Federal Court of Appeal | Cour d'appel fédérale

Date: 20191127

Dockets: A-324-19 (lead file),
A-325-19, A-326-19, A-327-19

Citation: 2019 FCA 292

Present: **STRATAS J.A.**

BETWEEN:

COLDWATER INDIAN BAND, SQUAMISH NATION, TSLEIL-WAUTUTH NATION, and AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE

Applicants

and

ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN PIPELINE ULC and TRANS MOUNTAIN CORPORATION

Respondents

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and CANADIAN ENERGY REGULATOR

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 27, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Coldwater Indian Band, Squamish Nation and Tsleil-Waututh Nation have brought motions seeking the exclusion of certain evidence relied upon by the respondents.

[2] For the following reasons, the motions will be dismissed.

A. Should the motions be dismissed for delay?

[3] The consolidated applications are proceeding on a highly expedited basis and under a strict scheduling order. The respondents served their affidavits on the applicants on October 25, 2019. Some seventeen days later, and dangerously close to the time the parties were to file their evidentiary records with the Court, the moving parties brought these motions. The Court directed the moving parties, at the time only Squamish Nation and Coldwater Indian Band, to provide a prompt explanation for the delay. They have done so.

[4] The respondents say that the moving parties' explanation is inadequate. They ask this Court to dismiss the motions for delay under Rules 58-59.

[5] The motions could have been brought much sooner. Although the scheduling order did not set a deadline for evidentiary objections, any fair reading of that order shows that evidentiary objections had to be brought very quickly. Seventeen days does not qualify as very quickly.

[6] Nevertheless, a number of considerations support an exercise of discretion in favour of hearing the motions despite this delay. The moving parties have been industrious and diligent in dealing with the tens of thousands of pages of complex evidence filed by the respondents. There is no question of improper motivation. Their motions are rather complex and required time to prepare. The delay has not prevented this Court from ruling sufficiently before the respondents'

deadline to file their evidentiary records. Finally, this Court prefers that, where possible, it decide matters on their true merits.

B. Should the motions be determined at this time?

[7] A single judge is managing these consolidated applications. The moving parties request that the panel hearing the applications, not the single judge, determine their motions, in whole or in part.

[8] It is for the Court, not any particular party, to determine who should decide what in this litigation. The Court can consider the parties' wishes on this but their wishes do not constrain the Court.

[9] Some settled jurisprudence in this Court governs this issue. A single judge before the hearing of an application or an appeal can but need not determine any motions brought before the hearing. As a matter of discretion, the judge can refer the motions to the hearing panel.

[10] Recognized factors govern this exercise of discretion: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at para. 11; *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at para. 6. The factors include the following:

- Is interlocutory determination consistent with the objectives of Rule 3 of the *Federal Courts Rules*, previous court orders, and subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which requires that applications for judicial review be "heard and determined without delay and in a summary way"? See *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 at para. 8. This consideration has led this Court to say that "[t]hose embarking upon an interlocutory foray to this Court…will not often find a welcome mat when they arrive": *Association of Universities* at para. 11; see also *Gravel v. TELUS Communications Inc.*, 2011 FCA 14 at para. 5. This concern can be alleviated where the proceedings are unlikely to suffer delay because of the presence of case-management or a strict scheduling order.

- Would interlocutory determination allow the proceeding and the hearing to proceed in a more timely, orderly and organized way? See *Collins* at para. 6; *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389. Would an interlocutory determination help the parties make their memoranda focused and effective? See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (*Tsleil-Waututh No. 1*) at para. 23. Sometimes interlocutory determinations usefully clear away issues that might divert the parties and the hearing panel from the real merits of the case.

- Is the result of the motion relatively clear cut or obvious? If so, this favours determining it before the hearing. But if reasonable minds might differ, the motion

should be left to the panel: *Collins* at para. 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 267 N.R. 135; *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at para. 9*; Gitxaala Nation v. Canada*, 2015 FCA 27 (*Gitxaala Nation No. 1*) at para. 12.

- Do the circumstances favour immediate determination of the motions? Is time of the essence? See *Amgen* at para. 9.

- Do the motions raise novel issues? Are the motions, and in particular the representations, incomplete such that an oral hearing of the motions by the panel would be desirable? See *Gitxaala Nation No. 1* at paras. 9-12; *Amgen* at para. 10.

- What type of motion is it? Is a motion of this type usually or commonly determined at a certain time? See, *e.g.*, *Janssen Inc. v. Teva Canada Limited*, 2015 FCA 36; *Tsleil-Waututh Nation No. 1* at para. 22.

- Does judicial economy favour hearing the motion before the hearing? See Amgen at para. 11.

- What are the parties' wishes?

[11] Notwithstanding these factors, certain matters must be left for the hearing panel. These are intimately associated with the merits of the proceeding, such as the weight to be given to evidence and any inferences to be drawn from it.

[12] In this case, most of the factors favour immediate determination of the motions. The outcome is clear-cut. Determining the motions will allow the respondents to draft their memoranda knowing what parts of their evidence will be before the Court. With the evidentiary issues out of the way, the hearing panel can concentrate on the merits of the applications. The Court will now determine the motions.

C. Analysis of the motions

(1) Relevance

[13] Some of the moving parties challenge the relevance of certain evidence in the Labonté Affidavit regarding the Government of Canada's response to this Court's quashing of the first approval of the Trans Mountain expansion project in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2018] 3 C.N.L.R. 205 (*Tsleil-Waututh No. 2*).

[14] To succeed on this point at this time, they must show that the evidence is "obviously irrelevant": *Mayne Parma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50, 331 N.R. 373 at para. 18.

[15] The moving parties fall short of this mark. Evidence regarding how the Government of Canada reacted to this Court's decision is relevant to its planning and design for the consultation process.

[16] Some of the moving parties also challenge the relevance of evidence concerning the participation of Mr. Iacobucci, a retired Supreme Court Justice, during the process of consultation. This evidence is relevant. It speaks to the adequacy of the consultative process.

[17] Coldwater Indian Band also challenges the relevance of statements in the Anderson Affidavit #2 concerning funding offers made to Indigenous groups. This evidence is relevant. Decisions of this Court have found the availability of funding to be relevant to whether the duty to consult has been met: *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 (*Gitxaala Nation No. 2*) at paras. 58, 189 and 209; *Tsleil-Waututh No. 2* at paras. 76, 99-108, 160, 534, 536 and 555; *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89 at paras. 10, 13, 17, 39, 44-45 and 52.

(2) Argumentative statements in affidavits

[18] The moving parties say that some statements in affidavits are overly argumentative. They invoke Rule 81(1). This Rule requires that affidavits be confined to facts without argument.

[19] Without doubt, affidavits should present facts without "gloss or explanation": *Canada (Attorney General) v. Quadrini*, 2010 FCA 47, 399 N.R. 33 at para. 18. There is a line between

expositions of factual data on the one side and, on the other, "controversial argumentation that steps over the line of permissibility" such as an affidavit that contains paragraphs that should appear in a memorandum of fact and law: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (*Tsleil-Waututh No. 3*) at para. 37.

[20] Some of the respondents' affidavits do have some argumentation. The same can be said of portions of the moving parties' affidavits: see, *e.g.*, the Lewis Affidavit at paras. 88, 161-162 and 213-216. It would have been better if all deponents for all parties restricted themselves to clinical expositions of fact.

[21] Argumentation in an affidavit can prejudice the opposing side. But more often than not, it has the potential to wreak more prejudice on the party presenting the affidavit. It can lower the credibility of the deponent and cast a shadow over the legal capability and professionalism of counsel.

[22] In this case, the argumentation in the respondents' affidavits is isolated and insignificant. Sometimes it usefully depicts the mental state or attitude of the deponent, a matter that is sometimes relevant. As well, the paragraphs said to be argumentative are not materially different from the ones ruled acceptable in *Gitxaala Nation No. 2* and *Tsleil-Waututh No. 3*. Finally, the hearing panel can be trusted to ignore any improper argumentation. The Court dismisses this objection.

(3) The relevance of post-decision evidence

[23] In an application for judicial review, the general rule is that only the evidence that was before the administrative decision-maker is relevant and, thus, admissible. As a result, post-decision evidence is normally irrelevant and, thus, inadmissible. See *Association of Universities*; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301; *Bernard*; *Tsleil-Waututh No. 1* at para. 86. However, there are exceptions.

[24] One exception is where post-decision evidence is relevant to a ground for setting aside a decision. For example, suppose that an administrative decision-maker was bribed to make the decision it did. Post-decision evidence proving the bribe would be admissible: *Tsleil-Waututh No. 1* at para. 99.

[25] Another exception is where post-decision documents are relevant not to the reasonableness of the administrative decision but to the remedial discretion of the reviewing court: *Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 10.

[26] Both of these exceptions apply here.

[27] Like this case, both *Gitxaala Nation No. 2* and *Tsleil Waututh Nation No. 2* were judicial reviews of a decision by the Governor in Council to approve a pipeline project under s. 54 of the *National Energy Board Act*, R.S.C. 1985, c. N-7. In those cases, the Governor in Council's decisions could not stand if they were unreasonable or if an essential prerequisite—satisfactory

consultation with Indigenous peoples—was not met. Because consultation was ongoing and the Crown, a different party, owed the duty to consult, post-decision evidence going to those issues was admissible: see *Tsleil-Waututh No. 3* at paras. 51-52 and 63-64 and *Gitxaala Nation No. 2* at para. 66 and 318. In these circumstances, the post-decision evidence is relevant to a ground for setting aside the decision.

[28] As well, to the extent that post-decision evidence shows that breaches of the duty to consult were rectified, obviating the need to quash the Governor in Council's decision, the evidence is admissible: *Namgis First Nation* at para. 10, citing Community Panel of the *Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 38.

[29] On the authority of *Gitxaala Nation No. 2* and *Tsleil Waututh Nation No. 2* and for the foregoing reasons, the impugned post-decision evidence is admissible.

(4) The report of Mr. Iacobucci

[30] Mr. Iacobucci was retained to advise the Government of Canada concerning the process of consultation with Indigenous peoples and First Nations. He oversaw some of that process. At the end of the process, he prepared a report. The report contains much information about the nature of consultative process and the planning and deliberation behind it and is relevant.

[31] In his report, Mr. Iacobucci opines that the consultation with Indigenous peoples and First Nations was adequate. The moving parties challenge the admissibility of this opinion. They

cite the well-established principle that expert evidence on the ultimate issue the Court will decide—here the adequacy of consultation with Indigenous peoples and First Nations—is inadmissible. They also draw attention to Mr. Iacobucci's status as a former Justice of the Supreme Court. They are concerned that this Court will be or will appear to be unduly influenced by the opinion of Mr. Iacobucci.

[32] These concerns are baseless. There is no actual or apparent risk of undue influence over this Court. Sitting judges swear an oath that they will decide cases on the law and the evidence themselves, not blindly accept the say-so of others or abdicate the decision to others. As well, for many other reasons, retired judges' opinions do not have as much influence on sitting judges as some might suppose.

[33] In this case, the Attorney General is not using Mr. Iacobucci's report improperly. The report is not being presented as an expert report admissible for the truth of its contents on the ultimate legal issue before the Court. If so, the report would be inadmissible: see, *e.g.*, *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, 412 D.L.R. (4th) 336; *Squamish Indian Band v. Canada* (1998), 144 F.T.R. 106.

[34] Instead, the Attorney General places the report in evidence to explain the steps Canada took to respond to specific shortcomings in the previous consultation process that this Court identified in *Tsleil-Waututh No. 2*. This use of the report is analogous to the use of opinions to show a party's motivation or that an action was taken in good faith: *Ross, Barrett & Scott v.*

Simanic (1994), 137 N.S.R. (2d) 45, 391 A.P.R. 45 (N.S.C.A.) at paras. 20-21; *R. v. Shacher*, 2003 ABCA 313, 339 A.R. 119 at para. 31.

[35] The three judges hearing the consolidated applications will form their own legal opinions based on the law as they see it, as they are required to do by their oath. They will disregard Mr. Iacobucci's legal opinions on the sufficiency of consultation, which are inadmissible. As this Court put it in *Canada (Board of Internal Economy)*, judges are "seasoned in the task of ignoring testimony and opinion that they have excluded in the course of a proceeding and at weighing evidence which, even if found to be admissible, is of little relevance, reliability or credibility": at para. 31.

(5) Hearsay objections

[36] The moving parties object to portions of the Taylor Affidavits (#1 and #2), the Tupper Affidavit and the Anderson Affidavit #2 on the ground they contain hearsay.

[37] For the following reasons, the hearsay objections are dismissed. In reaching this conclusion, the Court substantially agrees with the respondents' written representations on the issue of hearsay.

[38] In some cases, the affidavits set out background evidence and summarize evidence found elsewhere in order to orient the Court. This is not a hearsay use of the evidence. This use is permitted in an application for judicial review: *Delios*.

[39] However, this permitted use is not a back alley by which evidence can be smuggled into the applications for the truth of its contents. It must still be given first-hand elsewhere or be admissible under another exception to the hearsay rule: *Tsleil-Waututh No. 2*.

[40] In *Tsleil-Waututh No. 2*, this Court considered whether an affidavit tendered by Trans Mountain should be struck on account of hearsay. The Court admitted the affidavit for the purpose of orienting the Court but not as evidence of the truth of any contents of which the deponent had no personal knowledge. The Court in *Tsleil-Waututh No. 2* continued (at para. 151):

> Because [the deponent] did not demonstrate any material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants, and because there is no explanation as to why an individual directly involved in that engagement could not have provided evidence, evidence of Trans Mountain's engagement must come from other sources—such as the consultation logs Trans Mountain placed in evidence before the Board.

[41] The implication here is that if the deponent had material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants and if an explanation were given as to why others could not give evidence, the affidavit would have been admissible. This aligns with the so-called principled approach to hearsay, discussed below. It also seems to allude to circumstances where a person in a supervisory role in a department may give first-hand evidence concerning the conduct, activities and events in and around the department.

[42] This holding in *Tsleil-Waututh No. 2* is consistent with *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 105-116. In that case, this Court

held that evidence is admissible from departmental supervisors or similar individuals about the activities of their department, the conduct of their employees and events taking place in relation to the department where their knowledge is sufficiently direct and personal. To give this evidence, they need not be directly involved in all of the conduct, activities and events in and around the department. However, a departmental supervisor cannot introduce particular statements made by department personnel for the truth of those statements. In the words of *Pfizer* at para. 115, there is no general "department head" exception to hearsay.

[43] This Court's decision in *O'Grady v. Canada (Attorney General)*, 2016 FCA 221 is consistent with *Pfizer*. In *O'Grady*, a Director General at Statistics Canada swore an affidavit purporting to prove that certain records belonging to O'Grady were not used in a study. This Court held (at para. 10) that the affidavit was admissible, stating that "the affiant, by virtue of her responsibilities in the Government of Canada, was in a position to depose to the matters in question without necessarily having personal knowledge." In support of this statement, the Court cited *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823, aff'd on other grounds 2013 FCA 25. There, the Federal Court ruled admissible certain statements from a person acting in a supervisory capacity who was in a position to know if the facts in the statement were true.

[44] In *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249, 387 D.L.R. (4th) 623, the evidence alleged to be hearsay was source material for an expert witness that had been collected by individual surveyors and then processed by a computer program. The evidence was challenged because none of the surveyors or computer technicians were called as witnesses.

The Alberta Court of Appeal cited *Advance Rumely Thresher Co. v Laclair* (1916), 32 D.L.R. 609 for the proposition that "[t]he head of the team is entitled to testify about the work of the team, even if he or she does not have personal knowledge about every aspect of the work". In its view (at para. 47),

> It is unrealistic to think that each of the other team members should be called merely to testify that they followed their normal procedures in entering raw data. Absent some indication that there were flaws in the data entry or computer programming, judicial economy requires that the evidence all be entered through one witness.

[45] The *Advance Rumely* case is also instructive. There, a manager swore an affidavit referring to certain documents. He was not present when the documents were signed nor was he involved in the bookkeeping required to verify the accounting. However, the Court of Appeal admitted his evidence because (at p. 615) "as manager of the company, [he] has access to all the books of account", that was "surely sufficient to shew his means of knowledge" and "justifie[d] his making such an affidavit."

[46] In my view, *Tsleil-Waututh No. 2*, *Pfizer*, *O'Grady*, *Twentieth Century Fox*, *Kon Construction* and *Advance Rumely* all support the proposition that deponents who are department heads or supervisors with significant responsibilities in and oversight of their departments have enough personal knowledge to testify first-hand about the conduct, activities and events in and around the department.

[47] Messrs. Taylor, Tupper and Anderson all qualify in this respect. In this case, Messrs. Taylor and Tupper were akin to departmental supervisors participating in and closely overseeing

the activities of others concerning consultation. Mr. Anderson, although at a high level in the Trans Mountain organization, closely followed the progress of the pipeline expansion project. Exactly what Messrs. Taylor, Tupper and Anderson knew and how capable they were in gathering knowledge about the consultation is a question of weight for the panel. But it is not a question of admissibility. The impugned affidavits are admissible evidence of what was taking place concerning consultation, at least from the perspective of the various departments and organizations.

[48] This conclusion is consistent with and buttressed by the principled exception to hearsay. Under the principled exception to hearsay, hearsay evidence can be admitted if it satisfies threshold requirements of necessity and reliability: see, *e.g.*, *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

[49] In this case, much of the impugned evidence is reliable, supported as it is by documents, including summaries, notes and meeting minutes made in the course of consultations, all or some of which themselves may be admissible as business records.

[50] At paragraph 72 of his affidavit, Mr. Tupper explains that these minutes were prepared by Canada with the intention that they would be joint and reflect a common understanding of what was discussed. They were shared with Tsleil-Waututh Nation for its comment and approval in accordance with the protocol developed for engagement. Under this process, Tsleil-Waututh Nation registered no objection to the accuracy of the minutes. This sort of circumstantial guarantee of trustworthiness fulfils the reliability requirement.

[51] There is no suggestion the respondents are attempting to shield from scrutiny witnesses with first-hand information. Indeed, in many cases, the moving parties themselves have not given the sort of first-hand evidence they say in these motions the respondents should give. As well, there is nothing that suggests the moving parties have sought to examine the individuals they say have first-hand evidence or have moved for a Rule 41 summons (as discussed in *Tsleil-Waututh No. 1* at para. 103).

[52] On the issue of necessity, three considerations should be kept front of mind.

[53] First, necessity must be "given a flexible definition, capable of encompassing diverse situations" in which "the relevant direct evidence is not, for a variety of reasons, available": *R. v. Smith*, [1992] 2 S.C.R. 915 at 933-934. The "necessity [may not be] so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated": *Smith* at 934, quoting J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. III, 2d ed. (Boston: Little, Brown & Co., 1923) at §1420-22.

[54] Second, section 18.4 of the *Federal Courts Act* provides that applications for judicial review "shall be heard and determined without delay and in a summary way" and, on top of that, this Court has ordered a highly expedited schedule for the consolidated applications. The need for speed and efficiency affects the necessity analysis.

[55] Third, sometimes the nature and practical exigencies of a proceeding can affect the admissibility of evidence and, in particular, the Court's evaluation of necessity.

[56] This litigation concerns the adequacy of a consultation process that involved many individuals on both sides. A strict requirement of first-hand evidence from everyone involved would require all sides to prepare and file many additional affidavits, perhaps tens of them or more, with attendant cross-examinations. As a result, litigation concerning the duty to consult could take years and be extraordinarily expensive.

[57] This matters to both sides. On the one side, the inevitable delay could cause proponents and their investors to withdraw support for the project, ending it. In effect, the mere bringing of a challenge, with the inevitability of intolerable delay, functions as a veto of the project, something that the duty to consult is not intended to do: see *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at paras. 22 and 47 and cases cited therein. On the other side, Indigenous peoples and First Nations, forced to have multitudes swear first-hand affidavits and make themselves available for cross-examination perhaps for days on end, will suffer crippling costs and disruption. As a result, some may not have the ability to litigate.

[58] I agree with the submission of the Trans Mountain respondents that "[i]n a highly expedited judicial review proceeding, it would be absurd to require that an organization the size of [Trans Mountain] (or the Government of Canada) provide direct evidence from each and every individual who has communicated with [Indigenous peoples and First Nations] and/or been involved in meetings, telephone calls and written correspondence."

[59] Avoidance of an impracticably large number of affidavits, thereby promoting speed and efficiency, can fulfil the necessity requirement under the principled approach to the admission of

hearsay: *Lecoupe v. Canada* (1994), 81 F.T.R. 91 at para. 24. The Supreme Court also accepts that "necessity" can be founded upon the sheer number of potential sources of evidence:

> Moreover, the number of callers could also inform necessity. The Crown cannot be expected, where there are numerous declarants, to locate and convince most or all to testify at trial, even in the unlikely event that they have supplied their addresses — as in this case.

(*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520 at para. 72.)

[60] For the foregoing reasons, I dismiss the moving parties' hearsay objections.

(6) Failure to adduce the "best evidence"

[61] Some of the moving parties submit that the respondents have not provided the "best evidence" available. Failure to produce the best available evidence can sometimes cause the Court to ascribe little or no weight to the evidence. Sometimes that failure can support the drawing of an adverse inference: *Lévesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R. (3d) 425; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751 at paras. 22-30. But evidence is not inadmissible just because it is not the best available: *Split Lake Cree First Nation v. Sinclair*, 2007 FC 1107, 320 F.T.R. 1 at para. 26; *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360, 46 N.R. 483 (C.A.).

D. Disposition

[62] For the foregoing reasons, the motions will be dismissed.

[63] The respondents both call for enhanced costs in any event of the cause. I see no ground for awarding enhanced costs. Nevertheless, the respondents will have their costs of the motions in any event of the cause.

[64] The Court has only ruled on the narrow issue of the admissibility of the evidence impugned in these motions. Nothing in these reasons speaks to the inferences to be drawn from the admissible evidence and whether any adverse inferences should be drawn from the failure of the respondents to adduce evidence from witnesses with superior knowledge of the facts in issue. As well, nothing is said about the weight to be given to the admissible evidence. Admissible evidence that is given no weight is just as useless as inadmissible evidence. These issues are for the hearing panel.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 27, 2019

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