Date: 20060605

Docket: T-1890-05

Citation: 2006 FC 688

Ottawa, Ontario, June 5, 2006

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GARRY REECE on his own behalf
and on behalf of the LAX KW'ALAAMS INDIAN BAND, and
HAROLD LEIGHTON on his own behalf
and on behalf of the METLAKATLA INDIAN BAND

Applicant(s)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
As represented by
the MINISTER OF WESTERN ECONOMIC DIVERSIFICATION,
and the MINISTER OF THE ENVIRONMENT; and
the PRINCE RUPERT PORT AUTHORITY

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this proceeding the Applicants are seeking various prerogative remedies in connection with a decision made by the Respondent, the Minister of Western Economic Diversification (Minister), to enter into an agreement with the Prince Rupert Port Authority (Authority) for the development of the proposed Fairview Terminal Conversion and Expansion Project at Prince

Rupert, British Columbia. In the underlying motion for judicial review, a number of environmental issues are raised including an allegation that the decision-making process violated the *Canadian Environmental Assessment Act*, S.C., 1992, c. 37.

[2] In the motion brought before me, the Minister is seeking an Order to compel the Applicants to return a document which, the Minister says, was disclosed in error and which constituted a confidence of the Queen's Privy Council for Canada (Cabinet confidence).

[3] The primary facts about what happened are not in dispute, although some of the nuances are open to interpretation.

[4] In the course of the underlying proceeding and pursuant to Rule 317 of the *Federal Courts Rules* 1998 (SOR/98-106), the Applicants made a request for the record that was before the Minister in support of the impugned decision. In compliance with the disclosure obligation, counsel for the Minister, Wendy Divoky, made a request to the office of the Minister for delivery of relevant documents. Included in the materials provided by the Minister's officials was a document described as a Briefing Note for the Minister (Briefing Note) dated September 22, 2005.

[5] Ms. Divoky has deposed in her affidavit that she was alive to the potential that the Briefing Note along with two other documents might be Cabinet confidences, and thereby potentially protected from disclosure pursuant to section 39 of the *Canada Evidence Act,* R.S.C., 1985, C-5. That provision provides:

39. (1) Where a minister of the Crown or the Clerk of the Privy	39. (1) Le tribunal, l'organisme ou la personne qui ont le

Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

Definition

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(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

Définition

(2) Pour l'application du paragraphe (1), un « renseignement confidentiel du Conseil privé de la Reine pour le Canada » s'entend notamment d'un renseignement contenu dans :

a) une note destinée à soumettre des propositions ou recommandations au Conseil;

b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of “Council”
(3) For the purposes of subsection (2), “Council” means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

Exception
(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen’s Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

e) un document d’information à l’usage des ministres sur des questions portées ou qu’il est prévu de porter devant le Conseil, ou sur des questions qui font l’objet des communications ou discussions visées à l’alinéa d);

f) un avant-projet de loi ou projet de règlement.

Définition de « Conseil »
(3) Pour l’application du paragraphe (2), « Conseil » s’entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

Exception
(4) Le paragraphe (1) ne s’applique pas :

a) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l’existence remonte à plus de vingt ans;

b) à un document de travail visé à l’alinéa (2)b), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

Despite Ms. Divoky's awareness of these provisions, she nevertheless included a redacted copy of the Briefing Note within the Respondent's Rule 318 document production. In the Respondent's Rule 318 Certificate, the Chief of Staff for the Minister, Alastair Mullin, certified that full production of copies of relevant documents had been made excepting:

> …the following categories of documents which Her Majesty the Queen objects to transmitting:
>
> - any documents or portions thereof that constitute confidences of the Queen's Privy Council for Canada within the meaning of s. 39 of the *Canadian [sic] Evidence Act*. A certificate in respect of such documents will be filed pursuant to s. 39(1) of the *Act*;
>
> - any documents or portions thereof subject to solicitor-client privilege; and
>
> - any documents provided in confidence by third parties.

[6] In the accompanying Schedule to the Rule 318 Certificate is the following description of the Briefing Note:

> **Briefing Note for the Minister**
> - Portions have been severed as constituting confidences of the Queen's Privy Council. The Respondent Her Majesty the Queen in Right of Canada objects to transmitting those severed portions of document #1 as it claims that it may constitute confidences of the Queen's Privy Council for Canada within the meaning of s. 39 of the *Canadian* [sic] *Evidence Act*. A certificate in respect of such documents will be filed pursuant to s. 39(1) of the *Act*.
> - Portions have been redacted that are subject to solicitor-client privilege.

[7] The two other documents over which the Minister claimed protection were also duly noted in the above Schedule but neither was produced in whole or in part on the ground that they were Cabinet confidences.

[8] At some point between the disclosure of the Minister's documents by letter dated December 9, 2005 and December 22, 2005, Ms. Divoky determined that the redacted Briefing Note should not have been released. Her affidavit offers the following explanation for what had happened:

> 5. By letter dated December 9, 2005, (received by the Court on December 12, 2005) I provided to the applicants and the respondent the Prince Rupert Port Authority, a certified copy of the material requested from the Minister of Western Economic Diversification. In my covering letter I indicated that documents or portions of documents that constitute confidences of the Queen's Privy Council pursuant to s. 39 of the CEA would not be disclosed. The first document listed in the Schedule to the rule 318 certificate was the "Briefing Note" dated September 22, 2005. Attached as exhibit "B" is a copy of my covering letter of December 9, 2005, the rule 318 certificate and Schedule I to the Rule 318 Certificate.
>
> 6. I subsequently discovered that the Briefing Note dated September 22, 2005, should not have been including in the certified record as it had not been though a review process that would enable the Clerk of the Privy Council to determine if that document was a Cabinet confidence pursuant to s. 39(1) of the CEA.
>
> 7. The inadvertent disclosure occurred because in my attempt to comply with the strict time deadlines imposed by the *Federal Courts Rules* for a response to rule 317 requests, I failed to confirm with the Privy Council Office whether the Clerk of the Privy Council had reached a conclusion as to whether the Briefing Note of September 22, 2005, was a Cabinet confidence. When I was informed by officials with the Privy Council Office that the release of the Briefing Note, even in a redacted form, should not have occurred, I immediately wrote to the Court Registry and counsel for the other parties to ask that they return the Briefing Note. Attached as exhibit "C" is a copy of my letter dated December 22, 2005.

[9] Ms. Divoky sought to recover the Briefing Note on an informal basis by writing to counsel for the Applicants but that request was rebuffed. On February 24, 2006, the Clerk of the Queen's Privy Council and Secretary to Cabinet, Alex Himelfarb, made a claim that the Briefing Note in its

entirety was a Cabinet confidence and he issued a Certificate to that effect pursuant to section 39(1) of the *Canada Evidence Act*. The Clerk's section 39 Certificate claimed a similar protection with respect to the other two documents which had been previously identified by counsel for the Minister as Cabinet confidences but which had not been produced.

[10] It is on the strength of Mr. Himelfarb's Certificate that this motion is brought seeking the recovery of the Briefing Note by order of the Court.

[11] This motion raises two issues for determination. Firstly, I must decide if the disclosure of the Briefing Note described above can be fairly described as inadvertent and, secondly, whether an inadvertent disclosure can be cured or corrected by the *ex post facto* issuance of the section 39 *Canada Evidence Act* Certificate.

[12] The purpose, scope and process for protecting documents from disclosure pursuant to section 39 of the *Canada Evidence Act* has been thoroughly addressed by the Supreme Court of Canada in *Babcock v. Canada (Attorney General)* [2002] 3 S.C.R. 3, [2002] S.C.J. No. 58, 2002 SCC 57 (S.C.C.).

[13] The underlying facts to the *Babcock* decision, above, are not unlike the facts of the case at bar. In *Babcock*, the Federal Crown, as a defendant, claimed protection for a number of documents pursuant to section 39 of the *Canada Evidence Act,* albeit that some of those documents had already been produced in its list of documents. With respect to those documents, the Clerk's section 39 Certificate was asserted by the Crown to have retroactive legal effect.

[14] In a unanimous decision by the Court (Madam Justice L'Heureux-Dubé disagreeing on one issue but agreeing with the result) Chief Justice McLachlin observed that the sole purpose of section 39 of the *Canada Evidence Act* is to prevent the <u>disclosure</u> of Cabinet confidences. She also noted that the historical rationale for maintaining the confidentiality of Cabinet communications was to encourage untrammelled and candid discourse not moved by any concern that what is said may end up in the public domain. That object is further maintained by the taking of an oath of secrecy by the Ministers involved.

[15] Although the Court expressly declined to address the question of an inadvertent disclosure of a confidential Cabinet document, it did hold that where the Crown had deliberately disclosed a Cabinet confidence it lost the right to invoke section 39 *Canada Evidence Act*. This point is made repeatedly throughout the Chief Justice's decision, as can be seen from the following passages (emphasis added):

> 26 A fourth requirement for valid certification flows from the fact that s. 39 applies to disclosure of the documents. <u>Where a document has already been disclosed, s. 39 no longer applies. There is no longer a need to seek disclosure since disclosure has already occurred.</u> Where s. 39 does not apply, there may be other bases upon which the government may seek protection against further disclosure at common law: *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), at p. 630; *Leeds* v. *Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.); *Sankey* v. *Whitlam* (1978), 142 C.L.R. 1 (Austl. H.C.), at p. 45. However, that issue does not arise on this appeal. Similarly, the issue of inadvertent disclosure does not arise here because the Crown deliberately disclosed certain documents during the course of litigation.
>
> 27 On the basis of these principles, I conclude that certification is generally valid if: (1) it is done by the Clerk or minister; (2) it relates to information within s. 39(2); (3) it is done in a *bona fide* exercise of

delegated power; (4) it is done to prevent disclosure of hitherto confidential information.

…

29 As to the timing of certification, the only limits are those found in s. 39(4). Subject to these outer limits, it seems that information that falls within s. 39(2) may be certified long after the date the confidence existed or arose in Cabinet. At the same time, as discussed, if there has been disclosure, s. 39 no longer applies, since its only purpose is to prevent disclosure.

…

32 […] If a certificate is not properly filed, and documents are released, the Crown is precluded from claiming s. 39 protection. However, by releasing some documents, the Crown has not waived its right to invoke s. 39 over other documents.

33 It is argued that unless the broad power of waiver envisioned by the majority of the Court of Appeal is recognized, litigants opposing the Crown will be placed in the untenable position of being unable to rely on the Crown's production of documents, no matter how essential such documents are to their case or how late the Crown makes its claim to immunity. This concern is alleviated by the fact that s. 39(1) cannot be applied retroactively to documents that have already been produced in litigation; it applies only to compel disclosure.

…

35 Section 39 protects "information" from disclosure. It may be that some information on a particular matter has been disclosed, while other information on the matter has not been disclosed. The language of s. 39(1) does not permit one to say that disclosure of some information removes s. 39 protection from other, non-disclosed information. If the related information has been disclosed in other documents, then s. 39 does not apply and the documents containing the information must be produced. If the related information is contained in documents that have been properly certified under s. 39, the government is under no obligation to disclose the related information.

…

> 47 As discussed, s. 39 of the *Canada Evidence Act* does not apply to the government documents already disclosed. Nor does s. 39 apply to the five certified documents that were in the plaintiffs' possession or control. The documents were disclosed by the government in the context of litigation. The disclosure provisions of s. 39 therefore do not apply and these documents should be produced.

[16] Although it predates the decision in *Babcock*, above, the Federal Court of Appeal decision in *Best Cleaners and Contractors Ltd. v. The Queen* [1985] 2 F.C. 293 (F.C.A.) (QL) continues to offer some guidance for the application of section 39 of the *Canada Evidence Act* where, in a litigation context, the Crown discloses a Cabinet confidence to the opposing party but later seeks to resile from that position. In that decision, the Court noted that it was not dealing with information which had been improperly or illegally disclosed but, rather, “information which could, and perhaps should, have been kept confidential” as between the parties to the litigation (see page 12). In concluding that the Crown could not invoke this *Canada Evidence Act* provision (then section 36.3(1)) to prevent the use of the previously disclosed material, Justice Mahoney observed at page 13:

> There is a large measure of unreality in the proposition that the filing of a certificate has the effect of undoing the disclosure of information already lawfully disclosed to the opposing party in a legal proceeding. Everyone with a legitimate interest in the information has it except the Court. Maintenance of confidentiality against only the Court in such a case implies a Parliamentary intention to permit the filing of a certificate to obstruct the administration of justice while serving no apparent legitimate purpose. No such intention is expressed by Parliament; to infer it is repugnant.
>
> In my opinion, the certificate filed in this action is not a bar to the admission in evidence of documents (a), (b), (c) or (d), nor to the admission of the documents specified in the certificate if they were, in fact, produced on discovery, nor to the admission of the examination for discovery dealing with such of those documents as are admissible.

[17] More recently in *Pelletier v. Canada (Attorney General)* (F.C.A.) [2005] 3 F.C. 317, [2005] F.C.J. No. 569, 2005 FCA 118 (F.C.A.) the Federal Court of Appeal examined the question of disclosure of a Cabinet confidence where the subject document was mistakenly turned over to Mr. Pelletier. There the supporting affidavit clearly established the inadvertence of the disclosure and the Court did not hesitate to confirm the *ex post facto* application of section 39 of the *Canada Evidence Act*. In doing so, however, the Court confirmed its earlier holding in *Best Cleaners*, above, in the following passage at paragraph 29:

> [29] With respect, we do not believe that this decision is of any great assistance in the case at bar, since we are not dealing here with a document which was lawfully disclosed in a legal proceeding, but rather with a document disclosed by mistake outside a legal proceeding, although it ended up in a legal proceeding to determine whether it was confidential.

[18] To the extent that the above decisions can be reconciled, they are, of course, binding upon me.

[19] Because the Supreme Court of Canada in *Babcock*, above, did not deal with the problem of inadvertent disclosure of Cabinet confidences, the *Pelletier* decision, above, is binding authority on that point. To my thinking, *Babcock* and *Best Cleaners* are entirely consistent in their treatment of deliberate disclosures of confidential Cabinet documents made within the context of ongoing litigation. There the Crown cannot invoke section 39 of the *Canada Evidence Act* because it cannot establish one of the essential requirements for valid certification – that a calculated disclosure has not already taken place (see paragraph 26 in *Babcock*).

[20] This brings me to the question of the proper characterization of what took place in this case: was the decision to redact and disclose the Briefing Note an inadvertent error by counsel for the Crown because, if it was, that document can still be protected by a subsequently issued section 39 Certificate.

[21] To answer this question, it is essential to carefully examine what Ms. Divoky said in her affidavit about the disclosure of the Briefing Note and, also, what she did not say.

[22] We know from what was done that Ms. Divoky, as counsel for the Crown, considered the issue of Cabinet confidences and the application of section 39 of the *Canada Evidence Act* because she referred to both in her letter to the Court and in her accompanying Schedule to the Rule 318 document disclosure. Although we do not know who edited the Briefing Note, the rationale for doing so was stated to be the need to protect Cabinet confidences. The other two documents were expressly withheld from production for the same reason.

[23] It is also apparent that the Minister's Chief of Staff was aware of the decision to disclosure the Briefing Note in redacted form because he signed the Rule 318 Certificate to which the Schedule was attached.

[24] Ms. Divoky's affidavit characterized what took place as "inadvertent" because she "failed to confirm with the Privy Council Office whether the Clerk of the Privy Council had reached a conclusion as to whether the Briefing Note dated September 22, 2005 was a Cabinet confidence"

(see paragraph 7). This may have been a mistake of process but it does not support a characterization of the decision to release the Briefing Note as inadvertent.

[25] As an aside, the failure to complete an internal process of review by the Clerk may not be sufficient to excuse what took place because the Clerk is not the only party who is authorized to invoke section 39. Here, the Minister's Chief of Staff signed the Rule 318 Certificate, and may well have had the Minister's authority to do so, but nothing is said about this in the Divoky affidavit. This might be important because section 39 of the *Canada Evidence Act* extends to any Minister the equivalent authority to that enjoyed by the Clerk of the Privy Council. It is, therefore, interesting that Ms. Divoky's letter dated December 22, 2005 seeking the recovery of the Briefing Note refers both to the Minister's and to the Clerk's authority to decide, but then only refers to the failure to appropriately involve the Clerk as the basis for demanding the return of the document.

[26] A deliberate decision to redact and release the Briefing Note cannot be described as inadvertence. Clearly, counsel for the Crown considered what she was doing and understood that the Briefing Note could likely be protected from disclosure. She and/or the Minister's Chief of Staff appear to have been involved in the making of a very deliberate decision to hold back two documents as Cabinet confidences, and to edit the Briefing Note to remove certain references that were considered confidential. If there was any inadvertence, it was not in making the decision to disclose the Briefing Note but only in failing to follow through to a conclusion some form of internal process for review, and even that point is not clearly and unequivocally addressed in Ms. Divoky's affidavit.

[27] Given the emphasis placed upon the issue of prior disclosure in the *Babcock* decision, above, I do not believe that the decision made here can be appropriately included within the "inadvertence" exception recognized by the Federal Court of Appeal in *Pelletier*, above. Rather, the decision made here to disclose the Briefing Note seems to me to fit squarely within the holding in *Best Cleaners*, above, as a document lawfully disclosed in a legal proceeding by counsel with the ostensible authority to do so. This is not the kind of disclosure of a privileged document that occasionally occurs by a pure and simple mistake. I recognize that other considerations may also apply where a confidential document is unlawfully disclosed or improperly released into the public domain (e.g. the maintenance of integrity in the judicial process), as was the situation in *Bruyere v. Her Majesty the Queen*, [2004] F.C.J. No. 2194 (Fed. Ct.).

[28] Parties to litigation need to know that they can safely rely upon the efficacy of deliberate decisions and actions taken by counsel in the conduct of a case. Were it otherwise, litigation would essentially become unmanageable with parties resiling frequently from the positions taken by their counsel, or with each side requiring verification of the authority for every step taken by the other.

[29] I see no reason why the Crown or its counsel ought to be placed in some position of juridical advantage over any other lawyer properly entrusted with the management of her client's case, and where some process of authorization of procedural steps by the client has apparently not been followed. These types of informed decisions by counsel are almost always binding upon the client up to, and including, an unauthorized decision to compromise a client's claim or defence.

[30] There is nothing about the enforcement or recognition of a decision such as that taken here by Ms. Divoky that would undermine the integrity of the judicial process or which would justify a departure from the ratio of *Babcock*, above, to the effect that once disclosure is made it cannot be undone by resorting to section 39 of the *Canada Evidence Act*. As was noted in *Babcock*, above, the Minister may have other options for attempting to keep the Briefing Note out of the evidence at the hearing, but section 39 is no longer one of those options.

[31] In the result, this motion is dismissed with costs payable to the Applicants.

JUDGMENT

THIS COURT ORDERS that this motion is dismissed with costs payable to the Applicants.

"R. L. Barnes"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1890-05
STYLE OF CAUSE:	GARRY REECE ET AL v. HER MAJESTY THE QUEEN ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 9, 2006
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DATED:	June 5, 2006

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