

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-01-073832-120

DATE: APRIL 17, 2014

IN THE PRESENCE OF: THE HONOURABLE GUY COURNOYER, S.C.J.

THE QUEEN

Prosecution - petitioner

v.

LUKA ROCCA MAGNOTTA

Accused - petitioner

and

THE GAZETTE

Petitioner

and

SUN MEDIA CORPORATION

Petitioner

and

LA PRESSE

Petitioner

and

ATTORNEY GENERAL OF QUEBEC

Impleaded party

and

ATTORNEY GENERAL OF CANADA

Impleaded party

JUDGMENT

[1] On February 28, 2014, this Court, pursuant to section 709 of the *Criminal Code*, appointed the undersigned as Commissioner to take evidence of witnesses in France and Germany in May and June of 2014.

[2] The Court is now seized with five applications: three from media entities, one by the prosecution and one by the accused.

[3] The media are seeking a variance to the terms and conditions of the Rogatory Commission in order to attend the taking of the evidence of witnesses in France and Germany.

[4] The prosecution is seeking an order that the audio and/or video recordings of the witnesses' testimony taken in Germany will not be recorded by the media when the evidence is presented during the trial and further, an order that the audio and/or video recordings of these testimony will not be published, broadcasted or transmitted in any way¹.

[5] The accused takes the position that the Court's order appointing a Commissioner should be rescinded and that a publication ban should be issued if the Court allows the attendance by the media.

[6] The motions were originally scheduled to be heard on April 25, 2014. Because of the urgency of a speedy disposition of these issues in order for the Rogatory Commission to take place as planned, the Court heard the motions on April 11, 2014.

[7] The open court principle generally requires unhindered access to court proceedings² because "the administration of justice thrives on exposure to light — and withers under a cloud of secrecy"³.

[8] The specific issue in this case is whether the open court principle should be extended to the taking of evidence pursuant to s. 709 of the *Criminal Code* outside of Canada in order to allow media presence at the time of the taking of the evidence.

[9] There are no reported cases on this issue.

[10] Absent a constitutional challenge to the provisions of the *Criminal Code* with respect to evidence taken on commission (sections 709 to 714), the issue of the nature of the proceedings is to be resolved through an exercise of statutory interpretation and not by the *Dagenais/Mentuck* test.

¹ Motion by the Prosecution and supporting affidavit from Ms. Jacqueline Palumbo, Senior Counsel, International Assistance Group, Department of Justice, Canada.

² *R. v. Magnotta*, 2013 QCCS 4395.

³ *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, par. 1.

[11] In determining the nature of the proceedings, the Court should be guided by the modern principle of statutory interpretation⁴.

[12] Paragraph 712(2) of the *Criminal Code* establishes that the evidence of a witness taken out of Canada *may* be admitted in evidence in the proceedings.

[13] The Quebec Court of Appeal decided in *R. v. Neverson* that commission evidence does not become part of the trial unless and until it is tendered at trial⁵.

[14] Applying the decision of the Supreme Court of Canada in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*⁶, the Court comes to the conclusion that, evidence taken during a commission outside of Canada pursuant to the applicable provisions of the *Criminal Code*, "does not become a part of the court record and does not enter into the proceedings between the parties as long as the trial has not commenced".

[15] Such a proceeding is therefore not a public proceeding pursuant to either s. 486 of the *Criminal Code* and s. 13 of the *Code of Civil Procedure*.

[16] Furthermore, section 436 of *Code of Civil Procedure*, made applicable by s. 714 of the *Criminal Code*, makes clear that the evidence taken by the Commissioner should be returned sealed. This provision fortifies the conclusion that the proceedings are not public in nature and are confidential until tendered at trial.

[17] It also should be pointed out, that the order to appoint a Commissioner has triggered mutual legal assistance requests by Canada to both France and Germany pursuant to the relevant treaties signed with both countries.

[18] The Supreme Court of Canada described the scope of mutual legal assistance request in *R. v. Terry*⁷:

The practice of cooperation between police of different countries does not make the law of one country applicable in the other country. Bilateral mutual legal assistance treaties negotiated under the authority of the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C., 1985, c. 30 (4th Supp.), stipulate that the actions requested of the assisting state shall be undertaken in accordance with its own laws, not those of the requesting state: see, for example, the *Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters*, Can. T.S. 1990 No. 19, Art. VII, s. 2. As Dilks J. noted in *R. v. Filonov* (1993), 82 C.C.C. (3d) 516 (Ont. Ct. (Gen. Div.)), at p. 520, "[t]he sovereign authority of Canada ends with the sending of the request"

⁴ *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, par. 33-36.

⁵ *R. v. Neverson* (1998), 124 C.C.C. (3d) 468, at 476 (Que.C.A.).

⁶ [2001] 2 R.C.S. 743, 2001 CSC 51.

⁷ [1996] 2 S.C.R. 207, par. 18.

for assistance. Thus, if the Santa Rosa police in this case had been responding to a treaty request, they would not have been governed by the *Charter*.

[Emphasis added]

[19] It is therefore clear that Canada's sovereign authority ends with the sending of the mutual legal assistance request.

[20] The Court may not issue an order with extraterritorial application.

[21] A similar conclusion may be reached when one considers Canada's obligations under international law and the principle of the comity of nations as described by the Supreme Court's decision in *R. v. Hape*⁸ and the specific provisions of the treaties between Canada, Germany⁹ and France¹⁰.

[22] The Court comes to the conclusion that France and Germany are well within their sovereignty in opposing the presence of the media in the Rogatory Commission proceedings to be held on their territories. The respective treaty allows the assisting countries to set terms and conditions for their assistance.

[23] The Court declines to make the order sought by the media.

Evidence taken in Germany

[24] According to the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division* the media may record proceedings before the court on audiotape unless a judge orders otherwise. The broadcasting of any such recording is prohibited.

[25] In addition, taking photographs, filming, radio or television broadcasting is prohibited during sessions of the Court¹¹.

[26] On the other hand, court exhibits such as audio or video tapes may be published or broadcasted¹².

[27] Germany, pursuant to s. 13 of its Treaty with Canada, requested that the recording of the evidence taken on its territory be forbidden as well as an order that the audio and/or video support of the evidence taken shall not be published, broadcasted or transmitted in any way. Such terms and conditions may be sought under the Treaty.

⁸ [2007] 2 S.C.R. 292, 2007 SCC 26.

⁹ Sections 5 and 7 of the *Treaty between Canada and the Federal Republic of Germany on Mutual Assistance in Criminal Matters*.

¹⁰ Section 13 of the Treaty between the Government of Canada and the Government of the Republic of France on Mutual Assistance in Penal Matters.

¹¹ SI/2002-46 as modified by SI/2005-19, (2005) 139 Can. Gaz. II, 417, s. 1.

¹² *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65.

[28] In *Canadian Broadcasting Corp. v. The Queen*, Deschamps J. made clear that applying the *Dagenais/Mentuck* principles "does not mean that it is necessary to conduct a lengthy or elaborate review of the evidence, although all the relevant facts must be considered"¹³.

[29] The Court considers that the principle of international comity and the provisions of the Treaty between Canada and Germany are compelling factors in granting the request presented by Germany.

[30] In the Court's view, this is made clear by Lebel J. in *Hape* where he made the following observations:

52 In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to co-operate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international co-operation and the comity of nations.

[Emphasis added]

[31] As there is no clear violations of international law and fundamental human rights stemming from Germany's request, it should be granted.

[32] It should be clear that the media are not restricted to report, publish or broadcasted the content, nature or substance of the evidence of the witnesses taken in Germany.

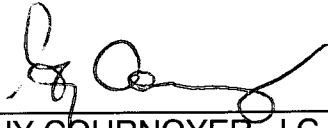
[33] **FOR THESE REASONS, THE COURT:**

[34] **GRANTS** the motion by the Prosecution;

[35] **PROHIBITS** the audio recording of the evidence of the witnesses taken in Germany when presented at trial in Canada;

¹³ *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, par. 14.

[36] **ORDERS** that the audio and/or video recording of the evidence of the witnesses taken in Germany shall not be published, broadcasted or transmitted in any way.



GUY COURNOYER, J.C.S.

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Date of hearing: April 14th, 2014