C.A. No. 131259

NOVA SCOTIA COURT OF APPEAL

Cite as: Canada (Attorney General) v. China, 1996 NSCA 243

BETWEEN:		
THE ATTORNEY GENERAL OF CANADA		James C. Martin for the Applicant
	Applicant	
- and -		
THE REPUBLIC OF CHINA		Alison Wheeler for the Respondent
	Respondent	
		Application Heard: December 20, 1996
		Judgment Delivered: December 31, 1996

BEFORE THE HONOURABLE JUSTICE DAVID R. CHIPMAN IN CHAMBERS

CHIPMAN, J.A.:

This is an application by the Attorney General of Canada on behalf of the State of Romania for leave to appeal from an order in Supreme Court giving leave to the Republic of China

(The Republic) to intervene in a hearing pursuant to s. 15 of the **Mutual Assistance in Criminal Matters Act**, Chapter M-13.6, R.S.C. 1985, c. 30.

The purpose of the **Act** is to facilitate the war against international crime. It enables foreign states with which Canada has a treaty or administrative arrangements to obtain evidence for use in criminal investigations and prosecutions.

On May 29, 1996 Romania commenced extradition proceedings in the Supreme Court against seven nationals of The Republic for the murder of three stowaways aboard the **Maersk Dubai**, a ship registered in The Republic and flying The Republic's flag, while that ship was on the high seas. The ship docked in Halifax on May 24, 1996.

On July 16, 1996 The Republic applied to J. M. MacDonald, J. of the Supreme Court for leave to intervene in the extradition proceedings. On August 9, 1996, MacDonald, J. granted The Republic standing with respect to the extradition proceedings for the limited purpose of calling expert evidence as to the jurisdiction in which the alleged crimes occurred, and making argument with respect to the jurisdiction of the extradition judge to grant an order, given the evidence adduced at the extradition hearing.

On May 30, 1996, at Romania's request, Cacchione, J. of the Supreme Court issued a search warrant pursuant to the **Act** respecting evidence on board the **Maersk Dubai**.

On August 26, 1996, Cacchione, J. heard an application by The Republic for leave to intervene in a hearing under s. 15 of the **Act** to send the things seized under the search warrant to Romania. Cacchione, J. granted this order. He also granted an order adjourning that hearing **sine die** pending the outcome of the extradition hearing against the seven nationals of The Republic now being heard by MacDonald, J. in Supreme Court.

An application to send abroad things seized on the execution of a search warrant is governed by s. 15 of the **Act**:

> **15.** (1) At the hearing to consider the execution of a warrant issued under section 12, after having considered any representations

> of the Minister, the competent authority, the person from whom a record or thing was seized in execution of the warrant and any person who claims to have an interest in the record or thing so seized, the judge who issued the warrant or another judge of the same court may
>
> > (a) where the judge is not satisfied that the warrant was executed according to its terms and conditions or where the judge is satisfied that an order should not be made under paragraph (b), order that a record or thing seized in execution of the warrant be returned to
> >
> > > (i) the person from whom it was seized, if possession of it by that person is lawful, or
> > >
> > > (ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or
> >
> > (b) in any other case, order that a record or thing seized in execution of the warrant be sent to the foreign state mentioned in subsection 11(1) and include in the order such terms and conditions as the judge considers desirable, including terms and conditions
> >
> > > (i) necessary to give effect to the request mentioned in that subsection,
> > >
> > > (ii) with respect to the preservation and return to Canada of any record or thing seized, and
> > >
> > > (iii) with respect to the protection of the interests of third parties.
>
> (2) At the hearing mentioned in subsection (1), the judge may require that a record or thing seized in execution of the warrant be brought before him.

In his decision to grant standing to The Republic, Cacchione, J. observed that The Republic claimed standing on two bases: (i) that it was a "person who claims to have an interest in the record or things so seized" and (ii) that it is a third party with respect to whose "interests" the judge may include terms and conditions in any order to send. With respect to The Republic's position he said:

> Given the ruling of Justice MacDonald and the limited standing that the Republic has . . . In my opinion, the Republic of China does have an interest. It is a third party. It has been granted limited

> standing and to deny it at this stage standing in these proceedings would in my view, be unfair and not in keeping with the protection of third party interests. Mr. Martin says that the Republic of China's interests are not interests under the **Mutual Legal Assistance in Criminal Matters Act** that in fact, this really is a political interest rather than an interest which is covered under the Act. I am not satisfied that it is a political interest. I think that in fact they ought to be given standing.

In granting the adjournment **sine die**, Cacchione, J. made the following comments about the undesirability of the order to send being made before the extradition matter was resolved:

> I commented to counsel earlier about putting the cart before the horse and again this seems to me to be putting the cart before the horse. There was some comment about these hearings should be expeditious, that to adjourn it again would delay and frustrate the intent of the **Act**. It really does not make much sense to me to deal with the issue of the return of the items until the extradition hearing is complete. We are at a loss at this time to say whether or not there will be extradition to Romania. To remit the items to the requesting state before hearing may in my view, involve further delays in bringing the detainees to justice. If the Extradition Court determines that they are not to be extradited to Romania, the items then in Romania, they would have to be brought back either to Canada or to Taiwan or to whomever else decides that they have an interest in these items. I think that that would unduly lengthen the proceedings.

This application for leave comes before me pursuant to s. 35 of the **Act**:

> **35.** An appeal lies, on a question of law alone, to the court of appeal, within the meaning of section 2 of the **Criminal Code**, from any order or decision of a judge or a court in Canada made under this Act, if an application for leave to appeal is made to a judge of the court of appeal within fifteen days after the order or decision.

In **Heafey et al v. The Attorney General of Canada** (unreported, 1995 A.Q. No. 509) Beaudoin, J.A. of the Quebec Court of Appeal dismissed two applications under s. 35 of the **Act** for leave to appeal. He said at paragraph 10:

> I wish first to draw attention to the extremely limited nature of the right of appeal under the **Act**. Parliament has allowed an appeal "<u>on a question of law alone</u>". This particular expression is not confined to this particular **Act**; the same expression can be found in the **Criminal Code** and other statutes. The few judgments on the matter that I was able to consult indicate that the judge or Court that grants leave to appeal must be convinced that what is involved is a strict problem of law (for example, a misconstruing of the statute) and not a mistaken

> interpretation of the evidence or the circumstances, let alone some doubtful exercise of judicial discretion in the enforcement of the legislation.

An application for leave to appeal under s. 35 of the **Act** was considered by Southin, J.A. of the British Columbia Court of Appeal in **The Attorney General of Canada v. Ross** (1994), 44 B.C.A.C. 228. The applicant was a United States citizen facing a charge of murder in California. He fled to Canada. Following a request by the United States Justice Department for assistance under the **Act**, documents were gathered from the applicant's Vancouver home pursuant to a search warrant and two judicial orders. A judge of the British Columbia Supreme Court granted a transmittal order respecting things seized under the warrant. The applicant sought leave of a judge of the British Columbia Court of Appeal to appeal the transmittal order, by virtue of s. 35 of the **Act**. The applicant contended that the judge erred in the interpretation of the **Act** in failing to determine with respect to each document whether it constituted evidence and in limiting his jurisdiction in the course of the review. After reviewing the facts and the relevant provisions of the **Act** Southin, J.A. considered at p. 237 the criteria upon which a judge should exercise the power conferred by s. 35:

> 1. Is the question raised not settled by authority?
>
> 2. Is it of importance generally and, if not of importance generally, is it nonetheless of great importance to a person with serious interests, such as his liberty, at stake?
>
> 3. Does the proposition of law put forward have any merit or, to put it another way, does it appear to the judge not to be frivolous?
>
> 4. Are there other discretionary considerations, such as prejudice to either the applicant or the requesting state which require to be taken into account?

After concluding that the answer to both the first and second questions was clearly in the affirmative, Southin, J.A. said at p. 237:

> If it were not for the fourth consideration, I would grant leave on the simple footing that it is not right that a serious question should be determined, in effect, by one judge of this Court. I might think that an

> argument was without merit which one of my brethren might think to be of great merit. But the fourth of the tests prevents my disposing of this matter in such an easy way.

Southin, J.A. considered that there might well be serious prejudice to the United States of America if leave were granted. The trial was scheduled for less than two months away. If leave were granted the court could not, in the light of its present case load, hear the appeal and deliver considered reasons in sufficient time to assure that the United States authorities would obtain the records and things sufficiently before the trial to prepare for it.

Southin, J.A. then addressed the merits of the applicant's case which turned on ss. 15 and 20 of the **Act**. After doing so, she concluded that while the applicant had raised important questions of the construction of the statute, he had failed to demonstrate on the facts breach by the judge of the duty under s. 15(2) or s. 20 of the **Act**. She concluded at p. 239:

> Putting into the scales both the prejudice to the requesting state from delay, and my opinion that if leave were granted the proposed appeal would have little chance of success, I consider that leave should be refused.

I have found the analysis carried out by Southin, J.A. in **Ross, supra**, to be of assistance in addressing this application and propose to do so within the same framework.

The applicant asserts two grounds of appeal that raise questions of law alone and which must be tested with reference to the first three criteria proposed by Southin, J.A.:

1) That The Republic is not a person who claims to have an interest in the things seized pursuant to the warrant within the meaning of s. 15 of the **Act** and is therefore not entitled to standing on the hearing.

2) That even if The Republic is a third party with reference to whose interests the judge may include terms or conditions in any order to send, this does not entitle it to be given standing by the judge on the hearing.

1. Person Who Claims an Interest

The Republic took the position before Cacchione, J. that it should have standing because it is a person with an interest in the things seized. It was not a possessory or proprietary interest, but one of the proper investigation and prosecution of the alleged offences committed by its nationals on a ship flying its flag while on the high seas.

The applicant submits that the phrase "person who claims to have an interest" and "interests of third parties" as found in s. 15 of the **Act** refer to recognized legal interests. It relies on the case of **United Kingdom v. Ramsden** (1996), 108 C.C.C. (3d) 289, a decision of the Ontario Court of Appeal. In that case four search warrants and an evidence-gathering order were issued under the **Act**. Counsel for Ramsden appeared and applied for standing to participate in proceedings held pursuant to ss. 15 and 20 of the **Act**. The Ontario Court of Appeal dealt with appeals by Ramsden dismissing three applications for standing and appeals by the United Kingdom from two orders granting standing to Ramsden. The Ontario Court of Appeal dismissed the appeals of Ramsden and allowed those of the United Kingdom.

In dealing with Ramsden's appeals, the Ontario Court of Appeal observed at p. 305 that a proprietary interest or even a mere possessory interest in the materials seized or produced would bring Mr. Ramsden within the purview of the **Act**. The Court reviewed the material before it and concluded that it was incapable of supporting Ramsden's claims to a proprietary or possessory interest in the material seized. The Court then dealt with an argument on Ramsden's behalf that by reason of his relationship with some of the persons named in the search warrants and the evidence-gathering order, he had an interest in the material subsequently seized and produced pursuant to the court orders. The Court concluded that the material before it could not support a finding of any legally recognized interest arising out of the "relationships" as alleged. The Court concluded at p. 307:

> If Mr. Ramsden indeed had a relationship with any of the persons named in the evidence-gathering order such as could give rise to an interest in the material produced by them as claimed, he should have been in a position to set out facts in support of his claim. It may be true that without access to the particular records before the court, Mr. Ramsden may not have been able to relate his interest to

> each specific item of evidence which was the subject-matter of the application. He should none the less have been in a position to lay a proper foundation for his claim. It was incumbent upon him to do so in order to establish that he was either a "person claiming to have an interest" in the records or things seized or produced within the meaning of s. 15 and s. 20 of the Act or a "third party" the protection of whose interest may be the subject-matter of terms and conditions attached to orders made pursuant to s. 18, s. 15 or s. 20 of the Act. He failed to advance any foundation for his claim.

In addressing the United Kingdom's appeal against rulings that Ramsden was a third party under s. 18 and a party who claims an interest in the material produced under s. 20, the Court found that the material relied on by Ramsden did no more than identify him as a target of the investigation. The Court concluded that the fact that Ramsden was a target of the investigation was not sufficient in and of itself to give him standing to bring the applications.

In my opinion the Ontario Court of Appeal does not answer the question whether the interest claimed by a person within the meaning of s. 16 must be a proprietary or possessory interest although it comes tantalizingly close to doing so. Its key findings were that Mr. Ramsden did not have such an interest, and that the material before the Court could not support the finding of any legally recognized interest arising out of the relationships as alleged.

I therefore conclude that the issue raised by the applicant is not settled by authority. In my opinion it is of importance generally and is, in any event, of importance to the applicant which has a serious interest at stake in the resolution of this issue. I am also satisfied upon a review of **Ramsden** that the proposition of law put forward is anything but frivolous.

The first point raised by the applicant passes, in my opinion, the first three of the criteria to be considered.

2. Standing of a Third Party with Interests

The applicant submits that a third party whose interests are referred to in s. 15(1)(b)(iii) of the **Act** is not entitled under s. 15(1) or otherwise to have standing even if the judge may include in the order terms and conditions with respect to protection of the interest of the third party. The applicant submits that Civil Procedure Rule 8 giving the Court power to grant an

intervenor order has no application to a proceeding under the **Act**. The **Act**, it is submitted, constitutes a complete code with reference to its subject matter including the procedural rules which govern applications thereunder. The judge before whom a hearing under s. 15 of the **Act** takes place is defined as:

> (d) In Nova Scotia . . . a judge of the Supreme Court.

It is submitted that the **Act** confers jurisdiction upon the judge and not the Court of which he is a member and therefore that the rules of the Court are not applicable. The Republic disagrees and submits that s. 10 of the **Act** is relevant:

> 10. The **Criminal Code**, other than section 487.1 (telewarrants) thereof, applies, with such modifications as the circumstances require, in respect of a search or a seizure pursuant to this Act, except where that Act is inconsistent with this Act.

The applicant counters by submitting that while power is given to the Court of Appeal to make rules under the **Criminal Code** for appeal purposes (see **R. v. Ross** (1992), 76 C.C.C. (3d) 536), this has no relevance to trial proceedings and in any event the scope of s. 10 of the **Act** is with reference to search and seizure and not rule-making powers generally.

The Republic also submits that whether Cacchione, J. was right or wrong on the issues raised, he had a judicial discretion to control the conduct of the proceedings before him in a manner which accorded with the propose administration of justice. With this the applicant takes issue, again making reference to the **Act** as a complete code insofar as the procedure before the judge is concerned.

On consideration, I have concluded that this issue as well raises matters, not as far as I have been made aware, resolved by authority. They are matters which are of importance and the propositions put forth by the applicant are not frivolous. This ground also passes the criteria under consideration.

DISCRETIONARY CONSIDERATIONS

Remaining is the fourth criterion, that is, whether there are other discretionary considerations such as prejudice to either the applicant or the requesting State which must be taken into account.

The hearing of the applicant's appeal before this Court will not work any prejudice such as was the case in **Attorney General of Canada v. Ross, supra**. Such appeal will, in all probability, be heard within a few months. Nobody has suggested that the extradition hearing, including any possible appeals, will be concluded before then. The Republic submits that I should consider the effect of the applicant's position upon the appearance of the administration of justice. That position, it is said, is that the materials should be sent to Romania without regard to the fact that the suspects may never be sent there for trial and without taking steps to ensure that the materials seized are, in fact, sent to The Republic if that is where the suspects are sent. In my opinion, in view of the anticipated time for hearing this appeal and the anticipated time for the ultimate resolution of the extradition matter, there is no significant risk of such an unfortunate result occurring. It will be recalled that Cacchione, J. adjourned the application for the order to send **sine die** until the conclusion of the extradition hearings. I am not satisfied that there are any discretionary considerations which must be taken into account here.

In the result, I grant leave to the applicant to appeal. The applicant may apply in Chambers for a date for the hearing.

I wish to thank counsel for making available to me the benefit of their extensive research.

Chipman, J.A.