Federal Court of Appeal  Cour d'appel fédérale

Date: 20130801

Docket: A-322-12

Citation: 2013 FCA 190

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

ALBERTA WILDERNESS ASSOCIATION,
WESTERN CANADA WILDERNESS COMMITTEE,
NATURE SASKATCHEWAN and
GRASSLANDS NATURALISTS

Appellants

and

ATTORNEY GENERAL OF CANADA and
THE MINISTER OF THE ENVIRONMENT

Respondents

Heard at Vancouver, British Colombia, on March 19, 2013.

Judgment delivered at Ottawa, Ontario, on August 1, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This is an appeal from an interlocutory order made by Scott J. (the Motion Judge) in the context of an application brought by Alberta Wilderness Association, Western Canada Wilderness Committee, Nature Saskatchewan, and Grasslands Naturalists (collectively, the appellants) seeking the Court's assistance in relation to an emergency order pursuant to section 80 of the *Species at Risk*

Act, S.C. 2002, c. 29 (the Act) and an amendment to the Recovery Strategy for the Greater Sage-grouse (the Recovery Strategy). As I understand it, the Notice of Application was drafted so as to request an order of *mandamus* if no recommendation for an emergency order has been made or for a judicial review of the decision declining to recommend the making of an emergency order, if such a decision has, in fact, been made. The problems inherent in this type of all purpose pleading have only been made worse by the Minister of the Environment's (the Minister) position that he is under no obligation to say if a decision has been made or, if a decision has been made, what it is. At this point, the Notice of Application is stalled on an issue of document production which, on the view I take of this case, is premature and unnecessary.

FACTS AND PROCEDURAL HISTORY

[2] According to the appellants, the Sage-grouse is an endangered species whose Canadian habitat is limited to small areas in south-eastern Alberta and south-western Saskatchewan. Its current range is approximately 6% of its historic range. Between 1988 and 2006, the total Canadian population of Sage-grouse declined 88%. As of 2010, there were approximately 42 male Sage-grouse remaining in Saskatchewan at two active breeding grounds while, as of 2011, there were approximately 13 males remaining in Alberta out of a total Alberta population of 30 birds.

[3] The appellants say that the primary reason for the decline in the Sage-grouse population is the on-going loss or degradation of their habitat through oil and gas development, overgrazing, and cultivation.

[4] As of February 2012, the appellants estimated that Sage-grouse would no longer be found in Alberta within a year, and would no longer be found in Canada within 10 years, unless steps were taken to protect the existing birds and their habitat.

[5] Section 80 of the Act provides as follows:

80. (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.	80. (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.
(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.	(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
(3) Before making a recommendation, the competent minister must consult every other competent minister.	(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

[6] On November 23, 2011, the appellants wrote to the Minister to inform him that, in their view:

> a) the Federal Government has enough information to identify further Sage-grouse habitat as "critical habitat". Critical habitat is defined in the Act as "habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species critical habitat in the recovery strategy or in an action plan for the species";
>
> b) during the Minister's delay in protecting critical habitat and in identifying (and protecting) additional critical habitat, populations of Sage-grouse in Canada have continued to decline;

> c) the decline in the numbers of Sage-grouse is primarily the result of human caused disturbance, such as oil and gas development, within or near Sage-grouse habitat; and
>
> d) Sage-grouse will disappear from Alberta by 2013 and from all of Canada within the next decade unless conservation and protection measures are undertaken;
>
> e) the governments of Alberta and Saskatchewan have failed to provide adequate or effective protection for Sage-grouse within their respective borders.
>
> Appeal Book (A.B.), pages 38-39

[7] In the same letter, the appellants demanded that the Minister recommend an emergency order under section 80 of the Act. The appellants demanded as well that the Minister identify further critical habitat through an amendment to the Recovery Strategy, pursuant to paragraph 41(1)(*c*) and subsection 45(1) of the Act. The appellants gave the Minister until January 16, 2012 to respond to their letter: see A.B. page 29.

[8] The appellants allege that, as of February 14, 2012, the Minister had failed or refused to do his duty under the Act, as set out in their letter of November 23, 2011.

[9] Accordingly, on February 14, 2012, the appellants commenced the application which gives rise to this appeal. In their Notice of Application, the appellants requested an order of *mandamus* in relation to the Minister's failure to recommend an emergency order and to amend the Recovery Strategy, as well as judicial review of the Minister's refusal to recommend an emergency order, to identify further critical habitat, and to amend the Recovery Strategy accordingly.

[10] This wide-ranging application concluded with a request, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), for production of documents. It is this request for production of documents which gives rise to this appeal.

[11] The Rule 317 request is made in the following terms:

> The applicants request that the Minister send a certified copy of the following material that is not in the applicants' possession but is in the Minister's to the applicants and to the registry:
>
> 1. The record of materials before the Minister, Environment Canada and Parks Canada to the date of this application concerning the Minister's duties under s.80 of the *Species at Risk Act* with respect to Sage-grouse in Canada;
>
> 2. If the Minister has refused to make a decision to recommend, or has made a decision not to recommend, an emergency order in relation to, or in response to, the letter of November 23, 2011 from the Applicants' legal counsel, the record of materials before the Minister, Environment Canada and/or Parks Canada at the time the Minister made this refusal or decision and any written reasons for the Minister's refusal or decision;
>
> 3. If the Minister has refused to identify further critical habitat for Sage-grouse in an amendment to the Recovery Strategy, or has made a decision not to identify further critical habitat in relation to, or in response to, the letter of November 23, 2011 from the Applicants' legal counsel, the record of materials before the Minister, Environment Canada and/or Parks Canada at the time the Minister made this refusal or decision and any written reasons for the Minister's refusal or decision; and
>
> 4. Such further and other material that may be in the possession, power, or control of the Minister, Environment Canada and/or Parks Canada and that may be relevant to these proceedings.

[12] On March 15, 2012, counsel for the respondents, prior to taking any steps in the litigation, forwarded to counsel for the appellants a document entitled *Certification and Objection pursuant to Federal Courts Rule 318* (the Certification and Objection) which states, among other things, that the government's decision making processes are not completed so that it is premature to conclude that the Minister has either refused or failed to exercise his duty to protect the Sage-grouse.

[13] The Certification and Objection then goes on to recite that the Governor-in-Council has the power to make an emergency order, as requested by the appellants. However, because such a decision invokes cabinet decision-making, it is protected by cabinet confidentiality. As a result, "it is not possible to reveal whether the Minister has made or will make a recommendation to the Governor-in-Council for an emergency order to be issued": A.B. page 29.

[14] Furthermore, as regards an amendment to the Recovery Strategy, the Certification and Objection states that further work is underway including consultation with landowners and others the Minister considers to be directly affected. The implication is that the Notice of Application and the request for document production are premature.

[15] The Certification and Objection concludes by:

> 1) certifying, under the signature of the Director, Wildlife Integration Program, Department of the Environment, that documents before the Minister in relation to section 80 of the Act, are subject to Cabinet confidence.
>
> 2) objecting to the production of relevant documents before the Minister on the basis of Cabinet Confidence.
>
> 3) objecting to production of documents relating to the decision refusing to recommend an emergency order and an amendment to the recovery strategy on the grounds that such request is "subject to conditions prematurely concluded" and that such request is therefore inoperative.
>
> 4) objecting to the production of all relevant documents on the basis that such a request amounts to discovery of documents in the context of an action, which is not appropriate in an application for judicial review.

[16] The Certification and Objection resulted in a certain amount of correspondence between counsels for the parties which, in the end, proved to be inconclusive. As a result, on May 17, 2012, counsel for the appellants proceeded with a notice of motion seeking the following relief:

> 1- An order directing the Respondents to inform the Applicants whether the Minister has made a decision to recommend an emergency order pursuant top s. 80(2) of Act;
>
> > a) if the Minister has not yet made a decision under s. 80(2) of the Act, an order directing the Respondents to inform the Applicants within 7 days of the fact of the making of, and of the content of, any such decision. [sic]
>
> 2- An order declaring that the "Certification and Objection Pursuant to Federal Courts Rule 318"is invalid or unlawful and an order that the Respondents immediately transmit to the Registry and to the applicants a certified copy of the record of materials before the Minister, Environment Canada and/or Parks Canada at the time the Minister made this decision and any written reasons for the Minister's decision
>
> 3- An order directing that any subsequent Certification and Objection issued by the Respondents, or either of them, must be limited by following considerations:
>
> > a) Section 39 of Canada Evidence Act, R.S.C. 1985, c. C-5 cannot apply to the fact of whether the Minister has made a decision under s. 80(2) of the Act or to whether the decision was to recommend, or not to recommend, an emergency order;
> >
> > b) Section 39 of the CEA cannot apply to materials prepared for the Minister to inform the exercise of his duties to recommend an emergency order to protect Sage-grouse under s. 80(2) of SARA;
>
> 4- Leave for the Applicants to file a requisition for hearing immediately;
>
> 5- Pursuant to the Federal Courts Rules 400 and 401, an order that the respondents pay solicitor-client costs of this motion to the Applicants forthwith and in any event of the cause; and
>
> 6- Such further and other relief as the nature of this motion requires and this Honourable Court deems just.

[17] Between the time the Notice of Motion was filed and the hearing of the motion, counsel for the respondents filed a certificate pursuant to section 39 of the *Canada Evidence Act*, R.S.C. 1985 c.

C-5, signed by the Clerk of the Privy Council, Mr. Wayne Wouters (the Clerk's Certificate). Mr. Wouters declared that he had examined two specific documents, described below, certified that they are, or contain, confidences of the Queen's Privy Council for Canada, and objected to the production of the documents.

[18] The first of the two documents is a memorandum to the Chief Executive Officer of Parks Canada dated December 21, 2011, and entitled "Memorandum to the Minister Re: Consideration of an Emergency Order to Protect Sage-grouse Critical Habitat". The second is a Memorandum to the Honourable Peter Kent dated January 16, 2012 "on proposals to Council".

[19] This is perhaps an opportune moment to set out the terms of section 39 of the *Canada Evidence Act*:

39. (1) Where a minister of the Crown or the Clerk of the Privy 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.	39. (1) Le tribunal, l'organisme ou la personne qui ont le 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.
(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof,	(2) Pour l'application du paragraphe (1), un « renseignement confidentiel du Conseil privé de la Reine pour le Canada » s'entend notamment d'un

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 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.

(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.

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

(*a*) a confidence of the Queen's Privy

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;

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.

(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.

(4) Le paragraphe (1) ne s'applique pas :

a) à un renseignement confidentiel du Conseil privé de la Reine pour le

Council for Canada that has been in existence for more than twenty years; or	Canada dont l'existence remonte à plus de vingt ans;
(*b*) a discussion paper described in paragraph (2)(*b*)	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.
(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.	

[20] In the Clerk's Certificate, Mr. Wouters claimed cabinet confidence pursuant to paragraphs 39(2)(*d*) and (*e*) of the *Canada Evidence Act*.

[21] On June 28, 2012, the Motion Judge, in an unreported decision, dismissed the appellants' motion. The Motion Judge's decision dealt principally with the claim of cabinet confidence made in the Certification and Objection and in the Clerk's Certificate.

[22] The Motion Judge noted that the cabinet decision process was engaged and had yet to be completed since no decision has been issued with respect to an emergency order under subsection 80(2) of the Act. The Motion Judge also noted that the legislative scheme contemplates a consultation process, as shown by subsection 80(3) which provides that before making a recommendation to the Governor-in-Council, the Minister must consult every other competent minister. The Motion Judge found that such consultations are normally conducted through "discussion papers, cabinet memoranda, and briefing documents prepared by senior public service personnel": see A.B. page 12.

[23] The Motion Judge relied on the fact that both the Certificate and Objection and the Clerk's Certificate clearly affirm that the matters under discussion have been brought or will be brought before Cabinet (or the Governor-in-Council – I will use the two terms interchangeably in these Reasons): see A.B. page 12. The Motion Judge referred to the decision of the Supreme Court in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, (*Babcock*) and found that the four part test set out there for the issuance of a certificate under section 39 of the *Canada Evidence Act* had been met:

> 1- The Clerk's Certificate was issued by the Clerk of the Privy Council;
>
> 2- The information sought to be protected falls within the categories described in subsection 39(2);
>
> 3- The power exercised flows from the statute; and
>
> 4- The power was exercised to protect Cabinet confidence in documents which have not previously been disclosed.

[24] As a result, the Motion Judge found that there was no reason to issue the order sought by the appellants.

[25] Relying on *Delisle v. Canada (Attorney General)*, 2004 FC 788, [2004] F.C.J. No. 966, at paragraph 13, the Motion Judge also accepted the respondent's argument that the demand in the Notice of Motion that the Minister inform the appellants whether a decision had been made and if so, what is was, amounted to a request for an interim order of *mandamus*, a remedy which is not available in Canadian law.

[26] Finally, the Motion Judge rejected the appellants' request for a lump sum award of costs in their favour on a solicitor-client basis. First, the appellants were unsuccessful and, *prima facie,* were therefore not entitled to costs. Second, the conduct of the respondents was not reprehensible, scandalous, or outrageous and as such did not attract solicitor-client basis. As for the appellants' request for an order that they be allowed to file a requisition for hearing immediately, the Motion Judge deferred to the Case Management Judge.

STATEMENT OF ISSUES

[27] The issues on appeal are essentially the same as they were before the Motion Judge.

[28] The primary issue is whether the claim of cabinet privilege asserted in the Certification and Objection is valid.

[29] The second issue is whether the Court should order the Minister to say whether a decision has been made with respect to a recommendation for an emergency order and, if so, to advise the appellants of that decision.

ANALYSIS

[30] This is an appeal from an interlocutory order of a Motion Judge in the course of an application for judicial review which raises only questions of law. The standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 9: correctness.

The Notice of Application

[31] Before dealing with the merits of the appeal, I think it useful to say a few words about the appellants' Notice of Application.

[32] Rule 302 of the *Rules*, provides that, unless otherwise ordered, an application for judicial review shall be limited to a single order in respect of which relief is sought. The Notice of Application in this matter includes within its scope no fewer than five decisions or possible decisions or orders:

> 1- the Minister's failure to make a decision with respect to the appellants' request for a recommendation that an emergency order be made pursuant to section 80 of the Act.
>
> 2- the Minister's refusal to make a recommendation to the Cabinet that an emergency order be made pursuant to section 80 of the Act.
>
> 3- the Minister's failure to identify critical habitat that is necessary for the survival or recovery of the Sage-grouse.
>
> 4- the Minister's failure to amend the recovery strategy for Sage-grouse and to include a final amended recovery strategy for Sage-grouse on the Species at Risk Public Registry.
>
> 5- the Minister's refusal to identify critical habitat that is necessary for the survival or recovery of the Sage-grouse.

[33] Items 1 and 4 seek an order of *mandamus* requiring the Minister to make a decision in relation to a recommendation that an emergency order be made and an amendment of the Recovery Strategy. Items 2 and 5 seek to judicially review the Minister's decision in respect of those subjects. Item 3 seeks a declaration in support of the subject matter of the request for an order of *mandamus*.

[34] It should be apparent that it is inconsistent to allege that a decision has not been made and that it has been made, if only by default. *Mandamus* lies only if a decision has not been made. Judicial review (other than for *mandamus*) lies only with respect to a decision which has been made and which is unlawful. An application for an order of *mandamus* compelling a decision or, in the alternative, an application for judicial review of the decision once made implies that the decision is necessarily adverse to the applicant. There is no basis for assuming that a discretionary decision will be decided in one way or the other.

[35] When questioned about this unusual way of proceeding, counsel for the appellants said that it was done to save time, so as to not have to recommence proceedings every time a decision was made.

[36] The course of this litigation is proof that, in litigation as in life, haste makes waste. This well-intentioned but ill-conceived effort to save time has resulted in this application being stalled for more than a year on a procedural point of document production which does not begin to address the merits of the appellants' legitimate preoccupation with the survival of the remaining Canadian stocks of Sage-grouse.

[37] The parties and the Case Management Judge or Prothonotary need to address the content of the Notice of Application before this matter proceeds further. If they do not, further procedural difficulties will ensure that the litigation lives far longer than the Sage-grouse it was launched to protect.

The claim for cabinet confidence immunity

[38] Since the premise underlying an application for an order of *mandamus* is that a decision has not been made, Rule 317, reproduced below, does not, on its face, apply:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal *whose order is the subject of the application* and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested. [my emphasis]	**317.** (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral *dont l'ordonnance fait l'objet de la demande*, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés. [Je souligne]

[39] The jurisprudence of the Federal Court is to the effect that where no decision has been made by a decision-maker, there is no order which can be the subject of an application. As a result, Rule 317 does not apply to in those circumstances: see *Gaudes v. Canada (Attorney General)*, 2005 FC 351, [2005] F.C.J. No. 434, at paragraph 16, *Western Wilderness Committee v. Canada (Minister of the Environment)*, 2006 FC 786, [2006] F.C.J. No. 1006 (QL) (*Western Wilderness*) at paragraph 8. Quite apart from the argument based on statutory interpretation, the decision reached by the Federal Court judges is eminently sensible in that, in the context of mandamus, the legality of the decision is not in issue. Only the failure to make the decision is. On that question, the documents before the decision-make are irrelevant, except for certain narrow exceptions which are not material here: see *Western Wilderness* at paragraph 8.

[40] As a result, the appellants' Rule 317 request with respect to their application for orders of mandamus was not well founded. That said, the Rule 317 request remains in effect with respect to the other orders requested in the Notice of Application, as presently drafted.

[41] It is useful, at this stage, to clarify what is not in issue. The Clerk of the Privy Council has filed a Certificate under section 39 of the *Canada Evidence Act*, claiming that the information contained in two documents described in the Annex to the Certificate is confidences of the Queen's Privy Council for Canada and thus exempt from disclosure. The appellants do not contest this: see Appellants' Memorandum of Fact and Law, at paragraph 27. On the other hand, the appellants say that the Certification and Objection is not a valid certificate pursuant to section 39 of the *Canada Evidence Act*. The respondents do not disagree: see the Respondents' Memorandum of Fact and Law at paragraph 27.

[42] The respondents have not argued that the common law of Crown immunity or sections 37 - 38 of the *Canada Evidence Act* apply. If a claim of Crown immunity were made, the Court would be entitled to demand that the material in respect of which the claim was made be produced so that it could examine it and decide whether the public interest in disclosure was more substantial than the public interest in maintaining the privilege: see *Carey v. Ontario*, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74.

[43] The substance of the respondents' position appears to be that because Cabinet deliberations are confidential, any information which is associated with such deliberations is, by that fact,

confidential. Their position is reflected in the following statement taken from the Certification and Objection:

> Therefore, because Cabinet decision making process is engaged in the decision to issue an emergency order, at this stage of the process in this case, it is not possible to reveal whether the Minister has made or will make a recommendation to the Governor in Council for an emergency order to be issued.
>
> Certification and Objection, A.B., page 45.

[44] This statement can be read as a claim of cabinet confidence or as a claim that the demand for information is premature since the final decision has not been made. That ambiguity is resolved in the Respondents' Memorandum of Fact and Law:

> 26. The Respondents' Certification and Objection was a *bona fide* reply to the Appellants' request for material under Rule 317 of the FCR [Federal Courts Rules]. The Certification and Objection explained that the Cabinet decision-making process is protected by a rule of confidentiality.

[45] It is important to recognize that there is a distinction between confidentiality and immunity from having to produce a document or a communication for the purposes of litigation. While confidentiality is a necessary element of a privileged communication, confidentiality alone does not confer privilege or immunity. In this context, the fact that cabinet deliberations are confidential means that a claim of immunity can be advanced. However, the means for making such a claim are limited. The respondents can either make a claim of crown immunity at common law or pursuant to sections 37-39 of the *Canada Evidence Act*. My reading of the respondents' Memorandum of Fact and Law indicates that their claim for immunity is based solely on section 39 of the *Canada Evidence Act*.

[46] The weakness of the argument that section 39 of the *Canada Evidence Act*, even in the absence of an appropriate certificate, nevertheless protects all proceedings with respect to an emergency order is evident from section 80 itself, reproduced below again for ease of reference:

80. (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.	80. (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.
(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.	(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
(3) Before making a recommendation, the competent minister must consult every other competent minister.	(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

[47] Section 80 leaves open the possibility that the Minister may not, on the evidence before him, be satisfied that a species faces an imminent threat to its survival or recovery. In that case, the Minister can decide that no recommendation for an emergency order should be made to Cabinet. As a result, no recommendation will be made to cabinet. In that case, the Minister's decision not to make a recommendation does not come within the terms of section 39 of the *Canada Evidence Act* as a matter "that [is] brought before, or [is] proposed to be brought before, Council", or otherwise. As pointed out in *Babcock*, one of the criteria for the issuance of a valid certificate pursuant to section 39 is that "the information must fall within the categories described in section 39(2)": see *Babcock*, at paragraph 24.

[48] If the position asserted by the respondents is correct, it would have the effect of sheltering from review every refusal to make a recommendation for an emergency order. This cannot be so. The Minister's discretion to decline to make a recommendation to Cabinet must be exercised within the legal framework provided by the legislation. The authority for that proposition is at least as old as the seminal case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at page 140:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

[49] The Minister's decision to decline to make a recommendation is therefore reviewable. The standard of review is reasonableness: see *Halifax (Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108, at paragraph 43.

[50] Returning to the issue of the claim of cabinet confidence made in the Certification and Objection, if the Minister has declined to make a recommendation to cabinet under section 80 of the Act, section 39 of the *Canada Evidence Act* does not apply. Nor does section 39 apply if the Minister has not yet decided whether or not to make such a recommendation under section 80. In the event the Minister has made a recommendation to cabinet under section 80, section 39 of the *Canada Evidence Act* may possibly apply to that recommendation, but in this case, no certificate has been issued under that section with respect to such a recommendation. In summary, neither the Certification and Objection nor the Clerk's Certificate disclose a legal basis for refusing to disclose

whether or not a decision has been made with respect to a recommendation for an emergency order and the nature of the decision.

[51] That being the case, this matter should be returned to the Case Management Judge or Prothonotary on the understanding that the Minister will communicate his position unequivocally and that the appellants will tailor their Notice of Application accordingly. It should then be possible to move this matter forward without further delay.

MISCELLANEOUS MATTERS

[52] The appellants' request for an order compelling the Minister to advise whether or not a decision has been made should be dismissed in light of the preceding paragraph.

[53] The appellants also sought an order that they be granted leave to file a requisition for hearing immediately. Like the Motion Judge, I am of the view that this is a matter for the Case Management Judge or Prothonotary.

[54] The appellants sought solicitor-client costs if they were successful and asked that they be relieved of the obligation to pay costs if they were unsuccessful. In my view, the lamentable state of this litigation is attributable in equal parts to both sides. I have already identified the difficulties created by the appellants' Notice of Application. As for the respondents, while it is clear that there may be a zone in this dispute in which cabinet confidence may be invoked, their claim of immunity

was unjustifiably broad and legally tenuous. This is a case in which each party should bear its own costs in this Court and in the Federal Court.

CONCLUSION

[55] As I understand the Motion Judge's decision, he found that the claim of Cabinet confidence under section 39 of the *Canada Evidence Act* was lawful. As noted, the appellants do not challenge that conclusion.

[56] Cabinet confidence applies only to that information which is described in a certificate signed by a Minister of the Crown or the Clerk of the Privy Council and which complies with section 39 of the *Canada Evidence Act* and the Supreme Court's decision in *Babcock*. To the extent that the Motion Judge conflated the Clerk's Certificate and Certification and Objection so as to extend the immunity attaching to Cabinet confidences to information which will not be brought forward to Cabinet, he erred in doing so.

[57] As a result, I would allow the appeal, set aside the Motion Judge's order, and making the order that the Motion Judge ought to have made, I would order that:

1- The appellants' motion for an order that the respondents are to inform the appellants whether the Minister of the Environment has made a decision to recommend an emergency order pursuant to subsection 80(2) of the *Species at Risk Act* is dismissed. This matter is returned to the Case Management Judge or Prothonotary so that the Minister can advise the

appellants of the status of his decision-making process and the appellants can tailor their Notice of Application accordingly.

2- The appellants' motion for an order declaring that the "*Certification and Objection Pursuant to the Federal Courts Rule 318*" is invalid is allowed in relation to the appellants' request for orders of *mandamus*. It is also declared that the Certification and Objection does not constitute a valid claim for Cabinet confidence pursuant to section 39 of the *Canada Evidence Act*.

3- The appellants' motion for an order that any subsequent Certification and Objection be limited by the considerations set out at paragraph 3 of the appellants' notice of motion is dismissed on the ground that it is redundant, given that the respondents are bound by the law as set out in these Reasons, subject to their right of appeal.

4- The appellants' motion for leave to file a requisition for hearing immediately is dismissed and the matter is to be dealt with by the Case Management Judge or Prothonotary.

5- The parties will bear their own costs in this Court and in the Federal Court.

"J.D. Denis Pelletier"

J.A.

"I agree
Johanne Gauthier"

"I agree
Robert M. Mainville"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-322-12
STYLE OF CAUSE:	Alberta Wilderness Association, Western Canada Wilderness Committee, Nature Saskatchewan and Grasslands Naturalists v. Attorney General of Canada and the Minister of the Environment
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 19, 2013
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	August 1, 2013

APPEARANCES:

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Angela Fritze	FOR THE RESPONDENTS

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