Date: 25 06 1998
Docket: CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE and RICHARD ROE NUMBER THREE

Defendants

- and -

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA and THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Third Parties

MEMORANDUM OF JUDGMENT

[1] The plaintiffs brought two applications addressing the issue of "public interest immunity" claimed by the defendant Government of the Northwest Territories over certain cabinet documents and discussions. One application is for the production of

certain documents for which a privilege is claimed by the Government. The other application is to compel the Government's designated representative to answer certain questions put to him on examination for discovery.

Application for Production of Documents:

[2] In its Statement as to Documents, the Government advanced a claim of privilege over certain documents described generally as follows:

> Documents, communications, memoranda and notes created by or for the purpose of informing the Cabinet and executive of the Government of the Northwest Territories concerning matters of a politically sensitive nature such that their disclosure would, or would be likely to, impair the proper functioning of the Government of the Northwest Territories;

There then followed a list of 98 numbers in sequence from "8001" to "8098". No other description was provided for these documents.

[3] Subsequently the Government filed an affidavit from Mr. Andrew Gamble, Secretary to Cabinet for the Government, claiming privilege from disclosure over 70 of these documents in the "8000" series. I have been advised that those documents in the "8000" series which are not listed in Mr. Gamble's affidavit will be or have been produced. A copy of this affidavit is attached as Appendix "A" to this Memorandum. As can be seen, the claim for privilege is advanced on the general basis that the documents constitute confidential cabinet communications and that their disclosure would impair the proper functioning of the Government. The attached itemized list of the documents gives very little descriptive information regarding each one.

[4] I need not discuss at length the concept of "public interest immunity" as it applies to government documents. The applicable principles are set forth in *Carey v The Queen* (1986), 35 D.L.R. (4th) 161 (S.C.C.). Suffice it to say that there is no longer a blanket privilege over any particular class of government documents. Any claim for such privilege, or as more accurately put, an immunity from disclosure in the public interest, must be balanced against the necessity to access all relevant evidence that may be helpful in the proper adjudication of litigation. The factors that go into this balancing exercise were concisely summarized by the late Justice D.C. McDonald in *Pocklington Foods Inc. v Alberta* (1993), 147 A.R. 141 (Q.B.), at pages 143 - 144.

[5] The accepted procedure in addressing such claims has been to look first at the reasons set forth by the government official, such as Mr. Gamble, in the affidavit setting up the claim to privilege. As noted in *Carey*, at page 173, deference should be given to the official's views and, in some cases, the court may be able to decide one way or the other on the basis of the official's statement alone. In cases of doubt the court may inspect the documents. This is a power that the court may exercise (through Rule 226(1)(c) of the Rules of Court) with respect to any claim for privilege. I think *Carey* may even go so far as to require an inspection before *any* disclosure is ordered (at page 189): "...Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice".

[6] In this case the Government concedes the relevance generally of these documents to this litigation (although it does not concede that each particular document is relevant). Its position is that the grounds for non-disclosure set out in Mr. Gamble's affidavit should be sufficient to uphold the privilege and, even if not, it is content to have me inspect the documents.

[7] Plaintiffs' counsel asserts that the blanket generalizations put forward are insufficient to even conclude that the claim for privilege may be valid. Such generalizations were not sufficient in *Carey* and they should not be given effect here. Further, counsel submits that since Mr. Gamble's affidavit lacks specificity, both in the claim for privilege and in the description of the documents, and since the onus is on the Government to establish the privilege, then I should simply reject the claim and order production. Alternatively, I should direct the filing of a further and better affidavit.

[8] With respect to the sufficiency of Mr. Gamble's affidavit, *Carey* offers some helpful comments (at page 174):

> In making a claim of public interest immunity, the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. Examples of how this should be done appear in *Burmah Oil Co. Ltd. v Bank of England*, [1979] 3 All E.R. 700 (H.L.), and *Re Goguen and Albert and Gibson* (1984), 10 C.C.C. (3d) 492, 7 D.L.R. (4th) 144, 40 C.P.C. 295 (F.C.A.), where the Minister described with as much detail as the nature of the subject-matter would allow the precise policy matters sought to be protected from disclosure.

[9] The rationale for particulars as to the nature of the claim advanced and the description of the documents in question was outlined in an earlier decision in

Pocklington Foods Inc. v Alberta, [1993] 5 W.W.R. 710 (Alta. C.A.). That case involved a public interest immunity claim. The government there filed what was described as a "detailed" certificate from a cabinet minister outlining why it claimed the privilege as well as a detailed description (date, author, recipient, type and contents) of each document. The Court recognized the need for a judge to inspect the documents. But, the Court also noted that inspection without the assistance provided by the detailed information given in that case may be a meaningless exercise. Côté J.A. wrote as follows on the task facing the judge doing the inspection (at pages 720-721):

> I do not wish to downplay the task here facing the learned Chambers justice. The law and the parties expect him to answer questions which no one can answer with certainty. He has already given this problem the utmost care and effort. There is now more practical assistance available, however. Before us, Crown counsel said that on reflection he believed that he had not given the plaintiff a full enough description of the 41 documents still not categorized. He volunteered to give more. And he pointed out that the Chambers judge could tell counsel for the plaintiff whether such new descriptions by Crown counsel were accurate or not. That will help the respondent plaintiff frame more argument.
>
> What is more, the law does not call on the Chambers judge to inspect on the theory that he must then answer *without more*. For example, many documents contain no clue whatever as to when or why they were created. By themselves, they do nothing to prove or disprove privilege. That is why the law has always called for affidavits of documents, or affidavits or certificates by Ministers, giving the *facts* founding privilege. That is why the more modern law allows the party resisting privilege to cross-examine and to lead evidence of his own. The document itself never need proclaim, let alone prove, its own privilege. Where there is not enough outside evidence of privilege, the court does not even get to inspection. Inspection only arises where there is already enough proof of privilege, by an adequate affidavit or certificate, no inspection is necessary. The document is simply producible for want of evidence that it is not...
>
> But often the wording of a document itself offers no real guidance as to privilege. The result then is not a mystery. It simply means that the judge ruling on privilege must rely upon the affidavit or certificate claiming privilege, and on any other outside evidence by either side. The judge's inspection is like an external physical examination by a physician. It is a useful check. But it is not a substitute for a careful history or lab test, and the external sights and sounds will often be inconclusive.

[10] Following on these comments, in my opinion Mr. Gamble's affidavit, both in the outline of the nature of the privilege claimed and in the description of the documents,

is deficient. For example, Mr. Gamble outlines in paragraph 3 different categories of documents but he does not relate any specific document to any specific category. The reference to solicitor-client privilege of course raises a different set of considerations from those relevant to public interest immunity. The general concern over disclosure impairing the functioning of government is no different in effect than the assertion of a class privilege that was rejected in *Carey*. Further, the description of each document provides little, if any, helpful information so as to assess the public interest concerns (for example, I have no idea what is meant by the description "issue form" used for many of the entries).

[11] Government's counsel referred me to another decision authored by Côté J.A. which, he submits, supports the manner used to describe these documents. The case is *Dorchak v Krupka* (1997) 196 A.R. 81 (C.A.). There Côté J.A. dealt at length with, among other things, how one should claim a privilege and describe privileged documents in an Affidavit of Documents. He quite rightly notes that there is considerable danger in giving away secrets by too full a description of privileged documents.

[12] I think the response to this submission is two-fold.

[13] First, the *Dorchak* case was decided on the basis of the Alberta Rules of Court. Those rules do not contain an equivalent to our Rule 221(2)(b)(iii) which requires that a Statement as to Documents set out:

> (iii) the documents in the possession, control or power of the party that the party objects to produce, the general nature of those documents (which shall be identified with reasonable certainty) and the specific grounds on which the party objects to production;

This rule is modelled on Rule 212(2)(c) of the Saskatchewan Queen's Bench Rules. That rule has consistently been interpreted as requiring documents to be separately identified. How identified in particular depends on the nature of the document: see, for example, *Zimmer v Haff* (1988), 28 C.P.C. (2d) 317 (Sask. Q.B.). That is the approach in this jurisdiction as well.

[14] Second, *Dorchak* deals with privilege generally (with solicitor-client privilege particularly). It is questionable, in view of the comments of Côté J.A. quoted above from *Pocklington*, whether he would apply the same approach to public interest immunity claims. I think not (especially since some types of privilege, such as

solicitor-client, are absolute while public interest immunity always requires a balancing of interests).

[15] I have considered whether I should simply go ahead and expedite matters by inspecting the documents now. Primarily for the reasons noted above in *Pocklington* I have decided against that. Such an inspection may be fruitless without further assistance in the descriptions of the privilege and each document. For that reason I will issue the following order.

[16] The Government shall produce a further affidavit from Mr. Gamble providing with reasonable specifity a description of each document for which privilege is claimed and the nature of the public interest concern applicable to each document. Such affidavit is to be filed and served within 60 days of the date of this Memorandum (unless some further time is agreed to by the parties). The plaintiffs may then cross-examine on the affidavit provided that they proceed with reasonable diligence. If matters are still unresolved after that, I will hear further submissions on inspection and production.

Application to Compel Answers on Discovery:

[17] The plaintiffs seek an order compelling the Government's representative to answer three questions put to him at his examination for discovery. In each case the issue of public interest immunity arises. I will quote from the discovery transcript to put each question and objection into context.

[18] The first two questions related to a press conference held by a cabinet minister (also the acting government leader at the time):

Question No. 1:

Q Was there a discussion beforehand as to what the press conference would be about and what Mr. Pollard would say?

A Yes.

MR. MOUSSEAU: Discussion where?

Q MR. WARNER: Was there a discussion in Cabinet?

MR. MOUSSEAU: I'm not sure that the witness is at liberty to discuss or to give evidence as to what was discussed in Cabinet by virtue of his oath, and I'm

instructing him not to advise -- not to give any evidence as to what was discussed in Cabinet.

Question No. 2:

Q MR. WARNER: On the fourth page of the press conference record, the second item down under Mr. Pollard's name, the statement is recorded that Mr. Pollard said, "Well, certainly the mine inspector could close the mine if there were reasons to believe that there were safety infractions or that it wasn't a safe workplace, but that is part of the mining inspector's job to do that." Have I correctly read from the document?

MR. MOUSSEAU: Did he read it word for word?

A Yes.

Q MR. WARNER: Thank you. Did that accurately express the government's view with respect to the authority of the mining inspector as at May 29th, 1992?

MR. MOUSSEAU: Don't answer that question.

MR. WARNER: Why?

MR. MOUSSEAU: He's not going to -- he's not here to tell you whether this is an authoritative government view as to the rights of mining inspectors. That's a conclusion of law.

[19] The third question related to certain recommendations contained in a letter issued over the signature of the acting government leader:

Question No. 3:

Q Was it the unanimous view of Executive Council that these three recommendations be made by the government?

MR. MOUSSEAU: The Executive Council, Cabinet?

MR. WARNER: Yes.

MR. MOUSSEAU: Don't answer the question.

Q MR. WARNER: If there was some deliberation about this -- first off, was the subject of the three recommendations something considered by Cabinet?

A Yes.

Q Was the decision to make these three recommendations unanimous?

MR. MOUSSEAU: Don't answer that question.

MR. WARNER: What's the basis for the objection?

MR. MOUSSEAU: He'd be breaching his oath of office. There is a tradition and convention in Canadian constitutional, English constitutional law that what is said in Cabinet is sacrosanct.

[20] Questions 1 and 3 raise directly what has been termed as cabinet confidentiality. References were made to the witness breaching his oath of office. That needs some clarification.

[21] The designated representative of the Government for purposes of discovery is Mr. Dennis Patterson. Mr. Patterson is a former political leader of the government and at the material times was a member of cabinet. I am unable to find any specific oath of secrecy that cabinet members must take. The *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, s.60, requires a minister to take an oath of allegiance and an oath of office, both as set out in Schedule C to that Act. Neither of these impose an obligation of secrecy. Nevertheless I am prepared to accept that there is a strong convention, a concomitant of the principle of cabinet solidarity, that imposes an obligation of confidentiality on ministers with respect to cabinet discussions.

[22] In *Smallwood v Sparling*, [1982] 2 S.C.R. 686, the Supreme Court held that the principles of public interest immunity applied to oral testimony (whether at a discovery or trial) as well as to the production of documents. There is no general immunity applicable to the testimony of ministers (or former ministers) and any privilege must be assessed in respect of the specific questions asked, not on the basis of some class category.

[23] In my opinion, the principle of collective responsibility of cabinet members for government decisions precludes answers to questions 1 and 3 noted above. What was said at the press conference and what was written in a letter (a letter that has been

produced) are the collective views of Government. The Government is sued as a collective entity and Mr. Patterson is presented so as to answer on behalf of that entity, not to answer on behalf of individual ministers. Furthermore, it strikes me that the questions go more to policy formation or at least the formation of government positions.

[24] In a somewhat similar vein, question 2 seeks an expression of opinion as to cabinet's acceptance or acquiescence in certain statements made at the press conference. The fact that the statement was made by the acting government leader can be taken as the statement of the government. The question is redundant.

[25] I have concluded that the witness need not answer these three questions. They broach cabinet confidentiality and they are, in many ways, redundant and unnecessary.

[26] The question of costs relating to these applications is reserved for future submissions if necessary.

[27] Dated this 25th day of June, 1998.

J. Z. Vertes
J.S.C.

To: J. Philip Warner, Q.C.
Counsel for the Plaintiffs

Pierre J. Mousseau
Counsel for the Defendant
Government of the Northwest Territories

APPENDIX "A"

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

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Defendants

- and -

ROYAL OAK MINES INC.

Third Party

- and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA

Third Parties

AFFIDAVIT

I, Andrew C. Gamble, Secretary to Cabinet, Government of the Northwest Territories, do hereby MAKE OATH AND SAY THAT:

1. I am Secretary to Cabinet of the Government of the Northwest Territories and as such

have personal knowledge of the matters hereinafter deposed to save where stated to be based on information and belief.

2. The Government of the Northwest Territories has, though its counsel, provided a Statement as to Documents. In that Statement the Government of the Northwest Territories has objected to produce some documents on the basis that their disclosure would, or would be likely to, impair the proper functioning of the Government of the Northwest Territories. I have examined the documents for which this form of objection to production has been claimed and believe that they should not be disclosed as to do so would be injurious to the public interest.

3. The documents consist of communications by, to and between members of the Executive of the Government of the Northwest Territories and senior members of Government Departments, and fall into several categories as follows:

a) solicitor client privilege;

b) options papers and information items generated for the Executive Council;

c) briefing notes and communications to and from cabinet ministers;

d) observations, comments, advice and analysis of departmental staff which are intended to be used, or are used, by ministers in formulating policy, and which reveal the process of providing advice; and

e) communications to and from the Premier and ministers of the Government of the Northwest Territories and the Government of Canada.

They constitute and relate to confidential communications arising at the highest level of government. It is important to the present and future functioning of the Government that such individuals are able to speak and write to each other candidly on such occasions. I believe that disclosure of such communications would be bound to have a chilling effect on such communications in the future and would impede the flow of information and opinion to and between members of the Executive. Such a result which would impair the functioning of government and would be detrimental to the members of the public whose interests the government serves. The documents which give rise to such concerns on the part of the Government are the following:

Doc. No.	Date	Doc. Type	Author
008002	92/07/01	Memo	Art Sorenson
008003	92/06/29	Options Paper	none shown
008007	92/06/19	Letter	Marcel Danis
008008	00/00/00	Letter	The Hon. Dennis Patterson
008009	92/06/08	Briefing note	none shown
008011	92/06/08	Letter	The Hon. Marcel Danis
008012 and 008013	92/06/02 00/00/00	Handwritten Memo Handwritten Memo	none shown none shown
008014	92/06/03	Fax	Michael Cunningham
008015	92/06/01	Memo	Ernie Comerford
008018	92/06/02	Handwritten notes	none shown
008019	92/05/28	Letter	The. Hon. Dennis Patterson
008023	92/05/26	Fax	Marcel Danis
008024	92/05/26	Issue form	none shown
008026	92/09/30	Letter	Marcel Danis
008027	92/12/24	Fax letter	Marcel Danis
008028	92/12/24	Fax letter	Marcel Danis
008033	92/06/10	Memo	none shown
008036	92/10/21	Letter	The Hon. N.J. Cournoyea

008037	92/08/28	Memo	Gilmour
008038	92/09/28	Memo	Nicholls
008039	92/09/29	Memo	not shown
008040	92/09/23	Letter	The Hon. Nellie J. Cournoyea
008041	92/09/22	Fax	John Quirke
008042	92/10/02	Memo	Jeff Gilmour
008043	92/10/02	Letter	Marcel Danis
008044	92/09/25	Memo	Kevin Lewis
008048	93/03/19	Issue form	none shown
008049	93/02/22	Letter	Ethel Blondin-Andrew
008051	00/00/00	Typewritten document	none shown
008053	92/05/15	Issue form	none shown
008054	92/05/15	Issue form	none shown
008055	92/05/19	Information item	none shown
008056	92/05/21	Issue form	none shown
008057	92/05/22	Issue form	none shown
008058	92/05/25	Issue form	none shown
008059	92/05/26	Issue form	none shown
008060	92/05/26	Memo	Bruce Rattray
008061	92/05/27	Letter	Ron McRae
008062	92/05/27	Letter	Lloyd Gould

008063	92/05/27	Issue form	none shown
008064	92/05/28	Draft Letter	Lloyd Gould
008065	92/05/28	Letter	Lloyd Gould
008067	92/06/02	Memo	Joan Perry
008068	92/06/02	Letter	Lloyd Gould
008070	92/06/11	Issue form	none shown
008071	92/06/15	Issue form	none shown
008072	92/06/15	Issue form	none shown
008073	92/06/17	Issue form	none shown
008074	92/06/18	Issue form	none shown
008075	92/06/19	Issue form	none shown
008076	92/06/23	Issue form	none shown
008077	92/06/23	Issue form	none shown
008078	92/06/23	Typewritten document	none shown
008079	92/06/23	Letter	Lloyd Gould
008080	92/06/23	Issue form	non shown
008081	92/06/25	Letter	Lloyd Gould
008082	92/06/26	Letter	Lloyd Gould

008083	92/06/28	Letter	John Quirke
008084	92/06/29	Options paper	none shown
008085	92/06/29	Letter	Lloyd Gould
008086	92/07/02	Issue form	none shown
008087	92/07/06	Letter	John Quirke
008088	92/07/06	Issue form	none shown
008089	92/07/14	Issue form	none shown
008090 and 008091	92/07/14 and 97/07/15	Issue form and Document cover page	none shown and Harris
008092	92/07/15	Issue form	none shown
008093	92/09/01	Issue form	none shown
008094	92/09/09	Issue form	none shown

5. I make this Affidavit in support of the Government's claim to privilege over the aforementioned documents and in response to an application by the Plaintiffs to compel production of the same.

SWORN before me at the City of)
Yellowknife, in the Northwest)
Territories, on this 18th day of)
May, 1998.)

Earl L. Johnson
Commissioner of Oaths in and for the Northwest Territories Being a Solicitor

CV 05408

IN THE SUPREME COURT OF
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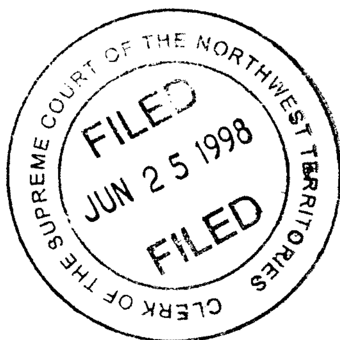
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Third Parties

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J. Z. VERTES