

Federal Court



Cour fédérale

Date: 20080916

Docket: T-1192-07

Citation: 2008 FC 1028

Ottawa, Ontario, September 16, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MAURICE PHILIPPS

Applicant

and

LIBRARIAN AND ARCHIVIST OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is seeking judicial review of a decision of Library and Archives of Canada (LAC) dated June 8, 2007, maintaining the restrictions on access to the Fonds Louis M. Bloomfield (Fonds Bloomfield) for a period of five years and providing for the possibility of limiting access to the records protected by solicitor-client privilege for a maximum of 50 years.

[2] This decision was made further to the judgment rendered by Mr. Justice Simon Noël of this Court dated November 14, 2006 (*Maurice Philipps v. Librarian and Archivist of Canada*, 2006 FC 1378, [2007] 4 F.C.R. 11), which allowed the applicant's previous application for judicial review

and referred the matter back to the LAC for reconsideration of the restrictions on access to the Fonds Bloomfield.

I. Facts

[3] The Fonds Louis M. Bloomfield is a collection of private archives placed in LAC by Louis Mortimer Bloomfield, a prominent Montréal lawyer who died in 1984.

[4] In a letter dated February 24, 1978, Mr. Bloomfield laid down as a condition for the transfer of his archives that the records transferred be kept for a period of 20 years after his death before being made public. He mentioned that his wife would be his literary executrix and that she could have access at all times to his records.

[5] Mr. Bloomfield died on July 19, 2004.

[6] On August 10, 2004, the applicant approached LAC in order to obtain access to the Fonds Bloomfield.

[7] On August 31, 2004, Mrs. Bloomfield asked that a new restriction be imposed on access to the Fonds for a period ending 10 years after her own death. In a letter to LAC, she raised concerns about her privacy and Mr. Bloomfield's reputation if access to the Fonds were to be allowed immediately. On September 8, 2004, LAC agreed to Mrs. Bloomfield's request and extended the period of restriction on access to the Fonds in accordance with her wishes.

[8] On January 17, 2004, the applicant formally requested access to the Fonds Bloomfield. Advised by LAC of the new restriction on access, he asked the Chief Archivist to review this decision and release the documentation on which this extension of the period of restriction on access was based. In response to this request, LAC informed him on February 16, 2004, that this new restriction resulted from an agreement with Mrs. Bloomfield.

[9] On April 20, 2005, LAC issued a new restriction and extended the restriction on access to the Fonds Bloomfield to 25 years after the death of Mrs. Bloomfield. The applicant again asked for a review of this decision. After reviewing the file, LAC replied to him in a letter dated August 8, 2005, that the restrictions on the Fonds Bloomfield were maintained and that this decision was final.

[10] This was the decision for which judicial review was initially sought. In a decision dated November 14, 2006, my colleague Mr. Justice Simon Noël allowed the application for judicial review and ordered that the matter be referred back to LAC for a new decision to be made based on his reasons for judgment.

[11] Noël J. said that in his opinion the respondent had made an error of law by changing the date of the restriction on access in accordance with Mrs. Bloomfield's wishes. Although the "Guidelines and Procedures for the Establishment and Management of Access Conditions relating to Fonds Held by Manuscript Division" allow LAC to take into account the views expressed by donors or their representatives, this is only one criterion among others that must be taken into account in the exercise of its discretion. Noël J. wrote the following in this respect:

[65] From this correspondence, it appears that LAC regarded Mrs. Bloomfield as the manager of the access restriction period and that as such her decision as to an extension of the non-access period was final. The donor, Mr. Bloomfield, did not give Mrs. Bloomfield this

power of management. He twice stated specifically that the non-access period was 20 years. Such was his intention and it must be respected. The interpretation of Mrs. Bloomfield's role by LAC was an error of law.

[12] Noël J. went on to state that LAC's decision to restrict access to the Fonds Bloomfield for a period of twenty-five (25) years after Mrs. Bloomfield's death was not reasonable in the circumstances and that there were no grounds warranting this additional extension. He stated the following in this regard:

[69] Although the 10-year extension of the restriction period in September 2004 was well documented, as Mrs. Bloomfield expressed a desire that the said extension be extended by 10 years after her death (see applicant's record, page 150) for privacy reasons and to protect her husband's reputation, such was not the case with respect to the 25-year extension, a decision made on April 20, 2005 (see applicant's record, page 114). No explanation was provided in support of such a change. Further, this decision is contrary to the LAC Guidelines indicating that a restriction period is reviewed as soon as it expires. There appears to be a contradiction in the letter of August 8, 2005. The renewal of the restriction extension period was made in September 2004 for a period of 10 years: accordingly, there was no expiration as it could not occur before 2014.

[70] The decision of August 8, 2005, describing the restriction period without explanation, was not reasonable in the circumstances in view of the facts in the case and the absence of reasons for this new extension, which was contrary to the Guidelines. Therefore, as it was not correct, it is reviewable.

[13] Following this decision, Peter Delottinville, Archivist and Director of the Political and Social Heritage Division of LAC, was assigned to make recommendations on the access conditions relating to the Fonds Bloomfield. Mr. Delottinville's affidavit evidence indicates that he followed the Guidelines in reviewing the access conditions relating to the Fonds Bloomfield, and took the following four factors into account: (1) the reasons for judgment of Noël J.; (2) the nature of the records contained in the Fonds Bloomfield; (3) the wishes of Mrs. Bloomfield as a close relative of the donor; and (4) the interest of researchers.

[14] Directed by Mr. Delottinville to review the nature of the records in the Fonds Bloomfield, Dale Cameron, Archivist at LAC, found these records to be “sensitive” or “highly sensitive” (terms defined in the Guidelines). He also found that certain records contained personal and confidential information.

[15] Further to this analysis, Mr. Deottinville recommended in a briefing note dated June 7, 2007, that access to the Fonds Bloomfield be restricted until 2014. This recommendation was then confirmed by the Director General of the Strategic Office, the Director General of Canadian Archives and Special Collections, and the Assistant Deputy Minister responsible for archives and documentary collections at LAC.

[16] After considering this recommendation, the Librarian and Archivist of Canada approved it, with two caveats. First, he adjusted the restriction period so that it ends in 2009 rather than in 2014. Second, he added that the records containing information protected by solicitor-client privilege would not be accessible for a maximum of 50 years.

[17] This decision was communicated to the applicant in a letter dated June 8, 2007, which reads as follows:

[TRANSLATION]

...

Library and Archives of Canada (LAC) undertook to make a decision on the situation of the Fonds Louis M. Bloomfield 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 Fonds, LAC officials decided that the Fonds 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 is elapsed and the Fonds opened, 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.

...

[18] This is the decision that is the subject of this application for judicial review.

II. Issues

[19] As part of his written and oral submissions, the applicant, who represented himself, raised a number of arguments against LAC's decision. First, he argued that this decision relied on an erroneous interpretation of Noël J.'s decision: Noël J. never indicated that a 10-year restriction would be reasonable. According to Mr. Philipps, this error is determinative to the extent that the decision of the Librarian and Archivist of Canada was influenced by this reading of the judgment proposed in the briefing note.

[20] Second, the applicant argued that Noël J.'s judgment had been disregarded, apart from the unsupported conclusion drawn with regard to the reasonableness of a 10-year restriction period. As proof of that, the applicant pointed to the fact that Mr. Delottinville, in his cross-examination,

seemed unable to indicate how it had been taken into account; he saw this as additional confirmation in the absence of any explicit reference to LAC's mission (to preserve Canada's heritage and facilitate access to it) and to the balancing tests outlined in the Guidelines, tests which Noël J. had nonetheless referred to in his judgment.

[21] The applicant also alleged that the decision of June 8, 2007, was not consistent with Noël J.'s judgment in that LAC continued to attach considerable weight to Mrs. Bloomfield's opinion when making its decision. Although the decision itself as communicated to the applicant on June 8, 2007, does not refer to this reason, the briefing note does refer to it and Mr. Delottinville's cross-examination seems to reveal the weight attached to that factor.

[22] Finally, the applicant alleged that arguments that the Fonds Bloomfield includes records containing personal information that could violate the privacy of third parties were not admissible because these new facts were not adduced in evidence in accordance with the *Federal Courts Rules*. He claimed that Mr. Delottinville's affidavit in this regard constitutes hearsay since he had no personal knowledge of these facts and that he relied on information given to him by Mr. Cameron. Alternatively, the applicant submitted that this argument was never raised when the Fonds was analyzed in 2002, and that is therefore only a pretext in order to maintain the previous decision set aside by Noël J..

[23] The real issue, in my opinion, is to determine whether the decision made by LAC on June 8, 2007, is in compliance with the *Library and Archives of Canada Act* and the Guidelines adopted thereunder, and respects the spirit and the letter of the judgment rendered by my colleague Mr. Justice Simon Noël further to the first judicial review sought by the applicant.

III. Statutory framework

[24] The *Library and Archives of Canada Act* (Act) does not expressly deal with the deposit of and access to private records held by LAC. However, the preamble of the Act sets out that it is necessary that Canada be served by an institution “that is a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada as a free and democratic society”.

[25] LAC’s objects are set out in section 7:

Objects

7. The objects of the Library and Archives of Canada are

(a) to acquire and preserve the documentary heritage;

(b) to make that heritage known to Canadians and to anyone with an interest in Canada and to facilitate access to it;

(c) to be the permanent repository of publications of the Government of Canada and of government and ministerial records that are of historical or archival value;

(d) to facilitate the management of information by government institutions;

Mission

7. Bibliothèque et Archives du Canada a pour mission :

a) de constituer et de préserver le patrimoine documentaire;

b) de faire connaître ce patrimoine aux Canadiens et à quiconque s'intéresse au Canada, et de le rendre accessible;

c) d'être le dépositaire permanent des publications des institutions fédérales, ainsi que des documents fédéraux et ministériels qui ont un intérêt historique ou archivistique;

d) de faciliter la gestion de l'information par les institutions fédérales;

- | | |
|---|---|
| (e) to coordinate the library services of government institutions; and | e) d'assurer la coordination des services de bibliothèque des institutions fédérales; |
| (f) to support the development of the library and archival communities. | f) d'appuyer les milieux des archives et des bibliothèques. |

[26] To attain these objects, the Librarian and Archivist of LAC may use the means provided for in section 8 of the Act:

Powers of Librarian and Archivist

8. (1) The Librarian and Archivist may do anything that is conducive to the attainment of the objects of the Library and Archives of Canada, including

- (a) acquire publications and records or obtain the care, custody or control of them;
- (b) take measures to catalogue, classify, identify, preserve and restore publications and records;
- (c) compile and maintain information resources such as a national bibliography and a national union catalogue;
- (d) provide information, consultation, research or lending services, as well as any other services for the purpose of facilitating access to the documentary heritage;
- (e) establish programs and encourage or organize any activities, including exhibitions, publications and performances,

Attributions de l'administrateur général

8. (1) L'administrateur général peut prendre toute mesure qui concourt à la réalisation de la mission de Bibliothèque et Archives du Canada et, notamment :

- a) acquérir des publications et des documents ou en obtenir la possession, la garde ou la responsabilité;
- b) prendre toute mesure de catalogage, de classement, de description, de protection et de restauration des publications et documents;
- c) compiler et maintenir des sources d'information et notamment une bibliographie et un catalogue collectif nationaux;
- d) fournir des services d'information, de consultation, de recherche et de prêt, ainsi que tous autres services permettant d'avoir accès au patrimoine documentaire;

to make known and interpret the documentary heritage;

(f) enter into agreements with other libraries, archives or institutions in and outside Canada;

(g) advise government institutions concerning the management of information produced or used by them and provide services for that purpose;

(h) provide leadership and direction for library services of government institutions;

(i) provide professional, technical and financial support to those involved in the preservation and promotion of the documentary heritage and in providing access to it; and

(j) carry out such other functions as the Governor in Council may specify.

Sampling from Internet

(2) In exercising the powers referred to in paragraph (1)(a) and for the purpose of preservation, the Librarian and Archivist may take, at the times and in the manner that he or she considers appropriate, a representative sample of the documentary material of interest to Canada that is accessible to the public without restriction through the Internet or any similar medium.

e) mettre en place des programmes visant à faire connaître et comprendre le patrimoine documentaire et encourager ou organiser des activités — notamment des expositions, des publications et des spectacles — à cette fin;

f) conclure des accords avec d'autres bibliothèques, archives ou institutions au Canada ou à l'étranger;

g) conseiller les institutions fédérales sur la gestion de l'information qu'elles produisent et utilisent et leur fournir des services à cette fin;

h) déterminer les orientations des services bibliothécaires des institutions fédérales et, à cette fin, fixer des lignes directrices;

i) apporter un appui professionnel, technique et financier aux milieux chargés de promouvoir et de préserver le patrimoine documentaire et d'assurer l'accès à celui-ci;

j) s'acquitter de toute autre fonction que lui confie le gouverneur en conseil.

Réalisation d'échantillons à partir d'Internet

(2) Pour l'application de l'alinéa (1)a), l'administrateur général peut, à des fins de préservation, constituer des échantillons représentatifs, selon les modalités de temps ou autres qu'il détermine, des éléments d'information présentant un intérêt pour le Canada et

accessibles au public sans
restriction dans Internet ou par
tout autre média similaire.

[27] In accordance with paragraph 8(1)(h), the “Guidelines and Procedures for the Establishment and Management of Access Conditions relating to Fonds Held by Manuscript Division” were adopted in 2005. They recognize the necessity of access restrictions relating to private records so as to facilitate the acquisition of such records of national significance. That being said, these Guidelines repeat that the ultimate goal of LAC is to increase and broaden access whenever possible.

[28] The Act, the Guidelines and the judgment of Noël J. indicate that a balance must be struck between facilitating access to the records, the conditions of the donation and other legitimate considerations.

IV. Analysis

[29] In the decision rendered on November 14, 2006, Noël J. arrived at the conclusion, further to a pragmatic and functional analysis, that the standard of review applicable to LAC’s decision to restrict access to the Fonds Bloomfield was reasonableness *simpliciter*. It does not seem to me that that this conclusion needs to be reconsidered further to the Supreme Court decision in *Dunsmuir v. Nouveau-Brunswick*, 2008 SCC 9. Consequently, this Court will intervene only to the extent that the decision-making process is not intelligible or transparent, or the decision does not fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[30] At the outset, the respondent admitted at the hearing that the briefing note and the consequent decision, as communicated to the applicant by letter dated June 8, 2007, demonstrated an erroneous interpretation of Noël J.'s judgment. This admission seems to me to be entirely appropriate and fair. In fact, Noël J. did not state anywhere in his reasons that a restriction on access to the Fonds Bloomfield until 2014 was reasonable. At most, he stated at paragraph 69 of his judgment (as reproduced at paragraph 12 of these reasons) that this restriction period was "well documented", unlike the 25-year period decided on subsequently, for which no explanation was provided.

[31] It should be noted that Noël J. was not required to make a decision concerning the 10-year restriction period decided on in September 2004. The impugned decision was the one to extend the restriction period to 25 years. That decision was made on April 20, 2005, and confirmed on August 8, 2005. What is more, it cannot be deduced from the fact that reasons are given for a decision that the decision is necessarily reasonable. As the Supreme Court pointed out in *Dunsmuir, supra*, the reasonableness of a decision owes as much to the decision-making process that led to it as to its very content.

[32] That being said, does this interpretation error vitiate the decision made by LAC on June 8 2007? I do not think so. The briefing note and (to a lesser extent) the letter of June 8 suggest that this erroneous reading of one paragraph in Noël J.'s judgment was only one of the factors taken into consideration by LAC. The letter of June 8 mentions that the review of the collection was undertaken [TRANSLATION] "in accordance with the guidelines proposed by Mr. Justice Simon Noël in his decision dated November 14, 2006", and was not solely based on this aspect. As for the

briefing note, it referred to a number of considerations which I will discuss shortly and certainly does not suggest that this interpretation error had a determinative impact on the decision.

[33] Moreover, the Librarian and Archivist of Canada did not feel bound by this opinion because he reduced the suggested restriction period by half. If the erroneous reading of Noël J.'s judgment had had the determinative impact that the applicant indicates, it seems that the Librarian and Archivist of Canada would have blindly followed the recommendation made. Does that mean that he would have reduced the restriction period even more if he had not been told that Noël J. considered a period of 10 years to be reasonable? This is pure speculation. Ultimately, the question that the Court must answer is whether the decision made was reasonable in view of all the factors that legitimately could be considered. Seen from this viewpoint, I believe that the decision was not unreasonable.

[34] It is well established, and Noël J. repeated this in his judgment, that it was up to LAC to take the appropriate measures to attain its objects under the Act. Parliament clearly wished to accord the Librarian and Archivist of Canada a certain leeway to allow LAC to fulfill its mission. Although the Guidelines adopted in 2005 cannot be considered legislative or regulatory provisions, they nevertheless serve as the basis for LAC to determine the access conditions. As mentioned above, both the Act and the Guidelines provide that LAC must strike a balance between facilitating access to the records, the conditions set by the donor and the other legitimate interests it may take into account.

[35] This is exactly what it did in this case. The briefing note to the Librarian and Archivist of Canada showed that the access conditions relating to the Fonds Bloomfield were reviewed in

accordance with the parameters set by the Act, the Guidelines and the Noël J.'s reasons for judgment. The records contained in the Fonds were also carefully reviewed, and it was determined that they contained personal information, and that personal information concerning third parties could be disclosed if they were consulted.

[36] The briefing note on which the Librarian and Archivist of Canada relied in making his decision does not conceal that Mrs. Bloomfield, the donor's widow, had been consulted to determine her position on granting access to the records contained in the Fonds. It seems that Mrs. Bloomfield maintained her previous position and expressed the wish that the Fonds remain inaccessible. However, contrary to the situation that prevailed when the decision reviewed by Noël J. had been made, there is nothing to indicate that Mrs. Bloomfield's opinion was determinative or that LAC felt itself to be bound by that opinion.

[37] There is therefore nothing to suggest that the decision made on June 8, 2007, was based on inappropriate considerations. In this area, like in any other, good faith must be presumed, and it is difficult to see what interest LAC might have in not being transparent or in giving undue weight to the wishes of a relative of the donor more than twenty years after his death. Nor has the applicant succeeded in proving that LAC had sought by every means possible to uphold its original decision and that the dice had been loaded from the start. On the contrary, Mr. Delottinville candidly admitted during his cross-examination that LAC had been mistaken in relying exclusively on the wishes of Mrs. Bloomfield in making its first decision, and that he had re-analyzed the decision in good faith. Moreover, he asked Mr. Cameron, an archivist with more than thirty years' experience, to examine the content of the records, and allowed him all the time necessary to do so. I see nothing here that could suggest any bad faith.

[38] It is true that the letter sent to the applicant on June 8, 2007, was not as explicit concerning the reasons underlying the decision as it could have been. However, it is well established that the requirements of procedural fairness and, in particular, the duty to give reasons, vary according to the circumstances of each case: *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 43-44. Given the fact that Parliament did not indicate anything in the Act and that the decision to restrict access to a fonds does not infringe any right that could be claimed by the applicant or by any other person desiring access, I hesitate to impose too great a burden on LAC.

[39] Finally, there is nothing to suggest that Mr. Cameron's conclusions that the Fonds contained records that, because of their confidential nature, would violate the privacy of third parties contradicted previous evaluations and were pure fabrication. No doubt it would have been preferable if Mr. Cameron had himself signed an affidavit attesting to the nature of the records in the Fonds Bloomfield. However, there is nothing to suggest that Mr. Delottinville did not faithfully report Mr. Cameron's remarks and observations. During his cross-examination, Mr. Delottinville stated that he had met with Mr. Cameron for close to an hour less than two days before writing his briefing note. Since he had directed him to do this work, had written his note shortly after meeting with him, and was very familiar with the general content of the Fonds Bloomfield, it is difficult to see how or why Mr. Delottinville could have misreported his remarks.

[40] Even supposing that a review of the Fonds Bloomfield had been carried out in 2002, we do not know anything about how it was conducted. The applicant argued that the decision resulting from this review had been recorded in the Reserved Funds Form filed in the record on July 9, 2002, and described the conditions of consultation as follows: "Restricted until 2004". The archivist who

did the review did not decide anything, because these were the original conditions of the donation made by Mr. Bloomfield when he transferred his records. There is therefore nothing contradictory between this “review”, which appears to have been purely *pro forma*, and the analysis carried out following Noël J.’s judgment, in which the various interests present were truly balanced.

[41] For all these reasons, I therefore find that the decision made by LAC on June 8, 2007, is 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.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed, with costs.

“Yves de Montigny”

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1192-07

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

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 25, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** DE MONTIGNY J.

DATED: September 16, 2008

APPEARANCES:

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Anne-Marie Desgens FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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