R. v. Schertzer, 2010 ONSC 6686

2010-12-10

CITATION: R. v. Schertzer, 2010 ONSC 6686

COURT FILE

NO.: CR487/06

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R837/10

DATE: 20101210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	))	
HER MAJESTY THE QUEEN	))))))	Milan Rupic , Susan Reid,
	))	John Pearson and J. Barrett, for the Crown
	)	John Rosen, Paul Alexander
Applicant	)))))))))	and Emily Beaton, for the Respondent, John Schertzer
– and –		
		Harry G. Black Q.C. and Joanne Mulcahy, for the Respondent, Steven Correia
		Peter M. Brauti, for the Respondent, Joseph Miched
JOHN SCHERTZER, STEVEN CORREIA, JOSEPH MICHED, NEBOJSA MAODUS and RAYMOND POLLARD		Patrick Ducharme, for the Respondent, Nebojsa Maodus
Respondents		Earl J. Levy Q.C., for the Respondent, Raymond Pollard
		HEARD: November 25, 26, 29 and 30, 2010

REASONS FOR Judgment

Pardu J.

[1] The Crown moves for an order pursuant to s. 714.2 of the *Criminal Code* permitting a witness in Spain, Aida Fagundo to testify in Spain and to have her testimony in Spain audible and visible to the court at trial by means of technology that would permit the witness to testify in the "virtual presence" of the parties.

[2] Section 714.2(1) of the *Criminal Code* provides,

> **Video links, etc.—witness outside Canada** -- A court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

[3] All agree that Aida Fagundo has relevant evidence to give and that her credibility will be subject to serious attack at trial. She is a witness in respect of whom a strong Vetrovec warning will likely be required.

[4] All agree further that the defence opposing the Crown's application has the onus of establishing on the balance of probabilities that it would be contrary to the principles of fundamental justice to permit the witness to testify in this fashion.

[5] The defence opposes the granting of leave to testify by videolink on the following grounds:

1. Fagundo was not called as a witness at the preliminary inquiry, and counsel did not have an opportunity to question her;

2. Police made inadequate efforts to locate Fagundo in time for her to be able to testify at the preliminary inquiry;

3. Police conducted a compelled interview of her in Spain pursuant to the treaty with Spain in relation to Mutual Assistance in Criminal Matters, to which defence counsel were not invited;

4. This interview and the investigation in general were inadequate to uncover much defence counsel would like to know about Ms. Fagundo, her background, occupation and activities, and the interview was infected with leading questions and mistranslations;

5. The court would be less able to monitor any improprieties associated with the giving of the evidence if she testifies in Spain;

6. The impact on the jury of examination and cross examination will not be the same if she is not present in person, in a case where her credibility is very much in issue;

7. The Crown will have an opportunity to question the witness before trial which is not available to defence counsel; and

8. Defence would still like the Crown to disclose more information about Fagundo.

[6] In the event that I permit her to testify by video link, defence counsel ask that I order that Crown and defence be permitted to question her in Spain, pursuant to the Treaty Concerning Mutual Assistance in Criminal Matters, as a condition of the reception of her evidence by virtual means.

[7] Some review of the factual background is necessary.

[8] The accused are charged with conspiracy to obstruct justice and other substantive offences including obstruct justice, perjury and assault. The Crown alleges that the accused, who were police officers, coerced Andreas Ioakim, a drug dealer, into luring Aida Fagundo to make delivery of 5 kilos of cocaine, arrested Fagundo when she arrived to make delivery on November 2, 1997, assaulted her, took her money and jewellery and concealed all of the above. Fagundo pled guilty to possession of cocaine for the purpose of trafficking on March 8, 1999, in Montreal and was sentenced to 30 months in jail. The conspiracy count alleges that the accused agreed to obstruct justice by various means, including falsification of their memo books, preparation of police records that contained false or misleading information, preparation of false affidavits, perjury and failing to account for evidence seized. The Crown alleges that this kind of conduct, and the concealment of the misconduct complained of by Fagundo are evidence from which the existence of the conspiracy could be inferred.

[9] The Special Task Force, composed of Toronto police officers and some RCMP officers began its investigation of the offences now before the court in late spring or summer of 2001, with the bulk of the investigation beginning in 2002, and the investigation of the Ioakim and Fagundo matters began in June, 2002.

[10] At that time, Fagundo had an ongoing relationship with an RCMP officer in Montreal, Gaetan Potvin, who introduced Fagundo to the STF investigators on August 12, 2002. Potvin was described as Fagundo's handler. It appears that she was providing some assistance to RCMP in relation to investigations that did not relate to the misconduct attributed to the accused persons before me. Officers Hamel and Follert spoke to her in a van, and made arrangements for her to attend for a more formal videotaped statement. She failed to appear and has spent the intervening years travelling widely, in Cuba, the Dominican Republic, and Spain where she now resides.

[11] In February 2003, RCMP officers had information that Fagundo was out of the

country, possibly because of threats from "Haitians" or street gangs. They asked Canada Customs and Immigration to notify them immediately if they should have any contact with Fagundo. No report was ever made.

[12] In April 2003, STF investigators were advised that Fagundo had moved to Cuba because of a death threat relating to money still owing for the drugs she had delivered in 1997.

[13] On September 10, 2003, investigators got information that Fagundo was in Malaga, Spain. She said she had been in Cuba, and was concerned that Daniel Muir had travelled to Spain and had learned of her whereabouts through a private investigator, and that he was there to kill her. Muir was said to be her former lover and a high level drug dealer. He had visited the club she owned in Malaga. A credit card receipt also established that Fagundo had also been in the Dominican Republic.

[14] In October 2003, it was confirmed Fagundo was back in Cuba.

[15] On January 3, 2004, Cuban authorities interviewed Fagundo in Cuba to see if she was willing to be interviewed by Canadian authorities. The Cuban authorities reported as follows:

> She recognized that due to a drug case, she was sentenced in 1997 to 30 months in prison. She found herself involved in the case in a casual way as the drug did not belong to her but to another Cuban woman resident of Canada with whom she doesn't have any relationship. At the time of her arrest she was in company of the same individual. The incident took place in the City of Toronto. She was detected and beaten up by the police that wanted to incriminate her for the facts. Consequently she suffered serious injuries.
>
> During the trial she pleaded guilty and as she didn't have money to pay for a trial against the seven police officers that had harmed her, she had to serve 6 months in a federal prison.
>
> She stated that the police officers that had beaten her up were arrested in 2000 for a corruption case and that Canadian authorities asked her to testify against them. She is not willing to do so since she fears for her security, among other reasons. Regarding the case, she stays in touch both with her lawyer and a Montreal RCMP officer called Guetan.

[16] The charges in this case were laid on January 7, 2004.

[17] On January 8, 2004, Fagundo called Potvin to express anger that she had been contacted by the Cuban authorities at the behest of Canadian police.

[18] By March 2004, police had information that Fagundo was once again in Spain,

although her exact location was unknown. She did have cell phone contact with Sgt. Gaetan Potvin from time to time. In March 2004 at the request of Canadian police, Spanish authorities went to a club in Malaga, Spain said to be owned by Fagundo, and an employee reported that Fagundo had sold the club and was living in Marbella, Spain.

[19] In June 2004, RCMP officers indicated to Spanish police that the file was on hold and they were not trying to locate Fagundo.

[20] It appears that Fagundo was arrested in Toledo, Spain on July 14, 2004.

[21] On March 9, 2005, STF investigators learned that Sgt. Paris of the Montreal RCMP proceeds unit had been in telephone contact with Fagundo and asked him to forward any call from her so they could speak to her.

[22] The preliminary inquiry took place between January and May, 2006. The first trial began in September 2007, and proceedings were stayed for delay in January 2008. The Crown appealed from the stay.

[23] Investigators renewed efforts to find Fagundo in Cuba and in Spain in February 2008. Inspector Goulet wrote to the RCMP liaison officer in Spain to advise that STF officers still were looking for Fagundo, and that finding her was a priority, given the status of the case and the appeal from the stay. Spanish police reported that they were close to finding her in February and March 2008.

[24] On May 9, 2008, Canada made a request to Spain pursuant to the Mutual Legal Assistance Treaty to locate and compel Fagundo to give a statement.

[25] In July 2008, Fagundo called RCMP to complain that Spanish police had stopped her on a road check. The RCMP liaison officer in Spain explained to her that the RCMP had been trying to locate her and were interested in her as a witness. Fagundo was upset at the prospect of appearing before a Spanish judge to give a statement. She expressed a willingness to go to the Canadian embassy to make a statement. She called Peter Goulet, an RCMP officer in charge of the investigation for a time until his retirement on July 28, 2008 to report that she was being treated by a physician, that she did not wish to cooperate with them, that they could not make her recall anything, and to leave her alone.

[26] By September 2008, officers began to make plans to interview Fagundo in Spain pursuant to the Mutual Legal Assistance in Criminal Matters Treaty. Fagundo was upset at this prospect because she thought contacts with Spanish police in efforts to locate her at the request of Canadian police would interfere with her application for a Spanish residency permit. She proposed to bring her own lawyer to the compelled interview.

[27] By letter dated October 15, 2008, Canada withdrew the MLAT request in order to accommodate Fagundo's fears that that process would interfere with her application

for a residency permit, and to allow her to make a voluntary statement.

[28] The interview was planned for December 10, 2008, but in the end, Fagundo did not appear after her lawyer told her the accused's lawyers would be chasing her down to interview her before the trial, and essentially that she had nothing to gain by consenting to be interviewed. Her lawyer told her she would have to go to Canada to testify and she did not wish to do so. In an effort to reassure her and persuade her to make a statement, Crown counsel had directed a letter be shown to her indicating that they would not disclose her personal address or telephone number to defence counsel and that they would forward any request from defence counsel to her own counsel. Fagundo's lawyer sent an email to the RCMP liaison officer saying Fagundo declined to be interviewed and could not remember anything relevant.

[29] Canada renewed its MLAT request on March 2, 2009 to compel Fagundo to answer questions. As of April 13, 2009, Spanish police had been unable to find her. By April, they had contacted her but she had not shown up for some planned meetings. Spanish police ultimately met with Fagundo and her lawyer and advised she would be compelled to answer questions.

[30] They reported back to the STF that they had met with Fagundo and her lawyer and that she was cooperative and prepared to testify, but that they expressed some concerns:

1. Witness does not want to testify in Canada;
2. Witness would be willing to testify via video conferencing;
3. Witness is fearing for her safety and requested some form of witness protection;
4. Witness stated that her witness statement may differ from what she had said previously in court and asked if she would be liable to be charged for perjury;
5. The week of the 11th of May will not work for her lawyer and it appears that a date in June would need to be identified; and
6. Witness would like to know if any of the accused are still working as police officers.

[31] The Spanish police reported further that she provided details of the incident and she stated that her perjury and witness protection inquiries related to her desire to tell the whole story.

[32] The interview took place on May 27, 2009. Fagundo attended with her lawyer. Two RCMP officers were present. Goulet asked the questions and Little took notes. An interpreter was present and 2 Spanish police officers. Fagundo was warned she was obliged to tell the truth and that she may be liable to "persecution" (translation) if she made misleading statements. The translator was incompetent and in the end much

of the interview took place in French, a language spoken by both Fagundo and Goulet. The entire interview was video recorded.

[33] On October 28, 2009, the stay of proceedings ordered by the first trial judge was set aside by the Court of Appeal.

[34] The mandatory terms of s. 714.2(1) reflect the reality that a potential witness who is out of the country cannot be compelled to return to Canada to testify. Admission of a hearsay statement of such a witness, without the opportunity to cross examine by defence counsel, or doing without the evidence are less likely to promote the truth seeking function of the trial.

[35] The principles of fundamental justice require that accused persons have a fair trial. In *R. v. Rose* 1998 768 (SCC), (1998), 129 C.C.C. (3d) 449 (S.C.C.) the Court observed at p. 99,

> As suggested by Sopinka J. for the majority of this Court in *Dersch v. Canada (Attorney General)*, 1990 3820 (SCC), [1990] 2 S.C.R. 1505, however, the right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case. As stated by Sopinka J., at p. 1515:
>
> The right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence.

[36] The sentiment expressed by Sopinka J. in *Dersch* accords with the more general principle stated by La Forest J. for the majority of the Court in *R. v. Lyons*, 1987 25 (SCC), [1987] 2 S.C.R. 309, at pp. 361-62, that while "at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness", nevertheless the entitlement to procedural fairness does not entitle the accused to "the most favourable procedures that could possibly be imagined".

[37] A fair trial does not always require that an accused physically confront a witness in person. In *R. v. Levogiannis* 1993 47 (SCC), (1993), 85 C.C.C. (3d) 327, for example, the court concluded that s. 486.2 of the Criminal Code which permitted a child to testify behind a screen or by closed circuit television from outside the courtroom, did not violate the accused's right to a fair trial. The court noted,

> The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case

> children, the rights of accused and courts' duties to ascertain the truth. The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.

and further,

> The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society (*R. v. Seaboyer*, *supra*, at p. 603; *Cunningham v. Canada*, 1993 139 (SCC), [1993] 2 S.C.R. 143; and *Rodriguez v. British Columbia (Attorney General)*, 1993 75 (SCC), [1993] 3 S.C.R. 519). While the objective of the judicial process is the attainment of truth, as this Court has reiterated in *L. (D.O.)*, *supra*, the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence (*R. v. Seaboyer, supra*, at p. 608).

[38] In *R. v. N.S.*, 2010 ONCA 670 , 2010 ONCA 670, the Court observed at p. 53 that there are many contexts in which the accused is not physically face to face with a Crown witness,

> While it is clear that face to face confrontation between the accused and prosecution witnesses is the accepted norm in Canadian criminal courts, there is no independent constitutional right to a face to face confrontation: *Levogiannis*, at p. 367. There are a number of evidentiary rules, both statutory (s. 715 of the *Criminal Code*) and common law (some hearsay exceptions) that admit statements made by declarants who do not testify at trial at all. Departures from the traditional face to face public confrontation between accused and witness will run afoul of the *Charter* only if they result in a denial of a fair trial to the accused. The *Charter* focuses not on face to face confrontation *per se*, but on the effect of any limitation on that confrontation on the fairness of the trial. Fairness takes into account the interests of the accused, the witness and the broader societal concern that the process maintains public confidence.

[39] Here, the mere fact that the witness would testify in a manner that makes her virtually present to counsel, the court and the jury is not contrary to principles of fundamental justice. There is no challenge to the constitutionality of the provision which contemplates that very prospect.

[40] Is there anything in the particular circumstances of this case that would make the trial unfair if she testifies in that fashion?

[41] Firstly, I have no doubt that defence counsel will be able to effectively cross examine her in a way that will make the weaknesses in her evidence and credibility apparent to the jury.

[42] I find that on the balance of probabilities, the witness was outside Canada at the time of the preliminary inquiry; was unwilling to return to Canada, and could not have been compelled to return to testify at that time. Whether or not the police could have been more diligent in attempting to locate her before the preliminary inquiry is of no moment, as she could not have been compelled to testify at that proceeding.

[43] In any event, there is no constitutional right to a preliminary inquiry at all, much less a right to discovery of a particular witness. In *R. v. S.J.L.* 2009 SCC 14 , (2009), 242 C.C.C. (3d) 297, the Court observed at paragraphs 21-23,

> [21] It is well established that the preliminary inquiry is a screening mechanism for the purpose of determining whether the Crown has sufficient evidence to commit the accused to trial: *R. v. Hynes*, 2001 SCC 82 , 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30, and *R. v. Sazant*, 2004 SCC 77 , 2004 SCC 77, [2004] 3 S.C.R. 635, at paras. 14-16. However, there is no constitutional right to a preliminary inquiry or to the outcome of such an inquiry: *R. v. Ertel* 1987 183 (ON CA), (1987), 35 C.C.C. (3d) 398 (Ont. C.A.), leave to appeal refused, [1987] 2 S.C.R. vii; *R. v. Moore* reflex, (1986), 26 C.C.C. (3d) 474 (Man. C.A.). The principle of fundamental justice recognized by this Court in *R. v. D.B.*, 2008 SCC 25 , 2008 SCC 25, [2008] 2 S.C.R. 3, according to which young persons are entitled to a presumption of diminished moral blameworthiness has no bearing on the right to a preliminary inquiry. That is not the stage at which the guilt of the accused or the appropriate sanction is determined. Dispensing with the screening process therefore does not result in a deprivation of fundamental justice, since the accused continues to be presumed innocent and retains the right to make full answer and defence: *Ertel*.
>
> [22] Similarly, although the preliminary inquiry may also allow an accused to test the credibility of witnesses and better appreciate the Crown's evidence (*Skogman v. The Queen*, 1984 22 (SCC), [1984] 2 S.C.R. 93, at p. 105), such incidental benefits do not give rise to a constitutional right to this proceeding: *Re Regina and Arviv* 1985 161 (ON CA), (1985), 51 O.R. (2d) 551 (C.A.), leave to appeal refused, [1985] 1 S.C.R. v; *Ertel* and *R. v. Sterling* 1993 6775 (SK CA), (1993), 113 Sask. R. 81 (C.A.).
>
> [23] Moreover, since *R. v. Stinchcombe*, 1991 45 (SCC), [1991] 3 S.C.R. 326, *R. v. Egger*, 1993 98 (SCC), [1993] 2 S.C.R. 451, *R. v. O'Connor*, 1995 51 (SCC), [1995] 4 S.C.R. 411, *R. v. La*, 1997 309 (SCC), [1997] 2 S.C.R. 680, *R. v. Dixon*, 1998 805 (SCC), [1998] 1 S.C.R. 244, and *R. v. Taillefer*,

> 2003 SCC 70 , 2003 SCC 70, [2003] 3 S.C.R. 307, an accused has had a right under the Constitution to the disclosure of all relevant information that is distinct from the right to a preliminary inquiry. But the Crown's duty in this respect does not extend to producing a witness for discovery: *R. v. Khela*, 1995 46 (SCC), [1995] 4 S.C.R. 201, at para. 18. Consequently, the incidental function of the preliminary inquiry as a discovery mechanism has lost much of its relevance: Department of Justice of Canada, working document prepared by D. Pomerant and G. Gilmour, *A Survey of the Preliminary Inquiry in Canada* (April 1993), at pp. ix and 35-36, and G. A. Martin and J. W. Irving, *G. Arthur Martin: Essays on Aspects of Criminal Practice* (1997), at p. 78.

[44] There are many complaints about the quality of disclosure of information about Fagundo by the Crown. Many of these complaints are in reality demands for further investigation, and demands for production of documents not within the Crown's possession or control. Undoubtedly it would be useful to both the Crown and the defence to have more information about Fagundo's antecedents, activities and mode of life. I will be hearing the defence application for further disclosure and proceed on the assumption that the defence will get or has received all the disclosure to which it is entitled. These requests relate primarily to collateral information relevant to the credibility of the witness. These issues do not render unfair the prospect of the witness testifying from a remote location, but virtually present in the courtroom.

[45] This case is far different from the circumstances described by Binnie J. in his dissenting reasons in Application under s. 83.28 of the *Criminal Code* 2004 SCC 42 , [2004] 2 S. C. R. 248. In that case, in the midst of the Air India trial, the Crown sought an order for the compelled examination of an uncooperative witness to obtain mid trial discovery of what he would say in the witness box. The transcript of that questioning would have been produced to defence counsel, but the hearing judge ordered that it was not to be shown to the accused. While Binnie J concluded in dissent that that conduct amounted to an abuse of process, the majority did not share those conclusions. Here the STF has been trying since 2002 to interview Aida Fagundo. Her whereabouts have not been readily apparent. The transcript and video recording of the compelled interview have been disclosed to counsel. I do not think that it would come as a surprise to defence counsel that police officers sometimes interview potential witnesses in the absence of defence counsel, or that Crown and police will meet with potential witnesses to prepare them for trial. I am not persuaded that the fact that defence counsel did not receive notice of the compelled examination in Spain in advance, or participate in that hearing would make reception of her evidence by virtual means unfair to the trial process. Some of the statements made by Fagundo in the interview may be of significant advantage to defence counsel. While Binnie J. concluded that the Crown had derived a significant tactical advantage from its ex parte examination of an unfriendly witness in the midst of another trial, here counsel do not point to any particular advantage accruing to the Crown as a result of the questioning.

[46] I am not persuaded that the technical means of securing the evidence will render

the trial unfair. The Crown proposes that a certified translator be used in the courtroom in Toronto. Any technical difficulties will have to be dealt with as they arise.

[47] Compulsion to testify will have to result from process in Spain pursuant to the Treaty on Mutual Assistance in Criminal Matters. The Mutual Legal Assistance in *Criminal Matters Act*, R.S.C. 1985 c. 30 and the Treaty Between Canada and the Kingdom of Spain on Mutual Assistance in Criminal Matters both provide that in Canada the federal Minister of Justice is responsible for administering the Treaty and the Act. The Treaty provides that "the contracting parties shall, in accordance with this Treaty, grant each other the widest measure of mutual assistance in criminal matters."

[48] "Assistance" is defined in Article 1, paragraph 6 to include a) the taking of evidence and obtaining of statements of persons and f) making detained persons and others available to give evidence or assist investigations;

[49] Article 3(1) provides that "assistance may be refused if, in the opinion of the Requested State the execution of the request would impair its sovereignty, security, public order or similar essential interest, prejudice the safety of any person or be unreasonable on other grounds."

Article 7 provides,

1. The Requesting State may request that a person be made available to testify or to assist in an investigation.

2. The Requested State shall invite the person to assist in the investigation or to appear as a witness in the proceedings and seek that person's concurrence thereto.

[50] Article 4(2) and (3) of the treaty provide,

> (2) To the extent not prohibited by the law of the Requested State, judges or officials of the Requesting State and other persons concerned in the investigation or proceedings shall be permitted to be present at the execution of the request and to participate in the proceedings in the Requested State.
>
> (3) The right to participate in the proceedings shall include the right of any person present to pose questions. The persons present at the execution of a request shall be permitted to make a verbatim transcript of the proceedings. The use of technical means to make such a verbatim transcript shall be permitted.

[51] Communications with another country pursuant to a Treaty fall within the prerogative powers of the Crown to conduct foreign relations. As noted in *Canada (Prime Minister) v. Khadr* [2010] S.C.J. No. 3, at pp [34] and [35],

> [34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, 1933 40 (SCC), [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.
>
> [35] The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* 2001 8537 (ON CA), (2001), 199 D.L.R. (4th) 228 (Ont. C.A.).

[52] Given this prerogative power associated with country to country communications related to application of a treaty, it would not be appropriate for this court to order as requested by defence counsel that provision be made under the Mutual Legal Assistance in Criminal Matters Treaty for defence counsel and Crown to be afforded now the opportunity to question Fagundo under oath, in Spain, in advance of her testimony before the jury. Not only would that interfere with the exercise of prerogative Canadian powers, but also with Spanish sovereignty, and the Spanish authority to decide how they will implement their treaty obligations. I do accept that I have jurisdiction to attach conditions to the reception of her virtual testimony to ensure that the accused have a fair trial. In any event I am not satisfied that such a course is necessary to provide the accused with a fair trial, and nor for the reasons already expressed that fundamental justice necessitates such a course. I do not think that it is practicable for me to specify the nature of the room in which Fagundo will testify nor the persons to whom she may speak when she is not testifying.

[53] Defence counsel raise the prospect that they will want to cross examine Fagundo on documents and show them to her, and do not wish to provide those documents to the Crown, even in a sealed envelope so that they may be taken out and shown to her in Spain. I have not been shown any documents executed by Fagundo upon which she might be cross examined, but if that arises, counsel can if they choose, retain an agent in Spain to whom they will give custody of the documents who will produce them when required for cross examination, if they are not content with the measures proposed by the Crown.

[54] This court does request that the Minister of Justice add to the Request to be submitted to Spain a request that Fagundo be sworn or affirmed in Spain, and that pursuant to Article 4(2) of the Treaty, if not contrary to Spanish law, that counsel for the accused, or an agent for counsel for the accused be permitted to be present at the examination, in addition to investigators proposed by the Crown. I see no reason for me to specify the name of Canadian police officers or agents who would be permitted to

attend. Counsel for the accused should advise the Crown within 20 days of the name of the person, if any, they propose attend the site of the examination in Spain.

[55] I would anticipate that Fagundo would also be asked to affirm or be sworn to tell the truth in the trial before me, in the usual fashion. I anticipate that to avoid logistical difficulties related to a jury trial and the time difference that the request will ask that the testimony be given between 9:30 a.m. and 4:30 p.m. Toronto time.

[56] The evidence will not be admissible unless the court, jury, counsel and accused can all see the witness on a screen and hear and see the witness testify in real time, and the witness will have to be able to hear and see counsel questioning her, the registrar who administers the oath, and the court, in the event that the presiding judge must speak to her.

Pardu J.

Released: December 10, 2010

CITATION: R. v. Schertzer, 2010 ONSC 6686

COURT FILE

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SUPERIOR COURT OF JUSTICE
HER MAJESTY THE QUEEN

App

– and –

JOHN SCHERTZER, STEVEN CORREIA, JOS
MICHED, NEBOJSA MAODUS and RAYMON
POLLARD

Respc

REASONS FOR JUDGMENT

Pardu J.

Released: December 10, 2010

- Windsor Port Authority v. K-Scrap Resources Ltd., 2006 16359 (ON SC)
- Petrykowski v. 553562 Ontario Limited, 2011 ONSC 6711
- Muscletech Research and Development Inc., Re, 2006 31212 (ON SC)
- Zinck v. Zinck, 2009 66149 (ON SC)
- R. v. Charette, 2008 11032 (ON SC)