



T-2285-95

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MONTREAL, QUEBEC, FEBRUARY 7, 1997

PRESENT: RICHARD MORNEAU, PROTHONOTARY

BETWEEN:

GAÉTAN DELISLE

Applicant

AND

D.R.A. SUGRUE

-and-

PHILIP H. MURRAY

-and-

THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS FOR ORDER

The purpose of this order is to follow up on the request of the Attorney General of Canada, on February 3, 1997, to reduce to writing the oral order I rendered in open court on January 13, 1997, at which time I dismissed an oral request made at the end of the hearing by counsel for the Attorney General of Canada (the respondent).

More specifically, on January 13, 1997 I dismissed an oral request by the respondent asking me to order that the Court file in this case be kept confidential on an interim basis.

It is this order that the respondent is now trying to appeal, hence his request of February 3, 1997.

The request for this interim order was made at the end of a hearing of close to two and a half hours that dealt, as it happens, with a motion on the merits by the respondent for an order that the Court file be kept confidential. This

same motion on the merits was preceded by another motion by the respondent that the hearing on the merits be held *in camera*.

As it became evident that the examination of the *in camera* motion had to precede the examination of the motion on the merits for confidentiality — and that the parties wanted to mutually exchange further affidavits and proceed to cross-examinations on affidavits — I, on January 13, 1997, at the end of the hearing and on consent, adjourned *sine die* both the motion for an *in camera* hearing and the motion on the merits for confidentiality. On January 14, 1997, I issued the following written order:

[*Translation*]

Motion by the Attorney General of Canada to:

ORDER the Registry of the Trial Division of the Court to keep this file confidential in view of the presence of confidential information and records within the meaning of subsection 39(1) of the *Evidence Act*;

REFUSE public access to this file.

[Rule 5 of the *Federal Court Rules*]

ORDER

This motion is adjourned *sine die* because it was preceded by a motion for an *in camera* hearing by the A.G. of Canada and because this latter motion was also adjourned *sine die*.

In regard to the respondent's motion for an interim order of confidentiality, the reasons that led me to dismiss it pertained to my analysis of the background of the case and my assessment of the parties' representations.

Although the respondent's motion on the merits was not exhausted and had been postponed *sine die*, I did not think I could or should (to preserve the merit of the respondent's motion for confidentiality) order provisionally that the record be declared confidential.

It was inconceivable to me that on the basis of a certificate of the Clerk of the Privy Council the respondent was seeking on January 13, 1997 to remove from possible public review a complete file of this Court which had been accessible to the public for more than a year.

In short, if I were to analogize with the applicable test for any interim request that a party might wish to make before a final decision is taken in the context of an application for judicial review (and here it was not prior to a decision being rendered in the context of an application for review, since the final decision on the merits had been rendered back on November 4, 1996), I would have to say that I was not convinced that the respondent's substantive confidentiality motion presented an arguable case or that the respondent would in the meantime suffer irreparable harm (if harm there were, it had already been suffered in the year before), and in any event the balance of inconvenience would certainly favour the public's right to have access to the file.

It had to be realized that even if it were agreed that from the initial date of filing of the respondent's motion, December 12, 1996, the Court file was not actually accessible to the public (since the Court Registry, following a certain practice, treated the record as a confidential matter), it was still the case that from October 27, 1995 to December 12, 1996 the Court file was accessible to anyone who wished to consult it, like any other file that was not the subject of an order of confidentiality.

It appeared to me that the respondent was asking this Court to be quite unrealistic in asking it, on the basis of the certificate filed on November 4, 1996, to temporarily undo this prior public availability. I thought at the time that the respondent was placing this court in a situation about as unreal as the one denounced in the following terms by Mahoney J.A. on behalf of the majority of the Federal Court of Appeal in *Best Cleaners and Contractors Ltd. v. The Queen in Right of Canada*, [1985] 2 F.C. 293, at 311:

There is a large measure of unreality in the proposition that the filing of a certificate has the effect of undoing the disclosure of information already lawfully disclosed to the opposing party in a legal proceeding. Everyone with a legitimate interest in the information has it except the Court. Maintenance of confidentiality against only the Court in such a case implies a Parliamentary intention to permit the filing of a certificate to obstruct the administration of justice while serving no apparent legitimate purpose. No such intention is expressed by Parliament; to infer it is repugnant.

[emphasis added]

It had to be realized as well that, albeit without challenging the lawfulness of this certificate, it operated only in the context of section 39 (formerly section

36.3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In other words, this certificate, once filed, prohibited the Court from compelling anyone to produce information covered by the certificate. As Mahoney J.A. pointed out in *Best Cleaners, supra*, at p. 311:

On a fair reading of the section, it is the compulsion of the disclosure of the information that is protected against, not the receipt of the information in evidence if it is available otherwise than by exercise of the tribunal's power to compel its production.

[emphasis added]

(MacKay J. of this Court, in *Samson Indian Nation and Band v. Canada*, [1996] 2 F.C. 483, at 522, quoted and relied on this passage from *Best Cleaners, supra*.)

In this case, neither the applicant nor anyone else has moved in this Court at any relevant time for disclosure of the information contemplated by the certificate. In my opinion, the certificate on which the respondent's motion is based was of no assistance to him for the purposes of his oral request.

If there is any point in drawing attention to the previous public availability of the disputed information, it will be noted that the certificate of the clerk of the Privy Council covers, in this case, information that is found, without exception, in the originating process filed by the applicant on October 27, 1995. It has not been proved to me that the applicant obtained possession of this information in some irregular or unlawful way.

Also on October 27, 1995 the parties appeared in this Court by way of a telephone call on a motion by the applicant for an interim interlocutory injunction. This motion was dismissed that same day. However, the respondent did not use the opportunity at that time to ask the Court for an order of confidentiality.

On December 22, 1995 the applicant filed his applicant's record. There was at that time no reaction from the respondent. On January 19, 1996 the respondent filed his record without raising any issue as to the confidentiality of the information. Yet the record was still public at that time.

On November 4, 1996 the Court held a public hearing on the merits of the applicant's application for review. The respondent then filed the certificate

referred to earlier, but without moving in this Court for any measure of confidentiality. The Court dismissed the applicant's application for review on that same day.

In a note by the Registry in the Court file dated November 12, 1996 there are the following comments:

[Translation]

RE: T-2285-95
GAÉTAN DELISLE v. D.R.A. SUGRUE ET AL

T-419-96
GAÉTAN DELISLE v. J.O.O. EMOND

At the hearing on the merits of the above-captioned matters on November 4 last, the affidavit of Guylaine Roy (doc. no. 11) was filed by Mr. Raymond Piché (respondent), in file T-2285-95 only. This affidavit introduces a "Certificate" from the clerk of the Queen's Privy Council for Canada and Secretary to the Cabinet. At page 2 of the said "Certificate" there is a reference to documents containing confidential information and an objection by the clerk to the disclosure of this information.

After the hearing, the Court (Tremblay-Lamer J.) indicated to the undersigned that absent a motion along these lines, no directive will be issued concerning the treatment to be given to the file(s) pursuant to the filing of the "Certificate" in question. This information was entered on the hearing summary of November 4, 1996 in T-2285-95 and communicated to Mr. Piché.

[emphasis added]

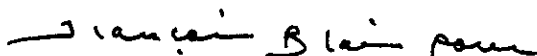
It was not until December 12, 1996 that the respondent filed a motion under Rule 324 for an order that the Court file be kept confidential.

As to the judgment in *Samson Indian Nation and Band*, referred to earlier, it seemed to me, in skimming through that judgment with one of the solicitors for the respondent, that the ratio of that judgment was inapplicable in the case at bar since the completely unique dynamic confronting MacKay J. in that case simply did not exist in the matter with which we are concerned.

"Richard Morneau"

Prothonotary

Certified true translation


Christiane Delon

Federal Court of Canada

Court file no. T-2285-95

BETWEEN:

GAÉTAN DELISLE

Applicant

AND

D.R.A. SUGRUE

-and-

PHILIP H. MURRAY

-and-

THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. T-2285-95

STYLE: GAÉTAN DELISLE

Applicant

AND

D.R.A. SUGRUE

-and-

PHILIP H. MURRAY

-and-

THE ATTORNEY GENERAL OF CANADA

Respondents

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 13, 1997

ORDER AND REASONS
FOR ORDER BY: Richard Morneau, Prothonotary

DATED: February 7, 1997

APPEARANCES:

Mr. James R. K. Duggan and Mr. Julius Grey

for the applicant

Mr. Raymond Piché and Ms. Nadine Perron

for the respondent

Mr. Mark Bantey

for the intervenor Southam Inc..

Mr. Luc Charbonneau

for the intervenor Sgt. André Girard

SOLICITORS OF RECORD:

Mr. James R. K. Duggan and Mr. Julius Grey
Montréal, Quebec

for the applicant

Mr. George Thomson
Deputy Attorney General of Canada
Montréal, Quebec

for the respondents

Lafleur Brown
Mr. Mark Bantey
Montréal, Quebec

for the intervenor Southam Inc.

Mr. Luc Charbonneau
Montréal, Quebec

for the intervenor Sgt. André Girard

MAY 27 1997

THE FEDERAL COURT
OF CANADA

LA COUR FÉDÉRALE
DU CANADA

Court No.: T-2285-95

No. de la cause:

Let the attached certified translation of the following document in this cause be utilized to comply with Section 20 of the **Official Languages Act**.

Je requiers que la traduction ci-annexée du document suivant telle que certifiée par le traducteur soit utilisée pour satisfaire aux exigences de l'article 20 de la **Loi sur les langues officielles**.

Order and Reasons for Order

May 9, 1997

Richard Morneau

DATE

Prothonotary

Protonotaire

Form T-4M

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