

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100329**

**Docket: A-519-08**

**Citation: 2010 FCA 88**

**CORAM: BLAIS C.J.  
NADON J.A.  
TRUDEL J.A.**

**BETWEEN:**

**MAURICE PHILIPPS**

**Appellant**

**and**

**LIBRARIAN AND ARCHIVIST OF CANADA**

**Respondent**

Heard at Montréal, Quebec, on March 22, 2010.

Judgment delivered at Ottawa, Ontario, on March 29, 2010.

**REASONS FOR JUDGMENT BY:**

**NADON J.A.**

**CONCURRED IN BY:**

**BLAIS C.J.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**NADON J.A.**

[1] In 1978, Montréal lawyer Louis M. Bloomfield, who died on July 19, 1984, transferred a significant collection of documents (the “Bloomfield Fund”) to Library and Archives Canada (LAC), on the condition that the public not have access to the documents until 20 years after his death.

[2] On August 10, 2004, the appellant requested that LAC give him access to the Bloomfield Fund. However, on August 31, 2004, Mrs. Bloomfield, the widow of Mr. Bloomfield, requested that LAC restrict access to the Bloomfield Fund until 10 years after her own death, owing to concerns for her privacy and the reputation of her spouse.

[3] On April 20, 2005, LAC decided to extend the no-access period applying to the Bloomfield Fund to 25 years after Mrs. Bloomfield's death.

[4] On August 8, 2005, the appellant filed an application for judicial review. That application was allowed by Mr. Justice Simon Noël of the Federal Court, who stated, in his November 14, 2006 decision that, in his view, LAC had erred in extending the no-access period because it had attributed disproportionate importance to Mrs. Bloomfield's wishes.

[5] Consequently, Noël J. concluded that LAC's decision was unreasonable and referred the file back to LAC for it to reconsider the appellant's request by taking into account his Reasons, the *Library and Archives of Canada Act*, 2004, c. 11, and the *Guidelines and Procedures for the Establishment and Management of Access Conditions relating to Funds held by Manuscript Division*.

[6] On June 8, 2007, LAC made a new decision, according to which the Bloomfield Fund would be made publicly accessible as of July 2009, except for certain documents that, in LAC's opinion, were covered by solicitor-client privilege and would therefore not be made accessible to the public for an additional period of up to 50 years.

[7] LAC's decision is found in a letter addressed to the appellant and dated June 8, 2007. The letter reads as follows:

[TRANSLATION]

Library and Archives of Canada (LAC) undertook to make a decision on the situation of the Louis M. Bloomfield Fund prior to June 8, 2007. In arriving at the decision mentioned below, an internal review of the collection was undertaken in accordance with the guidelines proposed by Mr. Justice Simon Noël in his decision dated November 14, 2006.

In his decision, Noël J. indicated that restricting access to the Fonds until 2014 was a reasonable measure in this case. Based on their review of the records in the Fund, LAC officials decided that the Fund would remain closed for a period of five years starting in 2004, and would therefore open the collection to researchers during the first week of July 2009. Once this period has elapsed and the Fund is open, LAC reserves the right, in accordance with sections 7 and 8 of the *Library and Archives of Canada Act*, to limit access to the material that is protected by solicitor-client privilege for an additional period of up to 50 years after the latest date in the file.

[Emphasis added.]

[8] On June 26, 2008, the appellant filed an application for judicial review, seeking to set aside LAC's decision and make the Bloomfield Fund accessible to the public immediately. As his application for judicial review made clear, the appellant criticized LAC for having failed to take Justice Noël's Reasons into account and for not providing reasons for its decision.

[9] On September 16, 2008, Mr. Justice de Montigny of the Federal Court dismissed the appellant's application for judicial review (decision 2008 FC 1028). According to de Montigny J., LAC's decision was "reasonable and consistent with the *Library and Archives of Canada Act*, the Guidelines adopted thereunder, and the reasons given by Noël J. in his decision on the first application for judicial review in this matter" (paragraph 41 of the Judge's Reasons).

[10] In addition, in light of the Supreme Court of Canada's decision in *Baker v. Canada (MCI)*, [1992] 2 R.C.S. 817, Justice Montigny found that LAC had met its obligation to provide reasons for its decision.

[11] On October 14, 2008, the appellant filed a Notice of Appeal in this Court.

[12] The respondent drew this Court's attention to the fact that since July 1, 2009, 75 percent of the documents have been accessible to the public. Therefore, according to the respondent, the appeal is moot. In my opinion, there can be no doubt that the appeal has no basis with respect to these documents.

[13] As for the documents covered by solicitor-client privilege, which documents will not be made publicly accessible for an additional period [TRANSLATION] "of up to 50 years after the latest date in the file", the respondent submits, *inter alia*, that neither before Justice Noël nor before Justice de Montigny did the appellant raise the issue of whether those documents were in fact covered by solicitor-client privilege. My reading of the application for judicial review before us in this appeal does indeed confirm that the appellant did not raise this issue at trial. Moreover, this issue is not raised in the Notice of Appeal filed by the appellant.

[14] The respondent submits that since the appellant did not raise the issue of solicitor-client privilege at trial, he cannot file the appropriate evidence concerning that issue. In my opinion, considering that the appellant did not raise the issue of solicitor-client privilege, he cannot ask

this Court to address it and to dispose of this appeal on that basis. In addition, I am satisfied that this Court's allowing the appellant to proceed on that issue would seriously prejudice the respondent, who was deprived of his right to file evidence on that issue.

[15] Accordingly, I would dismiss the appeal, but without costs, since the Attorney General of Canada has waived his costs before this Court and those to which he would have been entitled owing to the decision of Justice Montigny.

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“M. Nadon”

J.A.

“I agree.  
Pierre Blais C.J.”

“I agree.  
Johanne Trudel J.A.”

Certified true translation  
Sarah Burns

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-519-08

**STYLE OF CAUSE:** MAURICE PHILIPPS v.  
LIBRARIAN AND ARCHIVIST  
OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** March 22, 2010

**REASONS FOR JUDGMENT BY:** Nadon J.A.

**CONCURRED IN BY:** Blais C.J.  
Trudel J.A.

**REASONS DATED:** March 29, 2010

**APPEARANCES:**

Maurice Philipps THE APPELLANT ON HIS  
OWN BEHALF

Nathalie Benoît FOR THE RESPONDENT  
Benoît Letarte

**SOLICITORS OF RECORD:**

N/A FOR THE APPELLANT

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada