



[2021] 4 F.C.R. D-16

EVIDENCE

Related Subjects: Constitutional Law; Practice

Motion by applicant arising from its application for judicial review in relation to *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 (Emergency Proclamation), issued on February 14, 2022 pursuant to *Emergencies Act*, R.S.C., 1985 (4th Supp.), c. 22 (Act), s. 17(1) — Emergency Proclamation declaring that public order emergency exists throughout Canada, necessitating taking of special temporary measures for dealing with emergency — Underlying application for judicial review challenging lawfulness of Emergency Proclamation, related measures — In notice of application, applicant requested production of records related to Emergency Proclamation under *Federal Courts Rules*, SOR/98-106, r. 317 (Rule 317 Request) — Some records were initially produced in response to Rule 317 Request, including some that were redacted under *Canada Evidence Act*, R.S.C., 1985, c. C-5 (CEA), s. 39, other claims of privilege — On present motion, applicant seeking declaration that response to its Rule 317 Request is incomplete, serving to immunize decision from judicial review — Seeking order directing respondent to deliver items for which Cabinet confidence has been claimed in unredacted form, on counsel-only basis, subject to undertakings of confidentiality — Emergency Proclamation revoked pursuant to Act, s. 22 on February 23, 2022 — Further to protest movement in Ottawa against federal government's public health response to COVID-19 pandemic called "Freedom Convoy", on February 10, 2022, Prime Minister Trudeau convened Incident Response Group (IRG) to address ongoing blockades across country — Applicant, registered charity, whose mission is to protect constitutional freedoms — Filed its application for judicial review seeking declarations that Emergency Proclamation, Emergency Regulations unlawful — Other applications pending before Court — On March 31, 2022, Interim Clerk of Privy Council signing certificate under CEA, s. 39, claiming confidence of Queen's Privy Council of Canada in relation to specific materials — Subsequently, respondent stating that s. 39 certificate barring any disclosure of requested information, filed motion to strike underlying application, in particular — On February 23, 2022, GIC, on Cabinet's recommendation, issued Proclamation Revoking the Declaration of a Public Order Emergency, SOR/2022-26 [Revocation Proclamation] revoking Emergency Proclamation — Later, Clerk of Privy Council signing second certificate with schedule referencing portions of documents delivered to parties, Court for which Cabinet confidence, other privileges claimed — Applicant sought Order from Court for delivery of unredacted copies of any item listed in s. 39 certificates on counsel-only basis, subject to confidentiality undertaking — Whether record before Court complete; whether distinction between Cabinet, Governor in Council relevant to motion; whether record as whole, including delivery of redacted Cabinet materials, immunized decision from judicial review — Delivery of documents such as IRG, Cabinet Minutes, etc, second s. 39 certificate rendered much of what applicant sought to achieve moot — Nevertheless, applicant maintaining that delivered record continuing to be unresponsive to Rule 317 Request due to redactions in IRG, Cabinet material — Also submitting that effective, meaningful judicial review of decision to invoke Act can only be achieved through adversarial process which requires unredacted copies of record to be delivered to parties on counsel-only basis — Respondent arguing that, in its entirety, record sufficient for meaningful judicial review; that there is no provision in law for remedy applicant seeking — In present matter, Cabinet, informed by discussions before IRG, was decision maker responsible for declaration of Emergency Proclamation, subsequent regulations — Respondent's attempt to distinguish Cabinet, IRG from GIC is dissociated from constitutional convention, practical functioning of executive — Question not needing to be decided; however, proposition that IRG is not Cabinet Committee is dubious given its

composition, mandate — Clear that IRG’s consideration of reports about situation across country, attempts to deal with it fed directly into decision Cabinet making on February 13, 2022, to invoke Act — Was no different from other Cabinet committees that consider issues, options, recommendations before they are presented to Cabinet for decision — Material requested under *Federal Courts Rules*, r. 317 must be relevant to application, as determined with reference to grounds stated in Notice of Application — IRG, Cabinet minutes relevant; thus producible pursuant to rr. 317, 318, as they provide account of collective reasoning process engaged in by members of these two bodies in reaching decision under review — IRG played central role in Cabinet’s decision to issue declaration of public order emergency — Although focus of argument on motion on s. 39 redactions, considerable amount of redacted text appearing to fall within scope of other claims of privilege — Concept of Public Interest Privilege, while undefined, applying to various types of information which are deserving of protection, including at common law prior to enactment of CEA, s. 39 — In present circumstances, where two s. 39 certificates signed, Court may infer that claims of privilege under s. 37, which appear in notations on delivered materials, refer to public interests other than those in relation to Cabinet confidences — However, what those other interests may be not apparent here — Public interest immunity preventing disclosure of document where court satisfied that public interest in keeping document confidential outweighing public interest in its disclosure — Requiring careful balancing of competing public interests — No specific process to follow to determine s. 37 objections — Federal Court previously holding that it has full discretion to choose its own procedure based on circumstances before it — Filing of respondent’s objection to production under r. 317, delivery of redacted materials with notations indicating claims of public interest privilege can be construed as application under CEA, s. 37 — Applicant making out apparent case for disclosure of information redacted under claim subject to further consideration — Portions of redacted text in delivered materials indicating they are subject to solicitor-client privilege claims — While some of these appear to be isolated references, others are interspersed with other claims — Such privilege is as close to absolute as possible to ensure public confidence — As such, will only yield in certain clearly defined circumstances — Solicitor-client privilege is essential to effective administration of justice, aims to protect confidential relationship between lawyer, client — Save for limited exceptions inapplicable here, such information permanently protected from disclosure unless expressly waived by client — With respect to second s. 39 certificate (relating to confidences of Queen’s Privy Council for Canada) nothing turning on that — Present matter not case where respondent seeking to retrospectively claim protection for already disclosed documents — Moreover, second s. 39 certificate clear that applying only to “portions” of delivered documents — Applicant submitting that in case of judicial review of Cabinet decisions, material put before Cabinet, such as ministerial submissions, draft proposals, not excluded from reach of r. 317 — Under Act, s. 17(1), bodies exercising jurisdiction or powers conferred by or under Act of Parliament, within meaning of *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 2, are Cabinet, IRG, even though Act referring explicitly only to GIC — Therefore, record produced in response to applicant’s Rule 317 Request having to include materials before Cabinet, IRG, subject or not to CEA s. 39 or other privilege claim — Without such information, gap in record would persist, as it would lack any information about reasoning process leading to issuance of Emergency Proclamation, thus preventing Court from properly reviewing impugned decision — Court having plenary powers to control integrity of own processes — In fashioning remedy pursuant to plenary powers, imperative of meaningful judicial review of administrative decision-making must be reconciled with protection of any legitimate confidentiality interests — Was key consideration in present context — Section 39 typically understood as constituting absolute bar to disclosure of Cabinet confidences before reviewing Court — Case law pertaining to s. 39 also holding that its “draconian” cloaking of Cabinet confidences not offending rule of law, separation of powers, or independence of judiciary, etc. — Determinative question whether s. 39 certificate immunizing impugned decision from judicial review in manner inconsistent with rule of law — Respondent’s voluntary disclosure of redacted minutes, agendas in July undermining argument that it attempted to immunize impugned decision from judicial review in manner inconsistent with rule of law — Such information, together with certified tribunal record, other contextual information on record before Court providing basis for effective, meaningful, fair judicial review of decision — Bar set by case law for sufficiency of record of GIC decisions quite low — In present case, could not be said there was complete lack of anything in record on essential element — Decision to declare public safety emergency on February 15, 2022, not immunized from judicial review by claims of privilege over portions of record of Cabinet’s

deliberations before Act invoked — Sufficient information disclosed, in addition to that which was previously produced, to allow for effective, fair, meaningful judicial review of decision — Motion dismissed.

CANADIAN CONSTITUTION FOUNDATION V. CANADA (ATTORNEY GENERAL) (T-347-22, 2022 FC 1233, Mosley J., reasons for order dated August 26, 2022, 45 pp.)