

CANADA / JUDGMENT

## France v. Shu

2022 BCSC 2284

### COURT

Supreme Court of British Columbia

### DECIDED

30 December 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 2284 France v. Shu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

France v. Shu,

2022 BCSC 2284

Date: 20221230

Docket: OTR2022009

Registry: Vancouver

In the Matter of an Application to Vacate Evidence-Gathering Orders

Issued under s. 18 of the Mutual Legal Assistance in Criminal Matters Act

Between:

The Attorney General of Canada

on Behalf of The Republic of France

Applicant

And

Aylwin Shu and Ty Mey Eap

Respondents

Before: The Honourable Associate Chief Justice H. Holmes

Reasons for Judgment

Counsel for the Crown:

D. Majzub

Counsel for the Respondents:

M. Bolton, K.C.

S. Mahmood

Place and Date of Hearing:

Vancouver, B.C.

October 5, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 30, 2022

## INTRODUCTION

- [1] The Attorney General applies for an order vacating the evidence-gathering orders made on June 7, 2022 that require the respondents, Ty Mey Eap and Aylwin Shu, to appear in Vancouver, BC for examination by authorities from France in connection with a French criminal investigation.
- [2] The examinations have not taken place, and the Attorney General explains that the French authorities have now withdrawn their request to examine the respondents in Canada under the orders.
- [3] The respondents ask the Court to either decline the Attorney General's application for the orders to be vacated, or adjourn the application generally. They do so because the French authorities served the respondents in August 2022 with summonses to appear in Paris, France for a first appearance in an investigation in which their indictment is under consideration.
- [4] The respondents submit that the basis for the French authorities' change of approach requires further scrutiny before the Court should consider vacating the orders, because the change would cause the respondents to lose the immunity protections they have under the orders and Canadian law.

## BACKGROUND

- [5] I granted the evidence-gathering orders ex parte under s. 18 of the Mutual Legal Assistance in Criminal Matters Act, along with similar orders directed to a number of other people in relation to the same French investigation. The orders directed to the respondents each read as follows:

UPON HEARING THE EX PARTE APPLICATION made this day by Diba Majzub and Kathleen Tanner, counsel for the Attorney General of Canada on behalf of the Republic of France;

AND UPON READING the Treaty Between the Government of Canada and the Government of the Republic of France on Mutual Assistance in Penal Matters; sections 17 and 18 of the Mutual Legal Assistance in Criminal Matters Act; and the affidavit of Corporal George Amoako affirmed June 6, 2022;

AND UPON BEING SATISFIED that there are reasonable grounds to believe that offences have been committed and that evidence of their commission is available in Canada;

IT IS HEREBY ORDERED pursuant to s. 18(2) of the Mutual Legal Assistance in Criminal Matters Act:

1. THAT upon service of a copy of this order and a Notice of Examination (to be prepared by the Department of Justice), [name of respondent] (the "Witness") of [address of respondent], British Columbia, shall attend the offices of the Department of Justice located at 900 -- 840 Howe Street, Vancouver, British Columbia, on the date and time set out in the Notice of Examination and remain there until excused, to testify under oath or solemn affirmation, and to answer questions about [their] knowledge of the matters set out the request relating to the investigation of the offences in this matter (the "Examination").
2. THAT Deborah J. Strachan, Q.C., General Counsel, Department of Justice Canada, be designated pursuant to s. 18(2)(c) of the Mutual Legal Assistance in Criminal Matters Act as the person before whom the Examination is to take place; AND THAT such other counsel as may be named by Deborah J. Strachan, Q.C., be designated pursuant to s. 18(2)(c) of the Mutual Legal Assistance in Criminal Matters Act, as the person before whom the examination is to take place if Deborah J. Strachan, Q.C. is not available.
3. THAT the Examination shall be conducted by either or both of:
  - a. Brice Hansemann, Vice-président chargé de l'instruction, Pôle financier, Criminalité financière et cybercriminalité (Vice-President in charge of the Pré-Trial Investigation, Financial Unit, Financial Crime and Cybercrime);
  - b. Elise Tréguier, Vice-président chargé de l'instruction, Pôle économique et financier, Section criminalité financière et cybercriminalité (Vice-President in charge of the Pré-Trial Investigation, Economic and Financial Unit, Financial Crime and Cybercrime Section).
4. THAT the following persons are permitted to be present at the Examination:
  - a. [S.B.], greffière d'instruction (Court Clerk); and
  - b. [J.J.] (Certified French-English Court Interpreter).

5. THAT the Witness be informed that any evidence given by the Witness will not be used against them in any criminal trial or other criminal proceeding, except for a prosecution for perjury in the giving of that evidence or the giving of contradictory evidence.
  6. THAT [S.B.] may prepare a transcription of the Examination.
  7. THAT the Witness shall be served with a Notice of Examination and a copy of this Order at least three days before the Examination date. The examination date shall make reasonable accommodation for the Witness's schedule. The Witness may agree that the Examination for which the Notice is given occur before the expiration of the three days.
  8. IT IS FURTHER ORDERED pursuant to s. 19(1) of the Mutual Legal Assistance in Criminal Matters Act that Deborah J. Strachan, Q.C., or such other counsel as may be named by the Department of Justice Canada before whom the examination takes place, shall make a report to a judge of this court regarding the examination ordered herein.
- [6] Notices of examination were served on the respondents on Wednesday, June 8, 2022 requiring them each to attend for examination on Monday, June 13, 2022 at different specified times.
- [7] The respondents contacted Mr. Bolton on June 9, 2022. Mr. Bolton was also retained by several of the other people to whom similar evidence-gathering orders had been directed, and he wrote to the Attorney General on June 9 requesting that all of the interviews be rescheduled to allow his clients sufficient time to retain legal counsel and obtain legal advice. Mr. Majzub responded that day, agreeing to reschedule the examinations that were scheduled for imminent dates, including the respondents', but declining to reschedule the examinations scheduled for June 15 and 16, six or seven days in the future. Mr. Majzub also provided some information about the French investigation, the immunity afforded by the terms of the evidence-gathering orders, and certain rights of those to whom orders had been directed set out in s. 18(7) of the Act.
- [8] As a result of Mr. Bolton's request to Mr. Majzub, the respondents' examinations did not take place as originally scheduled. Examinations of some of the other people did take place at the scheduled times or were rescheduled to dates in October 2022.
- [9] The respondents' examinations never were rescheduled, and have not taken place.
- [10] On August 9, 2022, the French authorities issued the summonses to each of the respondents, summoning them to appear at the Cour d'Appel de Paris, Tribunal Judiciaire de Paris, on November 9 and 10, 2022 respectively for "your first appearance in an investigation". In accordance with the Treaty Between the Government of Canada and the Government of the Republic of France on Mutual Assistance in Penal Matters, the summonses were served on the respondents by Priority Post, together with a letter dated August 25, 2022 from the Department of Justice Canada's International Assistance Group, which read in full as follows:

**Re: Request by France for Service of a Notice of Summons**

You will find enclosed documents we received from the Republic of France. The French authorities have requested that the attached summons be served on you in accordance with the Treaty between the Government of Canada and the Government of the Republic of France on Mutual Assistance in Penal Matters.

According to the attached documents from the Cour d'Appel de Paris (the Court), you are summoned to appear before the Court November 10, 2022.

If your intention is to travel abroad, we encourage you to take all necessary precautionary measures by obtaining Covid-related information regarding travel to and from France and to assess your personal situation, including under the present circumstances, retaining the services of a lawyer if you wish to be represented in France.

Furthermore, if you wish to attend the hearing virtually, please contact the Court directly in order to make the necessary arrangements.

Please be advised that these documents act only as a notification and do not impose any legal obligations pursuant to Canadian law on you.

If you need further information with respect to the significance of these documents pursuant to French law, please contact the French authorities directly.

[11] Mr. Majzub wrote to Mr. Bolton on September 11, 2022 suggesting dates for examinations of some of Mr. Bolton's clients whose examinations were still outstanding, but advising that, for the respondents, the French authorities no longer wished to interview them. Mr. Majzub said that he would therefore arrange for the orders for the respondents' examinations to be vacated.

[12] Mr. Bolton responded on September 12, 2022 confirming dates for his other clients, but expressing serious concern that to vacate the evidence-gathering orders directed to the respondents would circumvent the protection they had as witnesses under those orders and the Act, and would appear to do so only because the respondents had exercised their right to retain counsel, and had therefore delayed the original examination dates. Mr. Bolton's representations were more extensive than this, but are conveniently encapsulated in the following extract from his letter (with the last names of the other clients replaced by initials):

On June 15 and 16, 2022, Mr. N., Ms. M., and Mr. L. appeared for their examinations with the French investigating judges. You advised us that you would follow up with us about rescheduling the pending examinations of Mr. Eap, Ms. L., Mr. Shu, and Mr. T. At that time, we reiterated to you and the French authorities that our clients agreed to cooperate with the French investigation as witnesses, would appear at the earliest possible date convenient for the French authorities, and even offered to appear via video conference if necessary.

Despite your written agreement to reschedule our clients' examinations so that they could consult with counsel and our clients' ongoing efforts to comply with the existing Evidence Gathering Orders, however, the French investigating judges are now seeking to summons Mr. Eap and Mr. Shu to appear in France. Mr. Eap, Mr. Shu and Ms. L. each recently received a summons by registered mail for a First Appearance Examination by the same French investigating judges to take place in person in November 2022 in Paris, France.

This recent development is most disconcerting. Less than three months ago, Mr. Eap and Mr. Shu were identified by the French authorities as witnesses and granted specific legal protections under the MLACMA. In reliance on Associate Chief Justice Holmes' Orders, they then sought a modest postponement of their examinations so that they could consult with counsel. Throughout the entire process, they remained committed to cooperating fully with the investigation and appearing for their Court-ordered examinations at the earliest possible date that would be convenient for the French authorities. Yet, having reasonably relied on your office's written agreement to reschedule the examinations, they are now being denied the very protections that were explicit in Associate Chief Justice Holmes's Orders, and are in parallel being summoned for interrogation and for potential prosecution in France.

On the face of it, the French authorities' inconsistent approach to our clients appears to be an attempt to circumvent the fundamental protections for Canadian citizens that are built into the MLAT process. Associate Chief Justice Holmes was very clear during the hearing of our application to clarify the terms of the Evidence Gathering Orders that it was always her intention that the persons to be examined were entitled to counsel. But Mr. Eap and Mr. Shu are now being summoned to France for having availed themselves of those rights. Additionally, by summoning Mr. Eap, Ms. L., and Mr. Shu to appear in France, the French authorities would be able to avoid the protections of the MLAT process, which as you know, includes a requirement in Article 5 of the Treaty between Canada and France that such requests be executed in accordance with the laws of the Requested State. Moving the proposed examinations to France would also eliminate the several statutory protections contained in sections 18 to 21 of MLACMA.

Our clients remain prepared to cooperate with the MLAT process in effect pursuant to the Orders of Associate Chief Justice Holmes. We ask that you encourage the French Authorities to comply with the MLAT process, including the safeguards and procedures in place for the protection of Canadian citizens, which the Attorney General of Canada sought from our court to facilitate the French MLAT Request. Indeed, Mr. Eap, Ms. L., and Mr. Shu will be prepared to proceed with examinations in Vancouver in October 2022, along with our other clients.

[Emphasis in original.]

[13] Mr. Majzub's response to Mr. Bolton included the following:

[ ] To the extent it is unclear, French authorities no longer wish to examine Messrs. Eap and Shu pursuant to the evidence gathering orders. The interest that French authorities now have to examine Messrs. Eap and Shu pursuant to French law in France is the subject of a separate legal process that is not connected to the Mutual Legal Assistance in Criminal Matters Act.

I am not aware of any legal obligation placed on the French authorities to move ahead with examinations pursuant to evidence gathering orders where they no longer wish to proceed with those examinations, or legal authority that precludes foreign authorities from changing their view on whether to treat an individual as a witness or otherwise during the course of a criminal investigation.

[14] Mr. Majzub also offered his view that the summonses were issued under French law and are not legally enforceable in Canada. That view had also been expressed in the cover letter, quoted above, which accompanied the summonses.

[15] The extracts, quoted above, from the letters of their respective counsel nicely convey the parties' positions in this application.

## ANALYSIS

[16] The respondents submit that there is a basis for concern that the French authorities acted in disregard of Canadian law in issuing the summonses. They submit that this concern arises because there is no apparent rationale for the respondents to be examined in France except that they occasioned a delay in their examinations in Canada under the evidence-gathering orders by exercising their rights to seek counsel and obtain legal advice.

[17] In support, the respondents note that they made it known to the French authorities that they were willing to appear in response to the evidence-gathering orders; indeed they offered to appear by videoconference to save the examining French authorities from travelling to Canada. They submit that they reasonably relied on the Attorney General's written agreement to reschedule their examinations to allow them to retain counsel and legal advice, a right under Canadian law that is expressly recognized and protected in the evidence-gathering orders. They note also that the evidence-gathering orders themselves expressly contemplated reasonable delays, by each providing that the examination date "shall make reasonable accommodation for the Witness's schedule".

[18] The respondents submit that the evidence-gathering orders should not be vacated until further inquiries can be made into the reason for the changed French approach. They submit that in the meantime the legal protections of the evidence-gathering orders should continue.

[19] For various reasons, I cannot agree.

[20] The respondents' position, at its foundation, flows from the inclusion of the following "immunity" term in the evidence-gathering orders:

THAT the Witness be informed that any evidence given by the Witness will not be used against them in any criminal trial or other criminal proceeding, except for a prosecution for perjury in the giving of that evidence or the giving of contradictory evidence.

- [21] Protective terms of this nature are contemplated by subsection 18(5) of the Act, which provides that an evidence-gathering order may include "any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named therein . . .".
- [22] This "immunity" term did not grant the respondents a general immunity from prosecution for the matters under investigation by France. The immunity it granted related specifically to the use (and derivative use) of evidence the respondents would give in response to the orders in which the term appeared, reflecting the more general principle of fundamental justice that prevents compelled self-incrimination.
- [23] The respondents have not given evidence in response to the orders, however willing they may have been to do so. Immunity relating to their evidence given in response to those orders simply does not arise.
- [24] The Treaty, in Article 9, paragraph 1, also provides for a form of immunity:
1. A witness or expert, whatever that person's nationality, who, pursuant to a request appears before or assists the competent authorities of the requesting State, shall not be prosecuted or detained or subjected to any other restriction of personal liberty in the territory of that State in respect of acts, omissions or convictions anterior to that person's departure from the territory of the requested State.
- [25] But nor does this provision assist the respondents in relation to the evidence-gathering orders. The provision is engaged only when, pursuant to a request, a witness "appears before or assists" the authorities of the requesting state. As already noted, the respondents have not appeared before the French authorities for an examination or otherwise provided assistance in response to the orders, and France no longer seeks the respondents' participation by that route.
- [26] Whether Article 9, paragraph 1 may confer immunity in relation to evidence or information the respondents may give in response to the summonses to appear in Paris is not before the Court in this application.
- [27] The French request under the mutual legal assistance process for the evidence-gathering orders, and the issuing of those orders for the respondents' examinations, did not freeze the French investigation or the approach of the French investigators. The French authorities remained free to continue their investigation, including by taking account of, for example, examinations that were conducted under other evidence-gathering orders. Nothing, including the respondents' willingness to provide evidence in response to the evidence-gathering orders, obliges France to continue to pursue that investigative approach if it no longer wishes to do so.

- [28] The respondents submit that there is no evidence to support the change in the French authorities' approach. They advise that their counsel in France reviewed the French authorities' 22-volume criminal file and found nothing to support the change in approach, or, more fundamentally, an investigation of the respondents.
- [29] But this submission invites an examination of prosecutorial discretion, an area into which courts do not intrude except with a solid basis for concern that the actions of the authorities may be motivated by bad faith or malice. This is all the more so in the context of mutual legal assistance, premised as it is on principles of state sovereignty and comity.
- [30] The respondents submit that the French authorities appear to have mistakenly understood that the respondents improperly failed to attend for scheduled examinations. They submit that the orders should not be vacated until the likely misunderstanding can be corrected.
- [31] However, Mr. Majzub responds that it is not the case that the French authorities were mistaken about why the respondents' examinations did not take place. Mr. Majzub is counsel responsible for this matter, and I accept his statement.
- [32] I note also that the only evidence to support the respondents' submission on this point is a letter dated October 4, 2022 from their French counsel to the French authorities, asserting that the French authorities misunderstood, and explaining that in fact the Attorney General had agreed that the examinations would be rescheduled. Thus, even if the French authorities had at one stage mistakenly believed that the respondents were in some way uncooperative or delinquent in not attending the examinations, those authorities have long had the actual facts, by way of French counsel's letter, and the opportunity to correct their misunderstanding, if such it once was.
- [33] I see no reason not to vacate the evidence-gathering orders, as the Attorney General, on behalf of France, requests.

## ORDER

- [34] The evidence-gathering orders relating to the respondents Ty Mey Eap and Aylwin Shu are vacated.

"The Honourable Associate Chief Justice H. Holmes"

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/sc/22/22/2022BCSC2284.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/france-v-shu-2022>

Prepared on 29 October 2026 · Esheria