

CANADA / JUDGMENT

Korea v. Jung

2020 BCSC 1978

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1978 Korea v. Jung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Korea v. Jung,

2020 BCSC 1978

Date: 20201210

Docket: 27360

Registry: Vancouver

In the Matter of the Extradition Act, S.C. 1999, c. 18, as amended

Between:

The Attorney General of Canada,

on behalf of the Republic of Korea

Requesting State

And

Myung Soo Jung

Person Sought

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

Counsel for Requesting State:

Diba B. Majzub

Ryan R. Dawodharry

Counsel for Person Sought:

Tony C. Paisana

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2020

Introduction

- [1] The Republic of Korea (the "Requesting State") seeks the extradition of Myung Soo Jung ("Mr. Jung") in relation to alleged conduct amounting to the Canadian offence of fraud, contrary to s. 380 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Mr. Jung has brought an application in the nature of abuse of process. Mr. Jung seeks a stay of the extradition proceedings. The central assertions grounding the application and the remedy sought are that the Korean criminal proceedings are being used for the improper purpose of collecting civil debts. Mr. Jung also submits that the two alleged victims of the fraud improperly influenced the Korean authorities, thus tainting the independence of the fraud investigations and decisions concerning the pursuit of criminal charges.
- [3] The Attorney General of Canada ("AGC"), on behalf of the Requesting State, seeks to summarily dismiss Mr. Jung's abuse of process application. It says that there is no air of reality to Mr. Jung's allegations, and that they are not capable of justifying a stay of proceedings for abuse of process.
- [4] The AGC's application for summary dismissal, which is before me now, engages the decision of our Court of Appeal in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 [Vukelich].
- [5] In *Vukelich*, rendered nearly 25 years ago, one of the grounds of appeal alleged before the Court was that the trial judge had erred in refusing to embark upon a voir dire concerning the constitutionality of a search warrant.
- [6] On this point, one of our great jurists, McEachern CJBC, said this on behalf of the Court:

23 My conclusions on the foregoing, briefly stated, are that counsel's statements, possibly supported by an affidavit, are a useful first step in persuading the judge to order a voir dire. If these are found to be insufficient, a more formal approach, involving affidavits and possibly an undertaking to adduce evidence (including calling the deponent as a witness), may be required. In other words, I would opt for the flexible approach recommended by the Ontario Court of

Appeal in Kutynec, rather than the formal procedure described on the earlier appeal in that case. In doing so, I do not purport to have exhaustively mentioned all the possible steps that should, or may, be taken in this flexible approach.

[7] And further:

26 Based on these authorities, it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues.

[8] Vukelich has since been adapted to the extradition context by the Court of Appeal in *U.S.A. v Ranga*, 2012 BCCA 81 [Ranga]. To satisfy the court that a voir dire will assist in the proper resolution of the real issues, Mr. Jung must demonstrate that there is some air of reality of a risk of unfairness in proceeding with the extradition process. Second, assuming the breaches posited, the cumulative effect of such breaches must justify the remedy sought: *Ranga* at paras. 16, 26-27; *U.S.A. v. Rogan*, 2014 BCSC 2370 at para. 8 [Rogan].

[9] For the reasons that follow, the AGC's Vukelich application is granted.

The Criminal Allegations

[10] A brief overview is all that is necessary for the purposes of the Vukelich application now before me.

[11] The Requesting State alleges that between June 16, 2005 and January 29, 2007, Mr. Jung fraudulently induced two individuals, Sun-jong Gwon ("Mr. Gwon") and Jung-guem Kim ("Mr. Kim-J") (collectively, the "Complainants"), by false representations, to advance Mr. Jung funds for certain purposes relating to real estate development projects in Vancouver and Korea. In addition, the Requesting State alleges that Mr. Jung promised to repay the funds by certain dates. The Requesting State further alleges that these representations were false, and that Mr. Jung did not use the funds for the stated purpose, nor did he repay the Complainants within the agreed upon timeframe, or at all.

The Gwon Fraud Allegations and Investigation

[12] The Gwon fraud allegations centre upon four alleged loans that Mr. Gwon made to Mr. Jung.

[13] First, in early 2005, Mr. Gwon made five monetary transfers to Mr. Jung totalling KRW 5,050,000,000[1] relating to a condominium development project in Vancouver (the "Infinity Development"). Mr. Jung agreed to repay Mr. Gwon in two installments.

- [14] The parties have placed the committal materials before the Court, which includes the Record of the Case ("ROC") and three supplementary ROCs ("the SROCS"). The material alleges that Mr. Jung induced Mr. Gwon into advancing the funds through false representations. The alleged representations concern the value of Mr. Jung's personal assets, the alleged profit he was momentarily about to realize from the construction project in Korea, and his success in obtaining funding for Infinity Development.
- [15] Second, in approximately September 2005, Mr. Gwon made four monetary transfers to Mr. Jung totaling KRW 4.454 billion[2] for the purchase of land adjacent to Infinity Development ("Quibble Creek"). The ROC alleges that Mr. Jung told Mr. Gwon that he intended to purchase the Quibble Creek lands to construct and pre-sell condominium units, and that he would invest KRW 7.5 billion[3] in the project. After receiving the money, Mr. Jung advised Mr. Gwon that he had purchased the Quibble Creek project. Mr. Jung later admitted (apparently in a written statement) that he had in fact used the funds for the Infinity Development project, and not to purchase Quibble Creek.
- [16] Third, on November 14, 2005, Mr. Gwon advanced Mr. Jung an additional \$700,000 CAD for Infinity Development. Mr. Jung did not repay the money, despite allegedly promising that he would do so the next day.
- [17] Finally, on November 23, 2005, Mr. Gwon advanced Mr. Jung another KRW 120 million[4] to fund a development project in South Korea (the "Seocho-dong project"). The ROC alleges that Mr. Jung later confessed to Mr. Gwon, again in writing, that he had never intended to operate the Seocho-dong project.
- [18] According to the ROC, Mr. Gwon visited Canada in June 2006, and determined that Mr. Jung had diverted the funds Mr. Gwon had provided for the Quibble Creek project to Infinity Development. Also, the ROC alleges that Mr. Jung fabricated financial records to hide this fact. Mr. Gwon also came to learn that many of the other representations Mr. Jung had made to secure the loan from him had been false; including, contrary to Mr. Jung's assurances, funding for Infinity Development was not impressive, and the project had suffered from very minimum pre-sales. In addition, the ROC claims that Mr. Jung had lied to Mr. Gwon about the value of his personal assets.
- [19] In November 2006, Mr. Gwon commenced a civil lawsuit in British Columbia to pursue these matters. Mr. Gwon has apparently been unsuccessful to date in obtaining any satisfactory resolution through the civil proceedings.
- [20] Around July 16, 2008, Mr. Jung left Korea and departed to Japan. At some point thereafter, Mr. Jung made his way to Canada. There is no other reasonable way to characterize this as Mr. Jung determining to flee the jurisdiction of Korea due to his legal problems. I will return to the circumstances of this flight, in the context of the Kim-J matter, momentarily.

- [21] Approximately one week after the Mr. Jung's departure, on July 25, 2008, Mr. Gwon filed a complaint with the Seoul Central District Prosecutor's Office. It appears on the material before me that the Chief Prosecutor, assigned Prosecutor Park Du-sun to oversee the investigation and the complaint. Prosecutor Park Du-Sun examined certain documents including what purports to be, effectively, a written confession Mr. Jung had previously provided to Mr. Gwon concerning the loan contract. The Requesting State alleges that Mr. Jung admitted that he had no intention to operate the Seocho-dong project and that he had in fact embezzled approximately 750 million KRW from Mr. Gwon.[5]
- [22] Prosecutor Park determined that Mr. Jung had defrauded Mr. Gwon and on September 23, 2008, in accordance with the process in place in South Korea, a judge of the Seoul Central District Court issued an arrest warrant for Mr. Jung. The arrest warrant was based on probable cause that Mr. Jung had committed a crime and may fail to attend an investigative proceeding.
- [23] Some of the materials that Mr. Gwon had filed in the civil proceedings in British Columbia outlining the alleged circumstances of the conduct of Mr. Jung were reproduced in the criminal complaint and, as well, now form part of the Requesting State's committal materials to be relied upon in the committal hearing. This fact has relevance to the abuse of process application of Mr. Jung and I will return to this point.

The Kim-J Fraud Allegations and Investigation

- [24] The material discloses that in December 2006, Mr. Jung invested in Gunwon Square, a high-rise construction project in Korea. A month later, Mr. Jung entered into a contract with a major shareholder in which Mr. Jung agreed to purchase 12.7% of the shares of the project for KRW 6 billion. According to the contract, Mr. Jung was to pay the funds in three deposits, and it is alleged for this purpose Mr. Jung intended to borrow the funds, or raise the funds through investments.
- [25] In order to comply with his obligations relating to the first deposit, Mr. Jung borrowed the funds from a business associate named Hak-tae Kim ("Mr. Kim-H"). According to the ROC, certain issues surrounding the Gunwon Square project came to light, and the future of the project become unsettled. As a result, Mr. Jung was unable to raise money for the second deposit. By late January, 2007, Mr. Kim-H began demanding repayment of the loan.
- [26] Mr. Jung then approached the Complainant, Mr. Kim-J, a person also involved in the construction business. Mr. Jung requested that Mr. Kim-J loan him KRW 700 million to purchase shares in Gunwon Square.[6] Mr. Jung allegedly promised Mr. Kim-J that he would repay the funds in two days. Mr. Kim-J advanced the funds. Mr. Jung did not repay Mr. Kim-J.

- [27] Consequently, on May 25, 2007, Mr. Kim-J filed complaints against Mr. Jung with the Seoul Central District Prosecutor's Office and the Internal Revenue Service of Korea. Prosecutor Jeong In-gyun directed the criminal investigation. On October 24, 2007, according to the ROC, Prosecutor Joeng In-gyun concluded that there was no evidence to indict Mr. Jung. As I understand it, Prosecutor Jeong In-gyun concluded that the KRW 700 million appeared to be an investment towards joint ownership of the shares and not a loan.
- [28] Both before and after the initial decision not to indict Mr. Jung, certain individuals met with Mr. Kim-J in hopes of resolving his dispute with Mr. Jung -- Mr. Goo Bae Jung (Mr. Jung's brother), and Mr. Kim Woo Jung, an acquaintance. I will return to the particulars of these meetings momentarily, as Mr. Jung places some reliance on these interactions.
- [29] In any event, on November 19, 2007, Mr. Kim-J requested a review or appeal of the decision not to bring charges against Mr. Jung. I am told there is a formal statutory process in place in the Republic of Korea for such an appeal or review of the initial decision.
- [30] A different Prosecutor, Mr. Moon Sung-in, took up the matter and commenced his own investigation. Prosecutor Moon re-interviewed Mr. Jung and Mr. Kim-J, and other witnesses on April 25 and April 29, 2008. On both dates, Mr. Jung allegedly conceded he had no ability to repay the money or any intention of using the funds to purchase shares. Instead, so he stated, he had used the money to repay Mr. Kim-H. On April 25, 2008, Mr. Kim-H confirmed to Prosecutor Moon that he had received KRW 700 million as a return of the money that he had previously advanced to Mr. Jung towards the first deposit to purchase the Gunwon Square shares.
- [31] In light of the second investigation, on April 30, 2008, Mr. Jung was indicted for the Kim-J fraud in Korea. On June 18 and July 2, 2008, Mr. Jung attended court and ultimately formally entered a guilty plea concerning the Kim-J allegations before the Seoul Central District Court. The matter of the sentencing of Mr. Jung was adjourned and Mr. Jung remained out of custody. Mr. Jung failed to appear in court for his sentencing date, and consequently the presiding judge issued a detention warrant for his arrest on July 16, 2008. Mr. Jung fled to Canada, as previously referenced.
- [32] At some subsequent point, Mr. Kim-J learned that Mr. Jung was living in British Columbia. Mr. Kim-J arranged for a Korean prosecutor to contact one Kim Woo, a mutual acquaintance living in British Columbia, to arrange a meeting between Mr. Kim-J and Mr. Jung.
- [33] Mr. Kim-J travelled to Vancouver and met with Mr. Jung. It appears the meeting was volatile. Mr. Kim-J threatened and assaulted Mr. Jung during the meeting and made several threatening phone calls to Mr. Jung following the meeting. On or about August 18, 2010, Mr. Kim-J was in fact arrested and charged with extortion, uttering threats, and assault, in relation to the events at the meeting and the days following.

- [34] Mr. Kim-J was released on bail. At his bail hearing, his counsel confirmed to the Provincial Court that Mr. Kim-J had come to Canada "highly motivated" to collect his civil debt. Further, counsel indicated that upon his release, Mr. Kim-J intended to reveal Mr. Jung's location to the Korean authorities and to "assist the Korean government in whatever way he [could]".
- [35] Counsel for Mr. Kim-J also advised the Provincial Court of his understanding that in Korea, where criminal charges arise from a civil debt, the authorities will drop the criminal charges upon satisfaction of the civil debt.

The Extradition and Refugee Proceedings

- [36] Mr. Jung's status in Canada first came into question in October 2009. At this time, Keith Mechler, an Inland Enforcement Officer at the Canada Border Services Agency ("CBSA") received a "tip" from a police liaison officer with the Korean Consulate. Officer Mechler was provided with documents relating to the criminal investigation in Korea. The CBSA then launched an investigation concerning Mr. Jung's status in Canada under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA].
- [37] Officer Mechler met with Mr. Jung on about four or five occasions. On one of those occasions, Mr. Jung indicated to Officer Mechler that he (Jung) would return to Korea on July 24, 2010. However, on July 21, 2010, Mr. Jung advised Officer Mechler that he intended to make a refugee claim instead. Mr. Jung claimed refugee status on September 22, 2010.
- [38] Sometime in August or September 2010, Officer Mechler met with Mr. Kim-J. At a meeting, with counsel present, Mr. Kim-J told the CBSA that he had been the victim of Mr. Jung's fraud and intended to present evidence and documentation to that effect. Mr. Kim-J's counsel provided Officer Mechler with documents related to the investigations in Korea.
- [39] Mr. Jung's formal refugee proceedings spanned from February to November, 2012 ("first proceedings"). It was during the course of these initial proceedings (on April 5, 2012), the Requesting State certified the ROC and requested Mr. Jung's extradition from Canada. The Minister of Justice did not initially issue the Authority to Proceed ("ATP") under the Extradition Act, S.C. 1999 c. 18. The issuance of the ATP, while permitting the commencement of extradition proceedings, would have, as well, suspended Mr. Jung's refugee proceedings.
- [40] On January 25, 2013, the Refugee Protection Division denied Mr. Jung's claim for refugee status as Mr. Jung had been convicted of fraud in Korea in an unrelated matter (1997-1998).
- [41] On August 7, 2013, Mr. Jung was granted leave to judicially review the RPD's decision to deny his refugee claim in Federal Court. The proceedings were ultimately delayed pending the release of the Supreme Court of Canada's decision *Febles v. Canada*, 2014 SCC 68, as that decision was expected to affect the outcome. On January 13, 2015, the parties made submissions on *Febles*. On January 15, 2015, the Requesting State certified the Supplementary ROC.

- [42] On April 15, 2015, the Federal Court granted Mr. Jung's judicial review application, and remitted the refugee proceedings to a differently constituted panel of the Immigration and Refugee Board ("second proceedings").
- [43] While the proceedings were ongoing, on July 19, 2017, the Requesting State certified the Second Supplementary ROC.
- [44] On September 13, 2017, while the RPD's decision was on reserve, the Minister issued an ATP authorizing the AGC to proceed before this Court to seek an order for committal for extradition to Korea.
- [45] On December 14, 2017, the RPD suspended Mr. Jung's refugee claim pending a final decision under the Extradition Act.
- [46] In a notice of application dated June 14, 2018, Mr. Jung applied to pursue two Charter arguments - a constitutional challenge to s. 105 of the IRPA, and an application to stay the proceedings as an abuse of process.
- [47] The AGC disputed this Court's jurisdiction to hear the arguments. In reasons indexed at 2019 BCSC 1962 ("jurisdiction reasons"), I concluded that the committal judge did not have jurisdiction to consider the constitutional validity of s. 105 of IRPA. However, I concluded that the abuse of process argument could be brought properly before the Court.

Law and Analysis

- [48] There is no absolute right to a voir dire during an extradition proceeding. Rather, the extradition judge must be satisfied that a voir dire would assist the court with a proper adjudication of the issues: Vukelich at para. 26; Ranga at paras. 14, 21.
- [49] In Ranga, the Court of Appeal discussed the application of Vukelich in the extradition context. A party seeking the Charter voir dire bears the onus of satisfying a two-pronged test. First, there must be some air of reality that there is a risk of unfairness in proceeding with the extradition process. Second, assuming the breaches posited, the cumulative effect of such breaches must justify the remedy sought: Ranga at paras. 16, 26-27; Rogan at para. 8.
- [50] This Court elaborated on the air of reality requirement in the first branch of the test in *U.S.A. v. Cameron*, 2012 BCSC 1788 [Cameron]. While it is not a high standard, it requires "some realistic possibility that the allegations can be substantiated": Cameron at para. 53. It cannot be satisfied based on "bald assertions", "vague and unsubstantiated suggestions", "conjecture or speculation", or "allegations made in the absence of an 'offer of proof'": Cameron at para. 54.

- [51] To demonstrate an air of reality, Mr. Jung must therefore provide a concrete evidentiary basis or offer of proof to justify the extradition judge embarking on an inquiry to assess the alleged Charter breach: *Cameron* at para. 54; *U.S.A. v. Kerfoot*, 2016 BCCA 306 at para. 61; *U.S.A. v. Freimuth*, 2004 BCSC 154 at para. 14 [Freimuth]; *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.) at para. 7; *R. v. Kwok*, 2001 SCC 18.
- [52] For the second branch of the test, Mr. Jung must demonstrate that the allegations are significant enough to justify the remedy sought: *U.S.A. v. Meng*, 2020 BCSC 1607. In other words, Mr. Jung's submissions, when considered at their best, must show a reasonable prospect of satisfying the test for staying proceedings based on the residual category for abuse of process as set out in *R. v. Babos*, 2014 SCC 16 at paras. 31-32 [Babos].

Mr. Jung's Allegations on the Abuse of Process Application

- [53] The application of Mr. Jung sets out the following allegations in support of the abuse of process application:
1. A stay of proceedings pursuant to section 24(1) of the Canadian Charter of Rights and Freedoms on the basis that the extradition proceedings amount to an abuse of process for one or more of the following reasons:
 - a) Canadian immigration authorities sought to deport the applicant for the improper purpose of assisting with the return of the applicant to Korea for prosecution;
 - b) The Minister of Safety and Emergency Preparedness opposed the applicant's refugee claim for the improper purpose of assisting with the return of the applicant to Korea for prosecution;
 - c) The Minister of Justice issued the Authority to Proceed for the improper purpose of circumventing the applicant's refugee claim; and
 - d) The prosecution in Korea is being used as a means to collect the civil debt [the four grounds].
- [54] While Mr. Jung relies on the four grounds set out in the application, certainly the focus in the application before me addressed the evidence in support of the ground alleging the prosecution in the Republic of Korea is being used as a means to collect a civil debt.
- [55] Mr. Jung raises several aspects of the conduct and statements of the complainants, both prior to and during the criminal investigations in Korea, that Mr. Jung asserts are capable of demonstrating the complainants are using the criminal proceedings to collect the civil debt; including, as well, supporting the submission that the Korean authorities had been improperly influenced in this regard and are complicit in the motives of the complainants.

In the Matter of Kim-J

- [56] Mr. Jung, in support of the submission that the behaviour of Kim-J is capable of supporting a claim of abuse of process, focuses on the threats and statements of Kim-J, made to various persons; and on Mr. Kim-J's announced intentions to pursue certain legal action and to corruptly mobilize his contacts amongst Korean authorities.
- [57] These matters include the statements made at his bail hearing, as previously referenced, and his attempts to produce evidence and documentation to CBSA to assist the authorities in that regard.
- [58] In addition, Mr. Jung relies on certain testimony in relation to Kim-J that was taken at his refugee proceedings.
- [59] On May 23, 2012, a Mr. Kim Woo Jung (no relation) claimed Kim-J was the head of a criminal organization that had provided protection to the employees of a Korean hotel in exchange for various services provided free of charge.
- [60] In those same proceedings, on August 28, 2012, Mr. Goo Bae Jung (Mr. Jung's brother) testified he had witnessed what he referred to as 'gangsters' affiliated with Kim-J occupy the business premises of Mr. Jung (the applicant) in April 2007. Mr. Goo Bae Jung testified the gangsters made threats during this event; although it is unclear in the transcript who or whom the gangsters are said to have threatened.
- [61] In addition, as previously referenced, Mr. Kim Woo Jung and Mr. Goo Bae Jung testified to a meeting or meetings with Kim-J in an attempt to resolve issues. Both witnesses claimed that Kim-J demanded more money, over and above the alleged KRW 700 million owed. In addition, there was testimony that at some point in the meeting Kim-J threatened to kill Mr. Jung.
- [62] Finally, at another meeting, at some point subsequent to the initial criminal complaint made by Kim-J; Kim -J said that when he sued Mr. Jung, he would go to jail for sure.
- [63] Mr. Goo Bae Jung also testified that Kim-J had stated he would settle the matter for KRW 2 or 3 billion; an amount greater than the debt. This, according to Mr. Jung's (the applicant) submissions on the Vukelich application, "was an obvious threat to go to the police or prosecution if Mr. Jung did not repay the money".
- [64] There is additional evidence revealed in the transcripts of the refugee proceedings. Mr. Kim Woo Jung described how a Korean government official had contacted him to act as a mediator between Kim-J and Mr. Jung at the time Kim-J came to Canada to try and resolve matters. There is a suggestion that this particular government official had previously arrested Kim-J on some matter. In his written submissions, Mr. Jung takes this to mean that Kim-J had "close ties" to Korean officials.

- [65] Mr. Goo Bae Jung, for his part, testified that an unnamed acquaintance in law enforcement told him that Kim-J had bribed "another" prosecutor to pursue the investigation and charge Mr. Jung with fraud after the initial investigation. Mr. Goo Bae Jung refused to name the unknown acquaintance that said this to him, and also conceded he had no direct knowledge of any of these allegations.
- [66] Mr. Goo Bae Jung also testified that Prosecutor Joeng In-gyun, the original prosecutor in the Kim-J matter, had been charged with bribery in an unrelated matter in Korea.
- [67] In addition, Mr. Jung has made an allegation that is recited in the RPD decision dated January 23, 2015. Mr. Jung alleges that in February 2008, Kim-J intimidated and bribed Mr. Kim-H to make false statements to the Korean police in the context of the review that was undertaken after the first decision not to indict Mr. Jung. The source of this information is not entirely clear.
- [68] Finally, at the conclusion of the hearing in this matter, counsel on behalf of Mr. Jung advised it was the intention of Mr. Jung to also state that Kim-J had bribed the prosecutor or words to that effect.
- [69] The modern law on abuse of process, in the context of criminal law, is addressed in Babos. Justice Moldaver for the majority summarized the matter as follows:
- [30] A stay of proceedings is the most drastic remedy a criminal court can order (R. v. Regan, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
- [31] Nonetheless, this Court has recognized that there are rare occasions --the "clearest of cases" -- when a stay of proceedings for an abuse of process will be warranted (R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (O'Connor, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
- [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
 - (2) There must be no alternative remedy capable of redressing the prejudice; and

- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
- [70] Certainly the allegations that the Canadian authorities proceeded in this matter for improper purposes, as recited in the first three grounds of the application, are devoid of merit. There is no basis in the record capable of supporting these allegations. The proceedings were allowed to unfold. The allegation that the evolution of the proceedings were fueled by improper motives is simply based on suspicion. In my view, these allegations are frivolous.
- [71] The final point rests on the allegation that "the prosecution in Korea is being used as a means to collect a civil debt".
- [72] A prominent feature underpinning this allegation is the submission that the Korean authorities were improperly influenced by Mr. Gwon and Mr. Kim-J in proceeding with the criminal charges against Mr. Jung.
- [73] In my view, the record before the court does not provide a sufficient foundation to conclude that the evidence is capable of supporting this submission.
- [74] There is no evidence the Korean authorities pursued the criminal proceedings in order to advance the civil claim.
- [75] Clearly there is evidence the conduct of Mr. Kim-J was, at times, wholly unacceptable; including uttering threats of death. Indeed, Mr. Kim-J was arrested as a result of this conduct.
- [76] That said, however reprehensible, I view this evidence as demonstrating no more than the vitriol of a frustrated and disgruntled litigant. I do not view the evidence as capable of giving rise to an inference that either of the complainants were using the criminal process in order to enforce a civil debt. Indeed, certainly Mr. Kim-J, rather than resting on law enforcement, pursued a regime of self-help in his attempts to collect the debt that ultimately landed him in our criminal justice system. There cannot be any question both Mr. Gwon and Mr. Kim-J; regardless of character, believed they were the victims of fraud on the part of Mr. Jung. Indeed, Mr. Jung has entered a guilty plea in relation to the allegations relating to Mr. Kim-J.
- [77] Similarly, the evidence that Mr. Kim-J improperly influenced the decision of the Korean authorities to indict Mr. Jung and pursue criminal charges does not provide a foundation capable of allowing the inferences or conclusions that the authorities were in fact improperly influenced; or indeed even that Mr. Kim-J attempted to improperly influence the authorities. It is an allegation and submission that rests on the most fragile of hearsay and double hearsay evidence; without any indicia of reliability or support. Surely a *voir dire* founded, at least in part, on an allegation the authorities were improperly influenced as a result of a bribe, must rest on some evidence of fact, rather than speculation, suspicion and

conjecture.

- [78] The record does not, in my view, provide an air of reality to the claim the complainants pursued criminal charges for the purposes of collecting a civil debt; or that they improperly influenced the authorities to so pursue and maintain the criminal proceedings. In my view the evidence amounts to bald assertions tethered to conjecture which is precisely the kind of circumstance contemplated in *Cameron*. At the end of the day, the proposed inferences that are urged only come to life if one embarks upon speculation.
- [79] I also conclude the conduct and purported statements of Mr. Kim-J fall well short of the "clearest of cases" that would warrant judicial inference in these extradition proceedings.
- [80] The AGC, for its part, relies somewhat on the analysis of *R. v. Walton*, 2019 ONSC 928 at para. 89, where Code J. summarized the law on abuse of process due to the misuse of criminal proceedings:
- [89] the modern post-Jewitt law is to the effect that there is no abuse of process if the police and Crown are not implicated in the complainant's improper demands and, instead, proceed with their own independent investigation and assessment of the appropriateness of criminal charges. Trotter J., as he then was, analysed the modern authorities on this point in *R. v. McCague*, supra and I adopt his analysis of the case law without repeating it. These modern authorities - Finn, Neal and Meyer - are unambiguous and they are binding. Provided that "charges were laid after an independent investigation and decision by the authorities," any antecedent improper motivation by the complainant is effectively cleansed or, at least, is not determinative of an abuse of process. In other words, the modern authorities focus on state misconduct, consistent with the principles set out in *Jewitt* and its progeny. [Emphasis added.]
- [81] The analysis in *Walton* was affirmed in *R. v. Nowack*, 2019 ONSC 5551 in the context of summarily dismissing an allegation that criminal proceedings were used to collect a civil debt.
- [82] Mr. Paisana adamantly submits, in a most spirited fashion, that the analysis undertaken by the court in *Walton* is flawed. In fact, counsel submits Mr. Justice Code is simply flat wrong in his understanding and analysis of the law. This is so, submits Mr. Jung, because, in the view of Mr. Jung, the language in *Walton* quoted above is inconsistent with the decision in *Babos*. Mr. Jung submits that a complainant's use of criminal proceedings to collect a civil debt will necessarily engage the residual category for abuse of process, absent any state misconduct. In this regard, Mr. Jung points to the comments in *Babos*; and in particular para. 37, where Moldaver J. stated as follows:
- [37] First, while it is generally true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict

stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)). [Emphasis added.]

- [83] It is not strictly necessary, given my conclusions on the evidence, to address this issue. That said, I do not read the comments of Code J. quite as starkly as counsel.
- [84] In my view, Walton simply suggests, albeit assertively, that a finding the criminal process is being pursued solely for the purpose of collecting a civil debt, will not be determinative of an abuse of process application in the face of otherwise independent decision making by state actors.
- [85] Consequently, I do not view Walton as inconsistent with the general proposition enunciated in Babos above.
- [86] The whole of the circumstances would need to be assessed in the context of the Babos framework. In particular, the balancing required on the third prong of the test requires the court to consider, among other things, "the interests of society in having the charges disposed of on the merits": Babos at para. 41. The public has little interest in seeing charges disposed of in cases where the authorities have made a decision to prosecute following an independent appraisal of the grounds to believe an offence has been committed. To this end, I agree with the analysis of *R. v. Finn* (1996), 139 Nfld & P.E.I.R 97., aff'd [1997] 1 S.C.R. 10, where the Court of Appeal for Newfoundland held:

It was, therefore, in attributing effective vicarious responsibility to the Crown for the complainants' actions that the judge fell into error. Where there has been neither police nor Crown involvement, nor acquiescence, in the perceived misuse of the criminal justice system through complaints laid by the alleged victim to enforce recovery of moneys from the accused, the Attorney General's power to prosecute ought not to be impaired. The complainants' motivation for laying the complaints should not have the effect of absolving the accused from responsibility to respond to legitimate charges. It is reasonable to infer that the public, for different reasons depending upon the awareness of the respective interests protected by the civil and criminal law, would perceive nothing perverse in a public prosecution of complaints, such as this appeal presents, where there was neither direct nor indirect police participation in the complainant's impugned conduct. To the contrary, it appears more logical to anticipate that the general public would view adversely the entry of a stay, which would be tantamount to acquittal, in these circumstances.

- [87] The Supreme Court of Canada affirmed the analysis of the Court of Appeal for Newfoundland in *R. v. Finn*, [1997] 1 S.C.R. 10 [Finn (SCC)] and again in *R. v. Neil*, 2002 SCC 70 [Neil]. In Neil, the Court held that "[t]he 'independent investigation and decision by the authorities' to prosecute militates against a finding of abuse of process here": Neil at para. 44, citing Finn (SCC) at para. 1 (emphasis added).

- [88] In my view, a proper and independent investigation by the authorities will weigh heavily against granting a stay of proceedings based on the residual category for abuse of process at the balancing phase of the test. The state's ability to pursue charges should not be tethered to the unprincipled motivations of complainants when the state comes to the conclusion, on its own independent appraisal of the facts, that there are reasonable grounds to believe that a crime has been committed.
- [89] However, to reiterate, I do not find the record before me is reasonably capable of supporting a conclusion that the Complainants commenced or initiated criminal proceedings solely for the purpose of collecting a civil debt; nor that the record is capable of supporting a conclusion that the Republic of Korea were improperly influenced in that regard.
- [90] In this regard, there is no evidence the Korean authorities failed to undertake an independent investigation and independent assessment of both these matters. In particular, there is no evidence the Korean authorities proceeded in any way under the improper influence of the Complainants. In my opinion, in these circumstances, there is no obligation on the Republic of Korea to prove that the investigation was properly and independently undertaken; nor to prove that it resulted in an independent decision to charge or not charge.
- [91] In any event, the parties have placed the committal materials before the Court for the purpose of this application. These materials reveal the investigative steps undertaken upon the review. It provides evidence of an independent investigation and assessment. It includes the information that Mr. Jung was interviewed; and ultimately pled guilty to the charges in the Kim-J matter.
- [92] Presumably, if the Requesting State found it necessary to place this evidence before the court upon an abuse of process application, they would proceed to do so as so advised.
- [93] In addition, in my view the record does not reveal a basis for calling into question the good faith of the investigative authorities in Korea.
- [94] I am guided here by the comments of Romily J. in *Freimuth* who stated:
- [56] Allegations of misconduct by foreign authorities should not be given any credence without further proof. In the absence of such evidence, entertaining allegations that foreign officials are misleading our Courts "conveys a reflection of the gravest possible kind, not only upon the motives and actions of the responsible government, but also impliedly upon the judicial authorities of a neighbouring and friendly power": *United States of America v. Turenne*, [1998] M.J. No. 541 (Q.B.) at para. 25. See also *United States of America v. Akrami*, [2000] B.C.J. No. 2000 (S.C.), 2000 BSCC 1438 at para. 21.

- [57] Absent clear cases of misconduct which undermine the right to a fair committal hearing or illegal acts done in Canada, it is my view that if there are any concerns about the conduct of foreign officials, this is properly a matter which can be raised with the Minister to be considered in exercising his discretion to order surrender. The conduct of foreign relations is vested in the Minister who can seek assurances from the requesting state to ensure compliance with fundamental justice: Mellino, *supra*, at pp. 349 & 353-354.
- [95] I read Freimuth to mean that the Court should presume that the Korean officials acted in good faith, both in bringing the charges and in seeking extradition. Mr. Jung has not offered any evidence beyond conjecture or speculation that would suggest otherwise: Cameron at para. 54.
- [96] This is consistent with the fact that it is Mr. Jung, and not the Requesting State, who bears the onus of proof in showing that there is an air of reality to the alleged Charter breaches. There is no obligation for the Requesting State to demonstrate an absence of misconduct.
- [97] Finally, Mr. Jung submits that upon close analysis of the factual narrative giving rise to the alleged criminal activity of Mr. Gwon, it is apparent the committal materials mirror certain information that was also contained in the materials generated by Mr. Gwon in the pursuit of his civil claim.
- [98] Mr. Jung submits this overlap, in the context of all the evidence, provides circumstantial evidence that the authorities in Korea lacked independence and indeed did not undertake an independent investigation of matters.
- [99] In support of this point Mr. Jung relies on the case of *U.S.A. v. Alfred-Adekeye* (31 May 2011), Vancouver 25413 (BCSC, unreported). In that case, this Court allowed a stay of proceedings based on an abuse of process in part because the U.S. criminal proceedings "mirrored" a civil counterclaim brought against the applicant. However, the Court also found that the U.S. justice authorities had been complicit with the complainants' improper use of the criminal process, which was to pressure the applicant to abandon his antitrust suit against Cisco.
- [100] Some of the findings of misconduct included the authorities' failure to make full and frank disclosure before the judge who had issued the provisional arrest warrant under the Extradition Act. In addition, at the applicant's bail hearing, an Assistant United States Attorney had filed a letter which was misleading and contained false allegations. Finally, the extradition request was simply unnecessary as the applicant had on numerous occasions sought a Visa to enter the U.S., which authorities had continuously denied. Ultimately, the Court's conclusion rested on the cumulative effect of these breaches, which included the authorities' complicity in misusing the criminal process.
- [101] I do not see the situation here as bearing similarity to *Alfred-Adekeye*. Concurrent criminal and civil court proceedings concerning an alleged fraud are not unusual; and often, by definition, are grounded in much factual common ground: *U.S.A. v. Whyte*, 2016 ONCA 624; *U.S.A. v. Wilson*, 2010 BCCA 85.

[102] In conclusion, in my view, the information, evidence, proposed evidence, and advice, does not construct a foundation upon which inferences could be drawn supporting the grounds proposed in the abuse of process application. There is not an air of reality to the propositions that the Complainants utilized the criminal justice system for the purpose of pursuing a civil debt. I am also of the view there is not an air of reality to the propositions that the authorities in this matter were driven, in whole or in part, by corruption, undue influence or improper motive.

[103] I conclude that Mr. Jung's abuse of process application fails to meet the first branch of the test articulated in Ranga. In addition, there is no reasonable prospect that the allegations could justify a stay of proceedings based on an abuse of process.

Conclusion

[104] Mr. Jung has failed to meet the evidentiary threshold required to justify holding a voir dire to argue his abuse of process application. Accordingly, the AGC's Vukelich application is granted. The application of Mr. Jung seeking a stay for abuse of process is dismissed.

"Crossin, J."

- [1] Approximately \$6 million CAD.
- [2] Approximately \$5.3 million CAD.
- [3] Approximately \$8.9 million CAD.
- [4] Approximately \$142,000 CAD.
- [5] Approximately 7 million CAD.
- [6] Approximately \$800,000 CAD.

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