HFX No. 463437

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ALEX M. CAMERON

Applicant

and

THE ATTORNEY GENERAL OF NOVA SCOTIA representing
Her Majesty the Queen in Right of the Province of Nova Scotia,
Stephen McNeil and Diana Whalen

Respondents

AFFIDAVIT OF BERNARD MILLER

(Sealed pursuant to the Order of Justice Boudreau dated July 17, 2017)

I, BERNARD MILLER, of the City of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY:

1. I have personal knowledge of the evidence sworn to in this affidavit, except where otherwise stated to be based on information and belief.

2. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

3. I confirm that, where my belief is based on a source other than my personal knowledge, I do verily believe the source.

4. I am currently the Deputy Minister of Strategy Management within the Executive Council Office of the Province of Nova Scotia (the "Province"). I assumed this role on October 1, 2017. In 2016, I was a Senior Executive Advisor in the Executive Council Office pursuant to

a contract for an initial term of twelve months, subsequently extended twice: initially until June 30, 2017, and subsequently to September 30, 2017. Between January 2014 and January 2016, I was the Deputy Minister of Planning and Priorities.

5. As a contracted Senior Executive Advisor in 2016, I reported to the Deputy Minister of the Office of the Premier. My role included providing leadership in areas relating to the Province's labour relations and negotiations, demographic economic strategy arising from the "Ivany Report", and other specific areas where the Deputy Minister might call upon me to provide leadership. Ultimately, this involved three additional areas of focus, namely, broadband connectivity, youth unemployment, and collaborative care (health).

6. I was the Managing Partner of the law firm McInnes Cooper between 2006-2013. I became a Partner at McInnes Cooper in 1996 and submitted my resignation as a Partner of the firm on September 20, 2017. My practice was focused on environmental law, including aboriginal law in relation to the negotiation of agreements in the energy and natural resources sector with First Nations and governments relating to environmental matters.

7. A copy of my Curriculum Vitae is attached as Exhibit 1.

Relationship with Alex Cameron

8. I have known Alex Cameron for 29 years. We articled together at McInnes Cooper in 1988-89, and worked together as associates for a few years until Mr. Cameron joined the Nova Scotia Department of Justice.

9. Mr. Cameron and I were both involved in the Stephen Marshall case, which was ultimately determined by the Supreme Court of Canada (*R. v. Marshall; R. v. Barnard*, [2005] 2

S.C.R. 220). Mr. Cameron acted for the Province, and I was part of the team acting for the Nova Scotia Forest Products Association.

10. I consider Mr. Cameron a friend. We have maintained a good relationship over the years, and would see each other socially on occasion.

Friday November 11, 2016

11. On Friday evening, November 11, 2016, I received an email from Mr. Cameron. He asked if we could speak over the weekend, as he was scheduled to appear in the Nova Scotia Supreme Court on the coming Monday on the Alton Gas LLP appeal matter (the "Alton Appeal"). He went on in the email to state that:

a) "The case is our first 'duty to consult' case" and I have raised an issue questioning whether the duty to consult applies in the circumstances"; and

b) There have been some "howls" in the media, and "it may be that some in government would like the point dropped. That could potentially be to the province's long term disadvantage."

A copy of this email is attached as Exhibit 2.

12. My only involvement in the Alton Gas matter had been attending a single meeting in 2014, while Deputy Minister of Planning and Priorities, where the ongoing consultations regarding the Alton Gas project were discussed, and being asked, in June 2016, to confirm my recollection of that meeting for the purposes of an affidavit being sworn in the Stay Motion. I

was otherwise only generally aware of the progress of the Alton Gas matter to the extent it was reported in the media.

13. When contacted by Mr. Cameron on the evening of November 11, 2016, I was not aware of the issues that had been raised, in the Legislative Assembly and the media, about the arguments advanced in his legal Briefs in this matter. I will refer to the Province's responding brief on Sipekne'katik's stay motion, and the Province's responding brief on Sipekne'katik's Section 138 Appeal, collectively as the "Province's Briefs".

Saturday November 12, 2016

Telephone Conversation with Alex Cameron

14. I returned Mr. Cameron's call on the morning of Saturday November 12, 2016. I had not read the Province's Briefs prior to this call, and indeed did not receive or read the Province's Briefs at any time while involved in this matter between November 11-14, 2016.

15. I listened to Mr. Cameron's concerns, and we discussed high level legal principles, particularly those from the *R. v. Marshall* (2005) case. I had assumed the role of Managing Partner of my firm the year after the Supreme Court of Canada's decision in that case, and had not been closely following developments in the case law since that time. My role with the Province did not involve advising on matters of aboriginal law.

16. During the call, Mr. Cameron expressed the concern that he was going to be instructed by the Province to withdraw an argument he had advanced in his Briefs regarding the duty to consult. He told me that he had raised the argument on a cautionary basis, to ensure that the Court did not make a finding impacting treaty rights or unsettled claims of Aboriginal title in

Nova Scotia on an insufficient factual record. He stated that he believed that "political correctness" was going to result in a decision that could have a significant, detrimental effect on the Province.

17. I understood Mr. Cameron's concern to be that the Province should not concede without proper evidence before the Court, as a matter of law, that there existed a duty to consult in this matter arising from Treaties or claims of Aboriginal title in the Province. I understood Mr. Cameron to be saying that as this specific issue had not yet been determined by Courts in the Province, it was important that it not be decided on the insufficient record currently before the Court.

18. We were not discussing, to my understanding, the Province's duty to consult arising from Aboriginal rights other than claims to title, such as Aboriginal rights to hunt and fish – a duty which had been recognized by the case law.

19. Because I understood that the position Mr. Cameron wished to advance had already been advanced in the Briefs filed with the Court, the primary focus of our discussion was the potential consequences of not addressing that position in Court having raised it in the Brief. Mr. Cameron expressed the concern that removing the argument could lead to an adverse finding against the Province, and that this could include a finding of a constitutional duty to consult based on Treaties and claims of Aboriginal title, which, he stated, was an unsettled proposition in Nova Scotia.

20. Mr. Cameron and I did not discuss any specific language used in his Briefs. As I had not read the Briefs, I did not understand (and we did not discuss) the nuances of Mr. Cameron's argument.

21. Given our relationship, however, I trusted his concerns that the Province's interests were at stake in a meaningful way, and that changing his position could potentially be to the Province's long term disadvantage.

Sunday November 13, 2016

22. On Sunday morning, I checked my email account and saw an email that Mr. Cameron had sent me the previous afternoon. His email read as follows:

> Hi Bernie: I'm just off the conference call with Karen Hudson, etc. I am not sure that she understands, entirely, the point that I was making or the importance of refraining from admitting that there is a constitutional duty to consult in NS. She said she would be getting instructions and that I was to assume I would be making the argument until I hear otherwise.

23. On Sunday evening, I received another email from Mr. Cameron. He was forwarding an email exchange on this issue, including an email from Deputy Minister Hudson in which she had instructed him that:

> ... The province will not advance a position that there is no duty to consult. If you need to address duty to consult, then the province's position, as discussed, is that there is a duty which can arise/be triggered by s35 charter, NS Policy OAA, the Envir Act itself (have I left anything out).
>
> If asked about the brief and "no duty to consult" statement is it possible to say that this was in response to a point raised by the other side and that the extent and scope of treaty relations is the subject of negotiations? ...

She also indicated that she had discussed the issue with the Deputy Minister to the Office of the Premier, Laura Lee Langley. A copy of this email is attached as Exhibit 3.

24. Mr. Cameron asked that I confirm that the email was "correct". I responded at 8:11 p.m., indicating that "I have been on the road and just back. I will call Karen now. I do not agree with the e-mail below."

25. My particular point of disagreement was that I believed, from her email, that Deputy Minister Hudson was conflating a constitutional duty to consult with duties under the *Environment Act* and OAA's policies. My concern was that the Province not "constitutionalize" the *Environment Act* and the OAA policies. A copy of my email is attached as Exhibit 4.

26. After speaking with Mr. Cameron, I spoke to the Deputy Minister of the Department of Justice, Karen Hudson. I believe that I spoke to the Deputy Minister twice over the weekend, although I cannot now be sure precisely when those calls took place.

27. I told the Deputy Minister about my discussion with Mr. Cameron. I expressed the view that neither the *Environment Act* nor OAA policies amount to a "constitutional duty" to consult (which is found at s. 35 of the *Constitution Act* and the case law). We also discussed Mr. Cameron's concern that withdrawing his arguments at this stage could result in an adverse finding against the Province.

28. I also spoke to Deputy Minister Langley and to the Premier's Deputy Chief of Staff, Ryan Grant. I expressed Mr. Cameron's concern that instructions he was receiving could have significant implications for unsettled issues surrounding claims of Aboriginal title in the Province. Both indicated that I should speak to the Premier directly.

29. In an email at 10:01 p.m., I told Mr. Cameron that "I have spoken with Karen, Laura Lee and Ryan. Working on clarifying instructions." A copy of this email is attached as Exhibit 5.

Monday November 14, 2016

30. On Monday, November 14, 2016, I was given a very short window to speak to the Premier. My discussion with the Premier lasted no more than three minutes.

31. I advised the Premier that the Department of Justice lawyer in the Alton Gas appeal, Mr. Cameron, was scheduled to appear in court that morning, and that he was concerned that if he withdrew an argument he had advanced about the duty to consult, there could be an adverse finding against the Province about Aboriginal title.

32. The Premier stated immediately and strongly that he did not see what argument could be made about the duty to consult. He stated that the Province recognized a duty to consult, and that the only thing that Mr. Cameron should argue in Court was that the Province recognized the duty to consult and had met that duty through extensive consultations. He noted that timelines had been extended to meet the duty.

33. After speaking with the Premier, I sent Mr. Cameron an email at 8:20 a.m. as follows:

> The submissions of the province should reflect the following three points:
>
> 1. Consultation has occurred and the Crown met the appropriate standard;
>
> 2. Nova Scotia recognizes a responsibility to consult and does so and has consulted in this case. In addition to policy adopted in NS for consultation, a constitutional duty arises when triggered by section 35 of the Constitution Act;
>
> 3. Notwithstanding the main argument, the Brief raises legal points regarding the nature and existence of the duty in the specific evidentiary basis of this case for this applicant. If the court considers it necessary to assess this aspect, the position raised in the brief may be advanced, although it should be emphasized at all times that the Crown, as a matter of policy consulted fully and submits it met the duty to consult.

A copy of this email is attached as Exhibit 6.

34. The first two points arose from my discussion with the Premier, and were consistent with Mr. Cameron's instructions from Deputy Minister Hudson. My intention was to reinforce and not contradict the earlier instructions provided by Deputy Minister Hudson, except to the extent as noted in item two – that the constitutional duty arises when triggered by section 35 of the *Constitution Act*.

35. As for the third point, I was concerned that my instructions still did not address Mr. Cameron's concern that an adverse inference could be drawn if he withdrew arguments already made in his Brief, and that he was in Court in just over an hour. In the time I had with the Premier, I had not addressed the detailed arguments that Mr. Cameron wanted to ensure were held in reserve, by the Court, going to what he stated were unsettled issues around Treaties or claims of Aboriginal title. As such, I indicated that "if the court considers it necessary" to assess those arguments, he could advance them, while emphasizing at all times that "the Crown, as a matter of policy consulted fully and submits it met the duty to consult". My intention was not to contradict Deputy Minister Hudson's email of November 13, 2016 at 6:34 p.m.

36. It was my expectation that if the Court did not insist on hearing those arguments, they would not be raised and Mr. Cameron would only advance arguments relating to the Province's fulfillment of its duty to consult, as instructed.

37. If the Court did insist on hearing those arguments, it was my expectation that Mr. Cameron would advance them to the extent of cautioning the Court not to make a broad finding relating to the duty to consult (arising, as I understood the argument, from Treaties or Aboriginal title claims) without a proper historical record.

38. I did not consider and we did not discuss the question of the constitutional duty to consult which arose from other Aboriginal rights, such as hunting and fishing. I did not authorize Mr. Cameron to take the position that the duty to consult arising from those Aboriginal rights, did not exist, and nor would I have.

39. Soon after sending the email, Mr. Cameron and I spoke over the phone. I told him that I had just sent him an email, which he should read, and apologized for the delay that morning on

the basis that I had to "speak to a tall guy" (by which I was referring to the Premier). Contrary to paragraph 40 of Mr. Cameron's Affidavit dated September 15, 2017, I did not tell him that "the sovereignty argument 'should not be abandoned'" or that he was "free to advance the argument but that it was 'subsidiary'". Our discussion, brief as it was, was consistent with my email.

40. I believe Mr. Cameron read my email while we were on the phone. He said something along the lines of "I think I can work with that", and ended the call.

After the November 14-15 Argument

41. I spoke to Mr. Cameron on November 17, 2016. Mr. Cameron's account of our conversation, at paragraph 46 of his Affidavit of September 15, 2017, is inaccurate. I did not say that the Premier had a "bad week" and would "come round" and recognize "what he had done". Mr. Cameron was upset and I said words to the effect of "it has been a bad week" and "this too shall pass". I also emphasized that it was unfortunate that arguments had been advanced in the Province's Briefs without the responsible Ministers being informed or asked for instructions.

42. I spoke to Mr. Cameron again on November 19, 2016. Contrary to paragraph 51 of Mr. Cameron's Affidavit, during our discussion on November 19, 2016, I did not say that "the government needed a 'scapegoat'" but that I did not think it would be Mr. Cameron.

43. By the time of my discussion with Mr. Cameron on November 19, 2016, I had been told that Mr. Cameron had taken the position to others in government that I had instructed him to advance the arguments that he advanced.

44. This was not true: not only had the arguments been advanced before I had any involvement in this matter, but I was operating, over the weekend before the appeal, without the benefit of having seen the Briefs and without a proper understanding of the nuances of the argument being advanced. Mr. Cameron knew that.

45. During the call, therefore, I said something along the lines that I was also being held responsible for the controversy.

46. To be absolutely clear, my email to Mr. Cameron was intended to reinforce and confirm that which he had already been told; that the Province had a duty to consult in this matter and had fulfilled that duty. Responding to what I understood to be his concerns about long term risk to the Province, I authorized him, if the Court considered it "necessary" (which I understood was possible because of the argument in his Brief), to advance the argument that I understood from our discussions that he had advanced: that a duty to consult arising from Treaties or claims of Aboriginal title had not yet been judicially determined in Nova Scotia, and that it ought not to be, nor was it necessary to make that determination on the record before the Court in this matter. I came to understand that Mr. Cameron did not follow those instructions in Court.

47. I have reviewed the transcript of the proceedings in the Alton Appeal on November 14 and 15, 2016. A copy of these transcripts is attached as Exhibit 7.

48. It is evident that Mr. Cameron followed his own course in his argument, and deviated significantly from the direction I had provided him in my email that morning. For example, at pages 199-206 of the transcript, Mr. Cameron devoted considerable time to reviewing a 1760 letter of Colonel Frye of Fort Cumberland (evidence filed in another case), and the reference by Colonel Frye of the supposed "submission" of bands to "His Brittanic Majesty". Mr. Cameron

then submits that he raises this issue on a cautionary basis to suggest that "this case is not one, I submit, for making absolute pronouncements about issues such as whether or not a duty to consult exists in Nova Scotia."

49. I was startled to read these submissions because I did not authorize Mr. Cameron to make them.

50. All of my communications with Mr. Cameron about the Alton Appeal occurred in the context of his solicitor-client relationship with the Province of Nova Scotia. It was my understanding that these communications were protected by solicitor-client privilege.

51. I swear this affidavit in support of the Respondents' response to Mr. Cameron's Application in Chambers, and for no other purpose.

SWORN BEFORE ME at the City of Halifax, in the Province of Nova Scotia on October 3, 2017

E. A. Gores

Signature of Authority

Print Name:

Official Capacity:

EDWARD A. GORES, Q.C.
A Notary Public in and for the
Province of Nova Scotia

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BERNARD MILLER