Society Promotion Environmental Conservation v. Canada, 2000 CanLII 15470 (FC)

Date: 2000-05-26
Docket: T-1509-99
Other citations: 24 Admin LR (3d) 239; 187 FTR 149
Citation: Society Promotion Environmental Conservation v. Canada, 2000 CanLII 15470 (FC), <http://canlii.ca/t/4470>, retrieved on 2017-05-12

Date: 20000526

Docket: T-1509-99

BETWEEN:

SOCIETY PROMOTING ENVIRONMENTAL

CONSERVATION on its own behalf

and on behalf of its members,

Applicant,

- and -

HER MAJESTY THE QUEEN

IN RIGHT OF CANADA,

Respondent.

REASONS FOR DECISION UNDER RULE 318 (4)

REED, J.

[1] These reasons relate to the applicant"s request pursuant to Federal Court Rule 317 for production by the respondent of documents relevant to the applicant"s application for judicial review. The decision to which the application for judicial review relates is that of the Minister of Public Works and Government Service confirming an intention to expropriate certain lands located at Nanoose Bay, British Columbia, pursuant to s. 11(1)(a)(ii) of the *Expropriation Act* , RSC 1985, c. E-21.

[2] The applicant"s request for documents identified two categories that it seeks to have produced:

a. Complete written transcripts of the Hearing conducted by Mr. Michael Goldie between July 19, 1999 and August 17, 1999 under the authority of the Expropriation Act, R.S.C. 1985, c. E-21 , s. 10; and

b. All documentation, materials and evidence which were before the Minister when he made the decision, pursuant to section 14 of the Act, to confirm the expropriation which is the subject matter of the above matter.

[3] The production of the first is no longer an issue. Neither the respondent, nor the Minister possess transcripts of the hearing proceedings - transcripts were never prepared. The respondent has tapes of the hearings and these have been made available to the applicant. Also, the respondent has agreed to prepare transcripts of portions of the tapes, providing the applicant"s requests in this regard are reasonable. The applicant has not yet had an opportunity to identify all the portions of the tapes that it wishes to have transcribed, and asks that this aspect of its request be left open for further disposition by the Court, should there be a need to seek further direction.

[4] I will make no order with respect to the first category, identified above, but I note that the respondent"s commitment to prepare transcripts of portions of the hearing tapes is a voluntary one. The commitment contributes, in a positive way, to the litigation process and the Court appreciates that approach. At the same time, while the respondent was under an obligation to make the tapes of the hearing available to the applicant, it did not have a legal obligation to prepare transcripts.

[5] With respect to the second category of documents sought in the request, the respondent has produced all the documentation requested except for two documents and parts of a third. Privilege is claimed for these pursuant to section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[6] The applicant argues that the certificate that was filed by the clerk of the Privy Council for the purposes of section 39 is inadequate because it does not contain sufficient information concerning the documents, information such as their dates, their authors, the addressees and the addressors, as well as a description of the nature of the documents. The applicant argues that this kind of information cannot be a cabinet confidence and should have been disclosed.

[7] I am persuaded that the dates of the documents, their authors, the addressees and addressors are within the privilege in question. In any event, the certificate that was filed in this case corresponds to that approved by the Federal Court of Appeal in *Re: Attorney General of Canada and Central Cartage Co. et al.*, 1990 CanLII 8009 (FCA), [1990] 2 F.C. 641 (F.C.A.).

[8] While the applicant relied upon the decision in *Samson Indian Band v. Canada*, 1996 CanLII 4039 (FC), [1996] 2 F.C. 483, for the proposition that the above described detail should be provided in a certificate, that aspect of that decision was not confirmed by the Federal Court of Appeal; see *Buffalo et al. v. Canada (Minister of Indian Affairs and Northern Development)* (1997), 220 N.R. 35 at 44-46.

[9] In the *Buffalo* case, the Federal Court of Appeal referred to the decision in *Central Cartage*. Both decisions state that it is appropriate for a section 39 certificate to track the language of section 39. Indeed, tracking the language of the section provides information about the nature of the documents in question.

[10] In the present case, for example, the second document for which privilege is claimed is described in the following way:

Document #2 is a copy of a record which consists of information contained in a memorandum the purpose of which is to present proposals or recommendations to Council within the meaning of paragraph 39(2)(a) of the said Act.

Document #2 is a copy of a record which consists of information contained in draft legislation within the meaning of paragraph 39(2)(f) of the said Act.

Subsections 39(2)(a) and 39(2)(f) of the *Evidence Act* read:

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

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

* * * *

(f) draft legislation.

[11] Thus, it seems clear that the document in question is a memorandum to cabinet that includes within it information concerning proposed legislation.

[12] It is sufficient, however, for present purposes to refer to the *Central Cartage* and *Buffalo* cases. Applying those decisions, I must conclude that the certificate that was filed in this case is a proper and adequate certificate.

[13] Two additional requests by the applicant for documents were addressed in the submissions filed by the parties. The applicant sought the production of the notes made by Mr. Goldie during the course of the hearing over which he presided, as well as production of the draft reasons that had been prepared for the Minister, and which he reviewed, before his final reasons were prepared and issued.

[14] I have not been persuaded that either of these documents is relevant to the judicial review application.

[15] Mr. Goldie objected to producing his notes on a number of grounds, one of these was that it was not his decision that is being judicially reviewed in this application, and his notes were not

documents that were before the Minister when the Minister made his decision.

[16] I am not prepared to accept that in all cases the notes of an individual who plays an evidence gathering role to assist a decision-maker are not relevant to a judicial review of the decision. At the same time, in this case there is a complete recording (on tape) of the proceedings before Mr. Goldie. If Mr. Goldie"s report was somehow tainted or skewed, or did not accurately summarize the evidence that was before him, then that can be ascertained directly by comparing the record of the proceedings with his report. His notes are simply not relevant.

[17] With respect to the draft reasons for decision, which the Minister reviewed before his reasons were prepared and issued in final form, again, I am not persuaded that that document is relevant. The draft may contain errors, statements with which the Minister did not agree, provisional conclusions that were not carried forward in the reasons he finally approved. It is the final version that is relevant for the purposes of the judicial review. The respondent referred to the decisions in *Canada (Attorney General) v. Commissioner of Inquiry on the Blood System (1996)*, 1996 CanLII 3924 (FC), 37 Admin. L.R. (2d) 241 (F.C.T.D.) at 256, and *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, of paras. 18 - 20, in support of his argument that the draft need not be produced.

[18] For the reasons given, no order need be issued pursuant to Rule 318(4).

(Sgd.) "B. Reed"

Judge

May 26, 2000

Vancouver, British Columbia

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1509-99

STYLE OF CAUSE: SOCIETY PROMOTING ENVIRONMENTAL CONSERVATION on its own behalf and on behalf of its members

v.

H.M.Q.

DEALT WITH IN WRITING PURSUANT TO RULE 318

REASONS FOR DECISION UNDER RULE 318(4) OF REED, J.

DATED: May 26, 2000

WRITTEN SUBMISSION BY:

Mr. Andrew Gage FOR APPLICANT

Mr. Michael Stephens FOR RESPONDENT

Mr. Jillian Calder FOR HEARING OFFICER

SOLICITORS OF RECORD:

Andrew Gage

Barrister & Solicitor

Victoria, BC FOR APPLICANT

Davis & Co.

Vancouver, BC FOR RESPONDENT