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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***Nunavut Tunngavik Inc. v. Canada (Attorney General) (2), 2014 NUCJ 31***
Date:	20141110
Docket:	08-06-713-CVC
Registry:	Iqaluit
Plaintiff:	**The Inuit of Nunavut as Represented By Nunavut Tunngavik Incorporated**
	-and-
Defendant:	**Attorney General of Canada**
Third Party:	-and-
	The Commissioner of Nunavut as Represented by the Government of Nunavut and the Government of Nunavut

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Before:	The Honourable Mr. Justice Johnson
Counsel (Plaintiff):	Dougald Brown
Counsel (Defendant):	Michael Robert
Counsel (Third Party)	Barbara McIsaac; Peter Doody
Location Heard:	Iqaluit, Nunavut
Date Heard:	October 29, 2014
Matters:	*Criminal Code*, s. 276; s. 276.2; *Canada Evidence Act*, RSC 1985, c C-5, s 39. *Nunavut Rules of Court*, N.W.T. R-010-96, Rule 27, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28.

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. BACKGROUND

[1] As I indicated in *Nunavut Tunngavik Inc. v Canada (Attorney General),* 2014 NUCJ 01, 2014 CarswellNun 1 [*the Judgment*], *Nunavut Tunngavik Inc.* [*the plaintiff*], and the Commissioner of Nunavut [the *third party*], applied for an Order under section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]. This order compelled the defendant to produce by March 31, 2014, the certificate specified in section 39 [*the Certificate*] of the *CEA.* This order sets out the documents that the defendant claimed were confidential because they constitute a confidence of the Queen's Privy Council of Canada [*Cabinet privilege*].

[2] The defendant [Canada] argued that the March 31, 2014 timeline was impossible to meet because of the volume of documentation involved and other similar documentary production commitments of the Privy Council Office [*PCO*]. Counsel argued that December 15, 2014 was a more appropriate date.

[3] Instead of imposing a set deadline for the filing of the Certificate, I decided to adjourn the motion to June 24, 2014. I did this hoping that the use of the informal documentary production process suggested by Canada would result in better progress in the classification of documents that were potentially subject to a claim of Cabinet privilege and the production of those documents not subject to that privilege.

[4] When the hearing of the motion resumed in June 2014, the plaintiff and third party were not satisfied with the pace of Canada's progress. I indicated again that Canada would have to increase the pace and the motion was adjourned to August 18, 2014.

[5] On August 18, 2014, the plaintiff and third party again expressed frustration with Canada's lack of progress. I again exhorted Canada to pick up the pace and set the next case management conference for October 29, 2014. I also ordered Canada to produce a report on its progress by October 22, 2014, so that the plaintiff and third party would have enough time to consider their positions.

[6] On October 24, 2014, Canada filed the affidavit of Terry Sewell sworn October 23, 2014 [*Sewell affidavit*] and a Case Management Brief. On October 29, 2014, the third Party filed its written submissions.

[7] I heard oral argument on October 28, 2014 and reserved judgment. I also set December 18, 2014 as the next date for a case management conference.

II. ARGUMENTS

A. Canada

[8] Canada provided a large amount of detail to demonstrate the efforts being made and the resources being devoted to comply with section 39 using the informal process described in the judgment. Canada noted that the process has two stages. The first stage is for the Department of Justice, Canada's Evidence Management Team (*DOJEvMT*) to identify all relevant documents that may be subject to the Cabinet privilege. All documents deemed by *DOJEvMT* to be subject to a potential claim of Cabinet privilege are set aside for further review by legal counsel in the Privy Council Office (*PCO*). All other documents are produced to the other parties. The *PCO* then puts the documents into one of three categories. The first one is to "protect in full", the second to "do not protect" and the third to "sever".

[9] The *PCO* categorized list of documents [*PCO List*] is then provided to the other opposing counsel. The Department of Justice [*DOJ]* Litigation Support Centre [*DOJLSC*] then imports *the PCO* list determination fields into Ringtail software and the *DOJEvMT* prepares redactions for the severed documents. The list is then reviewed by *DOJEvMT* to cull out documents covered by other types of privileges. A draft list of producible documents is prepared and sent to the *DOJLSC* for the generation of data and images. A draft production is generated by *DOJLSC* and then provided to the litigation team paralegal for production to opposing counsel. The draft *PCO* list is then sent to opposing counsel with a flat file of data and opposing images.

[10] The Clerk of the Privy Council *[Clerk*] is the most senior public servant in Canada. She is the Deputy Minister of the Prime Minister of Canada, the Secretary to Cabinet, and the head of the public service. She has many responsibilities and only commenced her duties on October 1, 2014.

[11] Canada currently estimates that the production of the Certificate for documents identified to date will require the Clerk to review over 17,000 pages of material with more material to come after the completion of productions in December 2014. Canada notes in its brief that the production of the Certificate will be a major undertaking of the Clerk. Canada's counsel indicated in oral argument that, if I set a date for the production of the Certificate, the resources currently devoted to the current informal process will have to diverted into the preparation of the Certificate.

[12] Canada proposes three options leading up to the trial date on March 9, 2015. First, allow the current informal process to continue and consider the possibility of an order compelling the filing of a Certificate at a later date. Second, allow the current process to continue with the option of issuing an order leading to a targeted Certificate. Opposing counsel could identify which of the determinations already made under the current process they intend to contest. A hearing regarding the scope and timing of a targeted Certificate dealing with specific determinations could be set for a date in early 2015. Third, allow the current process to continue and require that a Certificate be filed by March 1, 2015.

[13] If the Court chooses one of these options, Canada estimates that the documents identified up to the end of June 2014 can be classified by the current process by December 15, 2014.

B. Third Party

[14] The third party notes that the informal process has resulted in Canada identifying over 1,900 documents that may be subject to the Cabinet confidence privilege. 613 documents have been produced late. Canada asserts that some of its lawyers are of the opinion that the Clerk should consider some undisclosed documents to determine whether she should certify them as coming within the Cabinet privilege.

[15] In December 2013, Canada requested that I allow it until December 15, 2014 to determine which documents would be subject to the Cabinet privilege. I held that delaying production of the Certificate until that date would not allow sufficient time to deal with potential applications for judicial review as well as trial preparation. Despite that, Canada now proposes that no firm date be fixed or if one must be fixed that it be set for March 1, 2015.

[16] The third party submits Canada's submissions are not acceptable and that I should order Canada to produce the documents or the Certificate forthwith.

[17] The third party noted my summary of Canada's position in paras 28-30 of the Judgment and then quoted my words in paras 34 to 37. It highlighted paras 34 and 37 where I indicated that the December 15, 2014 timeline would leave insufficient time for judicial review as well as stating that Canada would have to devote more resources and set a more robust pace to avoid a date being set before December 15, 2014 to produce the Certificate.

[18] Canada knew it would be claiming the Cabinet privilege for some time as set out in excerpts of Terry Sewell's examination for discovery. Nevertheless by November 28, 2013, some seven years after the filing of the Statement of Claim, the *PCO* had not even started to review the documents that might be subject to the claim of Cabinet privilege.

[19] The third party has consistently taken the position that Canada's pace has been unsatisfactory. The Sewell affidavit demonstrates that the pace has not improved because the Clerk has not even started the process of reviewing the documents identified as being subject to a potential claim of privilege.

[20] In the 10 months since the motion was argued in December 2013, Canada has produced 613 documents from an identified group of 2,048 documents of potentially privileged documents. This pace is only slightly more than the 60 documents per month that I held was not satisfactory in the Judgment. Of the 613 documents produced to date, 79 were produced on September 23, 2014, and 116 on October 10, 2014.

[21] *PCO* counsel has concluded that 1,081 of the 2,048 documents they have reviewed should not be considered by the Clerk. In other words *PCO* counsel have determined that over half of the 2,048 documents provided to *PCO* counsel by *DOJEvMT* do not contain Cabinet confidences. These facts demonstrate that *DOJEvMT* are imposing a very conservative filter in setting aside relevant documents for potential review by the Clerk. One consequence of this approach is that documents are being produced much later than they should have been.

[22] Canada has only produced 613 documents because *DOJEvMT* did not consider other potential privileges when vetting the documents for the Cabinet privilege. As a result, there was a further delay that resulted in *DOJEvMT* identifying 468 of the 1,081 documents as being privileged for some other reason. The rationale for the claim of privilege has not been provided to the plaintiff or third party to this date.

[23] *PCO* counsel have not even started to review the 500 documents that *DOJEvMT* has provided them. If the rejection rate continues, over 250 of the documents will be not be caught by the Cabinet privilege.

[24] Even the 613 documents disclosed represent a significant amount of new disclosure eight years after Canada filed the Third Party Notice. Although these documents were not low-level, innocuous documents, but rather documents that were thought to contain Cabinet secrets, they were only disclosed after discoveries have almost been completed.

[25] Canada's proposal about continuing the informal process is unclear about when the plaintiff and third party will receive those documents that *PCO* counsel determine should not be considered by the Clerk.

[26] Canada is unable to estimate, for the documents produced after June 30, 2014, how many documents are involved or when a review for potential Cabinet confidences will commence let alone when it may be completed.

[27] The third party notes that I rejected the December 15, 2014 date as being too close to the trial date and yet that is effectively what Canada has accomplished since that date is only six weeks away. To make matters worse, Canada now proposes that the informal process continue and that I sanction the possibility of the Clerk never having to issue the Certificate, or alternatively to delay the issuance of the Certificate until March 1, 2015, eight days before the commencement of the trail.

[28] Oral and documentary evidence cannot be completed until the Clerk has determined whether to object to disclosure of any information under the Cabinet privilege and issue the Certificate.

[29] Until the Certificate has been delivered, the third party will not be in a position to determine whether to challenge or otherwise dispute any of the claims for Cabinet privilege.

[30] The third party disputes Canada's interpretation that the section 39 process is commenced with an order compelling production and that it is only upon receipt of the order that the Clerk may object by issuing the Certificate protecting the information from disclosure. Canada cites no authority for this proposition and it is not the law. As noted at paras 8-10 and 16 in *R v Wilson,* [1983] 2 SCR 594, CCC (3d) 97, once an order is made the person affected by the order has only two options – appeal or comply with the order.

[31] Section 39 does not authorize Canada to ignore an order requiring production of relevant documents. By its own terms, it provides for the basis of an objection to disclosure of information before a court "with jurisdiction to compel" the production of information – not before a court which has compelled the production of the information. The time to produce the section 39 Certificate is when the information is to be released, or sought to be released.

[32] Rules 219, 221, and 224 of the *Nunavut Rules of Court*, N.W.T. R-010-96, Rule 27, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28 [*Rules*], require that Canada list in its statements all documents in its possession, control, or power that relate to any matter in issue in the action, including "the documents…that the party objects to produce… and the specific grounds on which the party objects to production"[1]. Rule 224 also provides that a party may obtain copies of documents in another party's statement as to documents that the other party does not object to produce.

[1] *Nunavut Rules of Court*, N.W.T. R-010-96, Rule 27, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c. 28, 222.(2)(b)(iii).

[33] The issuance of the Certificate by the Clerk is the statutory procedure by which Canada may object, on the grounds of Cabinet confidentiality, to the production of relevant documents in the discovery process. This procedure is intended to be used, as set out in paras 5 and 21 of *Babcock v Canada* (*Attorney General*), [2002] 3 SCR 3, 3 CR (6th) 1 [*Babcock*], to support Canada's assertion claim that certain documents listed should be protected. These being documents which would otherwise be required to be produced. The Certificate is the "trigger by which information is protected".

[34] Contrary to Canada's submissions, there is no alternative process allowed by statute. If Canada wants to assert Cabinet confidence, it must follow the statute.

[35] It is not a matter of the Court ordering that the Certificate be issued – if it is not issued, the *Rules* require that the documents be produced. In the absence of a Certificate or the assertion and proving of another privilege, relevant documents and information must be produced. Canada has admitted that the documents in issue are relevant. Unless a Certificate is issued, the documents must be produced forthwith.

[36] Paragraphs 22, 25, 27, and 28, of *Babcock,* established the essential elements of the law governing attempts by Canada to protect secrets on the basis of Cabinet privilege. Among other things:

(a) s. 39(1) permits the Clerk to certify information as confidential; it does not restrain voluntary disclosure of confidential information;
(b) the authority given to the Clerk by s. 39(1) must be exercised for the *bona fide* purpose of protecting Cabinet privilege in the broader public interest; it is not to thwart public inquiry nor is it to gain tactical advantage in litigation;
(c) the Clerk must determine two things;
    (i) whether the information is a Cabinet privilege within s. 39; and

(ii) whether it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentially.

[37] Until the Clerk makes a final determination, the parties will be unable to complete the written and oral discovery process.

[38] As stated in para 39 of *Babcock*, if the Certificate is issued it is subject to judicial review. It is neither appropriate nor reasonable for Canada to suggest so late in the litigation and so close to the trial date that its informal process of partially disclosing documents in tranches as they are reviewed by *PCO* has been sufficient and that it should carry on with the Certificate to be delivered at a date yet to be determined; perhaps as late as March 1, 2015. The process has been neither sufficient nor satisfactory and it has detrimentally affected preparation for trial by withholding, until very late, what may be crucial evidence. It is submitted that it ought not to continue.

C. Plaintiff

[39] The plaintiff adopts and supports the submissions of the third party and further argues that neither the CEA nor the *Rules* permit waiver of the requirements for document production. Canada is not a special target with a free pass. The plaintiff and third party need access to the documents well in advance of the trial.

[40] Canada is in the current predicament because it was late starting the vetting process to engage section 39. It is not the fault of the lawyers involved but the bureaucrats who have devoted insufficient resources. As a result, the plaintiff is in the difficult position of preparing for trial and conducting discoveries without sufficient access to relevant documents. Canada must devote sufficient resources to the Cabinet privilege issue to provide the other parties time to prepare for trial and this Court must ensure that they do so by setting a hard deadline. Inconvenience does not trump compliance.

D. Reply by Canada

[41] Canada submits that it has recently increased the pace beyond its earlier pace of 60 documents per month. As indicated in para 12 of the Sewell affidavit, the *PCO* now has two full-time senior lawyers and one full-time counsel as well as two senior full-time and one part-time paralegals to assist in the review. The *PCO* has also moved from a paper-based production process and installed a new electronic document system to handle the volume of the documents in this case. The new system took some time to iron out problems to ensure it was compatible with the DOJ's electronic data system. It is now working efficiently and should allow the informal review to also work more efficiently.

[42] Canada is not arguing that the section 39 process is optional. The informal process used to date requires the agreement of the other parties and Canada hopes they will continue to work with that process. Canada proposes that it prepare another report for the next case management conference scheduled for December 18, 2014.

[43] The defendant also points out that the other parties did not appeal the Judgment, yet now want to abandon the informal process.

IV. ANALYSIS

[44] As I stated at para 34 of the Judgment, the vetting of documents for the Cabinet privilege should have been started and well under way by the time I heard the motion on December 13, 2013. Despite my concerns, I decided that the best approach was to give Canada a reasonable opportunity to carry out the vetting process using the informal process that has been in place for the past ten months because I accepted that there was a certain amount of bureaucratic inertia in a large institution like Canada. Canada also had new lawyers on the file and they needed some time to get up to speed on the file. I hoped that my comments and regular reporting at case management conferences would be sufficient to move the bureaucracy to devote more resources to the task at hand.

[45] I clearly identified that Canada had to devote more resources and to improve on the 60 documents per month pace, stating:

> The Defendant's proposal to produce 60 documents per month is not acceptable. It will have to devote more resources to this task and set a more robust pace to avoid a date before December 15th being set for the production of the certificate.

[46] As the third party has pointed out, I specifically stated that:

> I am satisfied that the Defendant's date of December 15, 2014 to provide a Certificate will not allow sufficient time to deal with any potential applications for judicial review nor for trial preparation.

[47] Both the third party and the plaintiff expressed their concerns with the pace of production at the case management meetings in June and August 2014, and I again admonished Canada to pick up the pace.

[48] Although the Judgment was released on January 15, 2014, the documents were vetted and released at a leisurely pace between that date and the case management conference in June 2014. Twenty-three documents were released on March 15, 2014 and eight documents on April 4, 2014. None were released in May and then as the case management conference neared, the pace picked up so that 98 documents were released in June, 2014.

[49] The pace improved after the case management conference with 277 documents being produced in July. There were no productions in August, but the pace improved after the August case management conference so that 79 documents were produced in September 2014 and 116 in October 2014.

[50] I am satisfied that the informal process proposed by Canada that I put in motion with the Judgment has not worked out as I anticipated. Only at the eleventh hour has Canada put a system into place that will pick up the pace. However, I was somewhat dismayed to find out that the Clerk has not even started her review and that Canada failed to review the documents not subject to Cabinet privilege for other claims of privilege.

[51] I appreciate that Canada has again changed lawyers and that they are not responsible for the current state of affairs. The problem is with the bureaucracy not responding with sufficient resources to allow a possible judicial review application to proceed sufficiently in advance of the March 9, 2015 trial date. That date was set on October 13, 2013. As I noted in the Judgment that date will not be changed.

> However, this court has committed more trial time to this action in 2015 than any trial since this court was created in 1999. In addition to committing the time of a judge there will be significant demands on the civil court staff and the Government of Nunavut in providing a courtroom to handle the trial. There will also be a requirement for electronic technical support to handle the documents necessary for the trial. Now that the cast has been set with agreement of all counsel there cannot be any delay in commencement of the trial.

[52] Although Canada's new counsel appear to have accelerated the pace of production and created a more efficient electronic document processing system, I am not convinced that the informal process will be concluded in sufficient time to permit a possible judicial review application. Some hard deadlines must be set.

[53] Canada did not dispute the legal requirements for document production outlined by the third party and I am satisfied it is a correct statement of the law. Canada is required to prepare a final statement of documents that includes all the relevant documents in its possession including those that it claims are subject to the Cabinet privilege. The statement will contain the usual section that indicates those documents where Canada is claiming a privilege other than the Cabinet privilege. For those documents that it claims are subject to Cabinet privilege, Canada must file the Certificate specified in section 39 of the *CEA*.

V. CONCLUSION

[54] Canada is ordered to produce the final statement of documents and have the documents available to the plaintiff and the third party by January 9, 2015. If it relies on section 39 to refuse production, then it must file the Certificate by that date as well.

[55] This result is close to Canada's second option and allows Canada to continue to work on the informal process while also working on the Certificate. I hope Canada will devote sufficient resources to accomplish both objectives.

Dated at the City of Iqaluit this 10th day of November, 2014.

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Justice E. Johnson
Nunavut Court of Justice