

Federal Court



Cour fédérale

**Date: 20140402**

**Docket: T-2005-06**

**Citation: 2014 FC 317**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, April 2, 2014**

**Present: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**LOUIS DUFOUR**

**Applicant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR ORDER AND ORDER**  
**(Appeal of an order from a prothonotary dated February 28, 2014)**

[1] In this motion, the applicant, Louis Dufour, appealed an order from Madam Prothonotary Tabib dismissing his *ex parte* motion that aimed to [TRANSLATION] "advise the official responsible for the file (Madam Prothonotary Tabib) that section 388 was breached and ask her to take the actions required to remedy it". Specifically, the applicant disputed the communications between the Court and the Royal Canadian Mounted Police (RCMP) and the Sûreté du Québec during mediation

sessions, claiming that they breached section 388, according to which “[d]iscussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed”.

[2] For the reasons that follow, I would dismiss the appeal.

### **Decision under appeal**

[3] In her order dated February 28, 2014, Prothonotary Tabib noted that the obligation of confidentiality provided under section 388 must be interpreted in light of section 152, which provides for the identification of and access to confidential documents. She also noted that section 59 of the *Federal Courts Act* provides for the assistance and services of the RCMP or any other police force that is found necessary to hold hearings before the Federal Court, or to the security of its members and staff. Therefore, Prothonotary Tabib found that the communication of relevant information by a member of the Court or its staff to the police force does not constitute a disclosure [TRANSLATION] “to the public”, but to [TRANSLATION] “an agency mandated by the law to provide support services to the court”. For this reason, the communications in this case are not, on their face, a breach of section 388.

[4] Moreover, she found that the police reports that became public did not reveal the substance of offers to settle exchanged during mediation, but that they instead related to [TRANSLATION] “the profound dissatisfaction and frustration expressed” by the applicant with respect to the mediation. Since this frustration had already been publically revealed by the applicant in his letter of February 3, 2009, which he had specifically requested be placed in the Court record, Prothonotary

Tabib found that the communications would have revealed [TRANSLATION] "only a different version of how the applicant expressed his frustration". Therefore, Prothonotary Tabib found that:

[TRANSLATION]

In the circumstances, and considering that this case is and remains suspended and that no remedy is sought or useful, in any case there is no reason to enquire further as to how the police force would have used the information that the Court shared with them.

### **Analysis**

[5] The applicant submits that Prothonotary Tabib committed an error of fact or law in interpreting section 388 in light of section 152. During the mediation sessions, the Court acted as a mediator and the judges responsible for case management on the record are not empowered to make orders, such as those provided under section 152. Moreover, the communications between the RCMP and the Court constitute a [TRANSLATION] "disclosure of the mediation proceedings". The applicant also submits that the mediator of record did not play a neutral role and that the only purpose of the RCMP's presence was to intimidate the applicants and compel them to accept the offer received without asking questions. The RCMP's presence also [TRANSLATION] "left a very bad impression" on the applicant because the RCMP officers had the right to be present when his counsel advised the Court that there was a conflict of interest and that he could no longer act for his client. Therefore, the RCMP knows why his counsel had a conflict of interest, while the applicant states that the basis of the conflict was never explained to him. The applicant submits that he has a right to a fair and equitable mediation.

[6] While I am sensitive to the applicant's frustration and profound dissatisfaction with the mediation, in *Z.I. Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 (*Pompey*) at

para 18, the Supreme Court of Canada established that the discretionary decisions of a prothonotary can be modified by the motions judge in only two instances:

18 Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), per MacGuigan J.A., at pp. 462-63. An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong: *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.), per Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi. For the reasons below, I conclude that the decisions of the prothonotary, the motions judge and the Court of Appeal are clearly wrong.

[7] In this case, since the question raised is not "vital to the final issue of the case", the order of Prothonotary Tabib can be modified only if it is affected by a clear error, "in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of facts".

[8] Section 152 is a rule of general application that may be used in all instances where, under a rule of law, a document or a material element must be considered to be confidential. Since section 388 provides a duty of confidentiality, it must be interpreted in light of section 152, which governs, among other things, access to documents or confidential material elements. I note that, contrary to the applicant's statement, the powers of case management judges include the power to "give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits", as provided by section 385.

[9] Section 59 provides that the Court or his staff may use the services or assistance of the RCMP or police forces when, given the circumstances, they are considered necessary. As Prothonotary Tabib found, the communication of relevant information by members of the Court or

their staff under this section does not breach the duty of confidentiality provided by section 388, which is imposed on [TRANSLATION] “the public”. These communications are rather a disclosure to [TRANSLATION] “an agency mandated by the law to provide support services to the court”.

[10] Further, I agree with the prothonotary’s finding that if the police reports became public, they did not reveal the substance of the offers to settle exchanged during the mediation sessions, but rather a version of how the applicant expressed his frustration.

[11] Moreover, as Prothonotary Tabib noted, the case is and remains suspended and no procedural remedy was sought or useful.

[12] Since it is impossible to confirm that Prothonotary Tabib committed a clear error by dismissing the motion, the appeal is dismissed.

**ORDER**

**THE COURT ORDERS** that the appeal is dismissed.

"Richard G. Mosley"

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Judge

Certified true translation

Catherine Jones, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2005-06

**STYLE OF CAUSE:** LOUIS DUFOUR

v

HER MAJESTY THE QUEEN

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING  
IN WRITING:** MARCH 27, 2014

**REASONS FOR ORDER AND  
ORDER:** JUSTICE MOSLEY

**DATED:** APRIL 2, 2014

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