Durakovic v. *Guzman et al.*

Court File No.: CV-06-319553

Motion Heard: April 7/16

In attendance:	M. Klippenstein/C. Wanless, for the plaintiff	416-598-9520, f.
	D. Richmon, for the defendant Guzman	416-323-9132, f.
	G. Wray, for the police defendants	416-361-2773, f.
	G. Asaro, for the CAS defendants	416-593-5437, f.

By the court:

[1] Dr. Durakovic is to attend to be examined for discovery in Ontario--at a place, on a date and at a time to be agreed or, failing agreement, on 10 days' notice. For the reasons that follow, it is my view that what is most just and convenient (*Midland Resources Holding Limited et al.* v. *Shtaif et al.*, (2009) 99 O.R. (3d) 550 (S.C.J.), at para. 22), having regard to the interests of all of the parties, is that Dr. Durakovic be examined in person in the province in which he commenced his action, in which his lawyers work and reside and in which the defendants and their lawyers work and/or reside. I accept that there is no presumption for or against video conferencing but, on the facts of this case, the balance tips in favour of Dr. Durakovic attending in person to be examined for discovery in Ontario.

[2] On this motion, Dr. Durakovic asks to be excused from attending, personally, to be examined for discovery in Ontario. His request is founded on his stated belief that "crossing the border into Canada is [for him] a high-risk proposition" and that "attempting to cross the border would automatically trigger national security measures with grave consequences" (affidavit of Dr. Durakovic, sworn February 3/16, at para. 44).

[3] What is an important consideration for me, here, is that Dr. Durakovic's stated belief does not accord with his experiences over the past 12 years. Freely and without arrest, interview or incident, Dr. Durakovic has travelled the world since allegations about his having ties to terrorist organizations were first made in October 2004—including to and from Canada.

[4] According to a document entitled "ICES Travel History", produced by the Canada Border Services Agency, Dr. Durakovic travelled to Canada at least 14 times between October 2004-May 2008—with his first foray into Canada being only two months after the allegations of terrorist ties (here at issue in the litigation) were first made. During that time period, Dr. Durakovic had access to his two daughters and travelled to visit them in Ontario on a weekly basis from his place of work in Sayre, Pennsylvania. At no time was Dr. Durakovic denied access into Canada; and, neither was he interviewed or arrested. And to Dr. Durakovic's knowledge, there are no warrants for his arrest, at present. While Dr. Durakovic was once arrested in Canada (i.e. after the allegations with which he takes issue were made), that arrest had nothing to do with allegations of terrorism (with which he takes serious issue and which he alleges to be defamatory) but, rather, with allegations that he uttered death threats.

[5] Mr. Richmon, who acts for Dr. Durakovic's former wife, submits that the plaintiff raised no concerns about cross-border travel when he was required to travel from the United States into Ontario during 2006-2008 for family and criminal law trials in which he was involved. One would have thought, he says and I agree, that Dr. Durakovic's concerns would have been more acute then—being more proximate in time to when allegations as to his stated terrorist ties were made.

[6] Not only has Dr. Durakovic never been denied access to Canada or been charged with terrorist-related offences but he admits that he has never even been questioned by CSIS, the CIA, the FBI or the U.S. Department of Homeland Security.

[7] Dr. Durakovic holds Canadian, U.S. and Croatian passports. He currently resides in the United States but, at least between 2004 and 2008, resided in Aurora Ontario (qq. 226-229, cross-examination of Dr. Durakovic). He has been a citizen of Canada since at least October 2004. He holds hospital privileges at University Hospital (REBRO) in Croatia. He also was an officer in the United States Army at the time that the terrorism allegations here at issue were made (q. 107, cross-examination of Dr. Durakovic) and is currently an officer in the United States Army Reserve—this without restriction.

[8] Since 2004, Dr. Durakovic has travelled to England, France, Germany, Switzerland, Austria, Hungary, Croatia, Italy, Switzerland, Turkey, Denmark, Sweden, Greece, Iraq, Saudi

Arabia, Kuwait and Bahrain (in addition to Canada)—also without restriction. He has never been denied access to those countries; and, neither does he have any information as to his being on a no-fly list in Canada or the United States. The concerns he now raises have in no way impeded his ability to work and travel for more than one decade.

[9] Dr. Durakovic's present hesitation in coming to Canada is borne of what he admits to be "deduction". He believes that his name has not been cleared in Canada and that he is still under suspicion of having terrorist ties--which suspicions, he suggests, have been shared among various intelligence agencies. He posits, though, that his concern is founded on "a feeling", a feeling that lingers because he has "never received any word or hint of any regret for wrongdoing" and because "Canadian police authorities have never had [the] decency to apologize" (cross-examination of Dr. Durakovic, at qq. 148 and 149).

[10] The police defendants provided Dr. Durakovic with an opportunity to have himself searched on the CPIC database to support or attenuate his concerns. Interestingly, he declined to agree to such a search--though it would have revealed any outstanding criminal charges and warrants for his arrest.

[11] I acknowledge that there is no evidence before me to suggest that Dr. Durakovic has entered Canada on a passport since May of 2008. Mr. Richmon submits that Dr. Durakovic's failure to travel to Canada and his resistance to travelling to Canada now stem from the loss of access to his two daughters and an outstanding Order requiring him to pay spousal support, child support and property equalization. Without in any way minimizing Dr. Durakovic's upset and consternation that found his claims herein, I admit to finding it curious that travel that he now considers a "high risk proposition" did not seem to trouble Dr. Durakovic when it might have most (i.e. before he had 12 years of unfettered travel across international borders to give him comfort and before the Canadian government and travel officials had 12 uneventful travel years, on the part of Dr. Durakovic, to give them comfort).

[12] I accept, as Mr. Klippenstein posits, that with the rise of ISIS, the Canadian Government and Canadian law enforcement agencies are increasingly concerned about "extremist travellers". But, so too, are the governments of other Western countries to and from which Dr. Durakovic has travelled without incident. And while the Canadian authorities have been granted "expansive

powers of arrest and detention...and expanded powers of information sharing...", as Mr. Klippenstein submits, so too have the U.S. (and other Western authorities). No Western country to which he has travelled throughout the past several years has impeded Dr. Durakovic's ability to live, work and travel freely.

[13] I recognize that video conferencing can be a viable and desirable alternative to testifying or examining a witness in person, as the plaintiff here suggests; but, video conferencing is not without potential problems and limitations. Issues can and do arise affecting connectivity, video quality and audio quality. These kinds of technical problems came into play, in a significant way, during Dr. Durakovic's cross-examination in respect of this motion--as recently as March/16.

[14] Further, there are at least one thousand pages of documents on which examinations herein will need to be conducted—including video and audio recordings of poor but discernable quality. While I accept that there are available technological solutions for the management of documents such as "Exhibit Bridge" and for the loading of electronic copies of recordings on computers, as the plaintiff posits, the cost of such solutions is not broken down for my consideration. And the use of such solutions necessarily adds to the complexity of the examination process.

[15] In the case at bar, the plaintiff's trip to Ontario to be examined would involve a short flight with a small cost (estimated at approximately $300.00 CAD), plus accommodation costs. This is less expensive than the cost of video conferencing which here would total more than $3,000.00 (CAD)—before factoring in document management solutions that would necessarily increase that cost. I note that the defendants have agreed to reimburse Dr. Durkavokic's reasonable travel expenses.

[16] Where, as here, credibility will be a key issue (this action involving defamation claims), and where, as here, two courts have commented on certain challenges that presented in the questioning of Dr. Durakovic under oath--including M.A.C. Scott, J. who observed what was described as Dr. Durakovic's tendency to summarily deal with or deflect any attempt by counsel to clarify his position or to make a parallel or contrasting review of previous testimony (*Durakovic* v. *Durakovic*, 2008 CarswellOnt 5329 (S.C.J.), at para. 39), and Maddalena, J. who was of the view that the plaintiff "dismisses and disengages with anyone who shares a different

opinion from his own" (*Children and Family Services For York Region* v. *Durakovic et al.*, FC-04-019783-01, at paras. 202 and 296)--it is, in my view, more fair and just that all counsel be permitted to look Dr. Durakovic in the eye, as it were, put documents to him directly and, from close up, observe his verbal cues and body language. While it may well be true that the demeanour of a witness is of greater importance to the trier of fact than to counsel, (*Midland Resources Holding Limited et al.* v. *Shtaif et al.*, *supra*, at para. 27), that does not mean that counsel ought lightly to be deprived of the ability to be face-to-face with the witness and to make the assessments that are more easily made without a screen as a barrier. It is also often easier for counsel to reorient a dismissive and disengaged witness (having regard to the assessments of Justices Scott and Maddalena but making no comment on them), to redirect him, and to reengage him from across a table than it is from a distance, with the threat of technical difficulties looming large (or even small).

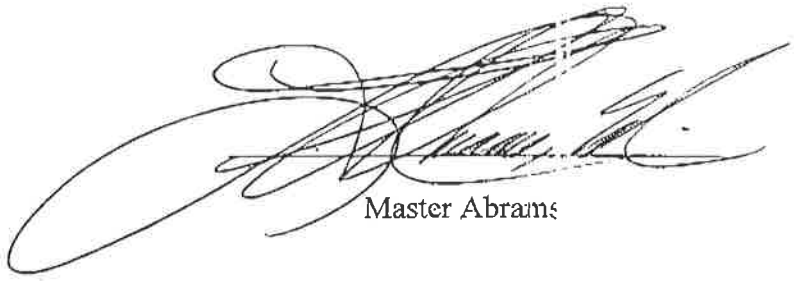
[17] I note, parenthetically, that Dr. Durakovic doesn't object to an examination in person, *per se*--only to an examination in Ontario. I note too that he has not raised any health or monetary issues that would preclude his travelling to be examined. To have defendants' counsel travel to the United States, documents in hand, would be a greater burden and significantly more expensive than to have Dr. Durakovic travel to Ontario where his Ontario lawyer works and where his documents are found. And, to date, there has been no offer by Dr. Durakovic to bear the costs of defence counsel's travels.

[18] Dr. Durakovic has admitted that he "...personally [has] no concerns [h m]self because [he is] not a threat to Canada or to anyone else (cross-examination of Dr. Durakovic, at q. 126) and that he doesn't know why crossing into Canada might be a high risk proposition (cross-examination of Dr. Durakovic, at q. 199). But he thinks that it will be. His supposition in this regard, when looked at in the context of his actual experiences over the years, is not sufficient to have me supplant what, in the particular circumstances of this case, I consider to be a more efficient, more efficacious, less costly and more direct manner of examining Dr. Durakovic.

[19] Ms. Asaro asks that a sealing order attach to the motion materials herein, in that they disclose information with respect to minor children that ought not to form part of the public record pursuant to the *Child and Family Services Act*. There being no objection in this regard, the Order is granted.

[20] Failing agreement as to the costs of this motion, I may be spoken to.

June 2/16



Master Abrams