Federal Court Cour fédérale

Date: 20160805

Docket: T-541-10

Citation: 2016 FC 899

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 5, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The defendant, Her Majesty the Queen (the Crown), appeals, under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], from an order dated March 11, 2016, by Prothonotary Morneau [the order], who dismissed the Crown's motion for the issuance of letters rogatory appointing a commissioner to obtain through written examinations the evidence of two

Mexican residents, Juan Carlos Abraham Osorio and Isidro Delgato Martinez, for use at trial. The Crown's motion also sought the issuance of a letter of request addressed to the competent judicial authorities of the United Mexican States requesting the issuance of such process as is necessary to compel the two Mexican residents to be examined in writing before the commissioner.

[2] The motion was filed in an action for damages brought against the Crown by the plaintiff, Régent Boily, who is claiming nearly $10 million in damages for the psychological and physical harm, trouble and inconvenience he supposedly experienced as a result of his alleged mistreatment by Mexican prison officials in August 2007.

[3] The Crown maintains that the order dismissing its motion is clearly wrong in that the exercise of discretion by the Prothonotary was based upon wrong principles or a misapprehension of the facts. The Crown criticizes the Prothonotary of wrongly relying on the time that elapsed before the Crown sought to examine Mr. Osorio and Mr. Martinez in the action brought by Mr. Boily. The Crown therefore asks the Court to set aside the Prothonotary's order and order the issuance of the letters rogatory and of the request sought.

[4] The Crown's appeal raises two questions:

- In issuing his order, was the Prothonotary's exercise of discretion based upon a wrong principle or a misapprehension of the facts?
- If it was, should the Court exercise its discretion *de novo* to grant the Crown's motion?

[5] For the reasons set out below, the Crown's motion is granted. The Court is of the opinion that the Prothonotary based his order upon an incorrect principle and a misapprehension of the facts. Granted, the standard for intervention in an appeal from a discretionary decision made by a Prothonotary in case management context is high. However, the Court considers that, in this case, the Prothonotary's findings as to the delays incurred in this case, the lack of probative value of the evidence sought under the requested letters rogatory, and the delay that the motion may cause in the trial are a series of errors warranting the Court's intervention. After reviewing the Crown's motion *de novo*, the Court is of the opinion that it must be granted in accordance with the proposed terms.

II. Background

A. *Facts*

[6] Mr. Boily, age 71, is a Canadian citizen. In November 1998, he was sentenced to 14 years in prison in Mexico for transporting almost 600 kilograms of marijuana. In March 1999, he escaped from the prison in the state of Zacatecas. A Mexican prison guard was killed during the incident.

[7] Mr. Boily returned to Canada that same year and was arrested by Canadian authorities in March 2005. Mexico then requested that Mr. Boily be extradited to Mexico to serve the remainder of his sentence for drug trafficking and to face criminal prosecution on charges of escape and homicide. In January 2007, the Minister of Justice informed Mr. Boily that Canada had received diplomatic assurances from Mexico about his safety in the event of his extradition

to Mexico. The Minister of Justice then ordered his extradition. Mr. Boily filed an application for judicial review of the decision to extradite him, which was dismissed, as were his appeals, which he had pursued all the way to the Supreme Court of Canada.

[8] Mr. Boily was extradited to Mexico in August 2007 and returned to the same prison from which he had escaped eight years earlier. He claims that he was tortured by prison security guards upon his arrival in Mexico in August 2007. He spoke of his alleged torture with two Canadian consular officials who came to visit him in prison that same month. The mistreatment ended after this visit.

[9] In April 2010, Mr. Boily brought an action against the Crown seeking $6 million in damages for psychological and physical harm, trouble and inconvenience resulting from his alleged mistreatment by Mexican prison officials in August 2007. He also seeks an additional $3 million in exemplary damages.

[10] In February 2011, the Crown filed a defence stating that it could not be responsible for any mistreatment Mr. Boily suffered in Mexico. The Crown denied the alleged torture, adding that in any event, it was not inflicted by servants of the Crown.

[11] In August 2013, the action was stayed *sine die* at Mr. Boily's request because he was unavailable for examination by the Crown. Mr. Boily's counsel withdrew after the stay was lifted, and he obtained new counsel in February 2015. Since the Crown was unable to examine him orally in Canada or by videoconference, Mr. Boily and the Crown ultimately agreed on a

written examination. In his written answers dated late August 2015 and received by the Crown in November 2015, Mr. Boily gave the names of the people who allegedly tortured him in August 2007. He identified these people as [TRANSLATION] "chief of security Juan Carlos Abraham Osorio, security guard Isidro Delgato Martinez, and a guard named David," and said that he had no other information about them.

[12] In response to this information naming Mr. Osorio and Mr. Martinez and to Mr. Boily's answers given on examination, the Crown brought a motion for the issuance of letters rogatory appointing a Mexican lawyer as a commissioner to obtain through written examinations the evidence of Mr. Osorio and Mr. Martinez, to be used at the trial of the action brought by Mr. Boily.

[13] Mr. Boily is still incarcerated in Mexico.

B. *Prothonotary's decision*

[14] In his order, the Prothonotary dismissed the Crown's motion with costs. After reiterating the factual background to the action, he noted that the motion had been brought late in the proceedings. He said that the Crown was claiming that [TRANSLATION] "the names of Mr. Osorio and Mr. Martinez were not provided until August 2015, when Mr. Boily was examined in writing for discovery." However, he pointed out: [TRANSLATION] "But the alleged acts and to a large extent the identities of Mr. Osorio and Mr. Martinez were brought to the attention of Canadian federal authorities first in August 22, 2007, and then in a March 2009 affidavit of the plaintiff, and this information has apparently been part of the Court's record since it began in 2010."

[15] After summarizing the established tests for issuing a commission, the Prothonotary stated that [TRANSLATION] "in this case the administration of justice does not favour granting the defendant's motion." Without questioning the Crown's good faith and while recognizing the relevance of the examinations sought, he nevertheless noted that [TRANSLATION] "the Canadian federal authorities could very well have sought to examine Mr. Osorio and Mr. Martinez as early as late August 2007." Thus, according to the Prothonotary, the delay should work against the Crown, since it is the Crown that would logically benefit from the evidence, as Mr. Osorio and Mr. Martinez [TRANSLATION] "would likely deny having committed acts of torture."

[16] As for the cooperation of Mexican authorities and the possibility of there being a delay in the action if the motion were granted, the Prothonotary found in favour of Mr. Boily in that the Crown had provided no evidence as to the cooperation that this Court should expect from Mexican authorities or to the time it would take to complete the out-of-court examinations.

[17] Lastly, the Prothonotary agreed with Mr. Boily that [TRANSLATION] "far from being required by the administration of justice, granting the present motion would reward the defendant for eight years of inaction and result in delays that the defendant has not even dared to quantify, all to take evidence unworthy of any weight from witnesses that the defendant has not even attempted to locate."

C. *Standard for intervention*

[18] It is trite law that in an appeal such as this the judge ought not to interfere with a Prothonotary's discretionary decision unless it is "clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of facts," or "the Prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case" (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at paragraph 18; *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 [*Sport Maska*] at paragraph 26; *Apotex Inc. v. Eli Lilly Canada Inc.*, 2013 FCA 45 at paragraph 4; *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 at paragraphs 17-19).

[19] "Clearly wrong" means that a clear error was made (*AstraZeneca AB v. Apotex Inc*., 2004 FC 71 at paragraph 37). However, no clear error was made if the decision reached by the Prothonotary was "the only one that was open to him" (*Moudgill v. Canada*, 2014 FCA 90 at paragraphs 7-8). Lastly, the motions judge's intervention is not warranted if the Prothonotary's error was inconsequential (*Sport Maska* at paragraph 69).

[20] Moreover, where an appeal is from a decision made by a Prothonotary in a case management context, the standard for intervention demands even greater deference from the appellate court. As the Federal Court of Appeal pointed out in *J2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41 [*J2 Global*]: "Because of their intimate knowledge of the litigation and its dynamics, prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases" (*J2 Global* at paragraph 16). So the Court

"should only intervene in order to prevent undoubted injustices and to correct clear material errors" (*J2 Global* at paragraph 16). In such cases, the prothonotaries' discretionary decisions must not be disturbed unless it is clear that the prothonotaries improperly exercised their discretion (*Turmel v. Canada*, 2016 FCA 9 at paragraphs 10-11). This Court "will only interfere with an order issued by a case management judge acting in that capacity in the clearest case of a misuse of judicial discretion" (*Constant v. Canada*, 2012 FCA 89 at paragraph 12). So it is a high standard of review.

[21] Where a Prothonotary's decision is clearly wrong or raises a question vital to the final issue of the case, the reviewing judge may then consider the matter *de novo* and exercise his or her discretion to render the decision that, in his or her view, ought to have been made in the first place (*Seanix Technology Inc. v. Synnex Canada Ltd.*, 2005 FC 243 at paragraph 11). It has been established and admitted by the parties that, in this case, the Crown's appeal does not raise a question vital to the final issue of the case. Therefore, the Court need only determine whether the Prothonotary's exercise of discretion was based upon a wrong principle or a misapprehension of the facts.

D. *Relevant provisions*

[22] Regarding the merits of the motion brought by the Crown, the relevant provisions of the *Rules* are rules 271 and 272, which deal with evidence taken out of court, commissions, and examinations outside Canada. These rules are part of those provisions of the *Rules* dealing with the circumstances and ways in which a party may request to take trial evidence out of court,

whether in or outside Canada. This is an exception to the rule, since ordinarily witnesses are to be examined in court at the trial.

[23] Rule 271 of the *Rules* deals with out-of-court examinations in general, whereas Rule 272 deals specifically with examinations outside Canada. They read as follows:

271 (1) On motion, the Court may order the examination for trial of a person out of court.	271 (1) La Cour peut, sur requête, ordonner qu'une personne soit interrogée hors cour en vue de l'instruction.
(2) In making an order under subsection (1), the Court may consider	(2) La Cour peut tenir compte des facteurs suivants lorsqu'elle rend l'ordonnance visée au paragraphe (1) :
(a) the expected absence of the person at the time of trial;	a) l'absence prévue de la personne au moment de l'instruction;
(b) the age or any infirmity of the person;	b) l'âge ou l'infirmité de la personne;
(c) the distance the person resides from the place of trial; and	c) la distance qui sépare la résidence de la personne du lieu de l'instruction;
(d) the expense of having the person attend at trial.	d) les frais qu'occasionnerait la présence de celle-ci à l'instruction.
(3) In an order under subsection (1), or on the subsequent motion of a party, the Court may give directions regarding the time, place, manner and costs of the examination, notice to be given to the person being examined and to other parties, the attendance of witnesses and the production of requested	(3) Dans l'ordonnance rendue en vertu du paragraphe (1) ou sur requête subséquente d'une partie, la Cour peut donner des directives au sujet des date, heure, lieu et frais de l'interrogatoire, de la façon de procéder, de l'avis à donner à la personne à interroger et aux autres parties, de la comparution des témoins et de la production des documents

documents or material.

ou éléments matériels demandés.

(4) On motion, the Court may order the further examination, before the Court or before a person designated by the Court, of any witness examined under subsection (1), and if such an examination is not conducted, the Court may refuse to admit the evidence of that witness.

(4) La Cour peut, sur requête, ordonner qu'un témoin interrogé en application du paragraphe (1) subisse un interrogatoire supplémentaire devant elle ou la personne qu'elle désigne à cette fin, si l'interrogatoire n'a pas lieu, la Cour peut refuser d'admettre la déposition de ce témoin.

. . .

[…]

272 (1) Where an examination under rule 271 is to be made outside Canada, the Court may order the issuance of a commission under the seal of the Court, letters rogatory, a letter of request or any other document necessary for the examination in Form 272A, 272B or 272C, as the case may be.

272 (1) Lorsque l'interrogatoire visé à la règle 271 doit se faire à l'étranger, la Cour peut ordonner à cette fin, selon les formules 272A, 272B ou 272C, la délivrance d'une commission rogatoire sous son sceau, de lettres rogatoires, d'une lettre de demande ou de tout autre document nécessaire.

(2) A person authorized under subsection (1) to take the examination of a witness in a jurisdiction outside Canada shall, unless the parties agree otherwise or the Court orders otherwise, take the examination in a manner that is binding on the witness under the law of that jurisdiction.

(2) À moins que les parties n'en conviennent autrement ou que la Cour n'en ordonne autrement, la personne autorisée en vertu du paragraphe (1) à interroger un témoin dans un pays autre que le Canada procède à cet interrogatoire d'une manière qui lie le témoin selon le droit de ce pays.

[24] Letters rogatory appoint a person to take the evidence and send a transcript of it to the Court, whereas a letter of request is issued by an officer of the Court to the competent judicial authority of the foreign state asking for the requisite assistance (e.g. a pleading) to compel the witness to attend in order to answer the questions asked or bring the documents sought.

III. Analysis

A. *Was the Prothonotary's exercise of discretion based upon a wrong principle or a misapprehension of the facts?*

[25] Mr. Boily argues that, in his order, the Prothonotary made no clear error that would warrant the Court's intervention, and that the Crown's submissions simply reflect a disagreement with how the Prothonotary exercised his discretion. According to the plaintiff, it was open to the Prothonotary to consider the excessive delay incurred by the Crown, because due diligence is definitely part of the circumstances that the decision-maker must take into account in exercising his discretion. Mr. Boily submits that the Prothonotary did not base his order upon an incorrect principle or a misapprehension of the facts.

[26] The plaintiff adds that, in his decision, the Prothonotary also referred to a range of factors recognized in case law—all of which pointed to dismissal of the Crown's motion—and that, as a result, the issue of delay was only one consideration among others. According to Mr. Boily, the Prothonotary considered the rights of the parties, the impact of his decision on the administration of justice, the reasonableness of the application, and all of the circumstances. Moreover,

Mr. Boily points out that the Prothonotary also noted the lack of evidence as to the cooperation that this Court can expect from Mexican authorities should letters rogatory be issued.

[27] Lastly, Mr. Boily argues that the Prothonotary validly accepted the delays to be expected if the Crown's motion were granted, and correctly concluded that the Crown had failed to provide evidence on this point; the Crown simply noted that delays were a possibility and did not dare to quantify the impact on the trial.

[28] The Court disagrees, finding instead that in relying heavily on the Crown's delay to act, accepting the lack of probative value of the evidence to be taken, and referring to the potential delay of trial in this case, the Prothonotary exercised his discretion on the basis of a wrong principle and upon a misapprehension of the facts. The Court is well aware of its limited power to interfere with discretionary decisions made by prothonotaries in a case management context. However, after analyzing the particular circumstances of the present case, the Court finds that this is one of those rare cases where it should intervene and set aside the order made.

(1) Delay criterion

[29] The Court would first of all point out that it does not agree with the Crown that a delay to act is not part of the jurisprudential or statutory tests to be applied when determining whether the issuance of letters rogatory or of request is warranted.

[30] The Prothonotary aptly summarized, in paragraph 5 of his order, the legal principles governing the issuance of a commission, and the parties do not dispute them.

[31] The issuance of a commission or letters rogatory is an extraordinary procedure which should only be granted in special circumstances and where the proper administration of justice requires it (*Canada (Minister of Citizenship and Immigration) v. Seifert*, 2004 FC 1010 [*Seifert*] at paragraph 10). Therefore, the Court has a broad discretion in the issuance of letters rogatory. In exercising this discretion, the Court must consider not only the rights of the parties and the circumstances of the case but also and above all the effects that its decision might have on the administration of justice (*Sanofi-Aventis Canada Inc. v. Apotex Inc.*, 2009 FC 294 [*Sanofi-Aventis*] at paragraph 39).

[32] To determine whether to issue a commission or letters rogatory, a four-part test is generally applied: (1) is the application made bona fide?; (2) does the evidence relate to an issue that the Court ought to try?; (3) will the witnesses named give relevant material evidence?; and (4) is there a good reason why these witnesses cannot be examined in Canada? (*Canada (Minister of Citizenship and Immigration) v. Jacob Fast*, 2001 FCT 594 [*Fast*] at paragraph 7). This list is not exhaustive, with the courts considering other factors such as whether the request is reasonable in all the circumstances, whether the witnesses are able and willing to testify, and whether the foreign authorities are willing to cooperate (*Seifert* at paragraph 5). The factors may vary, but they are always considered with a view to protecting the administration of justice.

[33] The Court agrees that a "delay" in seeking an out-of-court examination outside Canada is not explicitly part of the tests established by precedent. However, the Court does not see how the Crown can claim that this factor does not fall within the overarching concern for the administration of justice that must guide and underlie the exercise of the judicial discretion to

order the issuance of a commission. The question of delay could also easily be linked to the reasonableness of the application for letters rogatory, mentioned in *Seifert*. So due diligence is certainly part of the many circumstances and factors that the Court is entitled to take into account in exercising its discretion (*Sanofi-Aventis* at paragraph 44; *Seifert* at paragraph 5).

[34] In his order, without repeating each and every test set out in the case law, the Prothonotary concluded: [TRANSLATION] "In this case the administration of justice does not favour granting the defendant's motion." And it was with this imperative of the administration of justice that the Prothonotary associated the Crown's delay to act, which in his view was excessive. The Court finds that, in doing so, the Prothonotary definitely proceeded on the basis of a correct principle and made no clear error.

(2) Misapprehension of the facts regarding the delay

[35] However, after analysis, the Court is of the view that the Prothonotary misapplied this criterion in his decision to refuse the issuance of the letters rogatory and of request sought by the Crown, and that he based his findings on a misapprehension of the facts of the case. Specifically, the Court finds that the Prothonotary's order (and the harm to the administration of justice he identified) is based on a misapprehension of the facts regarding the time that elapsed before the Crown filed its motion to examine Mr. Osorio and Mr. Martinez, given both the time it took for Mr. Boily to file his action and the time that has passed since then.

[36] Remember that the issue here is the length of time it took the Crown to seek the out-of-court examinations that are the subject of its application for letters rogatory and of request. Essentially, in the order, the Prothonotary criticized the Crown for not acting promptly enough, and said that the incidents alleged by Mr. Boily and [TRANSLATION] "to a large extent" the identities of Mr. Osorio and Mr. Martinez were brought to the attention of Canadian federal authorities first on August 22, 2007, and then in a March 2009 affidavit of the plaintiff, and that this information had apparently been part of the Court's record since it began in 2010.

[37] First, the Prothonotary made a clear error in taking into account, in his assessment of the delay, the period of time before Mr. Boily brought his action, that is, August 2007 to April 2010. It is incorrect to say that the Crown could examine the two prison guards as early as late August 2007, when Mr. Boily did not file his action until 2010. There was no reason for representatives of the Crown to examine Mr. Osorio and Mr. Martinez before the action was filed, so the Court finds that the Prothonotary acted on a misapprehension of the facts in considering this period of almost three years and including it in the eight years of inaction of which the Crown is accused. In so deciding, the Prothonotary was clearly wrong and improperly exercised his discretion, as the period between the incidents alleged by Mr. Boily and his filing of the action is simply irrelevant in assessing the Crown's diligence in requesting the issuance of letters rogatory in the action brought by Mr. Boily.

[38] As for the period between the filing of Mr. Boily's action and the moment when the Crown filed its motion to take the evidence of the two prison guards outside Canada, the Court finds that it too is not excessive or incongruous in regards to the facts of the case, and that the

Prothonotary acted on a misapprehension of the facts in relying on this factor to conclude that the Crown's motion did not serve the interests of justice.

[39] After examining the record, the Court finds that the Crown cannot be held responsible for the delays to perfect in this case. The background to the proceedings shows that the lengthy period of inaction after the filing of Mr. Boily's action can be attributed largely to him, because it was at his request that the proceedings were stayed in August 2013; he could not be examined until almost two years later, in 2015.

[40] Moreover, the Court does not see how the Crown can be criticized for its delay to act to obtain the evidence of the two prison guards for the trial, considering that the Crown was unable to examine Mr. Boily until 2015, that the Crown had to do so in writing because it was impossible to do it by videoconference, that Mr. Boily did not complete his written answers until August 2015, and that the Crown did not receive them until November 2015. So the discovery process was not initiated and completed until 2015. However, it is well established that at the procedural level, the plaintiff should generally be examined for discovery before non-parties can be examined out of court.

[41] Moreover, the Court notes that in the timetable agreed upon by counsel for the parties in June 2015 to proceed with the written examinations, it was agreed in passing that the Crown would not seek leave to examine non-parties in writing until it had received Mr. Boily's answers to his written examination.

[42] The Court would add that, in his answers to his written examination, Mr. Boily provided no contact information for his alleged torturers and no evidence to corroborate his allegations; identified no other witnesses to what allegedly took place in August 2007; and said that he bore no marks of the alleged torture, that he had no way of knowing the version of the facts of Mr. Osorio and Mr. Martinez, and that he had not commenced proceedings against them or their employer.

[43] So it was not until the Crown had received Mr. Boily's answers to his written examination and noticed the gaps therein that it became clear that it needed the evidence of the two guards to have all the facts surrounding Mr. Boily's action and to determine the truthfulness of his torture allegations. There is no doubt in the Court's mind that this an issue material to the present case; all the relevant facts are required for the proper administration of justice. Even the Prothonotary admitted in his decision that the examinations sought were relevant, though he concluded that the interests of the administration of justice nevertheless dictated that the Crown's application be dismissed on account of the passage of time in the case.

[44] Furthermore, the evidence on record indicates that the Crown did not know Mr. Martinez's full name until it had received Mr. Boily's answers to his written examination in November 2015. Mr. Boily claims that Mr. Martinez's name was made known well before then, specifically in the November 14, 2011 report by the Committee against Torture, but in fact the names of the guards are not stated in that report. The Court also notes that in his amended statement Mr. Boily identified his torturers as [TRANSLATION] "a guard named David . . . a guard named Isidro" and [TRANSLATION] "chief of security J. Carlos Abrajan Osorio." He did not

provide Mr. Martinez's full name. The March 21, 2009 affidavit of Mr. Boily does not provide Mr. Martinez's full name either; it merely indicates that Mr. Boily was being threatened by [TRANSLATION] "a guard named Isidro."

[45] Therefore, the Crown is right to say that Mr. Martinez's full name was not known before Mr. Boily's written examination, so the Prothonotary was wrong to say in his order that the names of the two guards were [TRANSLATION] "to a large extent" known to the Crown. It is certainly inaccurate to say "to a large extent" when the last name of one of the two people involved is missing.

[46] Granted, the Court recognizes that in addition to the lengthy period of inaction, the Prothonotary relied on other criteria to support its decision to dismiss the Crown's motion. It is also true that the Prothonotary qualified what he said on the issue of delay in the proceedings and that he did not place all the blame on the Crown, expressly stating that some of the blame rested with Mr. Boily. However, a reading of the order tells us that the Crown's delay to act was the cornerstone of the Prothonotary's decision and formed the main basis for his finding regarding the interests of the administration of justice. So much emphasis was placed on it that the Prothonotary's misapprehension of the facts in this regard is enough to undermine the entire analysis, to make it clear that he improperly exercised his discretion, and to justify the Court's intervention. The Court is satisfied that without this misapprehension of the facts giving rise to the Crown's delay in requesting the out-of-court examinations of the two prison guards, the Crown's motion would not have been dismissed.

[47] This is certainly not an error that can be described as marginal or inconsequential (*Sport Maska* at paragraph 69).

(3) Probative value

[48] The Court is of the opinion that the Prothonotary also erred in his consideration of the probative value of the evidence. Indeed, the Court does not see how the Prothonotary could conclude at that stage of the request for examination, and in light of the facts of the case, that the out-of-court examinations of Mr. Osorio and Mr. Martinez would necessarily carry no weight.

[49] In this regard, the Prothonotary merely endorsed, in paragraph 9 of his decision, the written submissions of counsel for Mr. Boily, without elaborating further. Elsewhere in his decision the Prothonotary mentioned that the evidence would probably benefit the Crown because Mr. Osorio and Mr. Martinez [TRANSLATION] "would likely deny having committed acts of torture." But the fact that it is reasonable to expect the evidence of the two prison guards to contradict that of Mr. Boily and support the claims of Mexican authorities does not automatically strip it of all probative value.

[50] The Court finds that the Prothonotary acted on a wrong principle and on a misapprehension of facts in endorsing and thereby adopting Mr. Boily's comments about the lack of probative value.

[51] First, the probative value of potential evidence is not recognized in the case law as a test for determining whether or not to take evidence out of court, whether in or outside Canada. And, in the Court's view, it is also not a factor that can be associated with the interests of the proper administration of justice for such a procedural matter or with the reasonableness of a request for examination. On the contrary, the interests of justice rather dictate that the trial judge should hear or dispose of all the relevant evidence on record to be able to weigh it at trial.

[52] The weight to be accorded depends on the quantity and quality of the comments made by the person who provides the evidence, and it is normally a matter that is left to the discretion of the trial judge. Probative value depends on what the witness says, the quality of his or her evidence, and his or her credibility. It is not something that can be predetermined solely on the basis of the identity or profile of the person whose evidence is sought through an out-of-court examination for use at trial.

[53] The Court finds that the Prothonotary exercised his discretion on the basis of a wrong principle in accepting Mr. Boily's invitation to view the evidence of the two prison guards as lacking probative value.

[54] The Prothonotary also acted on a misapprehension of the facts in concluding as he did. No one can know at this stage, when out-of-court examinations are being requested by way of letters rogatory, what answers the two prison guards will give. There are multiple scenarios. For instance, they may totally deny that they were in the Mexican prison on that day in August 2007 when they allegedly tortured Mr. Boily. They may deny committing the alleged acts of torture.

Or they may confirm that they were there and were involved in some way in the incidents that gave rise to Mr. Boily's action. Regardless of their answer, it is undeniable that the evidence might on the contrary have definite probative value, even if it is in line with what Mr. Boily and the Prothonotary expected. Whether Mr. Osorio and Mr. Martinez deny or admit to involvement in the mistreatment alleged by Mr. Boily, their evidence will certainly play a role in the trial judge's assessment of the credibility of Mr. Boily and his torture allegations.

[55] Therefore, at the stage of the Crown's motion, there were no signs or facts to support the claim that the evidence of Mr. Osorio and Mr. Martinez would carry no weight. This claim is premature, purely speculative, and not rooted in any evidence and therefore constitutes a misapprehension of the facts by the Prothonotary.

(4) Delay of trial

[56] The Court also notes that the Crown's request to take the evidence of Mr. Osorio and Mr. Martinez through a Mexican commissioner was made well in advance of the trial and will not result in a delay in the proceedings, as pointed out by counsel for the Crown at the hearing. The situation is very different from that in *Sanofi-Aventis*, where the defendant was seeking to re-open its case.

[57] The Court agrees with the Prothonotary that it is in the interests of justice to ensure that the file is perfected and that the matter is moved along promptly. But the remedy sought by the Crown through its motion is perfectly in line with this, because the proceedings of this case must continue in parallel with the examinations of the two prison guards. Also, this was not something on which the Prothonotary could validly base his finding.

[58] In his order, the Prothonotary repeated Mr. Boily's comment that the Crown had failed to quantify the time it would take to complete the out-of-court examinations of Mr. Osorio and Mr. Martinez. That is true. However, the Court believes that inferring from this failure that the Crown's motion would delay the trial constitutes a misapprehension of the facts. It is not what the record or the submissions filed by the Crown indicate or suggest.

[59] In the circumstances, and for all of these reasons, the Court is of the opinion that in deciding that granting the Crown's motion was not in the interests of the administration of justice, the Prothonotary based the exercise of his discretion on a misapprehension of several of the facts surrounding Mr. Boily's action. In fact, the Court finds that it is rather the Prothonotary's decision to refuse the issuance of the letters rogatory and of request sought by the Crown that is an undoubted injustice and that has undermined the proper administration of justice in this case.

[60] This misapprehension of the facts is reason enough to set aside the Prothonotary's decision, as this is one of those rare cases where the Court should intervene.

B. *Following a* **de novo** *review, should the Court exercise its discretion to grant the Crown's motion?*

[61] After reviewing the Crown's motion *de novo*, the Court finds that it should be granted, as the tests for issuing letters rogatory and of request are met and it is eminently in the interests of the administration of justice to have the benefit of the evidence of Mr. Osorio and Mr. Martinez.

[62] Granted, the trial judge may ultimately accord little weight to the evidence of Mr. Osorio and Mr. Martinez. But denying the Crown the opportunity to examine the two prison guards and get their side of the story would mean that there would be no evidence other than that of Mr. Boily on the incidents that gave rise to his action for damages against the Canadian government.

[63] It is clear to the Court that it is useful and preferable, even necessary, to take the evidence of Mr. Osorio and Mr. Martinez at this stage of the file, rather than wait until the trial, because these individuals have information that could help identify relevant evidence or witnesses for the trial. This is particularly true since Mr. Boily disclosed during his written examination for discovery that there were no witnesses or evidence to support or refute his claims. If letters rogatory and of request are not issued, the version of the facts of the two prison guards may not end up in the Court's record.

[64] Moreover, like the Crown, the Court fears that the evidence of Mr. Osorio and Mr. Martinez will not end up in the record if it cannot be taken outside Canada, since the Court has no power to compel people residing outside Canada in civil proceedings such as that instituted by Mr. Boily. Canada has no treaty with Mexico allowing it to compel witnesses in a civil case in Canada.

[65] The Court is also satisfied that the motion would not result in any harm, delay, inconvenience or unreasonable costs for Mr. Boily, as the perfection of the file need not be delayed to allow the commissioner to take the evidence of Mr. Osorio and Mr. Martinez as requested by the Crown.

[66] The orders sought are in the interests of the administration of justice because they offer a procedural vehicle for providing a complete portrait of the testimony from everyone who may have been involved in the incidents raised by Mr. Boily in support of his relief. In fact, the Court is of the view that they are necessary to prevent a gross injustice to the Crown. So this is a situation where the Court has reason to exercise its discretion to order the extraordinary and exceptional procedure that is the issuance of letters rogatory.

[67] The Court is also satisfied that the criteria found in the case law and normally applied by this Court before ordering the issuance of letters rogatory and of request are met in this case (*Fast* at paragraph 7). First, there is nothing in the evidence on record to suggest that the Crown’s application is not made bona fide. Second, the evidence of the two prison guards certainly relates to a central issue that the Court ought to try; in fact, the evidence and questions

identified by the Crown in the application for letters rogatory deal with what is at the heart of Mr. Boily's action: his torture allegations. Third, the two witnesses will give relevant material evidence, because they are the only ones who have information on the incidents that gave rise to the damages claimed by Mr. Boily. Even the Prothonotary explicitly acknowledged in his order that the examinations sought related to an issue relevant to the positions of both parties in Mr. Boily's action. And fourth, there is good reason why these witnesses cannot be examined in Canada. Specifically, they cannot be compelled to give evidence in Canada on the trial of the civil proceeding brought by Mr. Boily, and it is more time- and cost-effective to examine witnesses out of court outside Canada.

[68] As for the other factors identified in the case law, that is, the reasonableness of the request taking into account all the circumstances, the relevance of the evidence to be taken or the interests of the administration of justice (*Seifert* at paragraph 5), the Court is satisfied that they all point in favour of it exercising its discretion to order the issuance of the letters rogatory and of request sought by the Crown.

[69] The Crown has a right to full answer and defence. It is clearly in the interests of justice to allow the issuance of the letters rogatory and of request because finding otherwise would deny the Court the benefit of the only way to have evidence supporting or refuting Mr. Boily's version of the facts. It is undeniable that this is a crucial issue central to Mr. Boily's action. It will be for the trial judge to determine which version prevails on a balance of probabilities, but it is certainly not in the interests of the administration of justice to prevent this evidence from being taken at

this stage and to make it so that the trial judge has an incomplete factual background to Mr. Boily's action.

[70] Lastly, the Court agrees with the Crown that the importance of the evidence of Mr. Osorio and Mr. Martinez could not have been evident until after Mr. Boily's examination answers were known. In this case, the Court finds that the Crown's application was not made late or too far into the proceedings. Far from it. It was made promptly, at the earliest possible opportunity, that is, after Mr. Boily's written examination was completed and before the trial itself.

[71] The Court notes that the Crown provided no persuasive evidence as to the cooperation that this Court should expect from Mexican authorities or to the exact time it would take to complete the out-of-court examinations of Mr. Osorio and Mr. Martinez. Mr. Boily points out that the Crown itself said in its written submissions that delays [TRANSLATION] "are a possibility because the commissioner will need to locate Mr. Osorio and Mr. Martinez and may have to resort to the Mexican courts to take their evidence."

[72] Obviously it would have been preferable for the Crown to elaborate further on this topic to reinforce the merits of its application. However, the Court notes that evidence of expected cooperation from the foreign authorities is not a requirement in the case law for authorizing the issuance of letters rogatory. Rather, it is one of the many factors identified by the case law in the Court's exercise of discretion (*Seifert* at paragraph 5). In this case, given the many other factors pointing strongly in favour of the Court exercising its discretion to order the issuance of the

letters rogatory and of request sought, the Court finds that this factor is not enough to justify dismissing the Crown's motion.

[73] In addition, the Court does not construe the Crown's statement as meaning that delays are to be expected in the trial of Mr. Boily's action, or that the trial will be delayed because of the request for out-of-court examinations. When it is read in context, it appears that what the Crown meant by delays being a possibility is that there may be delays in executing the commission itself. At the hearing, the Crown even repeated that the out-of-court examinations would not delay the trial.

IV. <u>Conclusion</u>

[74] For the foregoing reasons, the Crown's appeal is allowed and the Prothonotary's decision is set aside. The Court finds that the Prothonotary based his order upon an incorrect principle and a misapprehension of the facts and that his findings as to the delays incurred in this case, the lack of probative value of the evidence sought under the requested letters rogatory, and the delay that the motion may cause in the trial constitute an improper exercise of his discretion, which warrants the Court's intervention. After reviewing the Crown's motion *de novo*, the Court is of the view that it must be granted in accordance with the proposed terms.

JUDGMENT

THE COURT:

1. **GRANTS** the motion;

2. **SETS ASIDE** the decision made on March 11, 2016, by Prothonotary Morneau; and therefore

3. **ORDERS** that the Administrator of this Court issue letters rogatory in English appointing Javier Navarro Velasco, an attorney at Baker & McKenzie, with offices located at Oficinas en el Parque, Torre Baker & McKenzie – Piso 10, Blvd. Antonio L. Rodriguez 1884 Pte., 64650 Monterrey, N.L., Mexico, to locate Juan Carlos Abraham Osorio and Isidro Delgato Martinez and examine them in writing on all the facts related to the action, in accordance with the terms of the attached Draft Commission.

4. **ORDERS** that the Administrator of this Court issue a letter of request in English addressed to the competent judicial authorities of the United Mexican States under Rule 272 of the *Federal Courts Rules*, requesting the issuance of such order as is necessary to compel Juan Carlos Abraham Osorio and Isidro Delgato Martinez to be examined in writing before Javier Navarro Velasco, an attorney at Baker & McKenzie, on all the facts related to the action, in accordance with the terms of the attached Draft Letter of Request;

5. **ORDERS** that the parties complete the necessary proceedings and steps to perfect the file and set the dates for the trial;

6. **WITH COSTS** to the defendant.

"Denis Gascon"

Judge

Docket: T-541-10

FEDERAL COURT

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

DRAFT COMMISSION

TO: Javier Navarro Velasco
Baker & McKenzie
Oficinas en el Parque
Torre Baker & McKenzie – Piso 10
Blvd. Antonio L. Rodriguez 1884 Pte.
64650 Monterrey, N.L., Mexico

YOU HAVE BEEN APPOINTED A COMMISSIONER for the purpose of taking evidence in a proceeding now pending in this Court by order of the Court, a copy of which is attached.

YOU ARE GIVEN FULL AUTHORITY to do all things necessary for taking the evidence mentioned in the order authorizing this commission. You are to send to this Court a transcript of the evidence taken, together with this commission, forthwith after the written answers to the examination have been completed and sworn in. In carrying out this commission, you are to follow the terms of the attached order and the instructions contained in this commission.

THIS COMMISSION is signed and sealed by order of the Court.

(Date)

Issued by: ____
(Registry Officer)

Address of local office: 90 Sparks Street
Ottawa, Ontario K1A 0H9
Canada

INSTRUCTIONS TO COMMISSIONER

1. Before acting on this commission, you must take the oath (or affirmation) set out below. You may do so before any person authorized pursuant to subsection 54(2) of the *Federal Courts Act* to take affidavits or administer oaths outside of Canada.

   I, Javier Navarro Velasco, affirm that I will, according to the best of my skill and knowledge, truly and faithfully and without partiality to any of the parties to this proceeding, take the evidence of every witness examined under this commission, and cause the evidence to be transcribed and forwarded to the Court. (In an oath, conclude: So help me God.)

   Sworn (or Affirmed) before me at the (City, Town, etc.) of (name) in the (State, Country, etc.) of (name) on (date).

   ____
   (Signature and office of person before whom oath or affirmation is taken)

   ____
   (Signature of Commissioner)

2. The commissioner is required to give the person to be examined at least 10 daysnotice of the examination.

3. You are to administer the following oath (or affirmation) to each witness whose evidence is to be taken: *You swear (or affirm) that the evidence to be given by you touching the matters in question between the parties to this proceeding shall be the truth, the whole truth, and nothing but the truth. (In an oath, conclude: So help you God.)*

4. Where a witness does not understand the language or is deaf or mute, the evidence of the witness must be given through an interpreter. You are to administer the following oath (or affirmation) to the interpreter: *You swear (or affirm) that you understand the (language of witness) language and the language in which the examination is to be conducted and that you will truly interpret the oath (or affirmation) to the witness, all questions put to the witness and the answers of the witness, to the best of your skill and understanding. (In an oath, conclude: So help you God.)*

   You are to attach to this commission the written answers to the following written questions as well as any other information deemed relevant by the witnesses so as to provide a comprehensive statement in relation to the facts of this case that are to their personal knowledge, which can be answered in the language of choice of the witnesses:

List of questions in English

A. At present, do you work? If so, who is your employer, where do you work and what type of work do you do?

B. Did you work in August 2007? If so, who was your employer at that time, where did you work and what type of work did you do?

C. Do you personally know inmate Régent Boily or any other Canadian inmate detained at the Zacatecas prison in August 2007 bearing a similar name (hereafter "Mr. Boily")?

D. Are you aware that there have been allegations that Mr. Boily was tortured at the Zacatecas prison in August of 2007?

E. Have you ever used physical force against Mr. Boily or threatened to kill him or members of his family in August 2007? If not, are you aware that any such torture took place? If so, provide all information in this regard that is to your personal knowledge and any evidence you might have on the topic.

List of questions in Spanish

A. Usted trabaja en este momento? Si es el caso, quién es su empleador, en dónde trabaja y qué tipo de trabajo hace?

B. Trabajaba en agosto de 2007? Si sí, quién era su empleador en ese tiempo, en dónde trabajaba y qué tipo de trabajo hacía?

C. Conoce personalmente al detenido Régent Boily o a algún otro canadiense detenido en la cárcel de Zacatecas en agosto de 2007 que tuviera un nombre parecido (de ahora en adelante "Sr. Boily")?

D. Sabe usted que ha habido alegaciones de que el Sr. Boily fue torturado en la cárcel de Zacatecas en agosto de 2007?

E. Alguna vez hizo uso de fuerza en contra del Sr. Boily o amenazo matarlo a él o a miembros de su familia en agosto de 2007? En caso contrario, sabe si hubo algún tipo de tortura? Si es el caso, proporcione toda la información a este respecto que sea de su conocimiento personal.

5. You are to complete the certificate set out below, and mail this commission, the written examination and written answers and, as the case may be, the exhibits to the office of the Court where the commission was issued. You are to keep a copy of the written examination and written answers transcript and, where practicable, a copy of the exhibits until the Court disposes of this proceeding. Forthwith after you mail this commission and the accompanying material to the Court, you are to notify the parties who appeared at the examination that you have done so.

CERTIFICATE OF COMMISSIONER

I, Javier Navarro Velasco, certify that:

1. I administered the proper oath (or affirmation) to any interpreter through whom the evidence was given.

2. The evidence of the witness was properly taken.

3. The evidence of the witness was properly transcribed.

(Date)

____

(Signature of Commissioner)

Docket: T-541-10

FEDERAL COURT

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

DRAFT LETTER OF REQUEST

TO THE COMPETENT JUDICIAL AUTHORITIES OF THE UNITED MEXICAN STATES.

A CIVIL PROCEEDING IS PENDING IN THIS COURT between Régent Boily and Her Majesty the Queen.

IT HAS BEEN SHOWN TO THIS COURT that it appears necessary for the purpose of justice that a witness residing in your jurisdiction be examined there in writing.

THIS COURT HAS ISSUED A COMMISSION to Javier Navarro Velasco, an attorney at Baker & McKenzie, with offices located at Oficinas en el Parque, Torre Baker & McKenzie – Piso 10, Blvd. Antonio L. Rodriguez 1884 Pte., 64650 Monterrey, N.L., Mexico, providing for the written examination of Juan Carlos Abraham Osorio and Isidro Delgato Martinez, both of whom were working at the Zacatecas jail in August 2007.

YOU ARE REQUESTED, in furtherance of justice, to cause Juan Carlos Abraham Osorio and Isidro Delgato Martinez to appear before the commissioner by the means ordinarily used in your jurisdiction and, if necessary, to secure attendance, and to ensure that they answer the attached written questions under oath or affirmation.

YOU ARE ALSO REQUESTED to permit the commissioner to conduct the examination of these two (2) witnesses in accordance with the *Federal Courts Rules* and the commission issued by this Court.

AND WHEN YOU REQUEST IT, the Federal Court is ready and willing to do the same for you in a similar case.

THIS LETTER OF REQUEST is signed and sealed by order of the Court made on (date).

Issued by: ____
(Registry Officer)

Address of local office: 90 Sparks Street
Ottawa, Ontario K1A 0H9
Canada

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-10
STYLE OF CAUSE:	RÉGENT BOILY v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 31, 2016
JUDGMENT AND REASONS:	GASCON J.
DATED:	AUGUST 5, 2016

APPEARANCES:

Audrey Boctor Christian Deslauriers	FOR THE PLAINTIFF
Vincent Veilleux	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Irving Mitchell Kalichman Barristers & Solicitors Montréal, Quebec	FOR THE PLAINTIFF
La Société Professionnelle de Christian Deslauriers Inc. Barristers & Solicitors Ottawa, Ontario	
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT