives of the study were stated and also that the results would further improve understanding around competition in the Newfoundland market and would contribute to ongoing internal analysis and future policy developments.

[30] Exhibit F of the Snook Affidavit is an email dated May 2, 2016 from the Minister in response to a letter from Oceanex regarding the impact of the subsidies MAI receives. The email states that “I have noted your concerns related to the level of subsidies that MAI receives. As you will recall, Transport Canada commissioned an external consultant study in 2015 that assessed, among other elements, the freight transportation market in Newfoundland. The department appreciated Oceanex Inc.’s contribution to this study, and internal analysis is being finalized”.

[31] The CPCS Report states in its background section that Transport Canada had retained CPCS to assess the degree of distortion in the Newfoundland-Mainland freight market attributable to Government of Canada support to MAI and possible solutions in terms of revised fare structures. Further, that the research and analysis developed from the study would contribute to internal analysis and future policy developments. It also explicitly refers to Oceanex.

[32] Thus, if the Minister was the decision-maker, it is reasonable to infer that he was aware of the background to and of the CPCS Report, which was commissioned by Transport Canada, and that it was available to him. Accordingly, the Report would be admissible and potentially relevant to the extent that it may establish the existence of a relevant consideration in the determination of the 2016-2017 freight rates. Viewed otherwise, if the Minister was, or should have been, the decision-maker, then the CPCS Report was likely part of the record before him when he made that decision and would have to be produced in response to the Rule 317 request. Further, as noted by the Prothonotary in his May 5, 2017 Order, if on cross-examination Ms. Bergevin deposes that her generic reference in her affidavit to studies that she viewed when reviewing the Transport Canada file included the CPCS Report, then it may be compellable as a relevant document on that basis.

[33] As to MAI, it has not provided any sworn or other evidence to confirm that the CPCS Report was not before it when it purports to have made the decision setting the 2016-2017 freight rates. Thus, there is a live question as to whether MAI was the decision-maker, as it asserts, and, if so, then whether the CPCS Report was or should have been before it when it made the subject

decision. Of course, if MAI was the authorized decision-maker and if this Court does not, as MAI asserts, have jurisdiction, then the admissibility of the CPCS Report will be moot. If MAI was the authorized decision-maker and if this Court does have jurisdiction and if the CPCS Report was not and should not have been before MAI, then the Report would not form a part of the record and would likely not be admissible or relevant.

[34] In my view, in these circumstances it is also of note that the parties to this matter have submitted a significant body of affidavit evidence in support of and in response to Oceanex's application for judicial review. As summarized by the Minister in his submissions, these are:

Oceanex

- i) Affidavit of Captain Sidney J. Hynes, Oceanex CEO, sworn on September 8, 2016, providing background information on the Newfoundland commercial freight market and short sea shipping; a history and description of Oceanex's current operations; his evidence regarding MAI and its relationship with the federal government, including MIA's operations, subsidies and the alleged 2010 agreement; communications between Oceanex and the Minister with respect to its concerns over the federal government's treatment of MAI; and, his evidence concerning the detrimental impact on Oceanex;
- ii) Expert affidavit of David Gillen, an economist, sworn on September 8, 2016 providing opinion evidence on the role of competition in achieving the policy objectives set out in the *Canada Transportation Act*; how economically efficient prices are set in transportation markets; and, what markets MAI serves and the consequences for Oceanex of the subsidization of MAI;
- iii) Expert affidavit of Peter Neary, historian, sworn on August 18, 2016, providing opinion evidence on the origin and meaning of Term 32 of the Terms of Union;

Minister

- iv) Affidavit of Michèle Bergevin, Director, Portfolio Management within the Crown Corporation and Portfolio Governance Directorate in Transport Canada, sworn on September 8, 2016 attaching a copy of the 2010 Budget Decision;
- v) A second affidavit of Michèle Bergevin sworn on December 7, 2016 providing information concerning the setting of MAI's rates including an overview of

Canada's obligation under the Terms of Union to provide a ferry route between North Sydney and Port au Basques (the "constitutional ferry route"); a brief history of the constitutional ferry route; an overview of MAI, its corporate governance and structure; an explanation of how MAI sets its rates and how this has changed over time; and, information on Transport Canada's relationship with the marine industry and Transport Canada's role as the regulator;

MAI

- vi) Affidavit of Shawn Leamon, a Vice President at MAI, sworn on December 7, 2016 providing background on MAI; his evidence on the importance of the ferry services to Newfoundland and Labrador; an overview of MAI's operations; and, information concerning MAI's governance and its ability to set its rates;
- vii) Expert affidavit of Geoffrey Church an economist, sworn on December 7, 2016 responding to the economic evidence of David Gillen;

Attorney General for Newfoundland and Labrador

- viii) Affidavit of Raymond Blake, historian, sworn on November 30, 2016 providing opinion evidence on the intention of the parties to the Terms of Union with respect to Term 32; whether this was a commitment to simply operate a steamship between two points or something more; and, was it to be a subsidized service for the benefit of Newfoundland;
- ix) Affidavit of Dennis Bruce, economist, sworn on December 5, 2016 responding to the opinion evidence of Captain Hynes and David Gillen and providing his opinion on whether Oceanex's evidence established that MAI's pricing has had a detrimental impact on Oceanex's service offerings and, if MAI was no longer subsidized, what the impact on Newfoundland and Labrador's economy would be;

Reply and Surreply Affidavits

Oceanex

- x) Reply Affidavit of Captain Sidney J. Hynes sworn on January 19, 2017;
- xi) Reply Affidavit of David Gillen, sworn on January 19, 2017;

Attorney General for Newfoundland and Labrador

- xii) Reply Affidavit of Dennis Bruce, sworn on March 1, 2017.

[35] The parties are relying on the affidavits to bring out the background to and impact of the impugned decision. It is also likely that further detail will arise from the intended cross-examination of the affiants concerning, among other things, the identity and authority of the decision-maker as regards to the 2016-2017 freight rates. I note that, in its written submissions concerning this motion, the Minister states that he reserves the right to challenge the relevancy and admissibility of portions of this evidence at the hearing of the application for judicial review, if necessary.

[36] In these somewhat unusual circumstances, I have concluded that it is just and expeditious to exercise my discretion and permit the Supplementary Affidavit to be filed and served at this time. Although the identity of the decision-maker is at issue, the Supplementary Affidavit is admissible on the basis that if the decision-maker was the Minister then the CPCS Report would likely have formed part of the record before him and, if MAI was an authorized decision-maker and this Court has jurisdiction, then it is arguable that the Report should have been before it when it made its decision. The issue of the identity of the decision-maker will, in all probability, be fleshed out during the course of cross-examinations. And, unless the case management judge or the parties decide that it should be dealt with as a preliminary matter, it will ultimately be determined by me at the hearing of the judicial review.

[37] It is also noteworthy that Oceanex made its ATIP request seeking the CPCS Report in on July 22, 2016, however, it did not receive the Report until seven months later, on February 22, 2017. In the result, it was not available to Oceanex when it was required to file its affidavit evidence, on or before September 9, 2016, in support of its application for judicial review. Had

it been, it would in all probability have been attached as an exhibit to one of the Oceanex affidavits, avoiding the need for the Supplementary Affidavit. And, even if the admissibility of the Report had then been challenged, it is questionable as to whether the Court would have been receptive to making an advance ruling on admissibility (*Access Copyright* at para 11).

[38] As to relevance, I find that the CPCS Report is relevant to the issue of the identity of the decision-maker and to the question of whether the decision-maker, whoever it may have been, took into account all relevant considerations when making its decision, both of which issues are raised by the Amended Notice of Application. I do not agree with MAI's submission that the CPCS Report is an expert report. However, that said and as Oceanex concedes, nor can it be relied upon for the proof of the truth of its contents.

[39] It is also important to recognize that the relevance and weight, if any, of the CPCS Report will be fully determined as a part of the judicial review decision. It may be that the Minister, if he was the decision-maker, considered and rejected the Report. Or that MAI, if it was the decision-maker, was never informed of the existence of the Report. These matters, and others, will be addressed in the context of the judicial review.

[40] In these circumstances and despite the diligence of Oceanex, the CPCS Report was not available to Oceanex when it filed its supporting affidavits; the Supplemental Affidavit may assist the Court as it may be relevant to the question of whether the distortion of the freight rates attributable to the subsidization of MAI was or should have been a relevant consideration of the decision-maker, or, simply to provide a more complete appreciation of the ongoing freight rate

issue; and, in my view, the Respondents are not substantially or seriously prejudiced by the admission of the Supplemental Affidavit.

[41] Viewed in whole, in these particular circumstances, the filing of the Supplemental Affidavit at this time facilitates the just and most expeditious determination of the matter.

Overall it is preferable and in the interests of justice to permit the filing of the Supplemental Affidavit now, and to restrict its utilization, as may be necessary, based on relevancy and weight at the judicial review, rather than to exclude it.

ORDER

THIS COURT ORDERS that:

1. Pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106 Oceanex Inc. is granted leave to serve and file the Supplementary Affidavit of Captain Sidney J. Hynes, sworn on February 28, 2017.

2. Costs shall follow the cause.

“Cecily Y. Strickland”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-348-16

STYLE OF CAUSE: OCEANEX INC v CANADA (MINISTER OF TRANSPORT) AND MARINE ATLANTIC INC. AND ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 8, 2017

ORDER AND REASONS: STRICKLAND J.

DATED: MAY 12, 2017

APPEARANCES:

Guy Pratte
Nadia Effendi
Peter O'Flaherty

FOR THE APPLICANT

Joseph Cheng (Minister Transport)
Jeff Galway (Marine Atlantic)

FOR THE RESPONDENTS

Justin Mellor

FOR THE INTERVENER

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP
Barristers & Solicitors
Toronto, Ontario

O'Flaherty Wells Law
Barristers & Solicitors
St. John's, NL

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

Black Cassels and Graydon
Barristers & Solicitors
Toronto, Ontario

Attorney General for
Newfoundland and Labrador
St. John's, NL

FOR THE RESPONDENTS

FOR THE INTERVENER