

T-1517-04

2006 FC 1378

Maurice Philipps (*Applicant*)

v.

Librarian and Archivist of Canada (*Respondent*)

INDEXED AS: PHILIPPS v. CANADA (LIBRARIAN AND ARCHIVIST) (F.C.)

Federal Court, Noël J.—Montréal, October 17; Ottawa, November 14, 2006.

Cultural Property — Judicial review of respondent's decision maintaining restrictions on access to collection of private archives donated by Louis M. Bloomfield (donor) to Library and Archives Canada (LAC) in 1979, 1980 — Condition of donation documents not be made public for 20 years after donor's death — Donor died on November 7, 1984 — Wife named "literary executrix" of fund, accepted terms of agreement between LAC, donor, but on August 31, 2004 extended access restriction period to 10 years after own death, then to 25 years thereafter — Applicant's request for access in 2004 denied — Bloomfield collection part of Canada's "documentary heritage" in accordance with definition of term under Library and Archives of Canada Act — One of Act's objects under s. 7 to facilitate access to documentary heritage — LAC National Librarian given discretionary power to attain s. 7 objectives, including control over access to private documents LAC keeps — Applicant not having unconditional right of access to Bloomfield documents — Also not having unconditional right of access under Cultural Property Export and Import Act because Bloomfield documents irrevocably transferred pursuant to ss. 26, 27 thereof — Respondent erred in law in denying applicant's initial request for access in 2004 in extending restricted access period since donor not giving wife general powers to manage collection fund — August 8, 2005 decision not reasonable — Application allowed.

Civil Code — Judicial review of respondent's decision maintaining restrictions on access to collection of private archives donated by Louis M. Bloomfield to Library and Archives Canada — Pursuant to Civil Code of Québec (CCQ), arts. 1806, 1807, donor allowed to place limitation on gift such as limited access for specified period when transferring ownership — Because donor's wife given responsibility for controlling access to documents for 20-year period after donor's death, wife given special mandate for specific period in accordance with rules on mandate in CCQ (arts. 2130-2185) — Since donor not giving wife general powers, wife not having power to extend access restriction period.

Access to Information — Judicial review of respondent's decision maintaining restrictions on access to collection of private archives donated by Louis M. Bloomfield to Library and Archives Canada (LAC) — Access to Information Act, s. 68(c) excluding from application of Act certain materials placed in LAC — Therefore, because Bloomfield fund documents covered by Act, s. 68(c), applicant not having access thereunder.

Federal Court Jurisdiction — Judicial review of respondent's decision maintaining restrictions on access to collection of private archives donated by Louis M. Bloomfield to Library and Archives Canada — Respondent's letter, dated August 8, 2005, decision under Federal Courts Act — Letter confirming reassessment of request for access to Bloomfield documents — New exercise of discretion based on new facts — Decision "final", reviewable by court.

This was an application for judicial review of the respondent's decision maintaining restrictions on access to a collection of private archives donated by Louis M. Bloomfield, eminent Montréal lawyer, to Library and Archives Canada (LAC) between 1979 and 1980. It was a condition of the donation that the documents would not be made public for a period of 20 years after his death. He also directed that his wife would be appointed "literary executrix" and that she and named family members would have access at all times to the documents. After Mr. Bloomfield's

death on July 19, 1984, Mrs. Bloomfield accepted the terms of the agreement reached between LAC and Mr. Bloomfield but stated that restriction on access would be reviewable at a later date. The LAC data base indicated that access to the Bloomfield documents was restricted for 20 years beginning on July 19, 1984.

When the applicant first requested access to the Bloomfield documents on August 10, 2004, he was told that authorization was still required. Meanwhile, Mrs. Bloomfield requested and was granted another restriction on access to the Bloomfield documents for a period ending 10 years after her own death due to privacy concerns and to safeguard Mr. Bloomfield's reputation. The applicant was informed about this new restriction after submitting another request in January 2005 for access to the documents. The restriction on the Bloomfield documents was subsequently extended to 25 years after Mrs. Bloomfield's death. After further review, on August 8, 2005, the respondent wrote to the applicant stating that "the restrictions" on access to the Bloomfield documents were being maintained and that the denial of access was final. That is the decision of which the applicant sought judicial review.

The issues were: (1) whether Mrs. Bloomfield had the authority to revise the restrictions on access to the Bloomfield documents; (2) whether the LAC's letter of August 8, 2005 was a reviewable decision; (3) whether the applicant should have had access to the Bloomfield documents under the *Access to Information Act*, the *Library and Archives of Canada Act* or the *Cultural Property Export and Import Act*; (4) whether the respondent erred in denying the applicant's initial request for access to the Bloomfield documents; and (5) whether the respondent erred in deciding to extend the period of restriction on access to the Bloomfield documents.

Held, the application should be allowed.

(1) Because the donor was domiciled in Quebec at the time of the gift, the rules on gifts in the *Civil Code of Québec* (CCQ) (articles 1806-1841) were relevant. When the donor transferred ownership of personal documents to LAC, public access thereto was denied for 20 years. Such limitation was allowed under articles 1806 and 1807 of the CCQ. However, the donor did not provide for a review of that period but named a literary executrix whose function was to control access during the restriction period. Under the rules on mandate in the CCQ (articles 2130-2185), the literary executrix cannot have more powers than those given to her by the donor. Because his wife's mandate served a specific objective and was to expire at the end of the 20-year period of non-access, she was given a special mandate and her powers for controlling access ended at that time. Quebec case law clearly provides that the donor's intention governs. Therefore, because the donor did not give his literary executrix any general powers, including that of extending the access restriction period, she could not exercise a power the donor did not give her.

(2) The respondent's letter of August 8, 2005 was not a courtesy letter, which would not have been considered a decision or an order within the meaning of the *Federal Courts Act*. When the respondent decided to review his decision to deny the applicant access to the Bloomfield fund, he undertook a reassessment of the matter in view of the arguments the applicant had submitted and confirmed this reassessment by his letter to the applicant dated August 8, 2005. Therefore, since there was a new exercise of discretion based on new facts and the decision was "final" as was specified in the letter, that decision was reviewable by the Court.

(3) The applicant could not have access to the Bloomfield fund documents under the *Access to Information Act* since the documents are covered by paragraph 68(c) of that Act which excludes from the application of the Act certain materials placed in the LAC. The purpose of paragraph 68(c), in the context of access to information, is to treat differently documents that are in the possession of several institutions such as the LAC, if such documents have been placed there by a person or organization other than a government institution.

The *Library and Archives of Canada Act* does not address directly private documents placed in the LAC or the terms of access to documents in the LAC's possession. However, the Act's Preamble clearly states Parliament's objective of making documentary heritage available. According to the section 2 definition of "documentary heritage", the documents in the Bloomfield fund are regarded as part of Canada's documentary heritage. One of the Act's objects, which are stated in section 7, is to facilitate access to the documentary heritage, while section 8 provides the means to carry out its objects. There must be a balancing process between the objective of access and the observance of the conditions of the gift and other legitimate considerations. In short, the LAC National Librarian has been given the discretionary power to take appropriate measures to enable the LAC to attain the section 7 objectives. Because the *Library and Archives of Canada Act* does not limit the margin the deputy head has been given to achieve the LAC's

objectives, and in particular the control over access to private documents the LAC keeps, the applicant did not have an unconditional and unrestricted right of access to Mr. Bloomfield's personal documents.

The applicant also did not have a right of access to the Bloomfield documents under the *Cultural Property Export and Import Act*. According to sections 26 and 27 of that Act, cultural property transferred thereunder must be irrevocably transferred if the donor is to receive the tax benefits provided for by the Act. The Bloomfield fund documents were irrevocably transferred and Mrs. Bloomfield's subsequent agreement with LAC to restrict public access to the Bloomfield fund did not alter the nature of the ownership of the documents in the fund.

(4) The respondent erred in denying the applicant's initial request for access to the Bloomfield fund. Although the Guidelines provide a procedure to be followed when the period of access restriction expires—i.e. suggesting that a document under access restrictions becomes available to the public on January 1 of the year in which the access restriction ceases—they do not have force of law and do not impose any obligations on the respondent. The respondent did not provide reasons for its initial denial of access to the Bloomfield fund. Those reasons were stated later in subsequent correspondence from which it appears that LAC regarded Mrs. Bloomfield as the manager of the access restriction period and that her decision to extend the non-access period was final. However, because the donor did not give Mrs. Bloomfield this power of management, the interpretation of Mrs. Bloomfield's role by LAC was an error of law.

(5) The respondent also erred in deciding to extend the period of restriction on access to the Bloomfield fund. Although the 10-year extension of the restriction period in September 2004 was well documented and the reasons clearly stated, such was not the case regarding the 25-year extension. Further, this decision was contrary to the LAC Guidelines which indicate that a restriction period is reviewed as soon as it expires. Because the restriction period was renewed in September 2004 for 10 years, according to the Guidelines, the restriction period could not be reviewed until it expired in 2014. Given the absence of reasons for the new 25-year extension of the restriction period and given the facts of the case, the August 8, 2003, decision was not reasonable and was therefore reviewable.

statutes and regulations judicially considered

Access to Information Act, R.S.C., 1985, c. A-1, s. 68(c) (as am. by S.C. 2004, c. 11, s. 22), Sch. I (as am. *idem*, ss. 23, 24).

Civil Code of Québec, S.Q. 1991, c. 64, Arts. 1806 to 1841, 2130 to 2185.

Cultural Property Export and Import Act, R.S.C., 1985, c. C-51.

Cultural Property Export and Import Act, S.C. 1974-75-76, c. 50, ss. 26, 27.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(3) (as enacted by S.C. 1990, c. 8, s. 5, 2002, c. 8, s. 27).

Library and Archives of Canada Act, S.C. 2004, c. 11, Preamble, ss. 2 "documentary heritage", 5, 7, 8, 22, 23, 24.

cases judicially considered

applied:

Moresby Explorers Ltd. v. Gwaii Haanas National Park Reserve, [2000] F.C.J. No. 1944 (T.D.) (QL); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 303 K.R. 34; 2003 SCC 19; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

referred to:

M.B. c. F.G., 2006 QCCS 3215; *Denis c. Denis*, [1999] J.Q. No. 6363 (Sup. Ct.) (QL); *Centre hospitalier*

Baie-des-Chaleurs c. Hayes, 2006 QCCS 4697; *Bélanger c. Bélanger*, [2002] J.Q. No. 5240 (Sup. Ct.) (QL); *Vout v. Hay*, [1995] 2 S.C.R. 876; (1995), 125 D.L.R. 876; 7 E.T.R. (2d) 209; 183 N.R. 1; 82 O.A.C. 161; *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 982 (T.D.) (QL); *Hughes v. Canada (Customs and Revenue Agency)* (2004), 22 Admin. L.R. (4th) 49; 2004 FC 1055; *St-Onge v. Canada* (1995), 62 C.P.R. (3d) 303 (F.C.A.); *De-Nobile v. Canada (Attorney General)*, [1999] F.C.J. No. 1727 (T.D.) (QL); *Balfour v. New Brunswick House Cree Nation*, 2006 FC 616; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick* [2002] 1 S.C.R. 405; (2002), 245 N.B.R. (2d) 299; 209 D.L.R. (4th) 564; 31 C.C.P.B. 55; 17 C.P.C. (5th) 1491; C.R.R. (2d) 1; 282 N.R. 201; 2002 SCC 13.

APPLICATION for judicial review of the respondent's decision maintaining restrictions on access to private archived documents donated by Louis M. Bloomfield. Application allowed.

appearances:

Maurice Philipps on his own behalf.

Michel Pépin and *Anne-Marie Desgens* for respondent.

solicitors of record:

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for judgment and judgment rendered by

[1] NOËL J.: This is an application for judicial review whereby Mr. Maurice Philipps (the applicant) has challenged a decision by the Librarian and Archivist of Canada (the respondent), the deputy head of Library and Archives Canada (LAC), dated August 8, 2005, which maintained restrictions on access to the fund of Louis M. Bloomfield.

I. Facts

[2] The Louis M. Bloomfield fund (the Bloomfield fund) is a collection of private archives placed in LAC (formerly Archives Canada) between 1979 and 1980 by Louis Mortimer Bloomfield (Mr. Bloomfield), an eminent Montréal lawyer who died in 1984.

[3] In a letter dated February 24, 1978, Mr. Bloomfield laid down as a condition for the transfer of his archives that the documents transferred be kept for a period of 20 years after his death before the material (or any part thereof) was made public. Mr. Bloomfield's letter reads as follows (applicant's record, affidavit of Maurice Philipps, exhibit 3):

February 24, 1978

Archives Canada
Ottawa, Ontario

Attention: Lawrence Tapper.

Gentlemen,

The documents which you are taking from me to form a Bloomfield section of the archives are to be held for a period of twenty (20) years after my death before any of this material is made public.

My literary executrix will be my wife Mrs. Justine Stern Bloomfield and she will have access at all times to this material as well as the following persons:

1. Myself

2. My brother Bernard M. Bloomfield

3. XXXX

4. XXXX

Kindly confirm the above understanding,

J'aimerais recevoir une confirmation de la présente entente.

Yours truly,

Louis M. Bloomfield

The names appearing in notes 3 and 4 were initially excluded by LAC for right to privacy reasons.

[4] In the letter Mr. Bloomfield directed that his wife Justine Stern Bloomfield (now Justine Stern Cartier) (Mrs. Bloomfield), was to be appointed "literary executrix" and would at all times have access to documents in the Bloomfield fund along with certain other members of his family. In a letter dated July 30, 1979, Mr. Bloomfield specified that no other condition would be attached to the transfer of the Bloomfield fund and he again repeated that the documents were not to be accessible until 20 years after his death, except for the persons mentioned in his letter of February 24, 1978 (applicant's record, affidavit of Maurice Philipps, Exhibit 12).

[5] Mr. Bloomfield died on July 19, 1984.

[6] On November 7, 1984, following Mr. Bloomfield's death, LAC contacted Mrs. Bloomfield to tell her about the terms of the agreement reached between LAC and Mr. Bloomfield regarding the Bloomfield fund. On November 19, 1984 Mrs. Bloomfield replied to the letter and confirmed that she accepted the terms of the agreement. The letter of November 19, 1984 reads as follows (applicant's record, affidavit of Maurice Philipps, Exhibit P-1):

Mr. Lawrence F. Tapper

Staff Archivist
Ethnic Archives
PUBLIC ARCHIVES
395 Wellington St.
Ottawa, Ontario K1A 0N3

Dear Mr. Tapper,

I received your letter dated November 7, 1984 and further to our telephone conversation of November 16, 1984, as executrix for my husband, Louis M. Bloomfield, I agree that access to the collection of his personal papers (MG 31 E25) be restricted to researchers who have obtained my specific written permission.

This is to be in effect for a period of twenty (20) years from the date of his death—July 19, 1984. Of course we will review this matter again at a future date.

In the event of my absence or incapacity, my sister will act in my stead:

Mrs. Stephanie Glaymon
28 Harbour Lane
Margate, New Jersey 08402
U.S.A.

Tel. No. 609-822-4205

I hope that I have answered your questions and that all is clear.

Sincerely yours,

Justine S. Bloomfield

[7] Maurice Philipps learned about the existence of the Bloomfield fund in 1996 through the LAC data base. It mentioned that access to the Bloomfield fund was restricted for a period of 20 years beginning on July 19, 1984 (applicant's record, affidavit of Maurice Philipps, Exhibit X—page 25).

[8] On August 10, 2004 (that is, over 20 years after Mr. Bloomfield's death), the applicant approached the LAC reference service by e-mail in order to have access to the Bloomfield fund (applicant's record, affidavit of Maurice Philipps, page 26, paragraph 29).

[9] On September 3, 2004 Daniel Somers (Mr. Somers) of the LAC reference service replied to the applicant and advised that authorization to consult the Bloomfield fund was still required (applicant's record, affidavit of Maurice Philipps, Exhibit 17).

[10] Lawrence Tapper, LAC archivist (Mr. Tapper), received a letter from Mrs. Bloomfield dated August 31, 2004. In that letter Mrs. Bloomfield asked that a new restriction be imposed on access to the Bloomfield fund for a period ending 10 years after her own death, the reasons for this extension request being privacy concerns and safeguarding Mr. Bloomfield's reputation (applicant's record, affidavit of Maurice Philipps, Exhibit 19). A decision was made by LAC on September 8, 2004 to extend the period of restriction on access to the fund by 10 years after Mrs. Bloomfield's death.

[11] On January 6, 2005 the applicant sent an e-mail to Mr. Somers at the LAC asking him to confirm that the Bloomfield fund was now open to the public (applicant's record, affidavit of Maurice Philipps, Exhibit 22). Subsequently, on January 17, 2005 the applicant wrote Mr. Tapper by e-mail formally requesting access to the Bloomfield fund (applicant's record, affidavit of Maurice Philipps, Exhibit 23).

[12] On January 17, 2005 the applicant in reply to his e-mails, received an e-mail from Normand Laplante (Mr. Laplante), LAC Director of Social and Cultural Archives, who advised him that a new restriction had been imposed: non-access to the Bloomfield fund would be postponed by 10 years after Mrs. Bloomfield's death, at the latter's request (applicant's record, affidavit of Maurice Philipps, Exhibit 24).

[13] On January 18, 2005 in a second e-mail, Mr. Laplante wrote the applicant that control of restrictions on access to the Bloomfield fund was given to the fund's literary executrix, Mrs. Bloomfield, on Mr. Bloomfield's death in 1984. Further, Mr. Laplante indicated in his letter that it had been agreed between Mrs. Bloomfield and LAC in 1984 that Mrs. Bloomfield and LAC might subsequently review restrictions on access to the Bloomfield fund (applicant's record, affidavit of Maurice Philipps, Exhibit 25).

[14] On January 28, 2005 the applicant wrote the Chief Archivist, Ian E. Wilson, a five-page letter to ask him to review the decision to impose a new restriction on access to the Bloomfield fund and to release the documentation on which the extension of the period of restriction on access was based (applicant's record, affidavit of Maurice Philipps, Exhibit 27).

[15] On February 16, 2005 the respondent sent the applicant a reply in which he advised that he had reviewed the decision-making process relating to access to the Bloomfield fund (applicant's record, affidavit of Maurice Philipps, Exhibit 28). The respondent repeated what Mr. Laplante had written regarding control of restrictions on access to the Bloomfield fund and, by way of justification, advised that the new restriction on access to the Bloomfield fund resulted from an agreement concluded with Mrs. Bloomfield.

[16] On April 20, 2005, LAC changed the restriction on access to the Bloomfield fund: it would hold for 25 years

after Mrs. Bloomfield's death (applicant's record, affidavit of Maurice Philipps, Exhibit 33). The record contains no documentation explaining why this new extension was being imposed. The applicant learned about it subsequently.

[17] On April 25, 2005 the applicant again asked the respondent to review the decision to impose a restriction on access to the Bloomfield fund and to answer several questions relating to certain documents sent to him, but with several passages removed for reasons of privacy protection (applicant's record, affidavit of Maurice Philipps, Exhibit 35).

[18] On May 10, 2005 the respondent replied to the applicant that he was examining the arguments raised by the latter in his communication of April 25, 2005 and was considering the possibility of granting him access to the Bloomfield fund (applicant's record, affidavit of Maurice Philipps, Exhibit 36).

[19] On August 8, 2005 the respondent notified the applicant by letter (the letter of August 8, 2005) that he was maintaining [TRANSLATION] "the restrictions" on access to the Bloomfield fund and that the decision was final, as he had reviewed the matter in its entirety and consulted legal services. He wrote the following (applicant's record, affidavit of Maurice Philipps, Exhibit 37):

[TRANSLATION]

In this case, I have reviewed the reasons given in support of an extension and am persuaded that it was fully justified. The access restrictions are accordingly maintained for the period mentioned.

[20] The applicant sought judicial review of the respondent's decision of August 8, 2005.

II. Issues

- (1) Did Mrs. Bloomfield, the literary executrix of the Bloomfield fund, have the authority to revise the restrictions on access to the Bloomfield fund?
- (2) Was the letter of August 8, 2005 a reviewable decision?
- (3) In the affirmative, what standard of review is applicable to the decision in question?
- (4) Should the applicant have had access to the Bloomfield fund under the *Access to Information Act* [R.S.C., 1985, c. A-1], the *Library and Archives of Canada Act* [S.C. 2004, c. 11] or the *Cultural Property Export and Import Act* [R.S.C., 1985, c. C-51]?
- (5) Did the respondent err in denying the applicant's initial request for access to the Bloomfield fund?
- (6) Did the respondent err in deciding to extend the period of restriction on access to the Bloomfield fund?

III. Analysis

- (1) Did Mrs. Bloomfield, the literary executrix of the Bloomfield fund, have the authority to revise the restrictions on access to the Bloomfield fund?

[21] Mr. Bloomfield made a gift of his personal documents to Her Majesty the Queen in two stages (1979 and 1980). His personal documents were valued and a value assigned to them, and the said value could be used for tax purposes. The designated institution that became the owner of the personal documents on their receipt in 1979 and 1980 was the Public Archives of Canada, now known as Library and Archives Canada (applicant's record, affidavit of Maurice Philipps, Exhibits 5, 9 and 11).

[22] On February 24, 1978 Louis Bloomfield wrote a letter to LAC telling them that his wife, Mrs. Bloomfield, would be the literary executrix of the Bloomfield fund and that she would have access to the documents along with other persons selected by the donor, and that the restriction on access would hold for a period of 20 years, beginning

as of his death (applicant's record, affidavit of Maurice Philipps, Exhibit 3). On July 30, 1979 Mr. Bloomfield specified that there would be no other conditions except restriction on access for 20 years and that certain persons would have a right of access as advised in the letter of February 24, 1978 (applicant's record, affidavit of Maurice Philipps, Exhibit 12). In a letter of November 19, 1984 to Lawrence Tapper, Mrs. Bloomfield confirmed that she was accepting the role of literary executrix for the Bloomfield fund and that the restriction on access was to hold for 20 years, but that it would be reviewable at a later date: "Of course we will review this matter again at a future date" (applicant's record, affidavit of Maurice Philipps, Exhibit P-1).

[23] The applicant submitted that Mr. Bloomfield, an eminent lawyer, had stated clearly in his letter dated July 30, 1979 that no other condition was being attached to the transfer of his documents to LAC. Accordingly, the applicant considered that although Mr. Bloomfield appointed Mrs. Bloomfield as the literary executrix of the Bloomfield fund, she did not have the authority to extend the period of restriction on access to the fund as LAC maintained. The applicant submitted that, as literary executrix, Mrs. Bloomfield only had the authority to give a right of access to the Bloomfield fund during the 20-year period, a power mentioned in Mr. Bloomfield's letter of February 24, 1978.

[24] In rebuttal, the respondent argued that the role of literary executrix assigned to Mrs. Bloomfield gave her complete authority to manage the Bloomfield fund, a viewpoint shared by Mrs. Bloomfield in her letter of November 19, 1984.

[25] As mentioned above, the ownership of the documents was transferred to Archives Canada in 1979 and 1980. The clearly expressed intention of the donor was that access to the documents was to be limited to certain persons, including his wife, and that said access restriction would be in effect for a period of 20 years after his death. In the letter of July 30, 1979 he took care to state (applicant's record, affidavit of Maurice Philipps, Exhibit 12):

There will be no conditions attached to the deposit other than the original conditions that these documents be made available to the Public only twenty years after my death. In the meantime they shall be available to the persons named in my original letter of instructions which I believe Mr. Tapper had received.

[26] In view of the donor's clear intention, can Mrs. Bloomfield, the literary executrix of the Bloomfield fund, impose additional access restrictions beyond the period specified by the donor, namely 20 years after his death?

[27] As the donor was domiciled in Montreal, Quebec, at the time of the gift, it goes without saying that the rules on gifts set out in the *Civil Code of Québec*, S.Q. 1991, c. 64, at articles 1806-1841, are relevant in this case. The provisions relating to wills or mandates may also be of some assistance.

[28] The donor transferred personal documents to LAC in two stages (1979-1980) and at that point there was a transfer of ownership. A limitation may be placed on a gift (see articles 1806 and 1807 of the *Civil Code of Québec*). In this case, there was such a limitation: access was denied for a period of 20 years. The donor did not provide for any review of that period.

[29] As to the function of literary executrix specified by the donor, she is responsible for controlling access during the restriction period. She cannot have more powers than those given to her by the donor (see the rules on mandate set out in the *Civil Code of Québec*, at articles 2130-2185). Her mandate was to expire at the end of the 20-year period of non-access. If the donor had wished to give her a power to extend the period of non-access, he would have said so, and he did not. On the contrary, the donor stated twice that the period of non-access was 20 years.

[30] In the view of those facts, Mrs. Bloomfield was not given by the donor a general mandate, but rather a special mandate meant to serve a specific objective. The mandate terminates with the extinction of the power granted by him. Once the term of 20 years is complete, the power of controlling access ends as the donor specified that the restriction was to hold for 20 years and there was no power to extend that period beyond the term indicated by the donor. In Quebec, the case law is clear: in the context of a gift or mandate, as well as a will, the intention of the donor, mandator or testator, respectively, governs (as to mandate, see *M.B. c. F.G.*, 2006 QCCS 3215, at paragraph 19; for gifts and wills, see *Denis c. Denis*, [1999] J.Q. No. 6363 (Sup. Ct.) (QL), at paragraph 21; and for wills, see *Centre hospitalier Baie-des-Chaleurs c. Hayes*, 2006 QCCS 4697, at paragraphs 42 and 51; *Bélanger c. Bélanger*, [2002] J.Q. No. 5240 (Sup. Ct.) (QL), at paragraph 14; and *Vout v. Hay*, [1995] 2 S.C.R. 876, at paragraph 28).

[31] It appears to the Court that, in view of the rules on gifts and mandate in the *Civil Code of Québec*, when a donor has clearly imposed a condition in connection with a gift, it must be observed unless it is subject to additional conditions, and that is not the case here. Moreover, the donor did not give his literary executrix any general powers apart from that of controlling access to the personal documents during the 20-year access restriction period. Accordingly, the literary executrix has the powers given to her by the donor. He did not give her that of extending the access restriction period. Accordingly, she cannot exercise a power the donor did not give her.

(2) Was the letter of August 8, 2005 a reviewable decision?

[32] First, the respondent submitted that the letter of August 8, 2005 was not a reviewable decision, but rather a courtesy letter following the e-mail from Mr. Laplante on January 17, 2005, denying the applicant access to the Bloomfield fund. On this point, this Court has clearly held that a courtesy letter written in reply to an application for review or reconsideration is not a decision or an order within the meaning of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], and thus cannot be challenged by way of a judicial review application (*Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 982 (T.D.) (QL); *Moresby Explorers v. Gwaii Haanas National Park Reserve*, [2000] F.C.J. No. 1944 (T.D.) (QL); *Hughes v. Canada (Customs and Revenue Agency)* (2004), 22 Admin. L.R. (4th) 49 (F.C.) at paragraph 6). In fact, in *Moresby* Mr. Justice Pelletier (as he then was) made the following comment (*Moresby Explorers*, at paragraph 12):

In *Dumbrava v. Canada (Minister of Citizenship and Immigration)* (1995), 101 F.T.R. 230, [1995] F.C.J. No. 1238, Noël J. (as he then was) reviewed a series of cases dealing with the effect of correspondence with a decision maker after a decision has been made. In those cases, the Court held that a "courtesy response" does not create a new decision from which judicial review may be taken. As it was put by McKeown J. in *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 982 "... counsel cannot extend the date of decision by writing a letter with the intention of provoking a reply." Before there is a new decision, subject to judicial review, there must be a fresh exercise of discretion such as a reconsideration of a prior decision on the basis of new facts. [Emphasis added.]

[33] In this case, I do not view the letter of August 8, 2005 as a courtesy letter. Rather, it appears that, by his letter of May 10, 2005, the respondent decided to review the decision to deny the applicant access to the Bloomfield fund. Accordingly, the respondent, by that letter, decided to use his discretion to review the prior decision to deny the applicant access to the Bloomfield fund. The letter of May 10, 2005 stated (applicant's record, affidavit of Maurice Philipps, page 36):

[TRANSLATION]

Dear Mr. Philipps:

In view of the arguments made by you in your recent e-mail (on April 25), we have considered your request carefully. The situation is complex. We would like to have a little more time to consider the possibility of granting access to this collection. Rest assured that a reply will be sent to you in the near future.

Yours truly,

Ian E. Wilson, O.M., D. Litt.
Librarian and Archivist of Canada

[34] It can be seen from reading this correspondence and the new documents made since January 17, 2005 (see *applicant's record*, affidavit of Maurice Philipps: LAC form dated April 20, 2005 extending restriction from 10 to 25 years, Exhibit 33; note by ATIP analyst dated April 25, 2005, Exhibit 34; letter from applicant dated April 25, 2005 seeking new decision in light of new information, Exhibit 36) that the respondent undertook a reassessment of the matter in view of the arguments put forward by the applicant. The respondent accordingly exercised his discretion to make a new decision regarding the restriction on access to the Bloomfield fund. This was confirmed by the letter of August 8, 2005 sent to the applicant by the respondent nearly three months after the

respondent had indicated that he was carefully considering the applicant's access request. In that letter the respondent wrote (applicant's record, affidavit of Maurice Philipps, Exhibit 37):

[TRANSLATION]

Our file/Notre dossier

127106/8310

August 8, 2005

Mr. Maurice Philipps
1-1115, rue St-Georges #1
Longueuil, Quebec
J4K3Z5

Dear Mr. Philipps:

I acknowledge receipt of your e-mail of July 28, 2005 regarding access to the Louis M. Bloomfield fund (MG31E25).

As I indicated to you earlier, Library and Archives Canada is unable to provide access to this fund. After having carefully reviewed the matter in its entirety and consulted our legal services, I have come to the conclusion that the period of restriction on access to this fund has been extended in full compliance with the Act, consistent with the powers granted to Library and Archives Canada by its enabling legislation and in accordance with its standard procedures. I understand your disappointment and would like to assure you that neither the management of this file or your request for access to the fund was dealt with in any arbitrary or discriminatory way.

The standard practice here, when a period of restriction expires, is to contact the donor or his literary executor, usually in response to an access application, to inform them about the expiration of the restriction period and to consult them as to possible circumstances that might require its extension or modification. You may be sure that the public interest and the purpose of this institution to give as wide as possible access to Canada's documentary heritage are always considered in such discussions. Agreements with donors regarding temporary restrictions are in keeping with this purpose and the public interest in that they allow Library and Archives Canada to acquire for immediate processing significant private archival funds that would otherwise risk not being acquired until much later, thereby delaying their distribution, or even remaining indefinitely unavailable to Canadians.

In this case, I have reviewed the reasons given in support of an extension and am persuaded that it is fully justified.

The access restrictions are maintained for the period indicated. They constitute a contractual agreement binding on Library and Archives Canada.

Please note that this decision is final and that this letter is the more detailed reply mentioned in my letter of July 20, 2005.

The only person authorized to lift this restriction and give access to the Bloomfield fund is its literary executrix, and if you wish we can make a request to this effect in your own behalf. If so, please contact in writing Robert McIntosh, Director General, Canadian Archives and Special Collections Branch, 344 Wellington Street, Ottawa, K1A 0N4, robert.mcintosh@lac-bac.gc.ca.

Yours truly,

Jan E. Wilson

cc.: Hon. Liza Frulla, Minister of Canadian Heritage
Maka Kotto, M.P., Saint-Lambert [Emphasis added.]

Monsieur Maka Kotto, Député de Saint-Lambert [Je souligne.]

[35] In arriving at this [TRANSLATION] “final” decision the respondent consulted the record, the documents and the legal branch and concluded that the extension of the restriction period (now 25 years from April 20, 2005) was decided on in full compliance with the Act, consistent with the powers granted to the LAC and in accordance with standard regular procedures.

[36] Based on these facts, I find that the decision of August 8, 2005 by the respondent is reviewable by this Court, in accordance with the principles set out in *Moresby*. There was a new exercise of discretion based on new facts and it was [TRANSLATION] “final”.

(3) If so, what standard of review is applicable to the decision in question?

[37] According to the pragmatic and functional test, which was accepted without qualification by the Supreme Court of Canada for determining the standard of judicial review applicable to administrative decisions, the Court must consider four factors: the mechanism of review provided for by the Act; the relative expertise of the decision-making body; the purpose of the Act; the nature of the problem (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; amended reasons [1998] 1 S.C.R. 1222; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226). In the following paragraphs, I will analyse this case in the light of the factors mentioned in this paragraph.

a. Mechanism of review provided for by the Act

[38] In this case, the *Library and Archives of Canada Act*, S.C. 2004, c. 11 (the Act), that gives the respondent a discretion to take any action to protect documents in possession of the LAC and to provide all services necessary to give access to Canada’s documentary heritage, is silent as to the mechanism of review. This factor is thus inoperative herein.

b. Relative expertise of decision maker

[39] In this case, the respondent has expertise regarding questions of fact that relate to actions taken to carry out the LAC’s mission. On questions of pure law and mixed questions of law and fact, this Court has greater expertise than the respondent. Therefore, the respondent should be accorded a degree of deference on all questions of fact relating to LAC administration.

c. Purpose of the Act

[40] The *Library and Archives of Canada Act* and the Guidelines issued pursuant to that Act give the respondent broad discretion to ensure that LAC is able to preserve Canada’s heritage. In accordance with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 56, a less stringent standard of review is called for and hence, as to this factor, the respondent should be given a higher degree of deference.

d. Nature of the problem

[41] This application for judicial review has two separate aspects: first, it must be determined whether, in her capacity as literary executrix, Mrs. Bloomfield had the authority to restrict access to the Bloomfield fund, and that is a question of law; second, it must be determined whether the respondent erred in denying the applicant access to the Bloomfield fund, and that is a mixed question of fact and law. Therefore, on this factor the respondent should be accorded a lower level of deference.

Conclusion

[42] In this case, a pragmatic and functional analysis reveals that the standard of review applicable to the respondent’s decision is that of reasonableness, as the factors in the pragmatic and functional test provide for different degrees of deference. However, the standard of correctness applies to questions of law. Therefore, with

respect to 1, 4 and 5, the correctness standard applies and, as to the other questions, the standard of reasonableness.

(4) Should the applicant have had access to the Bloomfield fund under the *Access to Information Act*, the *Library and Archives of Canada Act* or the *Cultural Property Export and Import Act*?

(a) Access to fund under *Access to Information Act*

[43] The *Access to Information Act*, R.S.C., 1985, c. A-1 ([s. 68, Sch. I] amended by S.C. 2004, c. 11, by ss. 22-24) is a complete code of procedure the purpose of which is to safeguard the right of access to documents in the possession of federal institutions (*St-Onge v. Canada* (1995), 62 C.P.R. (3d) 303 (F.C.A.), at paragraph 3). Further, the *Access to Information Act* expressly provides in paragraph 68(c) that certain materials placed in the LAC are not subject to the legal provisions set out in the said Act:

68. This Act does not apply to

(c) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions. [Emphasis added.]

[44] In enacting paragraph 68(c), Parliament intended to treat differently, in the context of access to information, documents that are in the possession of several institutions such as the LAC, if such documents have been placed there by a person or organization other than a government institution.

[45] The Bloomfield fund material is covered by paragraph 68(c) of the *Access to Information Act*. Therefore, the applicant cannot have access to the Bloomfield fund documents under that Act.

(b) Access to the fund under the *Library and Archives of Canada Act*

[46] The *Library and Archives of Canada Act* does not address directly private documents placed in the LAC or the terms of access to documents in the LAC's possession. However, the objective of making documentary heritage available is clearly stated by Parliament in the Preamble to the Act:

WHEREAS it is necessary that

(a) the documentary heritage of Canada be preserved for the benefit of present and future generations;

(b) 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;

(c) that institution facilitate in Canada cooperation among the communities involved in the acquisition, preservation and diffusion of knowledge; and

(d) that institution serve as the continuing memory of the government of Canada and its institutions; [Emphasis added.]

[47] In addition, the *Library and Archives of Canada Act* defines "documentary heritage" in section 2 as follows:

2. The definitions in this section apply in this Act.

"documentary heritage" means publications and records of interest to Canada.

The documents in the Bloomfield fund may therefore be regarded as part of Canada's documentary heritage.

[48] Section 5 of the Act provides that the Governor in Council appoints a deputy head of the LAC to hold office during pleasure:

5. (1) The Governor in Council shall appoint an officer, to be called the Librarian and Archivist of Canada, to hold office during pleasure and to have the rank and powers of a deputy head of a department.

[49] Section 7 of the Act states the objects of the LAC. That section provides *inter alia* that:

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; [Emphasis added.]

[50] Section 7 does not specify what means the LAC may use to carry out its objects. Rather, those means are specified in section 8, that defines precisely the powers of the LAC 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, 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. [Emphasis added.]

[51] As per paragraph 8(1)(h) of the Act, LAC has drawn up guidelines. They are entitled "Guidelines and Procedures for the Establishment and Management of Access Conditions relating to Funds held by Manuscript Division" (the Guidelines); they were issued in 1995. Their purpose is to explain the management of access conditions. Once again, they reflect Parliament's intent of "facilitating access to" the documentary heritage. It is even stated that access to documents is one of the primary responsibilities of the Public Archives of Canada (now the LAC). However, there is also a very legitimate concern to ensure that the access objective does not prevent the collection of private documents; therefore, donors are consulted in view of establishing access restrictions while taking the needs of researchers into account. Therefore, a balancing process is required in such circumstances. I quote certain passages from the Guidelines (applicant's record, affidavit of Maurice Philipps, Exhibit 18, Guidelines 4 and 5):

BASIC PRINCIPLES

The basic principles relating to access conditions in Manuscript Division can be outlined as follows:

1. The Manuscript Division accepts the necessity of access restrictions relating to sensitive private records and recognizes that in many instances our willingness to apply restrictions facilitates the acquisition of private records of national significance.
2. While the Division recognizes the need for access restrictions and its own responsibilities in this area, its ultimate goal is to increase and broaden access whenever possible. For this reason, every effort is made to avoid indefinite restrictions and to make provision for the regular review of restrictions.
3. The identification of access requirements is viewed as an important part of the acquisition and control functions; while the subsequent management of access is an integral part of public service.
4. Archivists are expected to develop access restrictions in consultation with donors, while at the same time meeting the needs of our researchers and fulfilling the Division's responsibilities as defined by the authority/reference documents noted above.
5. Access to private-sector records owned by the Crown and placed in a public institution is viewed as a public service that should to the extent practicable be available equally to all clients (including staff members). Restrictions which apply to one group of researchers, but not to others, should, if possible, be avoided. While donors or their designates may control access for a specific period of time, archivists should work with donors to try and ensure an even-handed approach in the making of access decisions.

2. ANALYSIS FOLLOWING ARRANGEMENT

More detailed analysis of sensitive material to determine the specific categories involved and the recommended access restrictions. Staff engaged in such an analysis of Cabinet documents and classified information originating with government must be cleared to the appropriate security level.

It is also at this stage that archivists should consult the SNAP file relating to the funds and review any correspondence or prior agreements that might touch on the issue of access.

REVIEW, REVISION, AND REMOVAL OF ACCESS RESTRICTIONS

In most instances, material closed or restricted for a specific period of time should be made available to researchers on 1 January of the appropriate anniversary year. For example, files dating from 1965 that are closed for 30 years, should be opened on the first day of 1995. If the material scheduled for opening requires some screening or review, this process should be completed before the anniversary date.

Material closed for an indefinite period (usually as a result of departmental advice) should be reviewed (usually by access-review officers) in a regular 10-year cycle.

Trakker will eventually include a BF system that should be utilized by the Division to ensure that access restrictions are brought forward for updating or revision on a regular basis. When supplying a Trakker access code for a volume of restricted material, archivists should, at the same time, indicate a BF date, when the Custody of Holdings Division will notify Section chiefs that the restrictions applying to a volume should be reviewed. (For material closed or restricted for a specific period, the review date should be a full year before the expiration of the restriction.) Section chiefs will, in turn, assign material for review to archivists.

When access restrictions require revision (but are not entirely removed), the archivist must notify the Custody of Holdings Division of any changes relating to Trakker codes according to the provisions outlined above. The archivist must also create a new, revised RAF following the steps outlined above (see "Creating a Restricted Access Form").

When all access restrictions relating to a funds have expired, the archivist should revise the inventory, indicating that access code O (field C180) now applies to the funds. A copy of the restricted access form marked “Now Open” should be attached to the revised ICR. [Emphasis added.]

[52] In short, Parliament has given the LAC National Librarian the discretionary power to take appropriate measures to enable the LAC to attain the objectives set in section 7. It can be seen from reading sections 7 and 8 of the *Library and Archives of Canada Act* that the intent of Parliament was to give the National Librarian some leeway in order to achieve the LAC’s objects. Although the LAC’s objects are to allow public access to the documentary heritage, there is also an understandable concern to take the wishes of the donor into account. There must therefore be a balancing process between the objective of access and the observance of the conditions of the gift and other legitimate considerations. The Guidelines reflect that concern.

[53] In this case, since no provision of the *Library and Archives of Canada Act* limits the margin given to the deputy head to achieve the LAC’s objectives, and in particular as to the control over access to private documents kept by the LAC, I am of the view that the applicant does not have an unconditional and unrestricted right of access to Mr. Bloomfield’s personal documents. Under the Act and Guidelines, LAC must balance access against the conditions of the gift and the organization’s legitimate considerations. It must thereby assess the interests involved and justify its decision.

(c) Access to the fund under the Cultural Property Export and Import Act

[54] In 1978, when Mr. Bloomfield placed his private documents with the LAC, he received certain tax benefits under the *Cultural Property Export and Import Act*, S.C. 1974-75-76, c. 50.

[55] According to sections 26 and 27 of the *Cultural Property Export and Import Act*, cultural property transferred under the said Act must be irrevocably transferred if the donor is to receive the tax benefits provided for by the Act: the designated facility becomes the owner at the latest on the last day of the calendar year following the year in which the tax certificate for the cultural property is issued. In this case, the certificates concerning the documents were issued on July 5, 1979 and March 28, 1980. In the applicant’s submission, the imposition of a new restriction on access to the Bloomfield documents by Mrs. Bloomfield is in fact an attempt to control the ownership of the documents in the Bloomfield fund, which were irrevocably transferred, and that attempt at control is contrary to the said Act.

[56] I am of the view that the fact that the documents in the Bloomfield fund were irrevocably transferred does not give the public unconditional access to the documents. In view of all the evidence presented by the parties, it follows that Mrs. Bloomfield did not try to retake possession of the documents or to cancel the irrevocable transfer of the Bloomfield fund to the LAC. The fact that LAC concluded an agreement with Mrs. Bloomfield to restrict public access to the Bloomfield fund does not in any way alter the nature of the ownership of the documents in the fund. Therefore, the applicant has no right of access to the Bloomfield documents on account of the tax benefits received by the donor of the documents in the Bloomfield fund under the *Cultural Property Export and Import Act*.

(5) Did the respondent err in denying the applicant’s initial request for access to the Bloomfield fund?

[57] Mr. Bloomfield died on July 19, 1984. It will be recalled that he transferred the documents making up the Bloomfield fund under the condition that they were not to be made public until 20 years after his death.

[58] As we saw earlier in paragraph 51 of this decision, under the heading “Review, Revision and Removal of Access Restrictions”, the Guidelines provide a procedure to be followed when the period of access restriction expires. Generally, under these Guidelines, a document with an access restriction becomes available to the public on January 1st of the year in which the access restriction ceases. In this case, the period of access restriction expired on July 19, 2004, and so under the Guidelines access to the documents was open as of January 1, 2004, subject to other considerations under the Act and the Guidelines.

[59] These Guidelines do not have the force of law. However, they serve as tools for establishing general practices. In this case, the Guidelines define a practice within the LAC administration. However, the fact that the Guidelines suggest that a document under access restrictions will become available to the public on January 1st of

the year in which the access restriction ceases has no impact on the discretion of the LAC National Librarian to decide whether to make the documents placed under his control public. These Guidelines do not impose any obligation on the respondent.

[60] Further, even though one object of LAC is to make Canada's documentary heritage available, this does not impose a legal duty on LAC or its deputy head to make each of the documents in its possession available. Parliament did not see fit to impose such an obligation, apart from the applicable provisions of the *Library and Archives of Canada Act*. Accordingly, the LAC deputy head has a duty "to facilitate access to it" and to "provide access to it" (see paragraphs 7(b) and 8(i) of the Act).

[61] The initial denial of access to the Bloomfield fund on September 3, 2004 was very brief and did not state any reasons (applicant's record, affidavit of Maurice Philipps, Exhibit 17):

[TRANSLATION]

Our reference 2004-2005/14376

Maurice Philipps

Dear Mr. Philipps:

In reply to your request of August 10 regarding the Louis M. Bloomfield fund (MG 31, E 25), it should be noted that authorization to consult the fund is still necessary from Mrs. Justine Cartier, 110 Bloor St. West, Apt 1105, Toronto, ON M5S 2W7 (tel. 416-922-2092). This authorization should be sent to Lawrence Tapper at Library and Archives Canada, 395 Wellington Street, Ottawa, ON K1A 0N3. Mr. Tapper may [*sic*] reached by e-mail at Lawrence.Tapper@lac-bac.gc.ca.

Dan Somers
Reference and Genealogy Division
Library and Archives Canada

(613) 992-0452

No reason was given for this initial refusal. The respondent did not provide reasons for his refusal until later.

[62] First, on January 18, 2005 Normand Laplante, the LAC Director of Social and Cultural Archives, wrote the applicant an e-mail explaining why access to the documents had been denied (applicant's record, affidavit of Maurice Philipps, Exhibit 25).

[TRANSLATION]

On Mr. Bloomfield's death in 1984 management of the restrictions on access to his archive fund in the Public Archives of Canada was bequeathed to his literary executrix, Mrs. Justine Cartier, with whom the PAC came to the following agreement regarding restrictions on the fund:

"Access to the collection is restricted for a period of twenty years from July 19, 1984 to researchers who have obtained the specific written permission of Mme Cartier"

This agreement is contained in a letter from Mrs. Cartier dated November 19, 1984* in which she also indicated that these access restrictions would have to be reviewed at a later date. As is often the case at Library and Archives Canada, in view of the considerable number of funds and collections for which the institution is responsible, no review of the restrictions on the fund was done until the end of the twenty-year period, that is in summer 2004. It was agreed between Mrs. Cartier and LAC at that time that the following revision would be made to the access restrictions for the Bloomfield fund:

Originals

Vols. 1-31 Restricted—Access is restricted until ten years after the death of Justine Stern Cartier

Researchers wishing to obtain access to the Bloomfield fund should obtain written authorization from Mrs. Cartier. This agreement is contained in a letter to LAC from Mrs. Cartier dated August 31, 2004**. Please note that we cannot give you copies of these letters, which contain protected information regarding the federal government's negotiations with a donor.

It is important to note that the period of access restriction on the fund have [*sic*] never "expired" and the fund has never been open for unrestricted consultation. However, I encourage you to contact Mrs. Cartier for her written authorization to consult the fund . . .¹

[63] Second, in a letter dated February 16, 2005 from the respondent to the applicant, he explained the reasons why the request for access to the Bloomfield fund was denied (applicant's record, affidavit of Maurice Philipps, Exhibit 28):

[TRANSLATION]

I have also reviewed the decision-making process involving the access restrictions on the Louis M. Bloomfield fund. One of the objectives of Library and Archives Canada in acquiring and making available archive funds from private sources is to ensure a balance between our objects to make such documents available and our responsibility to protect the privacy of individuals and comply with our agreements with the donors of such funds.

In the case of the Bloomfield fund, the management of access restrictions was bequeathed at Mr. Bloomfield's death in 1984 to Mrs. Justine Cartier, the literary executrix, with whom Public Archives Canada had agreed on a restriction of 20 years until summer 2004. We had also agreed that this restriction would be subsequently reviewed. Review of conditions of access to a fund is standard practice at LAC; it enables us to take into account the evolution of the situation of the donor or its representatives. When this review was made in late summer 2004, LAC and Mrs. Cartier agreed that the fund would be restricted for a period of 10 years after her death to ensure that the privacy of individuals was protected. This review of access restrictions was made in accordance with institutional procedures established for funds and collections from private sources.

[64] Third, in a letter of August 8, 2005, the respondent explained, in the light of new information and the consultation made, the reasons why access to the Bloomfield fund was denied, and that this was a final decision, namely (applicant's record, affidavit of Maurice Philipps, Exhibit 37):

[TRANSLATION]

The standard practice here, when a restriction expires, is to contact the donor or his literary executor, usually in response to an access application, to advise them about the expiration of the restriction period and to consult them on possible circumstances that might require an extension or modification. You may be sure that the public interest and the purpose of this institution to give as wide as possible access to Canada's documentary heritage are always considered in such discussions. Agreements with donors regarding temporary restrictions are in keeping with this purpose and the public interest in that they allow Library and Archives Canada to acquire for immediate processing significant private archive funds that would otherwise risk not being acquired until much later, thereby delaying their distribution, or even result in them remaining indefinitely unavailable to Canadians.

In this case, I have reviewed the reasons given in support of an extension and am persuaded that it is fully justified. The access restrictions are maintained for the period indicated. They constitute a contractual agreement binding on Library and Archives Canada.

[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.

(6) Did the respondent err in deciding to extend the period of restriction on access to the Bloomfield fund?

[66] Upon the expiration of the period of access restriction to the Bloomfield fund imposed by Mr. Bloomfield, LAC concluded a new agreement on September 8, 2004 with Mrs. Bloomfield, the literary executrix of the Bloomfield fund, imposing a new access restriction on the Bloomfield fund according to which documents would only be available to the public 10 years after her death. Subsequently, on April 20, 2005, the new restriction on access to the Bloomfield fund was extended to a period of 25 years after Mrs. Bloomfield's death. There is no explanation in the record as to the reasons for this extension and the letter of August 8, 2005 is silent about it.

[67] The Guidelines state the following regarding consultations with donors and other authorities as to access restrictions on LAC funds (applicant's record, affidavit of Maurice Philipps, Exhibit 18):

CONSULTATION WITH DONORS AND OTHER AUTHORITIES

Analysis should be followed, where necessary, by consultation with the donor or other authorities (such as departmental access-review officers) or colleagues with experience relating to similar records. As noted above, when it comes to sensitive or highly sensitive personal information, donors or their designates may require the use of a permission restriction or a longer period of closure than the archivist might recommend. In negotiating such restrictions, the archivist must balance the legitimate rights of the donor with the Archives' desire to facilitate access where possible.

[68] Further, the LAC deputy head explained in his letters to the applicant the policy of consulting the donor or his representative when an access restriction period expires. Therefore, it can be seen that there was a well-established practice at LAC to consult donors and their representatives to determine the length and particulars of an access restriction before and after the transfer of documents to LAC. It is worth noting that though in practice LAC negotiates access restrictions with donors and their representatives, once the documents are in the LAC's possession, the deputy head has a discretionary power to conclude access restriction agreements with donors and their representatives under the Act and the mandate conferred on them.

[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.

IV. Conclusion

[71] The applicant sought damages. This proceeding is an application for judicial review and no damages can be awarded (see subsection 18.1(3) [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*; *De Noble v. Canada (Attorney General)*, [1999] F.C.J. No. 1727 (T.D.) (QL)).

[72] In addition, the applicant asked this Court to award him unrestricted access to the Bloomfield fund. Bearing in mind the Act and Guidelines, it was noted that LAC has discretion on access applications but must exercise it in accordance with the access objective of the *Library and Archives of Canada Act*, the conditions imposed by the donor of the personal documents, and other legitimate factors. It must be exercised in accordance with this judgment,

the Act and the Guidelines. The matter must accordingly be referred back so that reconsideration of the access application may take place.

V. Costs

[73] In view of the conclusion at which I have arrived, costs are awarded to the applicant.

[74] The applicant sought costs on a solicitor-client basis. For costs to be awarded on that basis, the case law requires that the evidence show reprehensible conduct on the part of the party against whom costs are awarded (*Balfour v. Norway House Cree Nation*, 2006 FC 616, at paragraphs 17-19; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405, at paragraph 86). Clearly, that is not the case here.

JUDGMENT

THE COURT ORDERS THAT:

- The application for judicial review of the decision of August 8, 2005 is allowed and the matter must be referred back to the decision maker for a new decision to be made based on the reasons herein;
- Costs are awarded to the applicant.

¹ * The record discloses the content of this letter to the effect that, following her husband's death, Mrs. Bloomfield (Mrs. Cartier) noted that the restriction would be for 20 years, but it would be revised at a later date (see applicant's record, affidavit of Maurice Philipps, Exhibit P-1).

** It is important to note that since then the letter from Mrs. Bloomfield (Mrs. Cartier) dated August 31, 2004 has been obtained by the applicant. It explains that the 10-year restriction extension was warranted to safeguard for privacy reasons the reputation of Louis M. Bloomfield (see applicant's record, affidavit of Maurice Philipps, Exhibit P-2).