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2/10/97 NO

DES-7-96

BETWEEN: The Right Honourable Brian MULRONEY, P.C.,

Applicant,

AND: The Attorney General of Canada
 -and-
 Kimberly PROST
 -and-
 J.P.R. MURRAY
 -and-
 Fraser FIEGENWALD,

Respondents.

REASONS FOR ORDER

DENAULT J.:

In the context of a civil liability action for injury to his dignity, honour and reputation, the applicant is asking the Court to dismiss objections made by the respondents Murray and Fiegenwald under sections 37 and 38 of the *Canada Evidence Act* in relation to questions that he intends to ask a Swiss government official pursuant to a commission for the examination of witnesses, and in relation to the filing of a draft document.

To understand the proceedings before this Court, the factual and legal context in which they have arisen must be described.

The applicant has brought a delictual liability action against the respondents in the Superior Court of Quebec¹ for faults committed in preparing, transmitting and sending a request for legal assistance in criminal matters² to the Swiss authorities. On October 8, 1996, the judge hearing the action, the Honourable Mr. Justice André Rochon of the Superior Court of Quebec, granted in part the respondents' motion for a commission for the examination of witnesses for the purpose of examining Pascal

¹ File No. 500-05-012098-958.

² Canadian request for legal assistance sent to the Swiss authorities on September 29, 1995 by Kimberly Prost, counsel, Director of the International Assistance Group, Department of Justice of Canada

Gossin, a lawyer and senior official with the Section for International Legal Assistance of the Swiss Federal Office for Police Matters residing in Bern, Switzerland, and ordered the parties to draw up a list of questions that Pascal Gossin was to be asked.

The First Certificate

On November 5, 1996, after the applicant had submitted his list of 100 questions that he wished to ask Pascal Gossin, the respondents J.P.R. Murray and F. Fiegenwald, who are respectively the Commissioner of the Royal Canadian Mounted Police (RCMP) and the officer in charge of the investigation, filed a certificate by RCMP Deputy Commissioner Frank Garrat Palmer ("the first certificate") to serve as an objection under sections 37 and 38 of the *Canada Evidence Act* in relation to the applicant's questions 19, 20, 21, 22, 55, 56, 81³ and 89.

The applicant's questions 19, 20, 21, 22, 55, 56 and 89, to which the respondents object in the first certificate and in respect of which the applicant is now requesting that the objections be dismissed, are as follows:

[TRANSLATION]

- Q.19:** Was the sending of the request for assistance of September 29, 1995 by the Department of Justice of Canada preceded by any discussions or exchanges of correspondence between Canadian officials or diplomats and Swiss officials or diplomats?
- Q.20:** If so, for each discussion or exchange of correspondence, can you indicate when, how, between whom and for what specific purpose?
- Q.21:** Aside from Kimberly Prost, have you personally had discussions or exchanged correspondence with other officials or representatives of the Government of Canada, whether or not they worked for the Department of Justice of Canada, in relation to the request for assistance of September 29, 1995?
- Q.22:** If so, for each discussion or exchange of correspondence, can you indicate with whom, when, how and for what purpose?
- Q.55:** Did you keep the requesting state informed about the progress of the proceedings in Switzerland?
- Q.56:** If so, on what occasions and what exact information was given on each occasion to the requesting authority?
- Q.89:** Do you know if the liaison officer in question provided information to the requesting authority concerning the request for assistance of September 29, 1995, and if so, when and what was the nature thereof?

³

Since the objection to this question deals only with a ground of public interest under section 37 of the *Canada Evidence Act*, Rochon J. reserved the right to determine the objection later.

The Second Certificate

In another judgment dated November 1, 1996, Rochon J. ordered the respondents the Attorney General of Canada and Kimberly Prost to provide the following documents: (1) a copy of the detailed draft of a request for assistance sent by the respondent Fiegenwald to the respondent Prost during the summer of 1995; (2) the various appendixes to the draft letter of request sent by the respondent Fiegenwald to the respondent Prost. On November 11, 1996, the respondents Murray and Fiegenwald filed another certificate by Deputy Commissioner Palmer to serve as an objection under sections 37 and 38 of the *Canada Evidence Act* in relation to Rochon J.'s judgment of November 1, 1996; that certificate, which is dated November 8, 1996, is considered "the second certificate".

The Motion to Dismiss the Certificates

The applicant brought a motion in the Superior Court of Quebec to dismiss Deputy Commissioner Palmer's two certificates or, in the alternative, to challenge them. On November 26, 1996, Rochon J. referred the objections made in the certificates to the Chief Justice of the Federal Court, specifically in so far as they alleged that the answers to the questions or the disclosure of the information would be injurious to Canada's international relations within the meaning of section 38 of the *Canada Evidence Act*.

The relevant provisions of the *Canada Evidence Act* (R.S.C. 1985, c. C-5) should be reproduced:

37.(1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

...

(5) An appeal lies from a determination under subsection (2) or (3)

(a) to the Federal Court of Appeal from a determination of the Federal Court-Trial Division; or

38.(1) Where an objection to the disclosure of information is made under subsection 37(1) on grounds that the disclosure would be injurious to international relations or national defence or security, the objection may be determined, on application, in accordance with subsection 37(2) only by the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications

...

(3) An appeal lies from a determination under subsection (1) to the Federal Court of Appeal.

...

(5) An application under subsection (1) or an appeal brought in respect of the application shall

(a) be heard *in camera*; and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(6) During the hearing of an application under subsection (1) or an appeal brought in respect of the application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*.

Inasmuch as the objections made by the respondents Murray and Fiegenwald are based on both grounds of public interest (section 37) and injury to international relations (section 38), this Court has jurisdiction over this case and I was designated by the Chief Justice of the Federal Court to decide it.

As counsel for the parties themselves acknowledged when this motion was heard, the same arguments were made in this Court as were made before Rochon J. of the Superior Court, aside from those relating to the issue of jurisdiction. Since Rochon J. clearly identified the issues involved, I will describe them by quoting from his judgment:⁴

[TRANSLATION] Counsel for the plaintiff submitted that, generally speaking, Royal Canadian Mounted Police officers cannot allege an injury to international relations. In support of this submission, they argued that the R.C.M.P. has no jurisdiction in such matters. More specifically, the *Mutual Legal Assistance in Criminal Matters Act* (R.S.C. 1985, c. 30 (4th Supp.)) provides that the Minister of Justice and the Secretary of State for External Affairs have jurisdiction over treaties and administrative arrangements relating to international co-operation

Furthermore, most of the questions concern exchanges between Pascal Gossin, Kimberly Prost and officials working with Ms. Prost. In these circumstances, they asked how an R.C.M.P. officer can sign certificates when he had no control over the exchanges between Mr. Gossin and the Canadian federal officials.

More specifically, counsel for the plaintiff made five objections, which they summarized as follows in their argument notes:

On their face, the two certificates show that the person who signed them:

1. did not balance the interests at stake;
2. is in a conflict of interest situation;
3. is not a "person interested" within the meaning of the *Canada Evidence Act* for the purposes of sections 37 and 38;
4. has disguised the grounds for objection under section 37 of the *Canada Evidence Act* with a term used in section 38 of the *Canada Evidence Act*, and
5. lacks any particulars whatsoever that might make it possible to determine whether the objections are genuine

This brief summary does not of course do justice to the arguments of counsel for the plaintiff. Counsel for the defendants asked that the plaintiff's motion be dismissed for reasons that were presented no less clearly.

In this Court, the respondents also argued that the questions to which they are objecting are irrelevant and that the applicant has not shown that they are crucial to his case.⁵

This motion was heard in two stages. At an initial hearing (December 13, 1996), counsel for the parties explained their respective points of view⁶ and at a second hearing (December 20, 1996), which was held *in camera* as authorized by subsection 38(5) of the Act, the person who signed the certificates explained the grounds for his objection in greater detail.

The Court intends to dispose quickly of the respondents' argument that the applicant has not shown that the questions in dispute are relevant and crucial to his case. Since those questions relate to discussions or exchanges of correspondence that occurred prior to the request for assistance of September 29, 1995, which is the basis for the action in damages, I consider that for the purpose of determining the validity of the objections in the context of this application, the questions are both relevant and crucial to the case.

The Court will now deal with the argument of counsel for the applicant that the author of the certificates is not a *person interested* within the meaning of the *Canada Evidence Act* for the purposes of sections 37 and 38 and, in any event, is in a conflict of interest situation.

Under subsection 37(1) of the Act, *a minister of the Crown in right of Canada or other person interested* may object to the disclosure of information on the grounds of a specified public interest. The other subsections of section 37 state which court has jurisdiction over this matter and how the objections can be determined. In section 38, Parliament has specified that where an objection is made, *inter alia*, on grounds that the disclosure of information would be injurious to international relations, the objection must be determined by the Chief Justice, or another judge, of the Federal Court.

⁵ Counsel for the respondents referred in particular to *Nazir Khan v. R* (Federal Court DES-2-95, February 14, 1996) and *Goguen v. Gibson*, [1983] 2 F.C. 463 (F.C.A.)

⁶ Counsel for the Attorney General of Canada and Kimberly Prost did not take part in either hearing.

Content of the Certificates

It appears from the certificates that Frank Garrat Palmer has been Deputy Commissioner of the Royal Canadian Mounted Police for the Northwest region since April 1, 1996. Along with Commissioner Murray⁷ and four other deputy commissioners, he is part of the RCMP's Senior Executive Committee. He is responsible in particular for police services in Manitoba, Saskatchewan, Alberta and the Northwest Territories. He has an LL.B. and has been a member of the RCMP for almost thirty-four years.⁸ In each certificate, Deputy Commissioner Palmer first explains why he has an interest in this case⁹ and then certifies that the disclosure of the information would be detrimental to the public interest, in the following terms:

First certificate: Disclosure of information: Detrimental to public interest

10. I certify to this Honourable Court that the communication and/or disclosure of some of the requested documents and information, hereinafter respectively identified (the "requested documents") and (the "requested information") would be detrimental to the public interest, namely the proper administration of justice and the sound and efficient operation of the RCMP and of other law enforcement agencies in Canada and elsewhere in conducting criminal investigations and implementing the criminal law. Additionally, the communication and/or disclosure of some of these documents and information would be detrimental to Canada's international relations

Second certificate: Disclosure of information: Detrimental to public interest

7. From my review of the documents and my knowledge of the current circumstances, I have no objection to the disclosure of a copy of the appendix submitted with the detailed draft letter of request.

8. From my review of the documents and my knowledge of the current circumstances, I certify to this Honourable Court that the communication and/or disclosure of portions of the draft letter of request which was presented by defendant Fraser Fiegenwald to defendant Kimberly Prost, would be detrimental to the public interest, namely the proper administration of justice and the sound and efficient operation of the RCMP and of other law enforcement agencies in Canada and elsewhere in conducting criminal investigations and implementing the criminal law. Additionally, the communication and/or disclosure of portions of this draft letter of request would be injurious to Canada's international relations.

⁷ He is both a respondent in this motion and one of the defendants in the action

⁸ Each certificate provides a lengthy description—almost 6 pages—of his career, knowledge and experience.

⁹ **First certificate: Interest**

8. I have reviewed and analyzed the ensemble of the documents in the investigators' file and discussed with them the information obtained during the course of their investigation and I have been periodically kept informed of the progress of their investigation. Therefore, I have an interest in the information sought from Mr. Gossin through the hereinabove listed questions to the extent, if any, to which the answers to the questions put to Mr. Pascal Gossin may yield information concerning the criminal investigation;

9. Also because the success of those of our investigations which take on an international perspective is dependent on Canada's good relations with foreign countries, I have an interest in ensuring that those good relations are not jeopardized in any way.

Second certificate: Interest

5. I have reviewed and analyzed the ensemble of the documents in the investigators' file and discussed with them the information obtained during the course of the investigation and, more particularly, the documents mentioned in paragraph 4. Furthermore, I have been kept informed of the progress of the investigation. Therefore, I have an interest in the matters and information hereinabove mentioned in paragraph 4 to the extent that they may disclose information concerning the criminal investigation.

6. Also because the success of those of our investigations which take on an international perspective is dependent on Canada's good relations with foreign countries, I have an interest in ensuring that those good relations are not jeopardized in any way.

The certificates then provide a detailed statement of the grounds of objection, namely the need to protect an ongoing criminal investigation and the injury to international relations.

Counsel for the applicant argued that Deputy Commissioner Palmer cannot be called a *person interested* for the purposes of section 38 of the Act because, in light of the allegations in the certificate concerning injury to Canada's international relations, the person who signed it should have been someone working for the government department responsible for mutual legal assistance between states or at least a government department involved in foreign affairs. According to counsel, the fact that the term *other person interested* comes right after the words *a minister of the Crown in right of Canada* is in itself a strong indication that the requisite interest must relate to the statutory responsibilities that the person in question has, whether directly or by way of delegation.

Analysis

Under the *Canada Evidence Act*, a *minister of the Crown in right of Canada* or *other person interested* may make an objection under sections 37 and 38. While no problem is presented by the term *minister of the Crown in right of Canada*, except in so far as such a minister who is directly involved in proceedings may be in a conflict of interest situation, the same is not true of the term *other person interested*. This cannot mean a person who has some interest, even a direct one, in civil or criminal proceedings. In *R-v-Lines*,¹⁰ the Northwest Territories Court of Appeal dismissed the appeal of an accused who wanted to make an objection under section 36.1 (now 37) of the *Canada Evidence Act*. The Court of Appeal held that a *person interested* in making an objection must have an official status and the authority to do so. It stated the following:

In our view Section 36.1 of the Canada Evidence Act cannot bear the interpretation that it can be invoked first by "a Minister of the Crown in the right of Canada" and secondly then by any other citizen of Canada. Parliament intended this section, in our opinion, to relate to official objections to disclosure of specified information from public records on the ground of some specified public policy. That is seen by the conjunction of "other person interested" with the words "Minister of the Crown in the right of Canada". It is not a case of *eiusdem generis* interpretation but it does show the official character of the objector. In addition the word "certify" is an inappropriate word to use if Parliament had intended the objection to be made by any casual passerby. "Certify" has the connotation of "attestation in an authoritative manner" though it is, of course, a word of wide import which may also refer merely to a formal or legal certificate.

But what is contemplated by the section is that a Minister of the Crown or some person with an authority in relation to the public interest specified makes the objection.

¹⁰ [1986] N.W.T.J. No. 2, Appeal No. N.W.T. 604.

The case law under section 38 of the *Canada Evidence Act* is very limited and the concept of *person interested* does not seem to have been considered.¹¹ The Court further notes that in cases in which the issue of injury to international relations has been raised, the certificates were issued by the Director of the Canadian Security Intelligence Service (CSIS),¹² the Director General of the Counter Terrorism Branch of CSIS¹³ and the Deputy Solicitor General.¹⁴

In Canada, it is the Minister of Justice—who is, as such, the Attorney General for Her Majesty—who is responsible for seeing that the administration of public affairs is in accordance with law and who has the superintendence of all matters connected with the administration of justice.¹⁵ His powers, duties and functions include advising the heads of the several departments of the Government on all matters of law connected with those departments.¹⁶

Furthermore, the powers, duties and functions of the Minister of Foreign Affairs extend to all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada.¹⁷ In carrying out these duties and functions, the Minister of Foreign Affairs conducts all diplomatic relations and all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization¹⁸

Under the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. M-13.6, it is the Minister of Justice and the Minister of Foreign Affairs who may

¹¹ In *Ranjan (Re)*, [1991] 1 F.C. 226, the certificate was issued by Assistant Commissioner Murray of the RCMP and the applicant's objection was based on the existence of a conflict of interest.

¹² *Henrie v. Canada*, [1989] 2 F.C. 229.

¹³ *Kevork v. The Queen*, [1984] 2 F.C. 753.

¹⁴ *Goguen v. Gibson*, [1983] 1 F.C. 872, aff'd [1983] 2 F.C. 463.

¹⁵ *Department of Justice Act*, R.S.C. 1985, c. J-2, paragraphs 4(a) and (b).

¹⁶ Paragraph 5(b).

¹⁷ *Department of External Affairs Act*, R.S.C. 1985, c. E-22, subsection 10(1), as amended by the *Act to amend the Department of External Affairs Act and to make related amendments to other Acts*, S.C. 1995, c. 5, section 7. Since that amendment, the term "foreign affairs" has been used rather than "external affairs".

¹⁸ Paragraphs 10(2)(a) and (b).

enter into administrative arrangements with other states providing for legal assistance in criminal matters.¹⁹

In the case at bar, can Deputy Commissioner Palmer rely on the *Royal Canadian Mounted Police Act* (R.S.C. 1985, c. R-10) to claim a right or privilege to assert that the disclosure of the information would be injurious to Canada's international relations? In short, is he a *person interested* within the meaning of the *Canada Evidence Act*?

The Solicitor General of Canada has jurisdiction over the Royal Canadian Mounted Police.²⁰ While it is possible that the Solicitor General of Canada, as a minister of the Crown in right of Canada, could have himself issued the certificates making, *inter alia*, an objection under section 38 of the *Canada Evidence Act*, the Court feels that the same cannot be said of Deputy Commissioner Palmer. There is nothing in the *Royal Canadian Mounted Police Act* or the *Royal Canadian Mounted Police Regulations*²¹ that confers such a power on him, and he has not shown in the certificates he prepared that he has some legislative or administrative authority to invoke the ground set out in section 38. His senior position in the RCMP—Deputy Commissioner for the Northwest region—does not entitle him to do so,²² and neither do his many years of experience and service.

While the RCMP may once have been able to assume international statutory jurisdiction because of its responsibility over security intelligence, the Court considers that this ceased to be possible with the passage of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. S-13, which confers a certain jurisdiction on that civilian agency over the conduct of Canada's international affairs (section 16) and authorizes it to enter into international arrangements with the approval of the Solicitor General in consultation with the Minister of Foreign Affairs (section 17).

Accordingly, the Court feels that in so far as Deputy Commissioner Frank Garrat Palmer's objections are based on injury to international relations within the

¹⁹ 6 (1) Where there is no treaty between Canada and another state, the Minister of Foreign Affairs may, with the agreement of the Minister [of Justice], enter into an administrative arrangement with that other state providing for legal assistance with respect to an investigation specified therein relating to an act that, if committed in Canada, would be an indictable offence.
 ...
 6.(3) An administrative arrangement entered into under subsection (1) or (2) may be implemented by the Minister [of Justice], pursuant to this Act, in the same manner as a treaty.
 ..
 7.(1) The Minister is responsible for the implementation of every treaty and the administration of this Act.
 ...

²⁰ *Department of the Solicitor General Act*, R.S.C. 1985, c. S-13, paragraph 4(c).

²¹ SOR/88-361, June 30, 1988, (1988) 122 *Canada Gazette II*, p. 3181.

²² Counsel for the respondents Murray and Fiegenwald argued that RCMP liaison officers have a diplomatic status that entitles them to forward international requests for legal assistance to the appropriate persons. Even if that is true, it must be noted that in the instant case the certificates are not signed by a liaison officer, and Deputy Commissioner Palmer's seniority within the RCMP hierarchy certainly does not give him the power that a liaison officer may have.

meaning of section 38 of the *Canada Evidence Act*, they are inadmissible and must be dismissed.

As far as the objections under section 37 of the *Canada Evidence Act* are concerned, the case should be returned to the Superior Court of Quebec for disposition.

OTTAWA, January 3, 1997

PIERRE DENAULT

J.F.C.C.

Certified true translation



A. Poirier

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: DES-7-96

STYLE OF CAUSE: THE RIGHT HONOURABLE BRIAN MULRONEY, P.C.
- AND -
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PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 13 AND 20, 1996

REASONS FOR ORDER BY: DENAULT J.

DATED: JANUARY 3, 1997

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**THE FEDERAL COURT
OF CANADA**

**LA COUR FÉDÉRALE
DU CANADA**

Court No.: DES-7-96

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.

Reasons for Order

16 Jan. 1997
DATE

Form T-4F

Pierre Denault
J.F.C.C. J.C.F.C.

Formule T-4F

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