Case Name:

United States v. Shull

Between
The United States of America, applicant, and
Leonard Fiessel, Robert Shull and Terry Shull,
respondents

[2004] B.C.J. No. 1434

2004 BCSC 908

Vancouver Registry No. CC991440

British Columbia Supreme Court
Vancouver, British Columbia

Goepel J.

Heard: May 31 and June 1 - 2, 2004.
Written submissions received: June 7, 10, 17 and 18, 2004.
Judgment: July 13, 2004.

(41 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- International law and conflict of laws -- Criminal law -- Extradition -- Procedure -- Evidence.

Application by the United States Government for the extradition of Shull and two others to face charges of securities fraud in the United States. Shull and the others challenged the admissibility of evidence submitted by the Government pursuant to section 32(1)(b) of the Extradition Act, on the ground that section 32(1)(b) was unconstitutional. The section was previously held unconstitutional and the issue was whether the court was bound to follow that decision.

HELD: Application dismissed. There was a long standing rule of practice relating to stare decisis which required a judge to follow the decision of another judge of the same court except in certain

circumstances. The rule ensured certainty in law. Since none of the specified exceptions applied, it was appropriate to follow the previous decision finding section 32(1)(b) unconstitutional. Accordingly, the evidence submitted by the Government in the proceeding was inadmissible. Shull and the others were discharged.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, ss. 1, 7.

Criminal Code, ss. 380, 463, 465(1)(c).

Extradition Act, ss. 23(2), 32(1)(a), 32(1)(b), 33(3).

Counsel:

Counsel for The United States of America: D.J. Strachan

Counsel for Leonard Fiessel: H.R. Anderson

Counsel for Robert Shull: R.C.C. Peck, Q.C., D.J. Martin, E. Gottardi, K.M. Eldred

Counsel for Terry Shull: M. Klein

GOEPEL J.:--

INTRODUCTION

1 The United of States of America (the "Requesting State") seeks the extradition of Leonard Fiessel, Robert Shull and Terry Shull (collectively, the "Respondents") to face charges on an indictment filed on April 8, 1998 in the United States District Court of the District of Massachusetts.

2 The indictment alleges a conspiracy to commit securities fraud by defrauding investors, securities fraud and wire fraud. All charges relate to trading in shares of Fairmont Resources Inc. ("Fairmont"), a company listed on the Alberta Stock Exchange, between September 1992 and March 1994.

PROCEDURAL HISTORY

3 The original Authority to Proceed ("ATP") was issued on November 5, 1999. The extradition hearing commenced before Loo J. on June 25, 2001. On June 29, 2001, Loo J. granted the

Respondents' preliminary motion and quashed the ATP on the basis that it contained insufficient particularity. An appeal of that decision was filed but subsequently abandoned.

4 On June 4, 2002, a new ATP was issued. It alleges that the Respondents conspired to defraud investors between September 1992 and March 31, 1994, contrary to ss. 380(1) and 465(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46, and that they defrauded certain named investors in the shares of Fairmont of money, contrary to s. 380(1) of the Criminal Code.

5 In February 2003, the Respondents brought an application before Allan J. seeking disclosure of documents, hoping to establish a factual foundation for a future application for a judicial stay of proceedings on the basis that unreasonable delay in pursuing the extradition had infringed their s. 7 Charter rights. Allan J. dismissed the application. She held that there was no air of reality to the submissions that the delay in commencement and recommencement of the extradition proceedings would affect the fairness of the extradition hearing. Her reasons are reported at [2003] B.C.J. No. 655, 2003 BCSC 444.

6 The extradition hearing commenced before me on December 10, 2003. At the outset, the Respondents challenged the admissibility of certain evidence. On January 16, 2004, I delivered reasons on that challenge. Those reasons are reported at [2004] B.C.J. No. 528, 2004 BCSC 64.

7 Sections 32-37 of the Extradition Act, S.C. 1999, c. 18 (the "Act") govern the admissibility of evidence at an extradition hearing. Section 32 provides, in part, as follows:

> (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:
>
> (a) the contents of the documents contained in the record of the case certified under subsection 33(3);
> (b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
> (c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

8 In this case, the United States relies on evidence submitted pursuant to s. 32(1)(b), being the contents of documents submitted in conformity with the terms of the extradition treaty between Canada and the United States. The Respondents did not challenge the constitutionality of s. 32(1)(b) at the evidentiary hearing.

9 The constitutionality of s. 32(1)(b) was successfully challenged in United Mexican States v. Ortega, [2004] B.C.J. No. 402, 2004 BCSC 210, in which Koenigsberg J. held that the section

violates s. 7 of the Charter and is not saved by s. 1. She held that s. 32(1)(b) should be read subject to s. 33(3) of the Act, which requires that, where the extradition partner wants to use a record of the case in an extradition hearing, the extradition partner must certify that the evidence summarized or contained in the record of the case is available for trial.

10 Koenigsberg J. released her decision that s. 32(1)(b) was unconstitutional on January 16, 2004, the same day I provided my reasons on the admissibility of the contested evidence. She released her decision on s. 1 of the Charter on March 2, 2004. Prior to the re-commencement of this extradition hearing, counsel for the Respondents gave notice of their intention to challenge the constitutionality of s. 32(1)(b).

ISSUES

11 When the extradition hearing resumed on May 31, 2004, counsel made submissions both on the correctness of the Ortega decision and whether the principles of judicial comity enunciated in Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.) bound me to follow Koenigsberg J.'s decision in any event. The parties also made submissions, on the assumption that the evidence was admissible, on whether the evidence would justify committal for trial in Canada. Counsel requested that I deal with that issue regardless of whether I found the evidence admissible.

AMENDMENT OF THE ATP

12 After the Respondents had submitted that there was no evidence to support Count 2 of the indictment, being the fraud on specific named investors, the Requesting State applied to amend the ATP to add these additional Canadian offences:

1. defrauding the public of money in the purchase and sale of Fairmont shares, contrary to s. 380(1) of the Criminal Code;
2. fraud affecting the public market, contrary to s. 380(2) of the Criminal Code;
3. attempting to defraud the public, contrary to ss. 380(1) and 463 of the Criminal Code; and
4. attempted fraud by affecting the public market, contrary to ss. 380(2) and 463 of the Criminal Code.

I set out a copy of the proposed amendment to the ATP as Appendix "A" to these reasons.

13 The power to amend an ATP is in s. 23(2) of the Act, which reads:

> The judge may, on application of the Attorney General, amend the authority to proceed after the hearing has begun in accordance with the evidence that is produced during the hearing.

14 The Respondents oppose the amendment. They submit it would be manifestly unfair and a miscarriage of justice to allow an amendment at this late date. They point out that the alleged offences took place between 1992 and 1994 and that the evidentiary base for the extradition of the Respondents has not changed since 2000.

15 Counsel for the Requesting State points to the words of the section which allow a judge to make an amendment after a hearing has begun. She further says that it is only in the course of closing submissions that the defence raised a question about the sufficiency of evidence to commit for the alleged offences. She notes that in United States of America v. Schrang (1997), 114 C.C.C. (3d) 553 (B.C.C.A.), the B.C. Court of Appeal held that evidence insufficient to establish the Canadian offence of fraud was sufficient to establish the offence of attempted fraud. She asks that I find the same here.

16 I am prepared to allow the amendment. The amendment does not change the substantive case the Respondents face and it is consistent with the evidence the Requesting State has produced during the hearing.

THE CONSTITUTIONALITY OF S. 32(1)(b) OF THE ACT

17 The Respondents submit that Hansard Spruce Mills binds this court to follow Ortega. Alternatively, they submit that I should follow Ortega in any event because it is correctly decided.

18 The Requesting State submits that Ortega is wrongly decided. They also submit that the decision in Hansard Spruce Mills does not preclude a Supreme Court judge from dealing with a matter de novo and reaching a different conclusion from another judge of the same court, particularly in a constitutional case. They further submit that even if Hansard Spruce Mills is otherwise binding, this case falls under one of the recognized exceptions in Hansard Spruce Mills because subsequent decisions have affected the validity of the impugned judgment.

19 Hansard Spruce Mills was delivered on August 16, 1954. Wilson J. (as he then was) concluded at 592:

> I will only go against a judgment of another Judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
> (c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

> If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

20 In explaining his decision, Wilson J. said earlier at 592:

> I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.

21 Hansard Spruce Mills has been cited on over 350 occasions. The B.C. Court of Appeal endorsed the rule in Re Ottaway (1980), 110 D.L.R. (3d) 231 (B.C.C.A.), in which Seaton J.A., while allowing the appeal on the merits, said at 233-34:

> Whether that change in. s. 25 might have permitted the Chambers Judge to distinguish the Ruscheinsky decision, [1948] 2 W.W.R. 58, I need not decide. Barring a distinguishing feature, I think that the Chambers Judge was correct in following a former decision of a Judge of the same Court: see Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590, 34 C.B.R. 202, 13 W.W.R. (N.S.) 285.

22 Southin J.A. questioned the applicability of Hansard Spruce Mills in constitutional matters in R. v. Silbernagel, [2000] B.C.J. No. 734, 2000 BCCA 251. Silbernagel concerned the constitutionality of photo radar legislation. A justice of the peace found the legislation to be constitutional, although some other justices of the peace had said the legislation was unconstitutional. Mr. Silbernagel appealed unsuccessfully to the Supreme Court of British Columbia. Mr. Justice Hollinrake dismissed his application for leave to appeal. The matter then came on for leave to review Mr. Justice Hollinrake's order. In oral reasons, concurred in by Newbury J.A., Southin J.A. in dismissing the leave application said at [paragraph] 4:

> In my view Hansard Spruce Mills sets down a rule of practice, a series of rules for trial judges in the application of the doctrine of stare decisis. It is not, however, a statute and it is not the law of the Medes and Persians. When a question of constitutionality arises, a trial judge, whether a Justice of the Peace or anything else, must address his or her own mind to the question and come to a conclusion in the absence of authority binding from above. There was no authority binding from above on the Justice of the Peace who dealt with Mr. Silbernagel.

23 Prowse J.A. agreed that the application for review should be dismissed. In regard to Hansard Spruce Mills, she said at [paragraph] 6:

> I would prefer not to express any firm views with respect to the effect of the Hansard Spruce Mills decision on constitutional questions simply because we haven't had the benefit of argument on that point.

24 The views of Southin J.A. are to be contrasted with those expressed by Lambert J.A. in John Carten Personal Law Corporation v. British Columbia (Attorney General) (1997), 40 B.C.L.R. (3d) 181 (C.A.). In John Carten, the petitioner challenged the constitutional validity of a provincial law imposing a tax on fees for legal services. The same law had successfully withstood a challenge in an earlier British Columbia Supreme Court decision which had not been appealed. When the matter came on for hearing in this court, Lowry J. (as he then was), in reasons reported at [1995] B.C.J. No. 1357 (S.C.), dismissed the petition on the basis of Hansard Spruce Mills without hearing it on the merits. At [paragraph] 6, Lowry J. specifically rejected the proposition that Hansard Spruce Mills did not apply in constitutional cases. He said at [paragraph] 7:

> I consider that a litigant can always raise new and even "old" arguments -- arguments that have previously been made and rejected -- in a case where the validity of legislation is at issue. But to the extent that the circumstances are such that the principle in re Hansard Spruce Mills applies, a previous determination made by this court will normally prevail. The litigant's recourse lies in an appeal. If that were not so, the certainty of this court's decisions would be much impaired. Its determination that a piece of legislation was valid would be only as certain as the success of the argument that might be advanced in the next case it heard. There would be no closure of the issue.

25 On appeal it was argued that Lowry J. should not have applied Hansard Spruce Mills. In regard to that submission, Lambert J.A. made the following comments at [paragraph] 7:

> Hansard Spruce Mills Ltd. embodies a rule of judicial comity. It was propounded by Mr. Justice Wilson, later Chief Justice, as a guide for one trial court judge examining an issue which had already been considered and decided by another judge of the same court. It is not a principle that directly binds this Court in dealing with our own previous decisions. Our rules for judicial comity are set out in Bell v. Cessna Aircraft Co. (1983), 46 B.C.L.R. 145 ([B.C.C.A.]) and British Columbia v. Worthington (Can.) Inc. (1988), 29 B.C.L.R. (2d) 145 ([B.C.C.A.]). What is more, this Court is not obliged to decline to review a Supreme Court of British Columbia decision because of the Hansard Spruce Mills Ltd. rule, since we are not bound to follow previous Supreme Court of British Columbia decisions. So no matter what view we might form about whether Mr. Justice Lowry was correct in applying Hansard Spruce Mills Ltd. in this case, we would still be obliged to consider the eight issues that Mr. Carten wished to raise before Mr. Justice Lowry and which he has argued before us. It follows that in this Court the Hansard Spruce Mills Ltd. issue is moot. I do not think that the

> Supreme Court judges, who developed the Hansard Spruce Mills Ltd. rules and who are familiar with their application, need to have any issues connected with the application of those rules resolved by this Court. If the application given to the Hansard Spruce Mills Ltd. rules by Mr. Justice Lowry proves, with the passage of time, to be an impediment to the administration of justice, and if the problem is not correctable by the Supreme Court itself, then no doubt it will come back to this Court and can be considered here in the light of the particular problem that might have arisen. So I do not propose to consider the question of whether Mr. Justice Lowry ought to have applied the Hansard Spruce Mills Ltd. rules.

26 In R. v. Benham (2003), 184 B.C.A.C. 29, our Court of Appeal was again asked to consider a trial judge's application of Hansard Spruce Mills in the context of a constitutional challenge. In Benham, the issue was a regulation that gave B.C. Hydro access to meters and other apparatus on its customers' premises. The trial judge had determined that he did not have to analyze the constitutionality of the regulation because he was bound to follow an earlier decision in which a trial judge had held that the regulation did not breach the s. 8 Charter rights of the owner occupants of property to which B.C. Hydro provides electrical utility services. The appellant argued that the trial judge should not have applied Hansard Spruce Mills and should have considered the constitutional issue anew, notwithstanding the earlier decision.

27 The Court of Appeal did not suggest the trial judge was wrong to apply Hansard Spruce Mills in Benham. Instead, it proceeded to analyze the original decision upon which the trial judge had relied. One of the judges on the panel was Newbury J.A., who had also sat on Silbernagel.

28 Hansard Spruce Mills sets forth an internal rule of practise for the British Columbia Supreme Court respecting matters of stare decisis. It sets forth guidelines by which members of the Supreme Court should treat judgments of their fellow judges. I do not accept that the Court of Appeal intended in Silbernagel to overturn 50 years of Supreme Court jurisprudence. It is important to note that the matter in Silbernagel came before the Court as an application for leave to appeal. At [paragraph] 3, Southin J.A. phrased the question before the Court as follows:

> In other words, he wants us to hear an appeal on the application of In Re Hansard Spruce Mills ....

29 When the Court of Appeal refused leave, it accordingly declined to address the issue of the application of Hansard Spruce Mills to lower court rulings. Southin J.A.'s comments concerning Hansard Spruce Mills are obiter dictum and, although entitled to respect, are not binding: see Pacific Hunter Resources Inc. v. Moss Management Inc. (2002), 100 B.C.L.R. (3d) 164 (S.C.) at [paragraph] 28 and the cases cited therein.

30 The Requesting State submits that I should not follow Ortega because it is contrary to several recent decisions that have upheld the constitutionality of s. 32 as a whole. It cites United States v.

Yang (2001), 157 C.C.C. (3d) 225 (Ont. C.A.); Germany v. Ebke, [2003] 9 W.W.R. 61 (N.W.T.C.A.); United States v. Gunn (2003), 181 Man.R. (2d) 136 (Q.B.); United States v. Ferras (2004), 184 O.A.C. 306; United States v. Latty, [2004] O.J. No. 1076 (C.A.); United States v. McDowell, [2004] O.J. No. 1190 (C.A.); United States v. Wacjman (2002), 171 C.C.C. (3d) 134 (Q.C.A.); United States v. English (2002), 169 C.C.C. (3d) 518 (B.C.S.C.) and my reasons in the evidentiary hearing.

31 At [paragraph] 8 of my earlier reasons, I said:

> Section 32 is constitutional: see United States v. Yang (2001), 157 C.C.C. (3d) 225 (Ont. C.A.); Germany v. Ebke, [2003] 9 W.W.R. 61 (N.W.T.C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 178; United States v. Gunn, [2003] M.J. No. 440 (Q.B.). Although all of the above constitutional challenges focused on contents of documents contained in a record of the case under paragraph 32(1)(a), the judgments did not distinguish between the various provisions of section 32 in assessing its constitutionality.

32 Those reasons, which I prepared prior to Ortega being released, did not distinguish between s. 32(1)(a) and s. 32(1)(b). The constitutionality of s. 32(1)(b) was not before me at that time.

33 Each of the other aforementioned cases considered the constitutionality of s. 32 in the context of cases where the challenged evidence was introduced by way of a record of the case under s. 32(1)(a). Although the constitutionality of s. 32(1)(b) was mentioned in some of the cases, it was not the primary issue. Ortega is the only case which has specifically imposed the constitutional imperative that the evidence proffered under s. 32(1)(b) be available for trial. Yang, Ebke, Wacjman and English were cited to Koenigsberg J..

34 The Requesting State also relies Wong J.'s brief oral reasons in India v. Singh (14 June 2004), 2279 (B.C.S.C.). Singh dealt with extradition in the context of a person sought for the imposition or enforcement of a sentence as distinct from a person sought for prosecution. Wong J. denied the challenge to the validity of s. 32(1)(b) in these words:

> Having received full argument from both counsel on this particular matter, I adopt the submissions in whole given by counsel for the State of India, and, in particular the submissions outlined in paragraphs 119, 120 and 121 of his written brief.

35 In the submissions Counsel for India distinguished Ortega on the basis that it involved a person sought for prosecution. He noted that there is a significant difference in the circumstances of a person sought for the enforcement of a sentence and those of a person sought for prosecution. Alternatively, counsel argued that Ortega was wrongly decided.

36 Given the strictures of Hansard Spruce Mills, which counsel also referred to in submissions, I

conclude that Wong J. chose to distinguish Ortega. If he had intended to find that Ortega was wrongly decided he would have done so directly.

37 The Requesting State further submits that the correctness of the decision in United Kingdom v. Tarantino (2003), 177 C.C.C. (3d) 284 (B.C.S.C.), upon which Koenigsberg J. relied has been affected by the decisions in United States v. Lillemo (17 November 2003), 21006 (B.C.S.C) and United States v. Freimuth, [2004] B.C.J. No. 197, 2004 BCSC 154. In both Lillemo and Freimuth, the court was asked to assess the reliability of the certification of the record of the case. Neither case dealt with the constitutionality of the evidentiary provisions of the Act. They are not decisions which affect the validity of Ortega.

38 Although the rule in Hansard Spruce Mills is a discretionary rule of practice, it is one of long standing. The purpose of the rule is to bring certainty to the law. Ortega is the only case which has examined the constitutionality of s. 32(1)(b) in the context of a person sought for prosecution. Therefore, I should follow Ortega unless one of the exceptions listed in Hansard Spruce Mills applies. To do otherwise would unsettle the law.

39 In my opinion, none of the exceptions in Hansard Spruce Mills apply and, accordingly, I am bound to follow Ortega. I make no comment as to its correctness; it is for the Court of Appeal to determine whether Ortega was properly decided. In the result, for the reasons Koenigsberg J. cited in Ortega, the evidence the Requesting State submitted on this extradition proceeding is not admissible.

SUFFICIENCY OF EVIDENCE

40 As noted, counsel requested that, regardless of my decision on the admissibility of the evidence, I express my views on the sufficiency of the evidence. Having ruled the evidence inadmissible, I do not believe it is appropriate that I do so. I do note, however, that other than the question of the identification of Terry Shull and the sufficiency of the evidence in regard to Count 2, the Respondents did not dispute that the evidence, if admissible, was sufficient to commit them for trial in Canada on the conspiracy offence found in Count 1 and on the four new counts in the amended ATP.

CONCLUSION

41 In summary, I grant the Requesting State's application to amend its ATP. I find that the evidence it submitted on the extradition hearing is inadmissible for the reasons set out in Ortega. The application for committal is dismissed and the Respondents are discharged.

GOEPEL J.

* * * * *

APPENDIX "A"

Court File No. CC991440

Vancouver Registry

SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the Extradition Act

BETWEEN:

THE ATTORNEY GENERAL OF CANADA,

on behalf of the UNITED STATES OF AMERICA

APPLICANT/REQUESTING STATE

AND:

LEONARD FIESSEL, ROBERT SHULL and TERRY SHULL

RESPONDENTS

PROPOSED AMENDMENT TO THE AUTHORITY TO PROCEED

(#2 dated 4 June 2002)

PURSUANT TO s. 23(2) OF THE EXTRADITION ACT

The Canadian offences which correspond to the alleged conduct are:

1. "As currently worded."
2. "As currently worded."
3. Fraud, by defrauding the public of money in the purchase and sale of shares of Fairmont Resources Inc. by:

    * buying and selling shares in a manner to create the impression that it

was a heavily traded stock;

* using manipulative trading practices to artificially inflate the price of the shares with intent to mislead investors regarding the real value of the shares; and
* making payments of Fairmont Resources Inc. shares and money to brokers to promote the stock as an investment and to sell the shares at inflated prices to investors;

contrary to subsection 380(1) of the Criminal Code.

4. Fraud affecting the public market, by:

* buying and selling shares in a manner to create the impression that it was a heavily traded stock;
* using manipulative trading practices to artificially inflate the price of the shares with intent to mislead investors regarding the real value of the shares; and
* making payments of Fairmont Resources Inc. shares and money to brokers to promote the stock as an investment and to sell the shares at inflated prices to investors;

contrary to section 380(2) of the Criminal Code.

5. Attempt fraud, by defrauding the public by:

* buying and selling shares in a manner to create the impression that it was a heavily traded stock;
* using manipulative trading practices to artificially inflate the price of the shares with intent to mislead investors regarding the real value of the shares; and
* making payments of Fairmont Resources Inc. shares and money to brokers to promote the stock as an investment and to sell the shares at inflated prices to investors;

contrary to sections 380(1) and 463 of the Criminal Code.

6. Attempt fraud by affecting the public market, by:

* buying and selling shares in a manner to create the impression that it was a heavily traded stock;

* using manipulative trading practices to artificially inflated the price of the shares with intent to mislead investors regarding the real value of the shares; and
* making payments of Fairmont Resources Inc. shares and money to brokers to promote the stock as an investment and to sell the shares at inflated prices to investors;

contrary to sections 380(2) and 463 of the Criminal Code.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2004.

"Deborah J. Strachan"

Deborah J. Strachan, Counsel for the Applicant/Requesting State

cp/i/qw/qlsmw/qlemo/qlbrl