Federal Court of Appeal

Cour d'appel fédérale

Date: 20231005

Docket: A-159-22

Citation: 2023 FCA 202

CORAM: **RENNIE J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

CHINA MOBILE COMMUNICATIONS GROUP CO., LTD., CHINA MOBILE INTERNATIONAL (CANADA) INC., and CHINA MOBILE INTERNATIONAL (UK) LIMITED

Appellants

and

CANADA (ATTORNEY GENERAL), MINISTER OF INNOVATION, SCIENCE AND INDUSTRY, and GOVERNOR GENERAL IN COUNCIL

Respondents

Heard at Toronto, Ontario, on May 15, 2023.

Judgment delivered at Ottawa, Ontario, on October 5, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] The appellants sought production of documents in the possession of the Governor in Council and the Minister of Innovation, Science and Industry (the Minister, or the Minister of Industry) under Rule 317 of the *Federal Courts Rules,* S.O.R./98-106. The Attorney General objected under Rule 318(2), and filed a certificate pursuant to section 39 of the *Canada Evidence Act,* R.S.C. 1985, c. C-5 setting out objections to disclosure on the basis of Cabinet confidentiality. The appellants pursued an order compelling production of the material before both the Governor in Council and the Minister.

[2] Associate Judge Horne dismissed the appellants' motion (2022 FC 125) and in an unreported decision in Federal Court file T-1377-21, the Federal Court upheld the Associate Judge's order (*per* Aylen J.). The Federal Court's order dismissing the appellants' appeal of the production motion is the subject of this appeal.

[3] I see no error in the Federal Court's decision and would dismiss the appeal.

II. Statutory framework for review of investments by non-Canadians

[4] The *Investment Canada Act,* R.S.C. 1985, c. 28 (1st Supp.) (the ICA) provides for the review of investments in Canada by non-Canadians. One of its objectives is to ensure that foreign investments are not injurious to national security. Reviews of foreign investments on this ground require decisions by the Minister of Industry (the responsible Minister), the Minister of

Public Safety and Emergency Preparedness and, ultimately, the Governor in Council. The relevant statutory provisions are set out in the annex to these reasons.

[5] The review process begins with the Minister of Industry. Where the Minister of Industry, having consulted the Minister of Public Safety and Emergency Preparedness, is satisfied that the investment would be injurious to national security (subparagraph 25.3(6)(*a*)(i) of the ICA), or, where the Minister of Industry is not able to determine whether the investment would be injurious to national security on the basis of the information available (subparagraph 25.3(6)(*a*)(ii) of the ICA), the issue can be referred to the Governor in Council.

[6] If the Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security, the Minister may, within the prescribed period, send a notice to the non-Canadian advising that an order for the review of the investment may be made by the Governor in Council (subsection 25.2(1) of the ICA).

[7] If the Governor in Council does make an order for the review of the investment, the Minister must send a further notice to the non-Canadian informing them of the order and advising them of their right to make representations to the Minister (subsection 25.3(2) of the ICA). The Minister must afford the non-Canadian a reasonable opportunity to make representations in the course of the review (subsection 25.3(4) of the ICA).

[8] The Governor in Council has broad powers when assessing an investment referred from the Minister in either of the circumstances contemplated by paragraph 25.3(6)(*a*). The Governor

in Council may, by order within the prescribed period, “take any measures in respect of the investment that he or she considers advisable to protect national security” (subsection 25.4(1) of the ICA), including requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity (paragraph 25.4(1)(*c*) of the ICA).

[9] Under subsection 25.4(1) of the ICA, the Governor in Council may only exercise its powers in respect of the investment where the Minister has referred the matter to the Governor in Council after consultation with the Minister of Public Safety and Emergency Preparedness. Put otherwise, a Ministerial recommendation is a threshold or pre-condition to a decision of the Governor in Council in respect of the investment.

[10] Section 25.6 of the ICA provides that decisions and orders of the Governor in Council, and decisions of the Minister, are final and binding and, except for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7 are not subject to appeal or to review by any court.

III. Review of China Mobile’s investment

[11] The appellants in this case were the subject of a review under the ICA. China Mobile Communications Group Co., Ltd. (China Mobile) is a Chinese state-owned company that provides mobile communication services throughout China. China Mobile International (UK) Limited (CMI UK) operates China Mobile’s international business. China Mobile International (Canada) Inc. (CMI Canada) is a subsidiary of CMI UK, and was incorporated in British Columbia. CMI Canada is the company that was the focus of the Governor in Council’s order.

[12] The initial review of China Mobile's investment in CMI Canada and its impact on national security resulted in the Minister's referral of the matter to the Governor in Council. CMI Canada received notice from the Minister pursuant to subsection 25.2(1) of the ICA advising that the Minister had reasonable grounds to believe China Mobile's investment in CMI Canada could be injurious to national security and that the Governor in Council may make an order for a review of the investment. In accordance with subsection 25.3(2) of the ICA, CMI Canada received a second notice informing it that the Governor in Council had indeed made an order for the review of the investment.

[13] By Order in Council dated August 6, 2021 the Governor in Council ordered China Mobile to divest itself of all right, title, interest and ownership in CMI Canada, or otherwise to wind up CMI Canada's business entirely, under subsection 25.4(1) of the ICA.

[14] The Order in Council was based in part on a report of the Minister's findings. No copy of this report was provided to the appellants, who believe the report to have been provided to the Governor in Council around July 2021.

[15] The appellants commenced a judicial review application. The content of their notice of application is significant for the purposes of this appeal and is therefore reproduced, in part, below (Appeal Book at p. 272):

> **THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF** an order of the Governor in Council dated August 6, 2021 and communicated to China Mobile Communications Group Co., Ltd. ("**China Mobile**") on August 9, 2021, pursuant to subsection 25.4(1) of the *Investment Canada Act,* R.S.C. 1985, c 28 (the "**ICA**"), ordering that China Mobile (a) divest itself of all right, title, interest and ownership in China Mobile International (Canada) Inc. ("**CMI**

> **Canada**" or the "**Canadian business**") and all assets used to carry on the Canadian business, whether held directly or indirectly through owners, subsidiaries or affiliates, including by equity or debt; or (b) wind up the Canadian business, on the basis that the Governor in Council was satisfied that CMI Canada's business may be injurious to national security (the "**Decision**") following referral by the Minister of Innovation, Science and Industry (the "**Minister**") (the "**Referral**").
>
> **THE APPLICANT MAKES AN APPLICATION FOR:**
>
> 1. An Order setting aside the Decision;
>
> 2. In the alternative, an Order setting aside the Decision, and remitting the issue back to the Minister and Governor Council [*sic*] to re-determine the matter;
>
> 3. A stay of the Decision pending the outcome of this application and any appeals;
>
> 4. Costs of this application on an elevated scale; and
>
> 5. Such further and other relief as counsel may advise and/or this Honourable Court may permit.

[16] The notice of application also included a request under Rule 317 for the materials "relevant to the application and to the [Governor in Council's order dated August 6, 2021] that is in the possession of the Governor in Council and Minister and not in the possession of the [appellants]" (Appeal Book at p. 286).

[17] In response, by letter dated September 28, 2021, counsel for the Attorney General transmitted three documents to the appellants. The first document was a letter from the Assistant Clerk of the Privy Council, refusing to disclose the requested material pursuant to Rule 318(2) on the basis that the material constituted "confidences of the Queen's Privy Council for Canada and as such, cannot be disclosed because of their confidential nature" (Appeal Book at p. 290). The second document was a schedule describing the material being withheld on the grounds of

Cabinet confidentiality under subsection 39(2) of the *Canada Evidence Act.* The third document was the Order in Council itself dated August 6, 2021.

[18] The appellants brought a motion for production of the materials requested under Rule 317 in their notice of application. The day after filing their notice of motion, the appellants received a certificate under section 39 of the *Canada Evidence Act*, signed by the Interim Clerk of the Privy Council and Secretary to the Cabinet. The certificate was dated December 17, 2021, and was attached as an exhibit to an affidavit within the respondents' motion record. The schedule to the certificate contained the following descriptions of the withheld documents, which match the descriptions in the schedule enclosed with the September 28, 2021 letter from the respondents:

> 1. Submission to the Governor in Council, July 2021, in English and in French, from the Honourable Francois-Philippe Champagne, Minister of Innovation, Science and Industry (the Minister), regarding the proposed Order in Council pursuant to subsection 25.4(l) of the *Investment Canada Act*, including a letter to the Minister from the Honourable Bill Blair, the Minister of Public Safety and Emergency Preparedness, the signed Ministerial recommendation, a draft Order in Council, 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, and 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. Therefore, the information is within paragraphs 39(2)(a) and 39(2)(d) of the *Canada Evidence Act*.
>
> 2. Signed and approved Order in Council of August 6, 2021, concerning China Mobile Communications Group Co. Ltd.
>
> This information is a record recording deliberations or decisions of Council. The information therefore is within paragraph 39(2)(c) of the *Canada Evidence Act*.

IV. Decisions Below

A. *Motion before the Associate Judge*

[19] Associate Judge Horne dismissed the appellants’ production motion in part.

[20] The Associate Judge determined that the appellants’ motion sought production of documents that were before a decision-maker other than the one whose decision had been challenged by the appellants (CMJ Reasons at para. 40). He found that the notice of application before him challenged only a single order, namely the August 6, 2021 order of the Governor in Council. The appellants had not, in his view, sought to judicially review the Minister’s decision to refer the investment to the Governor in Council (CMJ Reasons at para. 23).

[21] Relying on Rule 317 and this Court’s decision in *Tsleil-Waututh Nation v. Canada (Attorney General),* 2017 FCA 128, [2017] F.C.J. No. 601 (QL) [*Tsleil-Waututh*], the Associate Judge then concluded that documents in the possession of the Minister could not be the subject of a proper production request in this proceeding as the appellants had not sought to judicially review the Minister’s decision (CMJ Reasons at para. 29). He highlighted that Rule 302 limits applications for judicial review to a single order in respect of which relief is sought, unless the court orders otherwise, and that Rule 317 limits a party’s access to materials to those “in the possession of a tribunal whose order is the subject of the application” (CMJ Reasons at paras. 22 and 25).

[22] In arriving at this conclusion, the Associate Judge disagreed with the appellants that "judicially reviewing one decision necessarily means any preceding decisions or orders leading up to it are necessarily before the Court as well" (CMJ Reasons at para. 32). He stressed that the Minister's decision to refer "appears to be judicially reviewable under section 25.6 of the [ICA], but the [appellants had] not commenced any proceedings in respect of it" (CMJ Reasons at para. 33).

[23] As noted, the second ground of appeal relates to materials that were before the Governor in Council. The Associate Judge found that, contrary to the appellants' assertions, the respondents' certificate under section 39 of the *Canada Evidence Act* provided sufficient particulars regarding the withheld Cabinet confidences (CMJ Reasons at paras. 55, 57-60, and 62-65). He considered and applied the guidance from *Tsleil-Waututh* and *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 [*Babcock*] in his analysis of the certificate and concluded that it was a valid objection.

[24] The Associate Judge compared item #1 in the schedule to the certificate (describing the Minister's submission to the Governor in Council) to descriptions that had been before the Federal Court and this Court previously, and found that it closely tracked the descriptions found in the certificates at issue in *Tsleil-Waututh* and *Volpe v. Canada (Governor General)*, 2021 FC 1133, 341 A.C.W.S. (3d) 20 [*Volpe*] (CMJ Reasons at paras. 62-65). Observing these prior descriptions to be adequate and within the scope of section 39, the Associate Judge arrived at the same conclusion, as he "could not arrive at a contrary finding without disregarding precedent that [was] binding on [him]" (CMJ Reasons at para. 65).

[25] The Associate Judge set aside item #2 in the schedule of the certificate (describing a "signed and approved Order in Council of August 6, 2021") for failing to adequately describe what the certificate sought to protect, "without prejudice to the respondents delivering a revised certificate" (CMJ Reasons at para. 76). The appellants do not raise any issue with respect to item #2 on this appeal.

B. *Appeal to the Federal Court*

[26] The appellants appealed the Associate Judge's decision to the Federal Court, which upheld the Associate Judge's decision.

[27] The Federal Court held that it was open to the Associate Judge to characterize the notice of application as he did, and ultimately agreed with his characterization (FC Reasons at para. 13). The Federal Court noted that the appellants' arguments on the issue of Rule 317 and the scope of the notice of application had already been made to and properly rejected by the Associate Judge (FC Reasons at para. 12). Similarly, the Federal Court observed that the appellants had not "pointed to any evidence or argument that [Associate] Judge Horne failed to consider or any factually unsupported findings" (FC Reasons at para. 12).

[28] The Federal Court also agreed with the Associate Judge's second ground for dismissing the production motion and upheld the sufficiency of the section 39 certificate. The Federal Court rejected the appellants' arguments that the Associate Judge had misconstrued or improperly adhered to this Court's decision in *Tsleil-Waututh*, or had ignored the requirements of *Babcock*

(FC Reasons at paras. 18 and 20-21). The Federal Court emphasized that *Babcock* and *Tsleil-Waututh* are not inherently contradictory decisions (FC Reasons at para. 20):

> Case Management Judge Horne's reasons expressly refer to and apply the requirement of *Babcock*. While his analysis focused on the findings made in *Tsleil-Waututh* (and *Volpe*), one cannot lose sight of the fact that *Tsleil-Waututh* was an application of *Babcock*. Case Management Judge Horne reviewed in detail the information contained in the Certificate and determined that, like in *Tsleil-Waututh*, the particulars provided regarding Item #1 were sufficient. I see no error in that determination.

V. Issues

[29] There are two issues in this appeal: first, whether the Federal Court erred in sustaining the Associate Judge's conclusions regarding the decisions challenged in the notice of application for judicial review, and, second, the sufficiency of the respondents' certificate under section 39 of the *Canada Evidence Act*.

[30] The appellants say that the decisions below failed to recognize the "real essence" of their application for judicial review. They rely on *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue),* 2013 FCA 250, [2014] 2 F.C.R. 557 [*JP Morgan*] to argue that the Federal Court ought have undertaken a "holistic reading" of the notice of application, interpreting it as generously as possible. They emphasize that their application for judicial review seeks to challenge a "continuing course of conduct under the [ICA] statutory scheme", under which both the Minister's decision and the Governor in Council's order are subsumed (Appellants' Memorandum of Fact and Law at paras. 27, 33, and 39).

[31] The appellants also submit that the decisions below failed to acknowledge the clear language of their notice of application, which they say explicitly challenges the Minister's decision along with the Governor in Council's order. According to the appellants, "[t]he mere fact that the [Governor in Council's order] was defined as a "Decision" in the [n]otice of [a]pplication cannot lead to the realistic conclusion that the [a]ppellants did not intend to challenge [the Minister's referral]" (Appellants' Memorandum of Fact and Law at para. 33). They point to four elements of their notice of application that they say put the Minister's decision into issue:

a) The recital of the notice of application which references the Minister's decision and requests that the issue be remitted to him or her (reproduced above at paragraph 15);

b) The grounds of review listed in the notice of application, which allege breaches of procedural fairness and deficiencies in the Minister's actions;

c) The decision that was challenged in the notice of application's recital being consequential to the recommendation; and

d) The Rule 317 request included with the notice of application, which sought production of material in the Minister's possession.

[32] The appellants submit that the Associate Judge erred by declining to dispense with Rule 302, which limits applications for judicial review to one order per application. The appellants say that the fact that the challenged decisions consist of a "continuing course of conduct" shows that a separate application for judicial review would be a waste of resources. The appellants say that

the Minister's referral and the Governor in Council's order are inextricably linked and must therefore give rise to an exception to the limitation established by Rule 302.

[33] The appellants also argue that the decisions below wrongly treated *Tsleil-Waututh* as the authority on the sufficiency of certificates under section 39 of the *Canada Evidence Act*, and because of this strayed from the Supreme Court's guidance in *Babcock.* In their view, *Tsleil-Waututh* involved a unique, fact-driven analysis that permitted, only exceptionally, this Court's departure from *Babcock.* The appellants also point to *Smith, Kline & French v. Attorney General of Canada*, [1983] 1 F.C. 917, 1983 CanLII 5055 (FC) [*Smith, Kline*], which they say establishes a higher bar for certificate sufficiency than that applied by the Associate Judge and the Federal Court. The appellants maintain before this Court that item #1 of the schedule to the certificate includes only generic descriptions of the relevant material, making it impossible for the appellants to know whether the timeline of the documents' preparation and delivery complied with the prescribed periods required by the ICA.

[34] With respect to the scope of the appellants' notice of application, the respondents contend that the language of the notice of application is clear that the only decision under review is that of the Governor in Council; although the appellants point to errors made by the Minister in their notice of application, the respondents say that this does not expand the scope of Rule 317 to documents in the possession of anyone other than the decision-maker in question. The respondents characterize the appellants' argument on this issue as an attempt to "artificially rewrite their [n]otice of [a]pplication by suggesting that the identifying characteristics of the

decision they seek to review should be read as separate applications for judicial review" (Respondents' Memorandum of Fact and Law at para. 37).

[35] With respect to the section 39 certificate, the respondents say that it satisfies the requirements of *Babcock*. They say that the certificate on its face permits a court to ensure that the Clerk of the Privy Council (the Clerk) has withheld only those documents that fall under section 39, and has not therefore exceeded their statutory powers. According to the respondents, the Associate Judge arrived at a conclusion that was not only consistent with *Babcock,* but was also consistent with the later applications of that decision in *Tsleil-Waututh* and *Volpe*. The respondents argue that the appellants' reliance on *Smith, Kline* is misplaced, as that decision pre-dates *Babcock* and involved an action with discovery instead of an application for judicial review.

VI. Analysis

[36] I agree with the parties that the first issue before the Court—whether the appellants' notice of application sought to judicially review the Minister's decision to refer the investment to the Governor in Council—raises a question of mixed fact and law that is reviewable for palpable and overriding error. The parties disagree as to the nature of the question raised by the second issue regarding the sufficiency of the respondents' certificate under section 39. Because the resolution of the issue is driven by findings of facts and the interpretation of the certificate, the legal content of the question is not high enough to establish the question as one of law reviewable on a correctness basis (*Canadian National Railway Company v. Emerson Milling*

Inc., 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 22). For this reason, the second issue is also reviewable for palpable and overriding error as a question of mixed fact and law.

A. *Ground #1: Rule 317 and the scope of the appellants' notice of application*

[37] Rule 317 permits a party to request material relevant to their application for judicial review that is in the possession of the tribunal whose order is the subject of the application:

> **317(1)** A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

> **317(1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[38] This Court has described Rule 317 as "a limited purpose tool to obtain an administrator's record on a judicial review" (*Canada (Health) v. Preventous Collaborative Health*, 2022 FCA 153, 477 D.L.R. (4th) 184 at para. 10). It ensures that the reviewing court has access to the same record and information as did the original decision-maker upon making their decision. Importantly, it is only this material that may affect the reviewing court's decision. Material sought under Rule 317 must come from the administrative decision-maker in question, not others (*Tsleil-Waututh* at paras. 107 and 111; *Rémillard v. Canada (National Revenue)*, 2022 FCA 63, 2022 A.C.W.S. 922 at para. 28; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2019 FCA 257, 313 A.C.W.S. (3d) 236 at para. 12; *Canada (Attorney*

General) v. Iris Technologies Inc., 2021 FCA 244, 341 A.C.W.S. (3d) 416 at para. 36 [*Iris Technologies*]).

[39] Arguments that seek to infuse Rule 317 with discovery-like attributes are inconsistent with the historical underpinning of judicial review. The writ of *certiorari* was addressed to inferior courts and tribunals, requiring them to return the record that was before them to the supervising court. Rule 317 reflects, precisely, its jurisprudential provenance. Requests for all documents that could potentially bear on a matter in the hopes of establishing relevance have no place under Rule 317. Consequently, parties applying for judicial review cannot rely on Rule 317 to obtain every document they may wish to examine while preparing their application (*Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, 178 A.C.W.S. (3d) 696 at para. 15; *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 162 A.C.W.S. (3d) 570 at para. 17).

[40] Because of this, the content of the notice of application is important when considering what documents may be the subject of a request under Rule 317; such a request is "not available in relation to grounds and relief the notice of application fails… to set out" (*Iris Technologies* at para. 36).

[41] Where other government departments or agencies supply information to the administrative decision-maker, only the information that was actually before the administrative decision-maker is obtainable under Rule 317 (*Tsleil-Waututh* at para. 114, citing *Eli Lilly and Co. v. Nu-Pharm Inc.*, 1996 CanLII 4073 (FCA), [1997] 1 F.C. 3 (C.A.) at 28-29). This leaves

any other material beyond the scope of a Rule 317 request unless the decision or recommendation of that department is, in and of itself, subject to judicial review. Determining which documents the appellants may request under Rule 317 therefore requires a clear delineation of the decision, or decisions, the application seeks to judicially review.

[42] I see no error in the Federal Court's refusal to interfere in the Associate Judge's conclusion that the material in the possession of the Minister could not be subject to a request under Rule 317 on the basis that the Minister's decision was not the subject of the judicial review.

[43] Although courts must gain a realistic appreciation of the application for judicial review's essential character by reading it holistically and practically without fastening onto matters of form (*JP Morgan* at para. 50), this approach does not allow courts to read in elements of the application at the applicant's urging where they do not exist on the face of the notice of application. The determination of what decision is challenged in an application for judicial review is a question so fundamental to the application that an applicant cannot call on the court's generosity to achieve the broad interpretation of the application that they seek.

[44] The appellants' notice of application states that it is an application for judicial review "in respect of an order of the Governor in Council dated August 6, 2021 and communicated to China Mobile Communications Groups Co., Ltd. ("China Mobile") on August 9, 2021." The recital goes on to describe the terms of this order, and defines it as "the Decision." While the notice of application does describe the process leading to the referral in some detail, the only reference to

the Minister's decision in the notice of application's recital comes at the very end, where the appellants note that "the Decision" was made following referral by the Minister. The notice of application adds no further description of the Minister's decision, but does define it as "the Referral."

[45] The relief sought in the notice of application relates exclusively to "the Decision", making no mention whatsoever of "the Referral." Specifically, the appellants seek an order setting aside "the Decision", or, in the alternative, an order setting aside "the Decision" and remitting the issue to the Minister and Governor in Council.

[46] Reference to the Minister's decision is conspicuously absent from both the notice of application's recital providing an overview of the application for judicial review, and from its description of the relief sought. Although the notice of application alleges shortcomings in the Minister's actions when articulating the grounds of review, reference to errors made by the Minister in the grounds of review does not change the decision being reviewed. For these reasons, I agree with the Federal Court that the Associate Judge properly found that the appellants have not sought to judicially review the Minister's decision (FC Reasons at para. 15).

[47] I accept that multiple decisions that constitute a continuing course of conduct may be challenged in a single application for judicial review where the decisions were linked either by virtue of the statute, the decision-makers, the applicable legal questions, the timing of their issuance, or the commonality of facts or allegations and relief sought (*Key First Nation v. Lavallee*, 2021 FCA 123, 334 A.C.W.S. (3d) 677). I also accept that there may be situations

where a preliminary decision or recommendation is subsumed in a final decision. But that is not the case here given the structure of the statute.

[48] The Court always has discretion to exceptionally permit judicial review of multiple orders or decisions under Rule 302. This discretion should be exercised broadly, with a view to ensuring that the essential nature of the applicant's grievance is brought before the court. In reading notices of application, courts should concern themselves with the substance of the issues, not the form that they take. However, the court remains constrained by the statutory framework in issue. The ICA is clear that orders from the Governor in Council are reviewable separately from decisions of the Minister, as shown by the distinct and separate reference to each category of decision in the section of the ICA dealing with the availability of judicial review (section 25.6 of the ICA). The disposition of this appeal pivots on the unique statutory language of the ICA.

[49] Since the decisions here are not sufficiently linked, the appellants were not absolved of the obligation to identify the decisions they sought to challenge in their notice of application. In this case, the appellants identified only one decision that they sought to judicially review—the Governor in Council's order. As the Federal Court rightly noted, if the appellants wished to judicially review a continuing course of conduct comprising the decision of the Minister and the Governor in Council, it was theirs to plead in the notice of application (FC Reasons at paras. 13-14).

[50] As a practical matter, the appellants cannot claim to have implicitly challenged the Minister's decision on the basis that it is inextricably linked to the decision that they did

challenge. The appellants themselves acknowledge that "there is a difference between the Minister's *decision to refer* and the decision of the Governor in Council which is based on the Minister's recommendation and other materials sent to the Governor in Council" (Notice of Appeal at para. 24, emphasis in original).

B. *Ground #2: The sufficiency of the respondents' certificate under section 39 of the Canada Evidence Act*

[51] Section 39 of the *Canada Evidence Act* establishes a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings. Under subsection 39(1) of the *Canada Evidence Act,* the Clerk of the Privy Council may object to the disclosure of Cabinet confidences by certifying information as confidential. Subsection 39(1) also requires that, where the Clerk or a minister has validly certified the information as confidential, a judge or tribunal must refuse any application for disclosure of information without examining the information. The categories of information that fall within the scope of a confidence of the Queen's Privy Council for Canada are enumerated in subsection 39(2).

[52] The Supreme Court has articulated the following four requirements for a valid certification of confidentiality under section 39: it must be done by the Clerk or minister, relate to information within subsection 39(2), be done in a *bona fide* exercise of delegated power and be done to prevent disclosure of hitherto confidential information (*Babcock* at para. 27).

[53] The Clerk or minister must provide a description of the withheld information sufficient to establish on its face that the information is a Cabinet confidence falling under the protection of

section 39. Four indicia should normally be provided to establish that the document is in fact a confidence (*Babcock* at para. 28):

> 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.

[54] The appellants here dispute only the sufficiency of item #1 of the schedule to the certificate, in terms of its formal aspects and the particulars it provides. The appellants do not assert that the Clerk improperly exercised the discretion conferred by subsection 39(2).

[55] The certificate reflects the jurisprudence governing the application of section 39 of the *Canada Evidence Act*.

[56] In *Tsleil-Waututh*, this Court dealt with a description equivalent to that in issue in this appeal. The Associate Judge noted the similarity in language between item #1 of the certificate, and the second item of the certificate in *Tsleil-Waututh* (CMJ Reasons at paras. 63-65; see para. 29 of *Tsleil-Waututh* for a reproduction of the certificate in that case). The only differences between these items are those aspects that would necessarily vary depending on the factual circumstances: the date of the submission to the Governor in Council, the relevant minister, the subject matter of the proposed Order in Council, and the nature of the materials accompanying the submission. Otherwise, the descriptions are identical; they provide the same level of detail regarding the accompanying materials, describing them only in broad terms and omitting any dates related to the materials' preparation or delivery.

[57] The applicants in *Tsleil-Waututh* advanced the same argument as that advanced before this Court: that the description of the materials said to have accompanied the Minister's submission to the Governor in Council lacked specificity (*Tsleil-Waututh* at para. 30). This Court in *Tsleil-Waututh* rejected this argument (*Tsleil-Waututh* at paras. 40-42). This Court found that the description of the second item—the item comparable to item #1 in this case—was adequate, upon considering the alternative language available to the Clerk (*Tsleil-Waututh* at para. 42):

> If more particularity in the descriptions were supplied, there would be a substantial likelihood that the information that lies at the heart of what section 39 exists to protect would be disclosed to some extent. Enough concerning [the second item] has been disclosed to convince me that the decision to make the certificate and the certificate itself, in the words of *Babcock*, "flow from statutory authority clearly granted and properly exercised."

[58] The appellants here argue that, in dismissing the applicants' production motion, this Court in *Tsleil-Waututh* considered the fact that the evidentiary record on the application for judicial review was already sufficient for a meaningful review. They argue that a similarly full evidentiary record does not exist here, and that this distinguishes *Tsleil-Waututh* from the present matter.

[59] The fact that the evidentiary record in *Tsleil-Waututh* was both expansive and growing played no role in this Court's conclusion that the certificate was valid. This Court only commented on the state of the record in *obiter* to observe that the use of the section 39 certificate would not immunize the exercise of public powers as the applicants in that case suggested (*Tsleil-Waututh* at para. 56). Further, as the respondents point out, this Court transitioned to its discussion in *obiter* by clarifying that "the impact that a section 39 certificate might have on litigation is not a relevant factor for assessing the validity or sufficiency of a certificate" (*Tsleil-*

Waututh at para. 49). The state of the evidentiary record here does not distinguish *Tsleil-Waututh*.

[60] I turn now to the appellants' argument that the Federal Court erred by accepting the application of *Tsleil-Waututh,* instead of *Babcock,* to the certificate before it. According to the appellants, *Babcock*, as the leading case on certificates under section 39 of the *Canada Evidence Act*, cannot give way to any jurisprudence that merely applies its principles to a unique set of factual circumstances. I disagree with this characterization of the relationship between *Tsleil-Waututh* and *Babcock.*

[61] The principles emerging from *Tsleil-Waututh* are not contrary to those established in *Babcock,* nor do they apply only in exceptional circumstances as suggested by the appellants. *Tsleil-Waututh* does not diverge from *Babcock*. Although *Babcock* enumerated four indicia of identification that will generally suffice for a valid certificate under section 39, and although this Court in *Tsleil-Waututh* found the certificate before it to be valid even without these particular indicia, the decisions are not inherently at odds. As this Court acknowledged, the indicia listed by the Supreme Court were provided as examples only of what normally should be disclosed (*Tsleil-Waututh* at para. 32). The Supreme Court emphasized that the real concern driving analyses of certificates is whether the description of the information is "sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2)" (*Babcock* at para. 28).

[62] *Tsleil-Waututh* adheres to this principle. The Court asked whether it was clear that the withheld materials fell under section 39 of the *Canada Evidence Act* based upon the language of the certificate, and was satisfied that the application of section 39 was indeed clear on the face of the certificate (*Tsleil-Waututh* at paras. 34 and 38). This follows, precisely, the analysis as set out in *Babcock*. *Babcock* does not impose formalistic, rigid requirements on a certificate under section 39, absent which the certificate must necessarily be invalid or valid; instead *Babcock* focuses on the requirement that the certificate bring the withheld information within the ambit of section 39 for the benefit of judges and tribunals dealing with production requests and responsible for verifying the executive's power to claim Cabinet confidentiality. The appellants' assertion that *Tsleil-Waututh* cannot be considered alongside *Babcock* must fail.

[63] I also disagree with the appellants' argument that *Smith, Kline* establishes an error in the Federal Court's decision. *Smith, Kline* predates *Babcock* and the subsequent jurisprudence applying the Supreme Court's guidance in *Babcock*. The Federal Court in *Smith, Kline* also does not establish the high bar for certificate sufficiency that the appellants describe. The certificate in that case listed 70 withheld documents "without giving particulars as to dates, titles, authors, addresses, etc.", and instead described the documents with blanket terms that did not demonstrate the Clerk to have directed their mind to the criteria and limitations applicable to the assertion of Cabinet confidentiality (*Smith, Kline* at 928-931). Because of its place in the jurisprudence on section 39 of the *Canada Evidence Act* and the unique wording of the certificate at issue, *Smith, Kline* does not support the argument that the certificate in this case is invalid.

VII. Conclusion

[64] I would therefore dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

"I agree.
Laskin J.A."

"I agree.
Monaghan J.A."

Annex

Notice

25.2(1) If the Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security, the Minister may, within the prescribed period, send to the non-Canadian a notice that an order for the review of the investment may be made under subsection 25.3(1).

Avis

25.2(1) S’il a des motifs raisonnables de croire que l’investissement pourrait porter atteinte à la sécurité nationale, le ministre peut, dans le délai réglementaire, aviser l’investisseur non canadien de la possibilité que l’investissement fasse l’objet d’un décret d’examen en application du paragraphe 25.3(1).

Reviewable investments

25.3(1) An investment is reviewable under this Part if the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, considers that the investment could be injurious to national security and the Governor in Council, on the recommendation of the Minister, makes an order within the prescribed period for the review of the investment.

Investissements sujets à examen

25.3(1) L’investissement est sujet à l’examen au titre de la présente partie si le ministre, après consultation du ministre de la Sécurité publique et de la Protection civile, est d’avis que l’investissement pourrait porter atteinte à la sécurité nationale et que le gouverneur en conseil prend, sur recommandation du ministre et dans le délai réglementaire, un décret ordonnant l’examen de l’investissement.

Notice

25.3(2) The Minister shall, without delay after the order has been made, send to the non-Canadian making the investment and to any person or entity from which the Canadian business or the entity referred to in paragraph 25.1(c) is being acquired, a notice indicating that an order for the review of the investment has been made and advising them of their right to make representations to the Minister.

Avis

25.3(2) Le ministre fait parvenir, sans délai, à l’investisseur non canadien et à toute personne ou unité de qui l’entreprise canadienne ou l’unité visée à l’alinéa 25.1c) est acquise un avis les informant de la prise du décret ordonnant l’examen de l’investissement et de leur droit de lui présenter des observations.

Representations

25.3(4) If, after receipt of the notice referred to in subsection (2), the non-Canadian or other person or entity advises the Minister that they wish to make representations, the Minister shall afford them a reasonable opportunity to make representations in person or by a representative.

Observations

25.3(4) Si, après réception de l'avis prévu au paragraphe (2), l'investisseur non canadien, la personne ou l'unité informe le ministre de son désir de présenter des observations, ce dernier lui accorde la possibilité de le faire en personne ou par l'intermédiaire d'un représentant.

Ministerial action

25.3(6) After consultation with the Minister of Public Safety and Emergency Preparedness, the Minister shall, within the prescribed period,

(a) refer the investment under review to the Governor in Council, together with a report of the Minister's findings and recommendations on the review, if

(i) the Minister is satisfied that the investment would be injurious to national security, or

(ii) on the basis of the information available, the Minister is not able to determine whether the investment would be injurious to national security;

Obligation du ministre

25.3(6) Après consultation du ministre de la Sécurité publique et de la Protection civile, le ministre est tenu, dans le délai réglementaire :

a) de renvoyer la question au gouverneur en conseil et de lui présenter ses conclusions et recommandations, si, selon le cas :

(i) il est convaincu que l'investissement porterait atteinte à la sécurité nationale,

(ii) il n'est pas en mesure d'établir, sur le fondement des renseignements disponibles, si l'investissement porterait atteinte à la sécurité nationale;

Governor in Council's powers

25.4(1) On the referral of an investment under paragraph 25.3(6)(a) or subsection 25.3(7), the Governor in Council may, by order, within the prescribed period, take any measures in respect of the investment that he or she considers advisable to protect national security, including

Pouvoirs du gouverneur en conseil

25.4(1) S'il est saisi de la question en application de l'alinéa 25.3(6)a) ou du paragraphe 25.3(7), le gouverneur en conseil peut, dans le délai réglementaire, prendre par décret toute mesure relative à l'investissement qu'il estime

(a) directing the non-Canadian not to implement the investment;

(b) authorizing the investment on condition that the non-Canadian

(i) give any written undertakings to Her Majesty in right of Canada relating to the investment that the Governor in Council considers necessary in the circumstances, or

(ii) implement the investment on the terms and conditions contained in the order; or

(c) requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity.

indiquée pour préserver la sécurité nationale, notamment :

a) ordonner à l'investisseur non canadien de ne pas effectuer l'investissement;

b) autoriser l'investisseur non canadien à effectuer l'investissement à la condition :

(i) d'une part, de prendre envers Sa Majesté du chef du Canada les engagements écrits à l'égard de l'investissement qu'il estime nécessaires dans les circonstances,

(ii) d'autre part, de l'effectuer selon les modalités précisées dans le décret;

c) exiger que l'investisseur non canadien se départisse du contrôle de l'entreprise canadienne ou de son investissement dans l'unité.

Copy of order

25.4(2) The Minister shall send a copy of the order to the non-Canadian or other person or entity to which it is directed without delay after it has been made.

Copie du décret

25.4(2) Le ministre fait parvenir, sans délai, une copie du décret aux investisseurs non canadiens, personnes ou unités qui y sont assujettis.

Requirement to comply with order

25.4(3) The non-Canadian or other person or entity to which the order is directed shall comply with the order.

Obligation de se conformer au décret

25.4(3) Les investisseurs non canadiens, personnes ou unités assujettis au décret sont tenus de s'y conformer.

Statutory Instruments Act does not apply

25.4(4) The *Statutory Instruments Act* does not apply in respect of the order.

Non-application de la _Loi sur les textes réglementaires_

25.4(4) La *Loi sur les textes réglementaires* ne s'applique pas au décret.

Decisions and orders are final

25.6 Decisions and orders of the Governor in Council, and decisions of the Minister, under this Part are final and binding and, except for judicial review under the *Federal Courts Act*, are not subject to appeal or to review by any court.

Décisions et décrets définitifs

25.6 Les décisions du gouverneur en conseil et du ministre et les décrets visés à la présente partie sont définitifs et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d'appel ou de révision en justice.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-159-22
STYLE OF CAUSE:	CHINA MOBILE COMMUNICATIONS GROUP CO., LTD., et al. v. CANADA (ATTORNEY GENERAL) et al.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 15, 2023
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	LASKIN J.A. MONAGHAN J.A.
DATED:	OCTOBER 5, 2023

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