

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MALATA GROUP (HK) LIMITED

Plaintiff

-and-

MALATA CANADA LTD.

Defendant

AFFIDAVIT OF PROFESSOR VICTOR C. FALKENHEIM

I, VICTOR C. FALKENHEIM, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am currently employed as a Professor in the departments of Political Science and East Asian Studies at the University of Toronto. I hold a Phd. from Columbia University. Attached hereto and marked as **Exhibit “A”** is true copy of my *curriculum vitae*. As such, I have knowledge of the matters to which I hereinafter depose, save and except where expressed to be based upon information from other sources, in which case, I verily believe such other sources to be true.

2. This Affidavit draws on my almost 40 years of experience researching and teaching about political and legal developments in China. My areas of specialization cover political and legal reform, local politics and recent political trends. I have worked on China projects with the Canadian International Development Agency (CIDA) for over 15 years, for the World Bank on local governance issues in China and with the Canada China Business Council as well and served as Co-Director of the federally-funded Asian Business Development Program. I have focused on China's coastal development and spent a great deal of time visiting and researching the open coastal cities on China's southern coast in particular Fujian Province, the location of Mr. Chen's incarceration. I am familiar with the region, have advised companies doing business in the area and am knowledgeable about government efforts to crackdown on corruption in this area. In short, I feel well equipped to speak to a number of points raised in this case. I list these in the form of questions and comments that follow.

What is the likelihood that Mr. Chen's detention is the result of collusion by local police and judicial authorities in response to business and government pressures and inducements?

3. Mr. Chen's Beijing based lawyer, Ms. Li Kermin has offered the opinion that the charges of contract fraud against Mr. Chen involved the deliberate 'criminalization' of what was essentially a normal business dispute. She suggests further that this was a transparent effort by local authorities acting in the interest of influential local business interests to manipulate the judicial process as a means to extort a favourable contract settlement.

4. This assessment is entirely plausible and in all likelihood correct. My own experience, as well that of many legal specialists working in China, would confirm that such manipulations are common. Local prosecutions for economic crimes are often tainted by administrative pressures and corrupted by local economic interests. Successful business people are particularly vulnerable to fabricated or manipulated charges. In preparing this Affidavit I have consulted with a number of leading China law specialists. One confidential reply from a well known Washington D.C. based specialist offered the following succinct response: “this kind of thing happens all the time.”

5. Strengthening the plausibility of this inference of prosecutorial manipulation are the following well documented broad trends in business and governmental practice.

6. First, overall levels of corruption have intensified markedly in recent years, a fact that Chinese government sources acknowledge. Statistics supplied by the Chinese Communist Party’s main anti-corruption agency the Central Discipline Inspection Commission (CDIC) note that an average of 150,000-160,000 Party members per year are punished for various misdeeds and crimes. A 2007 report by China’s Chief Prosecutor, Procurator General Jia Chunwang listed investigations into corruption of 40,441 state officials of which 29, 996 were prosecuted. Of particular concern according to a 2007 report by a senior Chinese researcher was “the collusion of government and Party officials with big business.” The

researcher was quoted by China's official news agency as stating that "The number of high-level officials being investigated and arrested in the past four years is higher than any other period in the Party's history." Attached hereto and marked as **Exhibit "B"** are true copies to official Chinese government sources outlining these corruption statistics.

7. This assessment is supported by the view of foreign business practitioners in China. *Transparency International's* 'Corruption Perception Index' consistently places China among the bottom one-third of nations in terms of corrupt business practices. The pro-China *China-Britain Business Council* states in its market intelligence report that "corruption will remain a fact of business life in China in the foreseeable future." Their warning to British businessmen warrants extended quotation in the light of its relevance to this case. *"Remember that in China the courts are not independent of the government: local courts are greatly influenced by their respective local governments and have their own internal Party structure. Local governments in turn depend on local companies for employment and taxation income, both increasingly important as the central government devolves more and more budgetary responsibility to lower levels"*. Attached hereto and marked as **Exhibit "C"** are true copies of a few of the reports I have made reference to which includes the corruption perception index as well a copy of the report by the China-Britain Council.

8. Second, official accounts point specifically to growing *judicial and police corruption*. In 2002, 24,886 court employees were arraigned or prosecuted for corruption. In 2003, procuratorial organs disallowed 58,872 arrests and canceled prosecution in 27,957 cases as ‘misjudged.’ In April, 2004 the Supreme Court warned judges against abuse of power and in his 2007 report to China’s legislature, the National People’s Congress, Court President Xiao Yang, noted that 292 judges were found to have abused power for personal interests and 109 of them received criminal penalties. A 2007 study of local control over policing has documented “local leaders’ abuse of police to enforce illegal and predatory policies,” constituting ‘a major obstacle to building the rule of law in China.’ Attached hereto and marked as **Exhibit “D”** is a summary of an official report presented to the Chinese Legislature by President Xiao Yang as well as other academic writings pertaining to abuse of power in policing.

9. Third, regional and locally based corrupt networks now represent one of the most common patterns of corruption. Leading researcher Minxin Pei of the Carnegie Endowment in Washington D.C. has labeled these regional collusive arrangements as ‘local mafia states’ and has identified 50 such cases in 17 provinces as reported in China’s official media alone. Another major authority on corruption, Professor Yan Sun has described these ‘local corruption chains’ as particularly prevalent in rich coastal areas where ‘officials easily succumb to private sector inducements.’ The most notable recent example comes from Xiamen city, an area close to Zhangzhou, the jurisdiction in which Mr. Chen is

now being held. In this instance the entire city government was bought by powerful business interests. Even short of direct corruption, local governments cooperate closely with and support local business interests, and leaning on banks, courts and police to promote local development. This practice constitutes “business as usual” in Chinese cities and counties. Attached hereto and marked as **Exhibit “E”** are true copies of a few of the academic studies on local corruption and patterns of corruption that I have consulted to prepare this Affidavit.

10. Personal connections are an essential ingredient in all business transactions in China. The Chinese term for this is “guanxi”, a term whose literal meaning is connections. Using personal ties and calling in favours are universal practice and frequently overstep legal limitations to become illicit influence peddling and corruption.

11. Fourth, former Chinese nationals are among the most vulnerable to these kinds of pressures, and a number of cases exist to document this pattern of abuse. In a widely reported case which closely parallels that of Mr. Chen, Mr. David Ji, a Chinese-American electronics engineer was held in custody after being apprehended during a business trip and remains hostage while on bail in an ongoing commercial dispute over unpaid debts. What is significant in the *New York Times* report of late 2005, based on U.S. State Department and other sources, was the conclusion that the Chinese company, *Changhong*, a major local employer “deployed the police, prosecutors and judges in a campaign to collect its

debt.” A similar case affecting an Australian-Chinese entrepreneur, James Peng has similarly been followed closely as has been the high profile case of alleged tax fraud by an American-Chinese Jude Shao. Attached hereto and marked as **Exhibit “F”** are true copies of news reports detailing the specific cases I have cited above.

If Chinese authorities were to proceed with this case and prosecute Mr. Chen for the economic crime of fraud, how likely is it that he would receive a fair trial?

12. Despite efforts at legal reform, procedural abuses are common. A detailed review of the handling of the Jude Shao case by Creighton University School of Law Professor, R. Mack published in the 2007 issue of *Global Jurist* details the harrowing experience of Mr. Shao in the toils of what Professor Mack labels its “politically dominated criminal process...with its 99% conviction rate..” Quoting Ira Belkin, Senior Fellow at the China Law Center and legal adviser to the U.S. Embassy in Beijing, Professor Clark:

“The system is marked by long periods of investigatory detention, a high rate of confessions, and administrative penalties that are tantamount to incarceration without trial. Criminal suspects have no right to refuse interrogation, enjoy no presumption of innocence, and have no right to confront their accusers or compel the presence of witnesses to testify in their defense. The right to counsel is extremely limited in the investigatory phase of a case and although there is a right to counsel at trial, that right is circumscribed the absence of pre-trial discovery and the limited ability of the defense to conduct its own investigation.

Attached hereto and marked as **“Exhibit G”** is a true copy of the relevant chapter from Professor Mack’s publication.

13. Mack’s conclusion that “the ease with which the criminal justice system continues to be manipulated to serve shifting political agendas jeopardizes the long-term success of any reform efforts” seems eminently fair.

14. There is thus good reason to doubt that a fair trial by our standards for Mr. Chen is possible. Also, given China’s frequent resort to capital punishment in the case of economic crimes, the possibility of the death penalty, though unlikely, cannot be ruled out.

15. I make this Affidavit in support of Mr. Chen’s motion to stay these proceedings and for no other or improper purpose.

Sworn before me at the City)
Toronto, Province of Ontario)
On the 12th day of November, 2007)
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A Commissioner for taking Affidavits etc.

Victor C. Falkenheim