Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-2285-95

BETWEEN:

GAÉTAN DELISLE,

Applicant,

v.

D.R.A. SUGRUE,
Commanding Officer of the Royal Canadian Mounted Police (R.C.M.P.),

and

PHILIP H. MURRAY,
Commissioner of the Royal Canadian Mounted Police (R.C.M.P.),

and

ATTORNEY GENERAL OF CANADA,

Respondents.

REASONS FOR ORDER

NOËL J.

This is an appeal by the Attorney General from an interim decision of the prothonotary delivered at the hearing on January 13, 1997.[1] This decision was set down in writing on February 7, 1997, and reasons were then attached to the decision.

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1 This appeal was heard and disposed of on an urgent basis in motions Court at the request of the Attorney General of Canada.

The circumstances in which this appeal arose are set out in the decision of the prothonotary. Suffice it to say, for the purposes hereof, that a certificate was filed by the Clerk of the Privy Council under section 39 of the *Canada Evidence Act*[2] in judicial review proceedings instituted by the applicant. By filing that certificate, the Clerk of the Privy Council objected to the "production" of certain information contained in the application for judicial review and in the affidavit, the exhibits and the record that were filed subsequently. The information in question had already been entered in the Court's file since November and December 1995 when the certificate was filed on November 4, 1996, immediately before the hearing of the application for judicial review was to commence.

On that same day, after the certificate was filed, Tremblay-Lamer J. disposed of the applicant's application by dismissing it. In her reasons, she simply noted the fact that the notices required by section 57 of the *Federal Court Act* had not been given. No mention was made of the certificate.[3] The decision of Tremblay-Lamer J. was not appealed.

Since the case was closed,[4] the registrar, who was aware of the fact that a certificate had been filed, asked the Judge for directions as to what was to be done with the file. She indicated that if no request were made by the Attorney General, no particular directions would be given as to how the file was to be handled. Counsel for the Attorney General was therefore notified, and as a result, on December 12, 1996,

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2 R.S.C. 1985, c. C-5. Subsection 39(1) reads as follows:

> (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.

3 Since the certificate was only filed at the hearing, my colleague must necessarily have seen the file and what was in it prior to the hearing, regardless of the certificate.

4 The decision of Tremblay-Lamer J. was not appealed.

he filed a motion in which he asked [TRANSLATION] "that the file be kept confidential" permanently.

The case was to be heard by the prothonotary on January 14, 1997. Before the motion was heard, the Attorney General made a preliminary motion in which he asked that it be heard *in camera*. The hearing of that preliminary motion went on so long that it had to be adjourned. At the same time, the Attorney General's main motion was also adjourned.

It was at the time of that adjournment that the Attorney General asked that the file be kept sealed on an interim basis until his main motion was disposed of. The prothonotary denied that request at the hearing. Pursuant to that decision, the registrar of the Court removed the "confidential" seal that had been affixed to the file, in accordance with the direction that had been given by Tremblay-Lamer J. It is that decision by the prothonotary, refusing to order that the file be kept out of the public domain on an interim basis, that the Attorney General has appealed.

The appeal must be dismissed. In my opinion, the prothonotary was right to question the seriousness of the efforts made by the Attorney General to have the file sealed. Section 39 of the *Canada Evidence Act* does not have the effect that the Attorney General seems to want to attribute to it. In *Best Cleaners and Contractors Ltd.*,[5] the Federal Court of Appeal had occasion to consider the effect of that section in a context similar to the one we are dealing with here.

In that case, a certificate had been issued by the Clerk of the Privy Council in respect of certain information that had come out at an examination for discovery. At the trial, the trial judge, relying on the certificate, refused to look at that evidence, and

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5 *Best Cleaners and Contractors Ltd. v. The Queen*, [1985] 2 F.C. 293.

prohibited it from being produced. The information in question had been disclosed by the witness before the certificate was issued.

In a majority decision in which there was no dissenting opinion on this point, the Court of Appeal concluded that the trial judge had erred in excluding the evidence in question. Mr. Justice Mahoney observed specifically that the information had already been disclosed at the time of the hearing, and stated the following opinion:

> Section 36.3[6] is predicated on the notion that Her Majesty's Privy Council for Canada will be astute in not divulging information it deems confidential and that it requires a statutory right to maintain confidentiality only in the face of "a court, person or other body with jurisdiction to compel the production of information". 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.
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> 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.
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> In my opinion, the certificate filed in this action is not a bar to the admission in evidence of documents (a), (b), (c) or (d), nor to the admission of the documents specified in the certificate if they were, in fact, produced on discovery, nor to the admission of the examination for discovery dealing with such of those documents as are admissible.[7]

In the instant case, the information in question has been public knowledge since November and December 1995. Tremblay-Lamer J. saw this information, since the certificate was only filed on the day of the hearing. Denault J. also saw it, in the course of a preliminary motion made before him.

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6 Now section 39.

7 *Idem*, note 5, page 311. Counsel for the Attorney General tried to distinguish this decision on the ground that the information in the instant case was obtained or disclosed in an improper or unlawful manner. The only evidence he cited on this point is an affidavit which he produced but then withdrew before the deponent could be cross-examined. I could not accept that evidence.

As Mahoney J. noted, the purpose of section 39 is to prevent the disclosure of confidential information by preventing the courts from compelling production of this information and from seeing it. However, it does not affect information that has already been disclosed. Whatever may be said of the effect of section 39 on the power of a court to consider and see the evidence before it, it seems plain to me that this section does not authorize a court to order that information that has already been produced before it be subsequently taken out of the public domain. The prothonotary concluded that the Attorney General's right to have the file sealed seemed to him to be too uncertain to justify an interim order; having regard to the applicable law, that conclusion was justified.[8]

The Attorney General also contends that the prothonotary had no jurisdiction to make the order *a quo*. On this point, he relies on section 4 of the order of the Associate Chief Justice dated October 31, 1985, concerning the powers of prothonotaries. The Attorney General cited the English version of that section:

> Under rule 336(1)(g) the Senior Prothonotary and the Associate Senior Prothonotary are empowered to hear and dispose of any interlocutory application in the Trial Division other than the following, that is to say:
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> 4. any application for an order for disclosure of information or documents which in their nature are confidential or in respect to which a direction to withhold them from public inspection has been given by a judge.

Having regard to that order, the Attorney General contends that the prothonotary had jurisdiction only to grant the interim motion, since by denying it he was indirectly authorizing the production of confidential information.

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[8] The only decision that seems to cast any doubt on the decision of the Court of Appeal in *Best Cleaners* is the decision of the Trial Division in *Samson v. Canada*, [1996] 2 F.C. 483. In that case, MacKay refused to apply *Best Cleaners*, while acknowledging that *Best Cleaners* continued to have full effect, having regard to the specific facts in issue before him, and in particular, to:

> > ... the prior disclosure in oral discovery of information subsequently certified under section 39, and including the filing of the certificate late on the day before trial was set to commence. (pp. 521-522) (Emphasis mine)
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> These two factors are present in the instant case, and are precisely the factors on which the prothonotary based his decision.

I cannot accept this argument either. The prothonotary did not have a motion before him to compel the production of information or documents. On the contrary, it was a motion to prevent such production. On this point, I would repeat that section 39 cannot have any effect beyond what is provided therein. In the instant case, because the certificate was filed late, it had none of the effects set out in section 39; quite simply, it was filed too late. The registrar of the Court granted the Attorney General time to exercise his rights in respect of the information contemplated by the certificate purely as a matter of courtesy. In principle, those documents are in the public domain.

For these reasons, the appeal is dismissed.

Marc Noël

J.

Certified true translation

C. Delon, LL.L.

FEDERAL COURT
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	T-2285-95
STYLE OF CAUSE:	GAÉTAN DELISLE v. D.R.A. SUGRUE and PHILIP H. MURRAY and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 17, 1997

REASONS FOR JUDGMENT OF NOËL J. DATED FEBRUARY 24, 1997

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LUC CARBONNEAU	FOR THE INTERVENER (ANDRÉ GIRARD)
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