Date: 20071026

Docket: T-1591-04

Citation: 2007 FC 1110

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 26, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DOMINION INVESTMENTS (NASSAU) LTD. and MARTIN TREMBLAY
(President of Dominion Investments (Nassau) Ltd.)

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] This motion by the Canadian Broadcasting Corporation (the CBC) arises in the context of an action for damages brought by the plaintiffs against the Royal Canadian Mounted Police (the RCMP) for injury to its reputation. The plaintiff seeks leave to intervene in this case for a review of this Court's order on October 13, 2005, dismissing the motion for a stay brought by the defendant, which was supported by an affidavit and a certificate issued under section 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*Evidence Act*).

[2] This motion raises significant and unprecedented issues regarding freedom of the press, the role of the media and open court. After carefully considering the case and the parties' submissions, I have nevertheless arrived at the conclusion that it would be premature to rule on these issues at this stage of the proceedings.

FACTUAL BACKGROUND

[3] On August 30, 2004, the plaintiffs filed a statement of claim against the defendant, in which they sought damages of USD $6,350,000 in exemplary damages. They claim that the defendant allegedly transmitted false and misleading information about them to financial institutions and to U.S. authorities.

[4] This information was reportedly disclosed following a request by U.S. authorities to extradite a man named Daniel Pelchat. A document prepared in support of their application and filed in September 2002 in the Superior Court of Québec record notes the following:

> As part of our financial investigation, we have, together with the RCMP, learned that Pelchat's moneys are deposited into an investment account named Dominion Investments at the Royal Bank of Canada. While that investigation remains ongoing, the RCMP reports that Dominion Investments is a Bahamian money laundering operation affiliated with the Hell's Angels.

[5] As part of their action, the plaintiffs are also seeking a permanent injunction order to prevent the defendant from disclosing to anyone any information about the plaintiffs, including any information relating to the facts that gave rise to this action.

[6] On December 8, 2004, the plaintiffs filed a motion to obtain special case management due to the complexity of the facts, the disagreement between the parties regarding the conduct of the proceedings and the determination of the confidential nature of the information that will be disclosed by the parties in their proceedings and supporting documents.

[7] In response, the defendant submitted that she intended to bring a motion for a stay and an in camera and *ex parte* confidentiality motion such that the evidence to support her motions may not be disclosed to the plaintiffs and their counsel. According to the defendant, such a disclosure could be highly detrimental to public interest, and she therefore requested that instructions be developed in this regard.

[8] On December 14, 2004, Prothonotary Morneau allowed the special management request and set a timetable for the submission of the motion for a stay. This timetable was subsequently revised at the request of the parties and was subject to a new order made on December 23, 2004.

[9] On January 14, 2005, the defendant subsequently filed a motion for a stay under paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (Federal Courts Act), supported by the affidavit of inspector Serge Therriault and a written certificate by superintendent Stephen Covey of the RCMP under section 37 of the *Evidence Act.* The motion sought a stay of twelve months from the date of the judgment to be delivered and the restoration of inspector Serge Therriault's affidavit to the defendant.

[10] In the certificate that he filed in accordance with section 37 of the *Evidence Act*, superintendent Covey stated that disclosure of the information in the numerous redacted paragraphs of the affidavit would cause serious harm to public interest and, more specifically, to the operations of the RCMP and Canadian police forces, as well as the ongoing criminal investigations. He also certified that the redacted information would endanger the lives of individuals who cooperated with the police corps as part of these investigations were it disclosed and that it would identify or tend to identify informants and individuals under investigation, as well as investigation techniques used by the RCMP and, more generally, police information.

[11] In an order dated January 19, 2005, Prothonotary Morneau authorized the Registry to have inspector Serge Therriault's full and sealed affidavit hand-delivered. The order also provided that this non-redacted affidavit could only be viewed by the prothonotary or judge hearing the motion for a stay and that it would be hand-delivered to the defendant [TRANSLATION] "after a judgment to be rendered on the defendant's stay of proceedings and in the event of withdrawal of the stay of proceedings."

[12] It is therefore under this order that the defendant hand-delivered inspector Serge Therriault's non-redacted affidavit to the designated registry officer. In a note on record, the registry officer indicated that he had received the sealed envelope and had hand-delivered it to the prothonotary. The note added that the envelope would be kept in the vault at the local office in Montréal and

would be hand-delivered to the defendant post-judgment or should the stay of proceedings be withdrawn.

[13] The plaintiffs filed their reply record seeking the dismissal of the stay of proceedings on February 1, 2005. They also requested the dismissal of the defendant's objection to the disclosure of the information in Serge Therriault's affidavit, except the information regarding the identity of police informants or informers and/or any information allowing them to be identified; alternatively, they sought an order authorizing counsel for the plaintiffs to take note of all the sealed information and/or to issue a suitable safeguard order in accordance with Rule 385(1) of the *Federal Courts Rules*, SORS/98-106 (the Rules) and subsection 37(5) of the *Evidence Act*.

[14] On February 16, 2005, Prothonotary Morneau allowed the defendant's motion for a stay of proceedings for one year from the date of the order. With respect to Serge Therriault's affidavit and the superintendant Stephen Covey's certificate, the prothonotary was of the opinion that the requirements of section 37 of the *Evidence Act* had been met and that, consequently, there was no reason to authorize disclosure of the redacted portions of the affidavit. On this point, he stated the following (2005 FC 354):

> [18] In the circumstances of this case, and if we review the relevant aspects of section 37 of the Act [the *Evidence Act*], I am entirely satisfied as to the following points. First, that the Certificate meets the requirements of section 37 of the Act, and more specifically the requirements of subsection 37(1).
>
> [19] Second, for the purposes of subsections 37(4.1) and (5) of the Act, I conclude from an examination of the Certificate and of Serge Therriault's affidavit that disclosure of the information that has not yet been disclosed, as set out in that affidavit, would be harmful

> having regard to the specified public interest reasons set out in the Certificate.
>
> [20] As well, for the reasons that follow, I find, under subsection 37(5) of the Act, that I see no public interest reasons in the record to justify disclosure that outweigh the public interest reasons specified and identified in the Certificate.
>
> [21] Having regard to that conclusion, the Court need not undertake the exercise to which the remainder of subsection 37(5) relates, where a contrary conclusion is reached: authorizing disclosure of all or part of the information not yet disclosed subject to conditions.

[15] In his order, he also stated the following:

> [TRANSLATION]
>
> Furthermore, in accordance with the order of this Court dated January 19, 2005, when this order has attained final status, Serge Therriault's affidavit will be hand-delivered to the defendant, who will contact this Court's registry for that purpose. For a period of time, the Court will keep in its locked vault a copy of the same affidavit that it has annotated with other relevant Court notes. These documents will be destroyed in a secure manner after a reasonable period.

[16] On February 28, 2005, the plaintiffs appealed the order to stay proceedings made by Prothonotary Moreau. In a decision made on October 13, 2005 (2005 FC 1397), Gauthier J. allowed the appeal, set aside the order staying the proceedings and dismissed the defendant's motion for a stay. Expressing the view that section 37 of the *Evidence Act* "is already an exception to a number of fundamental principles of our law, which requires that proceedings be public, that the administration of justice be transparent, that the Court have the benefit of adversarial proceedings before making a decision and that each party have access to all of the relevant evidence, and particularly to the evidence presented to the Court by the opposing party" (para 46), Gauthier J.

found that section 37 may only be used in reactive contexts only and not in a proactive manner, as in this case. On this point, she found the following:

> [50] I conclude from my review of all of the factors that are relevant to a purposive interpretation of section 37 that neither the Prothonotary nor the Court has the power under that section to make a non-disclosure order in respect of Insp. Therriault's affidavit, which was filed by the defendant in support of its request for a stay and which includes its evidence regarding the irreparable harm it claims it would suffer. That provision does not allow the Court to hear an application other than a simple objection to disclosure, having regard to "secret" evidence, that is, information that cannot be disclosed to the other party.

[17] Then, alternatively, Gauthier J. considered whether the stay of proceedings should be granted even assuming that section 37 of the *Evidence Act* applies in a proactive context. On this point, she found that the prothonotary failed to have regard to the correct public interest principles that support disclosure in his analysis and confused the factors that are relevant to the analysis of the motion of a stay of proceedings with the principles relevant to an order under section 37. Assuming that even if Mr. Therriault's affidavit should not be disclosed under section 37, Gauthier J. was of the view that the defendant did not establish irreparable harm if the action was stayed. Without going so far as to say that a motion under paragraph 50(1)(b) of the *Federal Courts Act* could never be granted to enable police services to complete an investigation when a civil action has been instituted, Gauthier J. nonetheless considered that such a motion was premature in the context of this case.

[18] Gauthier J. gave three reasons in support of her opinion that the motion for a stay of proceedings was premature. First, she submitted that the defendant could always submit a redacted

statement of defence if necessary; the judge could then act pursuant to subsection 37(5) of the *Evidence Act* to set a reasonable period within which the defendant would have to disclose the redacted information as a condition of disclosure, if he or she found it appropriate.

[19] Second, Gauthier J. stated that she lacked details regarding the defence that the defendant intended to assert to balance the diverse interests at play at that stage of the proceedings. Finally, she also raised the fact that a stay would not necessarily resolve the dilemma faced by the defendant, insofar as her objection to disclosure was based on a number of public interests beyond the need to protect ongoing police investigations.

[20] Gauthier J. therefore allowed the appeal and dismissed the motion for a stay of proceedings. With respect to Serge Therriault's affidavit, she ordered that it be returned to the defendant in the following terms, which are found in Point 3 of her order:

> The affidavit of Serge Therriault [shall] be delivered to the defendant by hand. The defendant will have to contact the Registry for that purpose. The Court will retain a copy of the affidavit for a certain period of time in its locked vault, along with other relevant notes of the Court. Those documents will be securely destroyed after a reasonable period of time, it being understood that those documents must be retained at least until expiry of the time for appeal and, in the event of an appeal, until after final judgment only.

[21] This decision was not appealed, and Serge Therriault's affidavit was subsequently hand-delivered to counsel for the defendant on November 1, 2005, as attested to by the Court record.

[22] On February 5, 2007, over five months after Gauthier J.'s decision, the CBC filed a motion under section 4 of the *Federal Courts Act* and rules 4 and 109 of the Rules seeking a motion

authorizing it to intervene in the proceedings to have the order made by the Court on October 13, 2005, to have access to the non-redacted version of Mr. Therriault's affidavit. It was only then that the defendant reportedly learned that the copy of inspector Serge Therriault's affidavit had not yet been destroyed by the Registry despite Gauthier J.'s order.

[23] Without questioning compliance of the prothonotary's and Gauthier J.'s orders with the principles of the *Canadian Charter of Rights and Freedoms* (the Charter) when they were made, the CBC claimed that maintaining these orders could no longer be justified and violated the freedom of expression and the public's right to information once the RCMP's investigation was completed and Mr. Tremblay pleaded guilty to the charges against him in November 2006.

ISSUES

[24] The issues raised by the CBC's motion may therefore be established as follows:

1) Can the CBC be granted intervener status in this case?

2) Can the order made by Gauthier J. on October 13, 2005, having regard to the fate of Serge Therriault's affidavit be reviewed and, if so, should it be reviewed considering the developments that occurred since this date?

ANALYSIS

[25] All the CBC's arguments, both with respect to its request for intervention and to its motion to have Gauthier J.'s order reviewed, and thus have access to inspector Therriault's non-redacted affidavit, is based on the importance of freedom of expression and on the role that the media should

play to ensure the public's right to information and open court. In support of its argument, counsel for the CBC quite skillfully relied on the extensive case law of the Supreme Court in this matter, and specifically on *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835 [*Dagenais*], *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*], *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 [*CBC v. New Brunswick*], *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 and *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 [*Vancouver Sun*].

[26] Relying on this jurisprudence, the CBC first argued that the media should be granted standing to act [TRANSLATION] "whenever a motion for an order restricting the freedom of expression is brought" (CBC factum at para 28). It also claims that any order restricting freedom of expression must respect the principles set out in the Charter, based on the tests developed in *Dagenais* and *Mentuck*. In other words, the defendant should demonstrate that such and order is necessary to prevent a serious risk to the proper administration of justice, and that its salutary effects outweigh its deleterious effects on the rights and interests of the parties and the public, and the Court should be able to oversee its order to ensure that it complies with the Charter at all times.

[27] Despite its novelty, as counsel for the CBC herself acknowledges, this proposition is not without interest. Although the above Supreme Court case law was developed in the context of criminal law, it may well be possible to apply it, with the necessary adjustments, to a civil proceeding. At this stage, I will limit myself to the following remarks.

[28] First, it does not seem at all certain to me that the case law relied on by the CBC in support of the right of the media to intervene in a proceeding to ensure open court can be applied in this context. Not only was Mr. Therriault's unredacted affidavit handed over to the RCMP and should no longer be included in the court record, in accordance with Gauthier J.'s order, but, moreover, it has already been decided that the debate on privilege invoked under section 37 of the *Evidence Act* is not part of the proceeding and must be held in camera. See, for example, *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (C.A. Ont.) and, by analogy (in the context of an application made under section 486 of the *Criminal Code*, R.S.C. 1985, c. C-46 (Criminal Code)), *CBC v. New Brunswick)*, above at para 72.

[29] The purpose of open court and freedom of the press is to allow the public to be informed about what is happening in the courts and to form an opinion on the decisions made therein. As the Supreme Court stated in *CBC v. New Brunswick, supra*, at para 23:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. […]
>
> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(*b*) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media

> the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. […]

[30] By that reasoning, it does not seem at all clear that a secret document relied on to support privilege against disclosure should be included in the court record. On the assumption that even if the motion to stay had been granted, it may be asked on what basis the media could have sought to intervene to make representations on the possibility of releasing an affidavit that was not part of the court record and did not directly relate to the merits of the case. In this regard, it seems significant to me that the CBC was unable to identity any decisions in which a media organization was supposedly authorized in a civil action to intervene at the stage of the debate where it was being determined whether an objection to disclosure under section 37 of the *Evidence Act* should be maintained or to request a review. It may be thought, as the defendant argues, that it is only after the Court has ruled on the privileged nature of the information and dismissed the objection to disclosure that either of the parties could request a publication ban or a confidentiality order.

[31] It is true, as the CBC notes, that in *Dagenais*, above, at p. 872 the Supreme Court of Canada recognized that "[u]pon a motion for a ban under the common law rule, the court should give standing to the media who seek standing." However, I am far from satisfied, as the CBC argues, that from this a right to intervene by the media can be inferred every time a motion for an order [TRANSLATION] "that has the effect of restricting the freedom of expression is brought" (CBC's motion record, para 28). I acknowledge that in *Vancouver Sun*, the Supreme Court extended the scope of the rule developed in *Dagenais*, such the judge's discretion must be exercised in accordance with the Charter regardless of whether it is derived from common law or a statutory

provision (for example, under subsection 486(1) of the *Criminal Code* or embodied in the rules of practice. Nevertheless, in all of cases to which the Court refers, it was not the disclosure of a document that was in issue (as is the case when section 37 of the *Evidence Act* is invoked), but rather the question of whether a document to which the parties have access should be subject to a confidentiality order or whether it could instead be disseminated more broadly. In any event, I am not required to rule on this issue in this case, and these observations are in no way intended to be a definitive determination on the matter.

[32] The issue raised by the CBC, interesting as it may be, seems to me both late and premature: late because the CBC filed its motion to intervene over fifteen months after Gauthier J. delivered her order on October 13, 2005. In her reasons, Gauthier J. explained that she found the motion for a stay of proceedings to be premature and ordered that Serge Therriault's affidavit be hand-delivered to the defendant. This decision was a final decision that could have been appealed within ten days before the Federal Court of Appeal under section 37.1 of the *Evidence Act.* The defendant did not see fit to do so, and the CBC does not question the compliance of this order with the *Charter* principles.

[33] It is consistent with the state of case law that the documents consulted in the context of a debate under section 37 of the *Evidence Act* not be retained by the Court but returned to the party that raised the objections, in this case, the RCMP. In fact, the order to withdraw the affidavit and destroy the copy once the appeal period has expired can be considered incidental to the Court's decision not to disclose the protected information through a public interest immunity or police informer privilege. The fact that the Court registry did not destroy the copy of the affidavit, as

required by the order, does not change the case and cannot confer greater right on the CBC than on the plaintiffs.

[34] The CBC seeks intervener status to argue that Gauthier J.'s order, although it may be consistent with the principles set out in *Dagenais* and *Mentuck*, is no longer warranted considering the facts that have arisen since October 13, 2005. Specifically, the CBC alleges that the RCMP's investigation is now complete and that Mr. Tremblay pleaded guilty to the offences with which he was charged in November 2006. As a result, the defendant should therefore establish that the order is still necessary to prevent a serious risk to the proper administration of justice, and that there is no reasonable alternative measure to prevent said risk.

[35] To grant this motion would be to ignore the finality of the orders made by this Court. Unlike the search warrant mechanism in subsection 487.3(4) of the *Criminal Code*, section 37 of the *Evidence Act* does not provide for continuous review by the Court after a protective order is issued. Accordingly, there is no basis for this Court to depart from the general principles under which an order becomes final once it is signed by the judge who drafted it. As Décary J. wrote (speaking for the Federal Court of Appeal) in *Metodieva v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 38, [1991] F.C.J. No. 629 (QL):

> [3] The Rules and the case law of this Court are quite clear. Once an order has been signed by a judge, it is a final order (Rule 337(4)) which becomes effective on the date it is entered in the Registry (Rule 338(2)). Apart from "clerical mistakes . . . or errors arising . . . from any accidental slips or missions" which "may at any time be corrected by the Court without an appeal" (Rule 337(6)), a party who is not satisfied with an order of a judge of the Appeal Division may only challenge the order in the manner prescribed by the Federal

> Court Act or by the Rules of the Court, and in immigration matters by the Immigration Act and the Federal Court Immigration Rules.

[36] This is why the CBC's motion appears to me to be late. But it is also premature because the issues that it seeks to raise may be considered if the defendant again chooses to object to disclosure of certain information in the context of her defence. Only when the defendant is required to file her defence, and one of her representatives will be questioned out of court, that she will file her affidavit of documents in accordance with the *Rules*, or even during the trial, that counsel for the defendant can invoke section 37 of the *Evidence Act* to object to the disclosure of certain information. In the event that such an objection is raised by the defendant, the issues raised by the CBC will have to be decided. In the meantime, the defendant cannot be compelled to produce information on the basis of facts subsequent to Gauthier J.'s order, whether by the plaintiff itself or a third party. If balancing is necessary between the right to free expression, the parties' right to a fair and public hearing and the efficacy of the administration of justice, and if a debate is necessary on the stage of the proceedings at which this exercise should be carried out, it is best that it be when the Court has as much information as possible on the defendant's intended case.

[37] For all the foregoing reasons, I find that the CBC's motion for intervener status and to have the order issued by this Court on October 13, 2005, reviewed must be dismissed. Since the order made by Gauthier J. was final and could not be reviewed by this Court, the CBC could not help the Court make a decision and, therefore, cannot meet the requirement of Rule 109 of the Rules to obtain leave to intervene. That said, this decision should not be interpreted as preventing the CBC or any other media organization from returning to this matter should the defendant decide to invoke

section 37 of the *Evidence Act* once again to object to the disclosure of certain information in the context of this action.

ORDER

THIS COURT ORDERS that the CBC's motion be dismissed, with costs. The Registry shall securely destroy the copy of Mr. Therriault's affidavit, as well as all the related Court notes as soon as the appeal periods have expired. In the event of an appeal, the affidavit and the notes will be destroyed once a final judgment has been made.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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