Federal Court of Appeal  Cour d'appel fédérale

Date: 20170907

Docket: A-285-16

Citation: 2017 FCA 180

CORAM: **NADON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

RÉGENT BOILY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on May 4, 2017.

Judgment delivered at Ottawa, Ontario, on September 7, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This appeal concerns the administration of justice and the taking of evidence out of Court abroad for use at trial. The Crown sought leave of the Federal Court for an order appointing a Commissioner in Mexico to collect the written evidence of two Mexican prison guards accused of torturing Mr. Régent Boily, a Canadian citizen. Prothonotary Morneau denied the Crown's

request but the Federal Court overturned his ruling and ordered the Commission sought by the Crown.

[2] Mr. Boily now appeals to this Court seeking to have the Prothonotary's order reinstated.

[3] For the reasons that follow, I would allow the appeal.

II. Facts

[4] Régent Boily, the appellant, is a Canadian citizen. In 1998, he was sentenced to 14 years of imprisonment in Mexico for transporting 580 kg of marijuana in his motor home. In early 1999, he escaped from the Zacatecas prison, and during his escape, a prison guard was killed. He returned to live in Canada until 2007 when he was extradited back to Mexico to complete his sentence and face new charges related to his escape. The Canadian government received diplomatic assurances from the government of Mexico that Mr. Boily would not be mistreated in prison. He was returned to the Zacatecas prison where he alleges he was tortured in August 2007. Now aged 73, Mr. Boily remains in Mexican prison with an expected release date of 2021.

[5] I should add that during the course of the oral hearing, we were informed by counsel that Mr. Boily would shortly be returning to Canada to complete his sentence.

[6] Mr. Boily commenced an action against the Crown in 2010 pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, seeking damages from the Crown for having allowed his extradition to Mexico. It is in the course of that action that the Crown brought

a motion before the Federal Court to obtain the issuance of a Commission and letters rogatory to obtain the written testimony of two of the Mexican prison guards alleged to have tortured Mr. Boily, namely MM. Isidro Delgato Martinez and Juan Carlos Abraham Osorio. The Crown also sought the issuance of a letter requesting the assistance of the Mexican judicial authorities in summoning the guards to appear before the Commissioner. More particularly, the Crown sought the appointment as Commissioner of Mr. Javier Navarro Velasco, a Mexican attorney of the city of Mexico, for the purpose of taking the written evidence of the two prison guards.

[7] On March 11, 2016, the Prothonotary denied the Crown's motion on the basis that the Crown could and should have investigated Mr. Boily's allegations as early as 2007 and therefore, it should have sought to obtain the two guards' evidence much earlier. He also determined that the witnesses' statements would have little probative value.

[8] Pursuant to Rule 51(1) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), the Crown appealed the Prothonotary's decision to the Federal Court and on August 5, 2016, Gascon J. (the Judge) allowed the appeal (2016 FC 899). On the basis of the standard of review enunciated by this Court in *Canada v. Aqua-Gem Investments Ltd*., [1993] 2 F.C. 425, 1993 CanLII 2939 (FCA) [*Aqua-Gem*], the Judge found that the Prothonotary had based his decision on both a misapprehension of the facts (regarding the delay and the probative value of the evidence) and upon a wrong principle (regarding the probative value). Hence, the Judge examined the issue before him *de novo* and determined that the order sought by the Crown was warranted.

[9] The Judge ordered the administrator of the Court to issue in the English language letters rogatory to Mr. Velasco so as to allow him to find the two witnesses and to take their written evidence according to the terms of a "Draft Commission" attached to his order. The "Draft Commission", in its relevant part, provides as follows:

> 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.

[10] The "Draft Commission" lists five questions (in both English and Spanish) which the witnesses are to answer. These questions (in their English version) are the following:

> 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.

[11] The “Instructions to Commissioner” given by the Judge required Mr. Velasco “to attach to this commission the written answers to the following written questions…”.

[12] The Judge also ordered the administrator of the Court to issue in English a “Letter of Request” to the Mexican judicial authorities for the purpose of obtaining their aid to secure the attendance of the witnesses before the Commissioner.

[13] I should point out that the Crown’s motion was brought pursuant to Rules 99, 271 and 272.

[14] Before turning to the issues, I should mention that during the course of the hearing, we were also informed by counsel that the Commissioner had already executed his Commission. More particularly, we were informed that Mr. Velasco had been successful in finding one of the witnesses, namely Mr. Martinez, and that he had taken that witness’ evidence. I should say that prior to being so informed by counsel, the panel was not aware that the Commissioner had completed his task, albeit in part, because of the unavailability of Mr. Osorio.

[15] For the sake of having a complete record before us, we took it upon ourselves to obtain from the registry of the Federal Court a copy of Mr. Velasco’s letter of November 29, 2016, pursuant to which he filed the report of his Commission and a copy of the Crown’s letter to the administrator of the Court dated January 27, 2017, to which is attached a copy of the transcript of the evidence given by Mr. Martinez.

[16] In his report of November 29, 2016, to the Federal Court, Mr. Velasco indicates that although he was appointed to take the evidence of MM. Martinez and Osorio, he was only able to locate Mr. Martinez and hence, was unable to take the evidence of Mr. Osorio, adding that he had taken a number of steps, including the hiring of a private detective, to locate Mr. Osorio. At paragraph 9 of his report, he says the following:

> In sum, the Mexican State has no record of Mr. Abraham Osorio's birth and it has no record of his past employment. Even, the Zacatas prison has no record of him even working there and it has no last known address for this individual.

[17] As to the Crown's letter of January 27, 2017 and the attached transcript of evidence, I note that the Commissioner conducted a *viva voce* examination of Mr. Martinez, notwithstanding that the motion sought an order authorizing Mr. Velasco to take the written evidence of the witnesses. In other words, the Crown did not seek and the Judge did not order the Commissioner to conduct a *viva voce* examination of the witnesses.

[18] Thus, it does not appear that the evidence filed by the Crown is in compliance with Rule 99 which sets out the manner in which written examinations are to be taken. I will return to this question later on in these reasons.

[19] There is another point which I wish to discuss before turning to the issues. On June 26, 2017, a Direction was sent to the parties requesting their comments regarding the mootness of the appeal in view of the fact that the Commission had been executed by the time the appeal was heard. By letters dated July 12, 2017, and July 19, 2017, the parties provided their respective views on the matter. In brief, for different reasons, the parties take the position that the appeal is

not moot and that, in any event, even if we should conclude that it is moot, we should decide the appeal. Amongst other things, the Crown says that we should decide the appeal because the appeal would determine whether the evidence taken by the Commissioner is admissible.

[20] I agree that we should dispose of the appeal notwithstanding the fact that the Commission has already been executed. In my view, the question as to whether Commission evidence can be taken by way of written evidence which, as it stands, would not be subject to cross-examination by the appellant, is an issue which deserves our attention particularly in view of the paucity of the case law regarding this issue.

[21] Consequently, I now turn to the issues raised by the appeal.

III. The Issues

[22] This appeal raises the following five issues:

(1) What standard of review should this Court apply in reviewing the Judge's order?

(2) What standard of review should the Judge have applied to the Prothonotary's decision?

(3) Did the Judge err in finding that the Prothonotary made an error of fact?

(4) Did the Judge err in finding that the Prothonotary made an error of law?

(5) Did the Judge err in concluding, *de novo*, that the Crown's request for a written examination of the witnesses should be allowed?

IV. Analysis

A. *Standard of Review*

[23] In *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.R.L. (4th) 497 [*Hospira*], this Court changed the standards of review pursuant to which discretionary decisions of prothonotaries should be reviewed. In that case, we determined that the standards of review enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235 [*Housen*] were the standards which should be applied to discretionary decisions of prothonotaries. Consequently, errors of fact are to be reviewed on the overriding and palpable error standard and errors of law are to be reviewed on the standard of correctness. As we also indicated in *Hospira*, discretionary decisions of judges of the Federal Court should also be reviewed on the basis on the standards enunciated in *Housen*.

[24] The Judge's decision to apply the *Aqua-Gem* standards and not those of *Housen*, does not, *per se*, constitute a reviewable error. As we made clear in *Hospira*, and as the appellant concedes, the old and new standards use different languages to, in effect, express similar concepts. Thus, applying the old standards to the Prothonotary's decision does not vitiate the Judge's decision. As explained further below, I find that the Judge's "misapprehension of the facts" is equivalent to an overriding and palpable error of fact, and his use of a "wrong principle" is equivalent to an error of law.

B. *The Prothonotary made an error of fact regarding delay*

[25] Because of his view that the Crown was informed of the names of the two prison guards in 2007, and again in 2009 (Prothonotary's reasons at paragraph 4), the Prothonotary determined that the Crown could have interrogated the prison guards as early as the end of 2007 (*idem* at paragraph 6). Hence, in the Prothonotary's opinion, the delay between 2007 and the date on which the Crown brought its motion was the Crown's responsibility. The Prothonotary concluded that rewarding this delay would not further the administration of justice (*idem* at paragraph 9). In addition, the Prothonotary determined that the Crown had not put forward any evidence concerning the additional delay that would result by reason of the taking of the written examinations of the witnesses in Mexico. The Prothonotary ended by noting that the case before him had been plagued with interlocutory motions for which the Crown bore much responsibility.

[26] As the Judge pointed out in his reasons, the Crown had no reason to collect the written testimony of the prison guards until Mr. Boily commenced his proceedings in April 2010 (Judge's reasons at paragraph 37). I assume that in the absence of judicial proceedings, any investigation would have been within the purview of Global Affairs Canada and the Canadian Embassy in Mexico. However, Mr. Boily asked the diplomatic representative, who visited him in August 2007, not to disclose his accusations to the prison authorities (Written Discovery Examination of Mr. Boily, A.B. Tab 8 at p. 61, Q22).

[27] The Judge was also correct to point out that Mr. Boily was granted a stay of proceedings *sine die* in August 2013, which remained in place until early 2014. At that time, counsel for Mr.

Boily withdrew from the record, due to the difficulty of securing his testimony while in a Mexican prison, which led Mr. Boily to change counsel.

[28] Further, Mr. Boily's amended statement of claim provides scant information regarding the names of the guards who allegedly mistreated him. More particularly, at paragraph 26 of his amended statement claim, Mr. Boily refers to the guards as being David, Isidro and J. Carlos Abraham Osorio. His discovery examination by the Crown was completed in writing and only received in Canada in November 2015, several months behind the schedule agreed to by the parties on June 26, 2015. In his responses to the Crown's written discovery examination of April 25, 2015, Mr. Boily provided to the Crown, for the first time, the full names of two of the guards, namely Mr. Juan Carlos Abraham Osorio and Isidro Delgato Martinez. The third guard's full name remains unknown and the Crown did not seek to examine him.

[29] The Judge also noted that the parties had agreed to a schedule in June 2015 for completing the written examinations (although the Judge did not say so expressly, he must be referring to written discovery examinations). Although Mr. Boily consented to be discovered in writing he clearly did not consent to a written examination of the prison guards to serve as their trial testimony.

[30] In the end, after a proper consideration of the evidence, the Judge concluded that the Crown was not responsible for the entire period of delay between 2007 and 2016. He found that the Prothonotary, in citing delay as the principal reason for his refusal to allow the Crown's motion, had based his decision on a "misapprehension of the facts".

[31] In my view, the Judge made no error in so concluding.

C. *The Prothonotary made an error of law regarding probative value*

[32] In his reasons, the Prothonotary indicated that he did not believe that the testimony of the prison guards would be useful, as they would simply deny having tortured Mr. Boily. He also endorsed a statement by the appellant to the effect that the guards' testimony would have no probative value.

[33] As the Judge correctly points out, it was not for the Prothonotary to judge the value of the sought after testimony: that is the role of the trial judge. In the Judge's view, the guards' evidence could very well reveal information that was useful to the case, even if they denied the allegations made against them by Mr. Boily. The Judge went on to say that it was for the trial judge to weigh their credibility and persuasiveness, and that this exercise could not be done in advance (Judge's reasons at paragraph 52). The Judge was also correct in saying that the probative value of the evidence was not one of the criteria established by the case law to determine whether a Commission and letters rogatory were to be issued (*idem* at paragraph 51).

[34] Consequently, the Judge opined that the Prothonotary had based his decision on a "wrong principle" as well as on a "misapprehension of the facts" (Judge's reasons at paragraphs 53-54). I agree with the Judge that by including a factor that was not relevant in determining whether letters rogatory should be issued, the Prothonotary made an error of law. It is thus not necessary to determine whether this mistake also constitutes an overriding and palpable error of fact.

D. *Did the Judge err in his de novo review of the case?*

[35] The Judge granted the order sought by the Crown. Attached to his judgment, as I indicated earlier, are a "Draft Commission" appointing Mr. Velasco as Commissioner to take the evidence of MM. Martinez and Osorio and a "Draft Letter of Request", addressed to the Mexican judicial authorities requesting their assistance in summoning the two guards to appear before the Commissioner. In making his decision, the Judge appears to have assumed that because the Crown sought to obtain the written evidence of the two witnesses, he had to grant the motion if the criteria set out at Rule 271 were met. Hence, the Judge did not turn his attention to the question of whether the examination should rather proceed by way of *viva voce* questions and answers subject to objections and cross-examination.

[36] In my respectful view, the Judge made an error of law in failing to consider whether, in the circumstances of the case, *viva voce* questions and answers subject to cross-examination would be preferable. In my view, had he turned his attention to this question, he would no doubt have concluded that making the order sought by the Crown was not appropriate in the circumstances.

[37] I begin by a discussion of the Rules relevant to this appeal. Rules 271 and 272 are at the heart of this appeal. However, they must be read in the light of Rules 87 to 100.

[38] Rule 271 deals with the taking of trial evidence out of Court and Rule 272 applies to situations where that evidence is to be given outside of Canada. Those are the rules which both the Prothonotary and the Judge considered in making their respective decisions.

[39] Rule 271(2) sets out a non-exhaustive list of factors which the Court may consider in making an order. It reads as follows:

271(2) In making an order under subsection (1), the Court may consider	**271(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.

[40] Pursuant to Rule 271(3), in making the order sought "the Court may give directions regarding the time, place, manner and costs of the examination …" [My emphasis].

[41] Under Rule 272(1), the Court may make an order for the issuance of, in respect of evidence to be given outside of Canada, a Commission, letters rogatory, a letter of request and any other document required for the examination in the Forms prescribed by the Rules.

[42] The decision to allow or not the taking of Commission evidence is a discretionary decision in respect of which the case law has enunciated a number of factors that need to be considered in making the order. In particular, the four following factors are deserving of consideration: the application must be made *bona fide*; the issue in respect of which the testimony is sought is one that is relevant to the proceedings before the Court; the witnesses sought to be examined can give evidence which is material to the issue; and finally, there are good grounds for which the witnesses cannot attend the trial (see *Canada (Minister of Citizenship and Immigration) v. Fast*, 2001 FCT 594, 2001 CFPI 594 [*Fast*] ; *Canada (Minister of National Revenue-M.N.R.) v. Javelin Foundries & Machine Works Ltd.*, [1978] C.T.C. 597 (TD), [1978] F.C.J. No. 612 (QL). Needless to say, these factors are not exhaustive. It is up to the judge hearing an application for the taking of Commission evidence to consider all relevant circumstances which may or may not justify the granting of an order.

[43] I now turn to Rules 87 to 100. Rule 87 explains what an "examination" means in the context of examinations out of Court. It defines "examination" as follows:

87 In rules 88 to 100, examination means	**87** Dans les règles 88 à 100, interrogatoire s'entend, selon le cas :
(*a*) an examination for discovery;	*a*) d'un interrogatoire préalable;
(*b*) the taking of evidence out of court for use at trial;	*b*) des dépositions recueillies hors cour pour être utilisées à l'instruction;
(*c*) a cross-examination on an affidavit; or	*c*) du contre-interrogatoire concernant un affidavit;
(*d*) an examination in aid of execution. [my emphasis]	*d*) de l'interrogatoire à l'appui d'une exécution forcée. [mon soulignement]

[44] Rule 88(1) says that "Subject to rules 234 and 296, an examination may be conducted orally or in writing."

[45] Rules 89 to 98 set out the manner in which all examinations are to be conducted. As to Rule 99, it provides the procedure for written examinations. In particular, Rule 99(1) says that the party which intends to conduct such an examination must serve a list of questions in Form 99A for the person to answer. Rule 99(3) provides that the person examined shall answer the questions "by way of an affidavit" and that such affidavit must be in Form 99B and served on the other parties to the proceedings. It is important to point out that Rule 99 does not provide for the possibility of cross-examination.

[46] Finally, Rule 100 says that Rules 94, 95, 97 and 98 apply, *mutatis mutandis*, to written examinations.

[47] In rendering their respective decisions, neither the Prothonotary nor the Judge made any reference to Rules 87 to 100. A proper consideration of the relevant Rules leads to the conclusion that the Court may, under Rules 271 and 272, order that a person be examined in writing outside of Canada. In my view, such an examination is subject to Rule 99.

[48] As I indicated earlier, it does not appear that Mr. Martinez's examination was conducted in accordance with Rule 99. Rather, it appears that he was examined orally by the Commissioner without the presence of counsel for the parties. No affidavit in the Form prescribed by Rule 99 *i.e.* Form 99B, appears in the record. What we have before us is a transcript of the examination

conducted by the Commissioner on November 17, 2016, wherein he poses to the witness, *viva voce*, the questions set out in the list of questions provided by the Crown.

[49] Because I conclude that the Judge made a reviewable error in making the order sought by the Crown, I need not decide whether the Commissioner's failure to abide by Rule 99 is fatal.

[50] I now turn to the motion dated January 11, 2016, filed by the Crown in respect of which the Prothonotary and the Judge made their decisions. In support of its motion, the Crown filed the affidavit of Ms. Stephanie Lauriault, sworn January 12, 2016. For the purposes of this appeal, only paragraph 18 of Ms. Lauriault's affidavit is relevant where she says that the appellant had, when discovered by the Crown, identified MM. Osorio and Martinez, residents of Mexico, as two of the three guards that had allegedly tortured him. Ms. Lauriault also states that due to linguistic, geographic and diplomatic constraints, the Crown did not make any attempt to establish contact with the guards.

[51] Thus, when making its motion, the Crown had no information whatsoever regarding MM. Osorio and Martinez. In other words, the Crown was not aware whether the tentative witnesses were alive, whether they still worked in the Mexican prison system or whether they still resided in Mexico. Needless to say, the Crown, not having contacted the witnesses, did not know whether the witnesses would be prepared or not to come to Canada to testify at the trial. It appears that the Crown simply assumed that they would be unwilling to attend.

[52] Consequently, neither the Prothonotary nor the Judge had any relevant evidence concerning the witnesses. As it turned out, the Commissioner was unable to locate or obtain any information regarding Mr. Osorio.

[53] As indicated earlier, Rule 271 sets out a number of factors which the Court may consider in making an order for the purpose of taking trial evidence out of Court. Those factors are, to repeat them: (a) the expected absence of the person at the time of trial; (b) the age or any infirmity of the person; (c) the distance the person resides from the place of trial; and (d) the expense of having the person attend at trial.

[54] No doubt, the third and fourth factors appear to be met. With respect to the first and second factors, there was no evidence in regard thereto. In other words, the medical condition of the witnesses was unknown and there was no evidence in regard to their willingness to come to Canada to testify at the trial. In their decisions, the Prothonotary and the Judge did not address these factors. They seem to have assumed that the factors were met.

[55] Although I will not decide the appeal on this basis, it appears to me that it would have been open to the Prothonotary to dismiss the Crown's motion because of its failure to provide, in effect, any information regarding whether the witnesses were alive, residing in Mexico or willing to come to Canada to testify at the trial. The Court should not, as the Judge did, make an order authorizing the Commissioner to find the witnesses. That is not the Court's role. It is that of the party seeking to take the evidence of the witnesses. The Crown should have taken the steps necessary to find the witnesses and having done so, should have approached the witnesses to find

out whether they were prepared to come to Canada to testify. Only then should the Crown have brought its motion before the Court.

[56] In order to dispose of this appeal, it will be useful to briefly set out why the appellant objects to the Judge's decision. That will set the context in which the matter was debated both before the Judge and before us on the appeal. In the end, it is my view that the Prothonotary was correct in dismissing the Crown's motion, albeit for the wrong reasons.

[57] Not surprisingly, the appellant says that the Judge was wrong to intervene and thus should not have set aside the Prothonotary's decision. For the reasons which I have already explained, I am satisfied that the Judge was correct to intervene. However, having intervened, he should have reached the same conclusion as the Prothonotary.

[58] The appellant makes a number of submissions that are of relevance to the determination of the appeal. First, the appellant makes the point that the order sought by the Crown, *i.e.* the taking of the witnesses' written evidence as per Rule 99, denied him of the possibility of cross-examining the witnesses. Further, it denied the Court of the opportunity of observing the witnesses.

[59] Second, the appellant says that the Judge, in making his order, did not really consider the fact that the evidence would be limited to written questions and answers. Third, the appellant also says that limiting the evidence to written questions and answers constitutes an infringement

of a fundamental principle of the administration of justice, namely that parties have the right to cross-examine opposing witnesses.

[60] Fourth, the appellant says that allowing the Crown's motion for the taking of written evidence, without proof that it was necessary to so proceed in the circumstances, creates a dangerous precedent which this Court should not condone.

[61] Paragraph 56 of the appellant's Memorandum of Fact and Law nicely sets forth the appellant's view on the matter. The paragraph reads as follows:

> 56. [TRANSLATION] However, in the best interest of the administration of justice, and before allowing a clear exception to procedural rules and the applicable principles of justice, the Court must at the very least be satisfied that the situation justifies it. As a minimum, this requires that the party demonstrate : (i) that the witnesses in question were located; (ii) that they refuse to testify at the trial, even remotely, *e.g.* by videoconference; and (iii) that a commission in due form – *viva voce*, presided over by a judge, and with cross-examination – is not practicable.

[62] In my respectful view, the approach that the appellant suggests in the above paragraph is the proper approach. I am of that view for the following reasons.

[63] As I indicated earlier, Rule 271(3) gives the Federal Court discretion with regard to the "manner" in which the examination sought should be taken. In other words, whether the examination is to proceed by way of *viva voce* questions and answers or in writing is for the Judge to decide in the light of all relevant circumstances. From my reading of the Judge's reasons, I am in no doubt that he did not turn his mind to that question. He simply granted the motion because he was satisfied that the Crown was entitled to take the witnesses' evidence out

of Court. Although I am prepared to accept, subject to my earlier comments regarding the lack of evidence in regard to the first and second factors of Rule 271(2), that the Crown was entitled to take the witnesses' trial evidence out of Court, that does not in any way determine the manner in which the evidence should be taken.

[64] I begin by saying that there can be no dispute that the usual manner in which evidence is given at trial is by way of a *viva voce* examination of witnesses who shall be subject to cross-examination. It goes without saying, subject to Rules 271 and 272, that trial witnesses should be heard in the Courtroom before the trial judge. When a party is able to establish that such evidence should be taken out of Court, the Court should ensure to the extent possible that such evidence will be taken by way of *viva voce* questions and answers subject to cross-examination. That is why in most cases, Commission evidence pursuant to Rule 272 is taken by way of *viva voce* evidence often before the trial judge who, in such circumstances, is appointed as Commissioner. When the parties agree that a foreign person, not a judge, should be appointed as Commissioner, the evidence is nevertheless taken before the Commissioner by way of *viva voce* questions and answers subject to cross-examination and, in such a situation, objections are reserved for determination by the trial judge at the trial.

[65] This, however, does not mean that it may not be appropriate in certain circumstances to allow the taking of trial evidence out of Court in a different matter such as by way of written questions and answers as proposed by the Crown in the present matter. However, proceeding in the way suggested by the Crown must, in my respectful view, constitute the exception to the rule. Consequently, in order to obtain an order such as the one sought by the Crown in these

proceedings, the moving party must demonstrate to the Court's satisfaction that, in all of the circumstances, such an order is the proper one to make. In my view, that case was not made out in the present matter.

[66] Although the parties were unable to provide any case law relevant to the issue before us, I have been able to find one case which is of relevance. In *Leo v. Puget Sound Iron Co.*, [1954] B.C.J. No. 55, 13 W.W.R. (N.S.) 95 [*Puget Sound*], Wilson J. of the British Columbia Supreme Court had to determine the manner in which the evidence of the president of the defendant company should be taken on Commission. Wilson J. indicated that the witness was "very old, very ill, very weak" and that examining him in the usual manner by way of *viva voce* examination subject to cross-examination "may kill him" (*Puget Sound*, at paragraph 1) Consequently, Wilson J. was satisfied that the witness should not be subjected to the usual process.

[67] In *Puget Sound*, as the witness was the principal witness for the defence and the only person who could rebut the plaintiff's allegations, it was necessary to allow his examination out of Court. After making the point that the "modern practice" was that examinations should take place in the presence of the parties and their counsel and that the witnesses should be cross-examined and re-examined, Wilson J. ordered that the evidence would be taken by way of interrogatories and cross-interrogatories, adding that "if at any time it is made to appear that the witness can withstand and survive the much preferable process of viva voce cross-examination, that will be ordered" (*Puget Sound* at paragraphs 2 and 5).

[68] In my respectful opinion, Wilson J.'s decision in *Puget Sound* supports my view that the taking of written evidence out of Court to stand as trial evidence must remain an exception to the rule. Rule 290 also supports my position. That Rule provides as follows:

290 The Court may permit a party to use all or part of an examination for discovery of a person, other than a person examined under rule 238, as evidence at trial if	**290** La Cour peut, à l'instruction, autoriser une partie à présenter en preuve tout ou partie d'une déposition recueillie à l'interrogatoire préalable, à l'exception de celle d'une personne interrogée aux termes de la règle 238, si les conditions suivantes sont réunies :
(*a*) the person is unable to testify at the trial because of his or her illness, infirmity or death or because the person cannot be compelled to attend; and	*a*) l'auteur de la déposition n'est pas en mesure de témoigner à l'instruction en raison d'une maladie, d'une infirmité ou de son décès, ou il ne peut être contraint à comparaître;
(*b*) his or her evidence cannot be obtained on commission.	*b*) sa déposition ne peut être recueillie par voie de commission rogatoire.

[69] In other words, a party may be allowed to use all or part of its examination for discovery of a person (in that context, counsel for the person being discovered has no right to examine or re-examine the witness), other than the examination of non-parties (Rule 238(1)), where the person is unable to testify because, *inter alia*, of his or her medical condition and that person's evidence cannot be obtained on Commission. In my opinion, the assumption behind Rule 290 is that before the Court will accept the discovery examination of a person, it must make sure that there is no real possibility of that person being able to be examined in the usual manner, *i.e.* by way of *viva voce* questions and answers subject to cross-examination. Thus, the Rules clearly support the view that trial testimony should preferably be given by way of *viva voce* questions

and answers subject to cross-examination. Written examinations should only be allowed as evidence when proceeding in the usual way is not possible.

[70] Also in support of this view, is the unreported decision of Collier J. of the Federal Court in *Marubeni Corporation v. The Ship "Star Tarenger" and Westfal-Larsen and Co. A/S and Star Shipping Co. A/S* (July 25, 1977) Doc. T-2991-74 [*Marubeni*] (Referred to by McKeown J. at paragraph 8 of his reasons in *Fast*), where Collier J. explained why it was preferable in many cases to appoint the trial judge as the Commissioner to take the trial evidence of witnesses out of Court. At page 4 of his reasons in *Marubeni*, Collier J. opined as follows:

> One can possibly envisage a situation in an action of some kind where all the key witnesses are outside Canada; where there is obviously going to be major conflicts in factual or opinion testimony; where credibility (and assessment of it) would be or *[sic]* prime importance. It may perhaps be that the Court, in that situation, would concluded *[sic]* there were compelling reasons, in a practical sense and in the interest of justice, that a judge should be appointed. While a judge, in those circumstances, might technically be characterized as a mere commissioner, one must look at the position realistically. Basically, the judge would be sitting as a court, making immediate rulings on evidence and other legal points, arriving at tentative, or perhaps final, assessments as to credibility - all this in a foreign jurisdiction.

[71] In other words, it will be preferable to appoint the trial judge as the Commissioner when issues of credibility, for example, will, in the end, have to be determined by the Court. Again, the assumption is that *viva voce* questions and answers subject to cross-examination is the preferable way.

[72] It is clear in the present matter that the Crown did not put forward any evidence which would justify a departure from the usual manner of taking trial evidence, albeit out of Court. Not

only did the Crown fail to adduce any evidence regarding the witnesses which it sought to examine but it did not bring forward any evidence whatsoever as to why it was appropriate or preferable to proceed by way of written questions and answers. At the hearing, in answer to a question by the panel as to why it wished to proceed by way of written questions only, counsel for the Crown's answer was that the Crown was so proceeding because it could do so. In my respectful view, that answer was not very satisfactory in the circumstances.

[73] It appears to me that, as in *Puget Sound*, medical reasons may justify why a witness should not be subjected to *viva voce* questions and answers subject to cross-examination. It also appears to me that, depending on the nature and the importance of the evidence to be given, a judge might, in certain circumstances, allow Commission evidence to be taken by way of written evidence or by way of some other appropriate means, for example, by way of video-conference. By giving these examples, I am not to be taken in any way to be limiting the circumstances which might give rise to an order that Commission evidence be taken in writing only. In every instance, it shall be up to the judge hearing the motion to exercise his or her discretion in the light of all relevant circumstances. I simply wish to make the point that when asked to make an order for Commission evidence, it is imperative that the judge turn his or her mind to the manner in which the examination is to be taken, particularly when one of the parties to the case, as here, is objecting.

[74] Turning to the facts of the case now before us, there can be no doubt that the evidence of the prison guards is highly relevant to the issues raised by the appellant's action against the Crown. In particular, their evidence will likely be in contradiction to that of Mr. Boily regarding

his treatment in the Mexican prison. Thus, a serious issue of credibility will have to be determined by the trial judge. That evidence, I have no doubt, should be taken by way of *viva voce* questions and answers subject to cross-examination unless there are particular circumstances which justify a departure from the usual way. As I indicated earlier, there is no such evidence before the Court.

[75] I am satisfied that in failing to turn his mind to the manner in which the Crown sought to take the evidence of the prison guards, the Judge made a reviewable error. In my view, had he turned his mind to this question, he would no doubt have refused to make the order sought by the Crown, as there was simply no evidence before him which could justify such an order.

V. Conclusion

[76] For these reasons, I would allow the appeal with costs, I would set aside the judgment of the Federal Court and I would reinstate the Prothonotary's order dismissing the Crown's motion.

"M Nadon"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GAUTHIER J.A. TRUDEL J.A.
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