Federal Court  Cour fédérale

Date: 20221109

Docket: T-382-22

Citation: 2022 FC 1514

Ottawa, Ontario, November 9, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS and HAROLD RISTAU

Applicants/Moving Parties

and

GOVERNOR IN COUNCIL, HIS MAJESTY IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA

Respondents/Responding Parties

ORDER AND REASONS

I. Introduction

[1] This is a motion for an Order pursuant to Rule 317 and Rule 318 of the *Federal Courts Rules*, SOR/98-106 to compel production of the records and documents listed in the certificate issued under s. 39 of the *Canada Evidence Act*, RSC 1985, c.C-5 [*CEA*], by the Interim Clerk of the Privy Council on March 31, 2022 (the "Certificate"). As moved by the Applicants, the Order

would require the Respondents to have the Clerk issue a new Certificate within 15 days which provides the calendar dates of all six listed record descriptions in the Certificate. If a new Certificate is not issued within 15 days, the requested Order would require the Respondents to produce the listed documents and records in their entirety.

[2] For the reasons that follow, the motion is dismissed.

II. Background

[3] The motion arises from the Applicants' application for judicial review in relation to the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 [Emergency Proclamation], issued on February 14, 2022 pursuant to section 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp).

[4] The underlying application for judicial review challenges the lawfulness of the Emergency Proclamation and related measures. In their Notice of Application filed on February 23, 2022, the Applicants requested the production of records related to the Emergency Proclamation under Rule 317 of the *Federal Courts Rules*.

[5] On March 31, 2022, the then Interim Clerk of the Privy Council certified that information constituted a confidence of the Queen's Privy Council for Canada in relation to the following materials set out in a Schedule to the Certificate:

> 1. Submission to the GIC (Governor in Council) from the Minister of Public Safety and Emergency Preparedness dated February 2022, regarding the proposed Order in Council directing that a

> proclamation be issued pursuant to subsection 17(1) of the *Emergencies Act* RSC 1985, c 22 (4th Supp) including the signed Ministerial recommendation, a draft Order in Council regarding a proposed proclamation, a draft proclamation, and accompanying materials;
>
> 2. The record recording the decision of the GIC concerning the Emergency Proclamation, dated February 2022, signed by Council;
>
> 3. Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection 19(1) of the *Emergencies Act* and concerning emergency measures regulations, including the signed Ministerial recommendation, a draft Order in Council regarding proposed emergency measures regulations, draft regulations, and accompanying materials;
>
> 4. The record recording the decision of the GIC concerning emergency measures regulations, dated February 2022;
>
> 5. Submission to the GIC from the Minister of Public Safety and Emergency Preparedness, dated February 2022, regarding the proposed Order in Council pursuant to subsection 19(1) of the *Emergencies* Act and concerning an emergency economic measures order, including the signed Ministerial recommendation. A draft Order in Council regarding a proposed emergency economic measures order, a draft order, and accompanying materials.
>
> 6. The record recording the decision of the GIC concerning an emergencies measures order, dated February 2022.

[6] The Interim Clerk determined that the three submissions constituted memoranda the purpose of which was to present proposals or recommendations to Council, and therefore came within paragraph 39(2)(a) of the *CEA*. As for the three records of decision, the Interim Clerk determined that they constituted agendas of Council or records recording deliberations of decisions of Councils and thus came within paragraph 39(2)(c) of the *CEA*.

[7] The Interim Clerk further certified that paragraphs 39(4)(a) – the twenty-year limitation period – and 39(4)(b) – the discussion paper exception - did not apply in respect of the information.

[8] While the month and year of each of the records is set out in the Schedule, none of the references specify the precise calendar day on which they were made or submitted.

[9] A second certificate was signed by the Clerk of the Privy Council on August 4, 2022 attaching a schedule referencing portions of documents delivered to the parties in July 2022 for which s. 39 and other privileges are claimed. The August 4, 2022 certificate is not at issue in this motion. Claims of privilege under sections 37 and 38 of the *CEA* in relation to certain information in the disclosed documents are currently the subject of separate proceedings.

III. Legislative Scheme

[10] The legislative provisions relevant to this motion are Rules 317 and 318 of the *Federal Courts Rules* and section 39 of the *CEA.*

[11] Rule 317 of the *Federal Courts Rules* allows a party to request relevant material in the possession of the tribunal by filing a written request, while Rule 318 sets out a process for dealing with objections to requests under Rule 317.

[12] Section 39 of the *CEA* allows a minister of the Crown or the Clerk of the Privy Council to object to the disclosure of confidences of the Queen's Privy Council before a court. This

provision requires the Clerk or minister to consider two questions: first, whether the information is a Cabinet confidence within the meaning of the section; and second, whether it is information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality: *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 22 [*Babcock*].

Confidences of the Queen's Privy Council for Canada	**Renseignements confidentiels du Conseil privé de la Reine pour le Canada**
Objection relating to a confidence of the Queen's Privy Council	*Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada*
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.
Definition	*Définition*
(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	**(2)** Pour l'application du paragraphe (1), un renseignement confidentiel du Conseil privé de la Reine pour le Canada s'entend notamment d'un renseignement contenu dans :
(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.

Definition of Council

(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.

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.

Définition de Conseil

(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.

Exception	*Exception*
(4) Subsection (1) does not apply in respect of	**(4)** Le paragraphe (1) ne s'applique pas :
(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or	**a)** à un renseignement confidentiel du Conseil privé de la Reine pour le 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.	

IV. Issues

[13] The grounds for the present motion as set out in the Applicants' Amended Notice of Motion dated September 16, 2022 are that:

> The Certificate does not comply with s.39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 and the jurisprudence thereunder being *Babcock v. Canada (Attorney General)*, 2002 SCC 57 and *Canada (Privy Council) v. Pelletier*, 2005 FCA 118, as the actual calendar date of the records is not provided.
>
> The Applicants' expectation for the Certificate, using records 1 and 2 as examples, is that a Certificate in compliance should look as follows with the additions underlined and the calendar day described as "[#]":
>
> a. Submission to the Governor in Council, February [#], 2022, in English and in French, from the Honourable Marco Mendicino, Minister of Public Safety and Emergency Preparedness, regarding the

> proposed Order in Council directing that a proclamation be issued pursuant to subsection 17(1) of the *Emergencies Act*, including the signed Ministerial recommendation dated February [#], 2022, along with a draft Order in Council regarding a proposed proclamation, a draft proclamation, and any such accompanying materials.
>
> b. The record recording the decision of Council concerning a proclamation, February [#], 2022, and signed by Council.

[14] The Applicants submit that the issue on the motion is as follows:

> Should the Court compel the records in the Certificate under the terms that the Certificate be rectified and brought into legal compliance within 15 days from the date of this Court's disposition, or the documents and records listed therein be produced in their entirety?

[15] This statement of the issue presumes that the Certificate is legally invalid. The Court agrees with the Respondents' position that the issue is more accurately described as whether the March 2022 Certificate fulfills the purpose of bringing the information for which immunity is claimed within the ambit of s. 39(2) of the *CEA.*

V. Analysis

A. *Applicants' submissions*

[16] The Applicants argue the Certificate is *prima facie* non-compliant with the statutory and common law requisites of section 39 of the CEA. In *Babcock* at para 28, the Supreme Court held that for the certificate to comply with the CEA and the common law "[…] the date, title, author and recipient of the document containing the information should normally be disclosed. If

confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue." The Applicants add that in statute and in the general English language, the ordinary sense of the word "date" means a specific calendar day designated by month, numerical date of the month and year: *Edmonton School District No. 7 v ATA* 2013 ABCA 155 at para 29 [*Edmonton School District*].

[17] In *Canada (Privy Council) v Pelletier,* 2005 FCA 118 at para 17 [*Pelletier*], the Federal Court of Appeal agreed that "date" in *Babcock* meant the specific calendar day designated by the month, numerical date of the month and the year. In that case, the Court directed that a new certificate be issued within 15 days, the failure of which would result in the records at issue having to be produced. The Applicants seek the same remedy here.

[18] The Applicants argue the onus is on the Respondents to satisfy the Court that confidentiality concerns prevent disclosure of any of the preliminary indicia of identification, including the dates.

[19] Distinguishing their case from the decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*], the Applicants contend, in their Amended Notice of Motion, that the principle to be gleaned from that case is that :

> Particularity in the descriptions that are prima facie required by *Babcock* to be in the Certificate do not need to be provided when the Government can satisfy the Court that if the particulars are provided there would be a substantial likelihood that it could be deduced exactly what was placed before and discussed with the Governor in Council.

[20] The Applicants argue that the invocation of the *Emergencies Act* was done under the guise and protections of Canada's national security laws and all the records are protected and not public. Thus, compliance with the calendar date requirements that are *prima facie* required by *Babcock* and *Pelletier* could not lead to a substantial likelihood that it could be deduced exactly what was placed before and discussed with the Governor in Council.

[21] In their Reply submissions, the Applicants contend that the Respondents are incorrect when they argue that disclosing the specific date of the documents would undermine the purpose of section 39 by revealing information about the documents themselves. They reiterate that when confidentiality concerns prevent the disclosure of the usual requirements of the "date, title, author and recipient of the document", the onus falls on the government to establish that if that information was provided, there would be a substantial likelihood that it could be deduced exactly what was placed before and discussed with the Governor in Council. The Applicants argue that the Respondents have failed to show adequately, or at all, how or why having the precise dates on the Certificate would undermine the purposes of section 39 as it relates specifically to the invocation of the *Emergencies Act*.

[22] Further in reply to the Respondents' submissions, the Applicants add that this Court's decision in *Canadian Constitution Foundation v Canada (Attorney General),* 2022 FC 1233 [*CCF*] is distinguishable because the issue of the calendar dates of the Certificate was not raised in that motion. Thus, the comment at para 96 that "both certificates appear on their face to conform to the formal requirements as set out by the Supreme Court in *Babcock*" is of no assistance in this matter.

[23] The Applicants submit that nothing in the Respondents' Written Representations adequately absolves them of their burden to produce a compliant section 39 certificate, which distinguishes this case from *Tsleil-Waututh*. The Applicants argue the invocation of the *Emergencies Act* was not a largely public process. Indeed, the undeniable distinguishing fact is that invocation of the *Emergencies Act* was done under a cloak of secrecy. By not providing a valid section 39 certificate with dates as required, the Applicants contend that the Certificate obfuscates and thwarts public inquiry.

B. *Respondents' submissions*

[24] The Respondents' position is that the Certificate provides a description of the documents that is sufficient on its face to show that the information for which immunity is claimed falls within section 39(2) of the *CEA* and that the Interim Clerk of the Privy Council did not exceed the powers conferred upon her. They submit that disclosing the specific date of the documents would undermine the purposes of section 39 by revealing information about the documents themselves.

[25] According to the Respondents, the purpose of the Clerk's description is to establish that the information she has certified falls within the categories of section 39(2) and the standard set by the Supreme Court is one of sufficiency: the Clerk is required to provide a description containing information that is sufficient, on its face, to show that the information falls within the categories protected by section 39. An applicant can only succeed in challenging the certification when the information for which immunity is claimed does not on its face fall within section 39(2) or when the Clerk has improperly exercised the powers conferred by section 39(1).

[26] The Respondents contend that the jurisprudence confirms that calendar dates are not required for the descriptions to be considered sufficient under section 39. In their view, the dominant consideration in determining the sufficiency of the description is that it must provide enough information to allow a court to assess that the Clerk has listed documents that fit within the scope of section 39: *Tsleil-Waututh* at para 32 and 33.

[27] The Respondents further add that *Pelletier*, on which the Applicants rely, was decided 12 years before *Tsleil-Waututh* and other decisions since then (*Volpe v Canada (Governor General),* 2021 FC 1133 [*Volpe*] and *China Mobile Communications Group Co., Ltd. v Canada (Attorney General),* 2022 FC 125 [*China Mobile*]) have followed the same approach as *Tsleil-Waututh*.

[28] The Clerk's description of the Minister's submissions to the GIC, the Respondents contend, provides sufficient particulars, including particulars concerning the date of the document, to show on its face that the document in full is a confidence of the Queen's Privy Council for Canada and falls within a category of s. 39(2), thus satisfying the requirements of *Babcock*. The description identifies the month and year of the document, its author, and its recipient. While the description does not provide the title of the document (should there be one), it provides the type of document and its subject-matter.

[29] Moreover, the Respondents argue, the Applicants' pursuit of the date of the Ministerial recommendation is without merit. The Federal Court of Appeal, both in *Pelletier* and *Tsleil-Waututh*, held that the ministerial recommendation is not severable from the Minister's memorandum, as it is a component of the Minister's document.

[30] The Respondents contend that disclosure of the day on which the Minister made his submission to the GIC and the day of Council's decision would disclose aspects of the content of the Minister's submission. It would shed light on what the submission contained and thus undercut the protective purpose of s. 39 of the *CEA*. The matter of when a Minister decides the moment is opportune to bring forward a submission to the GIC and to seize Council of the subject for deliberation and decision is, the Respondents argue, the internal business of the executive.

C. *Analysis*

[31] At the outset, I agree with the Applicants that the observation I made in the *CCF* decision that "both certificates appear on their face to conform to the formal requirements as set out by the Supreme Court in *Babcock*" is of no assistance to the Respondents. The question was not at issue in that motion and the comment was made without the benefit of submissions from the parties or consideration of the authorities. It does not preclude the Court from examining the question raised by the Applicants on this motion.

[32] Cabinet confidentiality is essential to good government, and accountability of the executive branch and the principle that actions by government officials must flow from statutory authority granted and properly exercised is of primary importance in our society: *Babcock* at para 15. Cabinet members must be able to freely express themselves unreservedly without fear that what they say or act on will later be subject to public scrutiny*: Singh v Canada (Attorney General),* [2000] 3 RC 185 (C.A.) at paras 21-22; *Babcock* at para 18, *Pelletier* at para 18.

[33] The public also has an interest in the disclosure of information about the workings of government and, in particular, about decisions which affect their constitutional rights and civil liberties. That is especially true when members of the public seek disclosure in order to pursue their rights before the courts in lawsuits and on judicial review.

[34] In considering the interplay of these interests in this context, the Court must be satisfied that information for which Cabinet confidentiality is claimed truly relates to the deliberations and decisions of the GIC and is properly withheld.

[35] When a Clerk of the Privy Council or Minister certifies information under section 39 of the *CEA*, there is little scope for judicial review of the certificate: a judge or tribunal must refuse disclosure without examining the information. Before certifying information, the Clerk or Minister must answer two questions: (1) is it a Cabinet confidence within the meaning of sections 39(1) and 39(2); and (2), is it information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality? The protection afforded by section 39 only comes into play if the Clerk or Minister answers these two questions positively: *Babcock* at para 22.

[36] In *Babcock*, the Supreme Court established four requirements for a valid certification: *Babcock*, at paras 24-26. First, it must be done by the Clerk of the Privy Council or a Minister of the Crown. Second, the documents certified must contain information that fall within the categories described in s. 39(2). Third, the certificate must be issued for the *bona fide* purpose of protecting Cabinet confidences in the broader public interest, not to thwart public inquiry or gain

tactical advantage in litigation. Finally, for certification to be valid, the documents must not already have been disclosed.

[37] When determining that the information is a Cabinet confidence within section 39, the certificate must bring the information within the ambit of the CEA. As discussed in *Babcock* at para 28, the Clerk or Minister must "provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) or an analogous category". Further:

> The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. [Emphasis added]

[38] In my view, the reasoning of the Alberta Court of Appeal in *Edmonton School District No.7* is of no assistance in resolving the issue raised by the Applicants. The decision dealt with the reasonableness of the statutory interpretation of the word "date" in Alberta's *School Act.* As stated by the Court of Appeal at para 22:

> …While the word "date" is found in numerous statutes, the Board's interpretation of that word within s 101 of the *Act* is not of central importance to the legal system as a whole. The interpretation is specific to the contractual relationship between temporary teachers and school boards, and that is the extent of its application.

[39] By using the words "sufficient", "generally" and "normally", the Supreme Court in *Babcock* makes it clear that the details to which it referred are not mandatory. Thus, as submitted

by the Respondents, the requirement being established in *Babcock* is one of sufficiency, and the description required for claims of solicitor-client privilege is a guideline to evaluate the sufficiency of the information.

[40] As Justice Stratas wrote in *Tsleil-Waututh*, these references to sufficiency and to solicitor-client privilege are somewhat conflicting:

> [33] […] To assert solicitor-client privilege successfully over a document, it is not always necessary to disclose the date, title, author and recipient of the document. Sometimes the disclosure of this information—especially the title of the document—can reveal privileged information. In my view, based on a complete reading of *Babcock*, the **dominant consideration that overrides this potential conflict** is that the certificate must **provide enough information** to allow a court to assess, from the face of the certificate, that the Clerk has listed documents that fit under section 39, and has not exceeded her or his statutory powers. [Emphasis added]

[41] The documents which were the subject of the s. 39 certificate in *Tsleil-Waututh* were described, among other indicia, by month and year but not the precise day, as in the present matter. Among the arguments raised by the moving party challenging the certificate was that the lack of a specific day of the month meant that the documents were not sufficiently described. Justice Stratas concluded, at paragraph 34, that a description of a submission from a particular minister to the GIC during the month of its meeting, together with other information, qualified for protection under s. 39. In my view, the same reasoning applies in the present matter.

[42] Applying the analogy to information subject to solicitor-client privilege, Justice Stratas reasoned at para 36 that a memorandum with attachments regarding litigation from a lawyer dated “November 2016” would be privileged without further disclosure. He concluded, at paras

38-40, that the government had met its burden of establishing that the documents in question fell under section 39. A more particularized description of the documents, such as their exact dates, would, he concluded, "shed light on what the submissions said and, thus, reveal a Cabinet confidence." I am inclined to the same conclusion given the context in which the documents were presented to the GIC. This was not a situation in which considerable time had been taken to develop the Cabinet documents, as is frequently the case, but rather a reaction to fast-moving events.

[43] The Applicants rely heavily on *Pelletier* in support of their motion and request the same remedy that was granted by the Court in that case. *Pelletier* was a case in which there had been a number of procedural irregularities including inadvertent disclosure of the privileged information, including to the applications judge. In the result, the decisions appealed from were effectively a nullity. Moreover, the description of the documents in the certificates at issue (at para 12) are considerably less detailed from the ones at bar. Dates are suggested by a statement that "content indicates March 2004" indicating a lack of certainty as to even the month in which the ministerial submission and recommendation to the GIC had been made. The remedy crafted by the Federal Court of Appeal in *Pelletier* has to be read in light of what had transpired before the case reached the court.

[44] Despite the relative vagueness of the dates and lack of particularity of the descriptions, the Federal Court of Appeal was not persuaded that the certificates were subject to formal and fatal defects as the applications judge had found. Citing paragraph 28 from *Babcock*, Justice Létourneau speaking for the Court set to apply the following identification requirements to the

documents, namely the date (if any), the title (if given one), the author and the recipient. The Court then adds that :

> [19] To conclude, as the respondents suggest, that the privilege under section 39 of the Act is irretrievably lost by the slightest technical or formal deficiency in the certificate, is to give form priority over substance, at the expense of the very purposes of the privilege. We do not believe that this was **the legislative intent** or the effect sought by the Supreme Court of Canada in *Babcock* when it indicated the identification requirements.
>
> […]
>
> [21] We consider that this remedial approach is more consistent with the purposes of section 39, more likely to attain those purposes and so more in keeping with the legislative intent, as the idea of requiring sufficient identification of the documents covered by the certificate is not to cause the benefit of the privilege to be lost but to **enable the Court to see on the face of the certificate that these are Cabinet confidences**, that they fall under subsection 39(2) of the Act and that the Clerk did not exceed the powers conferred on him by the Act. In the Court's view, the holder of this public interest privilege should have the right to correct the inadequacy of the description of documents for which the certificate of confidentiality is filed. [Emphasis added]

[45] This line of reasoning – i.e. the insistence on the legislative intent and being able to see on the face of the certificate that they are Cabinet confidences – aligns with what Justice Stratas would go on to write in *Tsleil-Waututh* 12 years later at para 33 cited above. He concluded that the description of Document #2 was adequate and disclosed enough to satisfy the Court that the decision to certify was a proper exercise of statutory authority. The description of Document #2 read as follows (at para 29):

> #2: Submission to the Governor in Council in November, 2016 in English and French from the Honourable Jim Carr, Minister of Natural Resources, regarding a proposed Order in Council concerning the Trans Mountain Expansion Project, including signed Ministerial recommendation, summary and accompanying materials.

> This information, including all its attachments in their entirety which are integral parts of the document, constitutes a memorandum the purpose of which is to present proposals or recommendations to Council. The information is therefore within the meaning of paragraphs 39(2)(a) of the Canada Evidence Act.

[46] On its face, this description is very similar to those contained in the Certificate at issue in this case.

[47] More recently, in *Volpe*, Justice Fuhrer notes that the descriptions in the certificates before her are similar to those in *Tsleil-Waututh*, which leads her to conclude that even though more detailed descriptions would have made the task of assessing whether the documents fall within the ambit of section 39 easier, the information contained in the certificate is sufficient to convince her the exercise of the discretionary power was proper. A similar conclusion was reached by Associate Judge Horne in *China Mobile.*

[48] The Supreme Court in *Babcock* did not specify the "onus" which the government must meet in the case of a challenge to the sufficiency of a certificate. The dominant interpretation has thus been that discussed by Justice Stratas at para 33 in *Tsleil-Waututh* and again at para 38:

> [38] The Tsleil-Waututh Nation complains that the exact dates and titles of documents are not disclosed and this triggers a consequence: under *Babcock* (at para. 28) when there is such non-disclosure, "the onus falls on the government to establish [the documents fall under section 39], should a challenge ensue." That may be so, but for the reasons set out above, <u>that onus has been met, merely from the description provided on the face of the certificate: a description that has persuaded me that here there has not been any exceedance of statutory power.</u> [Emphasis added]

[49] Similarly, I am satisfied that the onus to establish that the documents in question fall within the scope of s. 39 has been met from the description provided on the face of the Certificate and that the statutory power to rely on the privilege has not been exceeded.

[50] I also agree with the Respondents that the Applicants' pursuit of the date of the Ministerial recommendation in Documents 2, 4 and 6 is without merit. As held by the Federal Court of Appeal in *Pelletier* and *Tsleil-Waututh,* the ministerial recommendation is not severable from the Minister's memorandum, as it is a component of the Minister's document.

VI. Conclusion

[51] It is clear to this Court from the descriptions in the Certificate and the attached schedule that information in the documents is subject to the Cabinet confidence privilege. As noted above, claims of privilege under sections 37 and 38 of the *CEA* are currently the subject of separate proceedings. To require specification of the day of the month as sought by the Applicants would be to give form priority over substance at the expense of the very purposes of the s. 39 privilege, as stated by Justice Létourneau in *Pelletier*. Moreover, disclosure of the specific dates might reveal privileged information, the concern raised by Justice Stratas in *Tsleil-Waututh.* It could not have been the legislative intent to require the Respondents to disclose the very information for which the privilege is claimed in order to satisfy the onus set out in *Babcock.*

[52] For these reasons, the motion must be dismissed.

[53] The Respondents have not requested costs and none will be awarded.

ORDER IN T-382-22

THIS COURT ORDERS that the motion is dismissed without costs**.**

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-382-22
STYLE OF CAUSE:	JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS and HAROLD RISTAU v. GOVERNOR IN COUNCIL, HIS MAJESTY IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA
DATE OF HEARING:	WRITTEN SUBMISSIONS ONLY
ORDER AND REASONS:	MOSLEY J.
DATED:	NOVEMBER 9, 2022

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