

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**FERNANDO ARDUENGO and NIEVES DEL CARMEN ARDUENGO**

Plaintiffs  
(Respondents)

- and -

**TORONTO STAR NEWSPAPERS LTD., GORDON BARTHOS and  
JOHN HONDERICH**

Defendants  
(Moving Parties)

**FACTUM OF THE RESPONDENTS  
(Motion Returnable February 7, 2005)**

11 February 2005

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Court File No. 95-CU-87317

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**FACTUM OF THE RESPONDENTS**

**PART I - NATURE OF THE PROCEEDINGS**

1. The Plaintiffs admit for purposes of this motion that some evidence from Inspector Arenas might be relevant to the Defendants' theory of the case. The issues on this motion are:
  - i. Whether a proper case has been made out that the evidence of Inspector Arenas should be received at trial by commission under Rule 36;
  - ii. whether the procedures proposed in Chile are sufficient to allow an order for commission evidence for admission at trial that be would be fair to the Responding Party;
  - iii. Whether the questions proposed in the Letters Rogatory are proper in light of the very recent disclosure of documents and relevant to the issues at trial;

iv. assuming this Court were prepared to accept the Chilean procedures as a

substitute for our own trial procedure, whether the extraordinary cost of obtaining the evidence should be imposed on the Plaintiffs.

2. The factual summary by the Defendants continues what is essentially a smear of the Plaintiffs as "murderers". The fact is no Judge in Chile "pointed to" the Plaintiffs as "murderers" as the article in question asserts. This kind of reporting would never be accepted of procedures in the Canadian courts based on reporting of facts as in this story.
3. The Defendants seek to justify the defamation on this basis that the Plaintiffs were "involved" or were wanted somehow before a tribunal as witnesses.

Applicants Motion Record, Tab 3A - the Star Article

## PART II - THE FACTS

4. The Defendants only this January produced a supplementary Affidavit of Documents listing the documents in their possession from the Chilean "court" files upon which this line defence is proposed. (Supplementary Motion Record - Tab A), notwithstanding requests by plaintiff counsel. (See Responding Motion Record, Tab B and C, letters August 19 2003 and August 27 2003). No Discovery by the Plaintiff (or Defendants) on these additional documents has been done. No identification of witness statements to be relied on has been provided, except Inspector Arenas.

5. Which of these the documents are the ones upon which Inspector Arenas will base his testimony? It is noteworthy, and unsworn, that Inspector Arenas says in his letter, Tab R, simply that he has “specific information about the possible participation of Fernando Ardeungo”. The proposed Letters Rogatory seek to ask him (eg Question 19, Applicants’ Supplementary Motion Record, p 167) to identify and describe “the significance” of *any* documents in his possession relating to the murder of Verdugo that refer to either [Fernando or Nieves] Arduengo.
6. Virtually none of the documents have been translated.
7. The Defendants have repeatedly said they may have an expert witness on Chilean court procedures but have not produced any report. The factual basis of any expert report would presumably be the factual evidence of the police officer, Inspector Arenas. Presumably he can not give expert evidence on the nature of the Chilean procedures. A comparison of Chilean and Canadian criminal procedures is of great significance to the consideration of this libel. The Arduengos are effectively being asked to attend at trial to cross-examine a key factual witness on this issue without knowing what the expert witness evidence will be. Proper procedure requires they know any expert evidence three months in advance of trial. They are being asked to examine a key witness at trial before they have that expert report. It is possible, indeed likely, that the cross-examination of Arenas may be critical to that expert evidence, perhaps for the Arduengos.

### Part III - ARGUMENT

*Should an Order be Granted in this Case?*



8. On relatively non-controversial point of evidence the policy of facilitating commission evidence for use at trial, even for the mere convenience of a witness, is not controversial. However for controversial evidence the Court should prefer that the evidence be presented during the trial in the normal manner. This is so especially where the admissibility of the evidence according to complex legal issues is likely.
9. Has a case been made that Inspector Arenas cannot come to Canada for the trial as would be the norm? There is no sworn evidence on this issue. His letter Tab R, unsworn, does not say he cannot come, only that he needs an order of the Court to be able to disclose information. Why not obtain that Order? The Affidavit of Mr Cantwell does not tell us why not? It is not clear that the procedure proposed is even necessary for his convenience. Indeed he says in his letter he would like to testify. He has travelled to Canada before on this investigation.
10. Furthermore, it is noted, that it is not clear from the affidavit material that Inspector Arenas could not participate in the taking of Commission Evidence before an Ontario Commissioner (knowledgeable about our law of libel) in Chile. It is only clear that if he is forced to testify by Letters Rogatory that compulsory procedure must be as described by Mr Cantwell. An Ontario Commissioner would at least partially answer the numerous problems raised below about the unsuitable procedures proposed and especially regarding the relevance of questions. If the normal procedures were followed for taking commission evidence a direct and cross-examination could be conducted in English (translated to Spanish for the witness) in Chile and Canadian law of relevance to the law of defamation could be more easily applied.

*Are the Procedures in the Chilean Courts 'fair' for the purposes of use at our trial?*

11. In any event the presumption for the taking of commission evidence is that the manner of obtaining that evidence should mirror trial procedures in all respects necessary for a 'fair' trial, if not a perfect trial. It is respectfully submitted this means at a minimum that:
- a) the manner of presentation of the evidence and the right of cross-examination should duplicate that available in an actual trial so that evidence can be properly sifted, tested and evaluated;
  - b) the cost consequences of taking evidence in this manner should be transparent, that is the same as if the trial took place in the normal course.
12. The procedure for examining the witness is described by Mr Cantwell's Affidavit. (Motion Record, Tab 2). The questions proposed in the Letters are presumed to be admissible. As noted below many if not most of those questions are invitations to open ended evidence that would be inadmissible at our trial, or if partly admissible would be properly interrupted by objection. (See below - eg "Tell me the significance of ...") The Chilean officials have no power, it seems, to scrutinize the questions for relevance. The Defendants will have two "goes" - first through the specified questions and then through "clarifications". Of much greater significance is that the Plaintiffs do not have a cross-examination but only a right to ask to questions of "clarification". Recourse to a Judge to determine the propriety of questions is based only on whether they are proper "clarifications". The issues of the relevance of questions to issues at trial according to the law of libel is apparently not considered. But it is difficult to believe that the inevitable disputes on the proper nature of "clarification" would not spill over into the issues of "relevance".
13. The procedures described would be suitable for Discovery but not trial.

14. The issues raised go right to the heart of the very difficult issues of the law of defamation raised by this evidence. Difficult legal argument is inevitable. This is not a proper case to employ legal procedures in another jurisdiction which put key question of Canadian law in the hands of someone inevitably unfamiliar with our law.
15. What happens when Inspector Arenas produces additional documents or information about which the Plaintiffs have not been advised, remembering this part of the trial? On what basis will such tactics be judged by the local Judge? As proper clarification?
16. In all of this Canadian Counsel will be present but not the parties so proper cross-examination is possible who cannot attend in Chile without jeopardising their Canadian immigration status. In some situations the lack of the client presence at trial for evidence - clearly a right - might be relatively insignificant. In this case the issue is whether they are justly accused of murder this grossly unfair.
17. Furthermore Mr Cantwell's Affidavit describes that "clarification" questions can only be asked by local counsel. Arguments on same to the supervising Judge also have to be made by local counsel. This means *great* expense for the Plaintiffs to brief an additional lawyer in Chile on the complex factual history and the Canadian law of defamation, particularly the fine points of the law of justification.

*The Issues of Relevance of Arenas Evidence*

18. The evidence of Arenas is highly controversial. It is clear the gist of evidence is that the Arduengos are murderers. His report goes to extreme lengths to try to show Fernando Arduengo was party to the murder of Verdugo. It is hardly fair such evidence be treated as a strained exception to normal standards of trial fairness of full and proper cross-



examination.

19. If local counsel does not speak English fluently (the Arduengo's lawyer does not speak Spanish) then a translator will be required at the stage of working with that lawyer.
20. A translator will be required at the stage of the hearing so the Arduengo's Canadian Counsel can understand the arguments.

*Documents on Which the Questioning will be Conducted*

21. The problems of these procedures are triply complicated because of the Defendants manner of conducting the Defence to date. The documents upon which this trial evidence will be presented by this witness have not been identified. They have not been identified because the Affidavit of Document listing the Chilean Court documents that might possibly be relied on has only been supplied last week. The documents have not been translated. Further we do not know whether Inspector Arenas will have more documents when he testifies. To suggest proper cross-examination at trial on a crucial point in the trial can take place in these circumstances, is, respectfully, not acceptable.
22. It does not appear that further PreTrial Discoveries can address these difficulties because the Defendants do not know what the additional evidence of Inspector Arenas will be, other than the statement already given (Motion Record, Tab H). This is of considerable significance because, to date, there is *nothing* even incriminating Nieves Arduengo in that statement. Should she be forced into a trial and sandbagged by surprise allegations that have never been disclosed to her?
23. To properly parallel the procedures of a trial it would be necessary to have documents upon which questions to the witness are based properly translated before trial. (Whether



documents need to be translated as early as the stage of Affidavit of Documents does not need to be determined here.) In this situation some of those documents can be inferentially identified through Inspector Arenas' statement but even those not been translated. The translation of these is a lesser issue to what additional documentation he proposes to refer to and the translation of those *before* the proposed cross-examination.

#### *Relevance of the Questions*

24. The examination of Arenas raises difficult issues of relevance in the law of justification as part of the law of defamation. For the reasons outlined below the questions proposed in the Letters Rogatory are probably inadmissible. One issue is whether a Master should determine these issues of relevance and rule in the questions to be asked and whether this usurps the proper functions of the trial judge.
25. The different nature of Chilean criminal "investigation" under the direction of a "Judge" is central to this case. It is questionable whether Canadians would understand or equate this investigation function to one of a "Judge". It is more like a prosecutor. The comparison to our criminal procedure may get quite intricate and may be relevant to the Star's justification defence. There are substantial legal questions regarding the nature of legal defence which overlap. The law in this area is evolving. While it is conceded that Inspector Arenas may have some relevant evidence in this area it is more likely he is the factual basis for expert evidence on this point.
26. The Star cannot justify their defamation on basis other than that specified in the pleadings. They cannot conduct the trial on the basis of any allegations other than those set out in the

pleadings. Justification is a far reaching defence - that the allegation is true - even if we didn't have the facts at the time and even if we get the facts from the story target at Discovery. But it is limited strictly to the allegations set out in the pleading. Arenas should not be permitted go astray and the questions clearly lead him astray.

See Brown, *Law of Defamation*, Tab 1, Case Book of the Responding Party

27. The Star avails itself here of the right to plead and prove a lesser defamatory meaning and justify that. If they win both arguments then they win the case, ie their meaning is the only mean and it is true. (See *Pizza Pizza*) The legal question of considerable significance is whether *Pizza Pizza* should be the basis for the Star to expand the law of libel to allow the reporting of mere allegations which they do not defend other than the fact they were made. This would not be permitted under the law of defamation as normally understood.
28. The Star denies the Plaintiff theory based on the words the Judge "pointed" to then "as the murders" and says only that they will prove the plaintiffs were "involved", and that "witnesses ... pointed to them".
29. The Star is not permitted to attempt to suggest the Plaintiffs are the murders of Verdugo, or that they are the murder of others etc., because they did not plead this. This topic is highly explosive because they Arduengos have said to immigration authorities repeatedly that they did witnessed mistreatment and killings and while in forced employment with the police and they fled Chile because of this.
30. The relevance of the area of questioning was explored in a motion before Master Kelly and the Star's attempt to seek such information was strictly limited. (See Order of Master Kelly)
31. A publisher cannot defend a defamation on the basis that someone else told them the

defamatory words. They must prove the truth of the words to make out their justification defence. Inspector Arenas evidence that some witness told him something does not help. What he was told is inadmissible hearsay.

32. The following proposed questions raise significant legal and evidentiary issues:

#1 - Inspector Arenas "knowledge of the process of criminal investigation and the relationship between the police and the investigating courts" - *if factual* is relevant. His opinions on this are irrelevant. The question is far too broad and will generate endless problems in Chile which cannot be addressed without knowledge of issue in Canadian defamation law. What does it mean to a Canadian that a "judge" points to someone as "the murderer". How do we understand an "investigating" judge? What are the facts of the Chilean method of investigation. This is probably a matter for expert evidence.

A related problem is - what documents might be referred to explain this? What are they? Where are the translations?

#2 - a proper background question

#3 - Other investigations are irrelevant and the question is improper.

#4 - Same as #1 - If the Police Officer sticks to the facts his answers would be proper.

The question should be rephrased to ask about facts.

#5 - The fact that he investigated is proper background. What his initial orders were - with the document as translated - is proper background. How the matter came to his attention asks for hearsay allegations which have not been pleaded or disclosed - other than the Report of Arenas provided.

#6 The history of the interviews with Arduengos is proper provided all documents upon



which he bases this evidence have been proved and translated before hand. The “significance of any evidence” is inadmissible opinion.

- #7 The statement of Navarrete is an statement of a witness that might be admissible at trial going to the proof the justification defence the Star has chosen and pleaded. But Inspector Arenas’ opinion why this points to Fernando Arduengo is opinion evidence and inadmissible.
- #8 The Report of Arenas to the Court Nov 4 1994 is opinion evidence. It is irrelevant. It is an attempt to infer the reasons and conclusions of the Judge which is hearsay.
- #9 The “significance” of the Court order of July 19 1994 cannot be answered. The “hard” answer to this is presumably in the actual laws of Chile and should be proved in translation and introduced by an expert. While in the normal course the opinion of police man in Canada about the effect of a summons or a subpoena might be thought proper, in the context of this case, we are not dealing with is not that simple question.  
  
If the “significance” of the “order” suggests that the Report represents the Court’s “opinion”, then it is inadmissible hearsay.
- #10 Same objections as #9
- #11 Same objection as #9
- #12 Complete hearsay and irrelevant.
- #13 Same objection as #9. Whether there was “jurisdiction” to apprehend the Arduengos is a matter of expert legal opinion.
- #14 This is a matter of expert legal opinion. If there is a legal opinion on this, it would

seem to be irrelevant to the issues in this case. The opinion of this witness is inadmissible.

#15 Irrelevant.

#16 If there are "other" investigations this witness would be giving hearsay evidence about them. If there are, the relevant documents have not been identified, disclosed or translated and this question, if otherwise thought proper, should be denied on this basis.

#17 The question is proper save an except the content of any witness statements which must be proved by direct evidence.

#18 This question should be answered by identifying translated copies of the relevant documents.

#19 This question is a fishing expedition. If there are documents other than ones Arenas report refers to, they should be identified and translated before the Chilean procedure. But more important, asking for the "significance" of the documents is another effort to get Arenas' inadmissible opinion on the record.

#### *Expense*

33. The very substantial expense of the extraordinary procedure to obtain the proposed evidence is also an important issue in this application. The question is whether it is fair to shift to the opposing party the additional expenses, let alone such a high level of expense, before trial.

#### *Translation*

34. Were the evidence of Arenas presented in the normal manner the evidence of the Defence witnesses and documentation would be presented to the Trial Judge in English *without*

*expense* and to opposing party before trial. Under the procedure proposed the cost of extensive translation services for the attendance at the procedure in Chile, document translation before and during the hearing in Chile and translation to local Counsel to act in the Chilean procedures are to borne by the Plaintiffs in advance of trial.

*Chilean Counsel*

35. Were the evidence of Arenas presented in the normal manner the Plaintiffs would not be required to retain a second lawyer in Chile to conduct the (limited?) cross-examination and related legal argument.

*Travel Time for Canadian Counsel*

36. Arguably the time for preparing to cross-examine Arenas and actually conducting same is part of the standard trial cost and should not be subject to an order here. But the expense of attending to get this evidence this evidence is extraordinary. The long trip to Chile and back is two full days - assuming there are no travel difficulties. "Recovery time" from such a trip is not a luxury, remembering this is trial evidence. The time involved cost in briefing Chilean counsel is substantial. This additional time should be paid in advance.

*Actual Travel Expenses*

37. Air fare and hotel and meal expenses should be ordered paid in advance of trial.

PART IV - ORDER REQUESTED

38. The Responding Parties requests as follows:

1. The application be dismissed with costs payable forthwith.
2. In the alternative that the Application be adjourned until all the



documents to which the witness will refer are provided by certified translation and the questions proposed for the witness can be properly considered.

3. In the further alternative that the Application be adjourned until the any expert report of the Defendants are produced.
4. In the further alternative, that the questions proposed in the Questions in the Letters Rogatory be revised in accordance with Submissions on relevance and this issue be adjourned to be considered after presentation of properly translated documents and any expert report.
5. In the further alternative that if and when Letters Rogatory are granted that it be with an order that the Plaintiff's full costs be paid in advance of trial.
6. Costs of this Application payable forthwith.

RESPECTFULLY SUBMITTED

February 3, 2005

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Charles Campbell  
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