Date: 1999 02 09
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] This is the second installment of an ongoing dispute as between the plaintiffs and the defendant Government of the Northwest Territories over production of Cabinet documents. The defendant has asserted a public interest privilege over a number of documents so as to prevent their disclosure in this litigation. It takes the position that these documents consist of confidential communications to, from and among the members of Cabinet and executive of the government concerning matters that, if disclosed, would likely impair the proper functioning of government.

[2] On June 25, 1998, the first time this issue came before me, I said that, based on the principles enunciated in *Carey v. Ontario* (1986), 35 D.L.R.(4th) 161 (S.C.C.), any claim for immunity from disclosure on public interest grounds must be balanced against the necessity to access all relevant evidence that may be helpful to proper adjudication of litigation. I think an excellent synopsis of this aspect of what can be termed "Crown privilege" was provided by Professor P.W. Hogg in his article, "Government Liability: Assimilating Crown and Subject", at (1994) 16 **Advocates Quarterly** 366. He noted that in recent years actions of government have been put to increasing critical scrutiny by the courts and a trend has emerged whereby governments are subjected to the same laws and rules of litigation as ordinary citizens. He wrote (at page 371):

> The longstanding issue here has been the extent to which the courts could review a claim by a Minister that a document was privileged on the ground that its disclosure would be injurious to the public interest. This issue broke out into various subsidiary issues. Was the certificate of the Minister conclusive? Were the documents immune from judicial inspection? Was the need to preserve candour in the public service a sufficient ground of public interest? Were Cabinet documents in a particularly protected category? Since the Second World War, the courts of the Commonwealth have gradually tackled all these questions -- with predictable results given the tendency that I have been reporting. In Canada, the final step was taken in *Carey v. Ontario*, in which all of the above questions were answered "No". The Supreme Court of Canada refused to accept a certificate of Crown privilege with respect to Cabinet documents, refused to accept that candour in the public service was a particularly important ground of public interest and remitted the claim of privilege to the trial court to inspect the documents in private and to decide whether or not they ought to be produced. The only thing the courts have not done is to deny that there are some categories of government documents that ought not to be disclosed, even if they would be relevant to litigation. The need for a Crown privilege has not been challenged and I do not think it ever will be. But the privilege has been brought under strict judicial control, to the point that a judge will readily overrule a Minister's judgment as to the requirements of the public interest -- or at least insist that the requirements of the administration of justice must take priority.

[3] In June I ordered that the government provide a further and better affidavit describing the particular documents for which privilege was claimed and the nature of the public interest concern applicable to each document. A further affidavit was filed and the deponent has been cross-examined on it. The parties have now agreed that I should address two issues: (1) Should the documents be disclosed without inspection? (2) Should I direct that further details of the documents be provided by the government? The parties also agreed that I can consider these questions solely on the basis of the written submissions filed by each of them (as per Rule 388).

[4] The supplementary affidavit filed by the defendant lists 70 documents for which privilege is claimed. One of them, however, has already been disclosed and included here inadvertently (No.008060). Another one (No.008067) sets up a claim of solicitor and client privilege. Apparently there are four other documents for which that privilege is asserted but no details have been provided. For the 69 documents which are the subject of the Crown privilege claim, the defendant essentially asserts that they deserve protection from disclosure because disclosing them would have a chilling effect on the candidness of internal government communications and thus hinder policy development and executive decision-making. The documents have been identified as being of various types: briefing notes, options papers, and what have been called "issue forms", prepared by senior officials for the advice of Cabinet; memoranda as between officials and Cabinet members; correspondence between federal and territorial ministers; and various notes prepared by officials and ministers.

[5] Plaintiffs' counsel argued that the descriptions of the various documents as well as the nature of the public interest concerns identified with respect to each document do not satisfy a reasonable threshold test for invoking privilege. It is submitted that this threshold test needs to be satisfied in order to get to inspection "as a backup check".

[6] I agree that there is a threshold test to satisfy. The documents must be described with sufficient certainty so as to be able to identify each document as the document described. Further, the nature of the privilege must be set out. The plaintiffs have a right to know the exact grounds for the privilege claim. Asserting a blanket privilege on the basis of candour within the public service is not sufficient to justify keeping documents secret.

[7] I do not agree, however, that inspection is merely a "backup check". It seems to me that the very essence of the *Carey* decision is that inspection must be made whenever a privilege claim is asserted. In *Carey* there was only a general claim for immunity without specifics. Yet the Court, in such a case where there was a lack of specifics and

uncertainty as to the nature of the claim, directed that the documents be inspected. This also accords with the intent of Rule 226(2) respecting inspection of documents for which any type of privilege is claimed.

[8] There may indeed be cases that fail to meet a threshold test. In such cases the documents will be ordered produced without inspection. The original affidavit filed by the government in these proceedings did not meet that test. In my opinion, however, the supplementary affidavit at least meets a bare threshold of asserting the privilege. It is clear that the documents are of a type that could generally be described as "Cabinet confidences", i.e., documents containing advice, recommendations, directions, and communications respecting decision-making by Cabinet. The description of each particular document, however, is still deficient. So, while I do not order disclosure without inspection, I will order that further details be provided.

[9] I want to address some specific points raised by plaintiffs' counsel.

[10] First, counsel argued that similar kinds of documents have already been produced by the government (No.008060 for example) or by other parties who have somehow obtained copies of them (No.008093 for example). In my opinion this is immaterial. Just as there is no blanket claim of privilege, there is no blanket waiver of privilege (certainly not an implied waiver). A document may be disclosed without losing the right to assert a privilege over another document of the same type.

[11] Second, counsel referred specifically to a series of documents identified as correspondence from the Chief Mining Inspector to the Minister seeking direction. The government has apparently disclosed what directions were given by the Minister but refuses to disclose what facts were conveyed by the Inspector upon which those directions were based. Counsel argued that this all relates to a matter in issue in this litigation, in particular, to the defences raised by the government respecting the policy/operations dichotomy applicable to government liability for negligence. That may be true, but that is an argument as to the relevance of the documents not as to whether a privilege applies. A document may be irrelevant and non-producible with or without the privilege. If a document is relevant, then the privilege claim must be assessed. Hence the need for inspection.

[12] Counsel also referred me to documents identified as correspondence between federal and territorial Cabinet ministers. The defendant asserts that the contents of such correspondence are "both sensitive and important to the relations between the two levels

of government" and that disclosure "may have a chilling effect on future communications of a similar nature". However, as plaintiffs' counsel pointed out, many of these types of documents have already been made public and some have been disclosed in this litigation. For example, document No. 008007 (described as a letter from Minister Danis to Minister Patterson dated June 19, 1992) appears to be the same document as contained in a bundle of documents tabled in the Legislative Assembly on October 1, 1992, and already produced in this litigation. It seems to me that it is too late now to assert a privilege over documents that the government has already made public.

[13] Finally, there are some documents (for example, No.008043 and No.008049) that are described as copies of correspondence between federal officials but copied to territorial officials. In my view, if the federal government does not claim privilege (as the "originator" and "recipient" of this correspondence) then it is not for the territorial government to do so. The defendant should therefore ascertain the intentions of the federal government in this regard.

[14] I have concluded that we should move forward to an inspection of these documents as expeditiously as possible. There is no point in further affidavits and protracted cross-examinations. There is a need, however, for additional information.

[15] Therefore, I direct that counsel arrange a date to attend before me in Chambers when I will inspect those documents for which the government still wishes to assert a privilege. Prior to doing so, the government is to provide further particulars as follows with respect to each document and to comply with the following directions:

1. Identify who authored each document and, if no particular individual can be identified, at least identify the government department or division from which it emanated.

2. Identify the event, condition or issue that the document addresses.

3. Specify whether the document seeks direction, or gives recommendations, or merely provides information.

4. Specify whether the document is meant to be used in the formulation of policy or in the decision-making as to an actual action.

5. With respect to those documents for which a solicitor and client privilege is claimed, identify the individual who is the "solicitor" by name, position in the

government or otherwise, and nature of duties of that position, and generally comply with undertaking No.9 given on October 22, 1998.

6. Identify those documents which have already been either made public or disseminated in any other forum and, if privilege is still claimed for these documents, the basis on which it is claimed notwithstanding their prior disclosure.

[16] I note that during his cross-examination, the defendant's representative (Mr. Gamble) stated at one point that he was concerned about divulging opinions and advice, not the particular facts contained in the documents. I am not going to direct disclosure of facts in the documents nor even a statement as to whether a particular document contains facts. I am concerned that if such information was disclosed now it may inadvertently reveal the very information over which privilege should apply. Nevertheless, I direct that the government also comply with the undertakings numbered 6, 7 and 8 from Mr. Gamble's cross-examination.

[17] Once the directions have been complied with, I wish to move forward to inspection of the documents. I contemplate that counsel will be in attendance then and they will have an opportunity to make submissions to me on the validity of the privilege claimed with respect to each document.

[18] The directions are to be fulfilled within 30 days of this Memorandum. I expect counsel to be in contact within that time as well to set a date for the inspection.

[19] Costs will be reserved.

[20] Dated at Yellowknife, NT, this 9th day of February 1999.

J.Z. Vertes,
J.S.C.

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

P.J. Mousseau,
Counsel for the Defendant
(Government of the Northwest Territories)

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THE HONOURABLE JUSTICE J.Z. VERTES