

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140402**

**Docket: A-273-13**

**Citation: 2014 FCA 88**

**Present: STRATAS J.A.**

**BETWEEN:**

**FOREST ETHICS ADVOCACY ASSOCIATION  
and DONNA SINCLAIR**

**Applicants**

**and**

**THE NATIONAL ENERGY BOARD and  
THE ATTORNEY GENERAL OF CANADA and  
ENBRIDGE PIPELINES INC.**

**Respondents**

**and**

**COUNCIL OF CANADIANS – THUNDER BAY CHAPTER**

**Intervener**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 2, 2014.

**REASONS FOR ORDER BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR ORDER**

**STRATAS J.A.**

[1] The applicants move for an order under Rule 312 permitting them to file additional evidence in this judicial review.

[2] The additional evidence sought to be placed before the Court is a report published by the Energy Policy Institute of Canada, a non-governmental body. The applicants note that one of the deponents referred to this report during her cross-examination. They submit that this makes it part of the record in these proceedings.

[3] Of course, that is not so. The record in these proceedings consists of the record actually filed by the parties. The applicants' record does not contain the report. It is not part of the record in these proceedings until the applicants satisfy the Court that it should be added under Rule 312.

[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*, [2000] 1 F.C. 135 at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.
- (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*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654.

[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 Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 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?

[7] For the purposes of argument, I shall assume that the applicants have established the two preliminary requirements. I turn to the three *Holy Alpha* questions.

[8] On question (a), I note that before filing their record on January 23, 2014 the applicants were aware of the report they now seek to introduce. It was also a subject for discussion during cross-examination on December 6, 2013. The report does not appear in the applicants' record.

[9] This judicial review is at the eve of hearing. The parties have filed their memoranda of fact and law. The applicants have filed the requisition for hearing. Indeed, having confirmed their readiness in their requisition for hearing, the applicants brought this motion on the very next day. In these circumstances, the attempt to introduce new evidence calls for a factual explanation.

[10] The applicants have not given that explanation. The only affidavit they offer in support of their motion is sworn by a law clerk employed by the applicants' law firm. That affidavit consists of information and belief identifying the report and certain documents, nothing more.

[11] On question (b), the applicants have not satisfied me that the addition of this non-governmental report into the record is important in the sense that it might affect the result.

[12] Finally, on question (c), the respondent Attorney General and the respondent Enbridge Pipelines Inc. have identified prejudice: they have not had an opportunity to challenge this report either through rebuttal evidence or cross-examination. The applicants have not adduced any evidence or explanation that satisfactorily addresses this prejudice. In the circumstances of this case, the addition of the report into the record at this late stage would cause procedural unfairness.

[13] As a general matter, a Court will not exercise a fact-based discretion in a party's favour unless it has relevant evidence before it. Here, the affidavit tendered to the Court falls short of the mark.

[14] The applicants are unsuccessful on this motion. However, I credit them for bringing it. Some try to smuggle reports and other material properly introduced by way of affidavit into books of authorities. This practice is improper and has been criticized by the Supreme Court: *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845.

[15] For the foregoing reasons, I dismiss the motion with costs.

“David Stratas”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-273-13

**STYLE OF CAUSE:**

FOREST ETHICS ADVOCACY  
ASSOCIATION AND DONNA  
SINCLAIR V. THE NATIONAL  
ENERGY BOARD AND THE  
ATTORNEY GENERAL OF  
CANADA AND ENBRIDGE  
PIPELINES INC. AND COUNCIL  
OF CANADIANS – THUNDER  
BAY CHAPTER

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:**

STRATAS J.A.

**DATED:** APRIL 2, 2014

**WRITTEN REPRESENTATIONS BY:**

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