

CANADA / JUDGMENT

U.S.A. v. Erasto

2021 BCSC 2371

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2371 U.S.A. v. Erasto

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. Erasto,

2021 BCSC 2371

Date: 20210716

Docket: 28742-1

Registry: Vancouver

In the Matter of the Extradition Act,

S.C. 1999, c. 18 as amended

and

In the Matter of

The Attorney General of Canada on behalf of

the United States of America

and

Abate Samuel Erasto

Before: The Honourable Mr. Justice A. Ross

Oral Reasons for Judgment

Counsel for Attorney General of Canada

on behalf of the Requesting State:

A.S. Sanghera

Counsel for the Person Sought:

L. Myers, Q.C.

J. Oppal

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 12-13, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2021

- [1] THE COURT: The Attorney General of Canada on behalf of the United States of America (the "Requesting State") seeks an order committing Abate Samuel Erasto to await surrender to the United States of America pursuant to the Extradition Act, S.C. 1999, c. 18, for the purposes of prosecution.
- [2] The charges in the United States against Mr. Erasto relate to an alleged conspiracy to traffic controlled substances. The alleged conspiracy involved parties in British Columbia and California.
- [3] On behalf of the Requesting State, the Attorney General says that Mr. Erasto's membership in a drug trafficking conspiracy is a reasonable inference arising from the Requesting State's evidence. As a result, it submits Mr. Erasto should be committed to await surrender to the United States for the purpose of prosecution.
- [4] Mr. Erasto does not take issue with the Attorney General's submissions in relation to the applicable law, the formulation of the tests, or the legal standards to be applied on this application. His arguments focus on two issues:
- a) first, he says the issue of identity is not sufficiently established; and
 - b) second, he says that on the facts available to the court at this hearing, the Requesting State has not met the evidentiary burden required with regard to the essential elements of the offence of conspiracy.
- [5] For the reasons I discuss below, I find that the Requesting State has met the applicable evidentiary burden, and I order that Mr. Erasto be remanded in custody to await surrender on the offence specified in the authority to proceed.
- [6] First, I will review the procedural history and legal framework.

The Authority to Proceed

- [7] This application is governed by the provisions of the Extradition Act. The Extradition Act provides that the Minister of Justice (the "Minister") is responsible for the implementation of extradition agreements and administration of the Act. Once a request is made to the Minister by a state with which Canada has an extradition agreement, the Minister may authorize the Attorney General to apply for a provisional arrest warrant of the individual. Any such warrant must contain the name or a description of the person to be arrested, set out the offence, and order the person to be arrested without delay and brought before the judge who issued the warrant or before another judge in Canada.
- [8] This Court issued a provisional arrest warrant for Mr. Erasto on September 3, 2019.
- [9] In order to proceed with the extradition, the Minister must issue an "Authority to Proceed" which authorizes the Attorney General to seek a court order for the committal of the person sought.
- [10] The Minister issued an Authority to Proceed for Mr. Erasto's extradition on December 4, 2019. On that basis, the Attorney General is authorized to apply to this court for an order for Mr. Erasto's committal.

Corresponding Offence

- [11] The authority to proceed indicates that Mr. Erasto is sought by the Requesting State for prosecution in relation to conduct that corresponds to the Canadian offence of conspiracy to traffic a controlled substance listed in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, contrary to s. 5(1) of that Act, and contrary to s. 465(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46.
- [12] The Attorney General submits, and Mr. Erasto concedes, that the offence alleged by the Requesting State is equivalent to the Canadian offence of conspiracy to traffic a controlled substance.

The Evidence of the Requesting State

- [13] In support of its application, the Attorney General relies on the following evidence provided by the Requesting State:
- a) a revised record of the case for prosecution certified by Victoria A. Degtyareva, Assistant United States Attorney for the Central District of California on November 26, 2019, the record of the case ("ROC");
 - b) a supplemental record of the case for prosecution certified by Victoria Degtyareva on February 5, 2020, the supplemental record of the case "SROC");
 - c) the evidence of RCMP Constable Rosanna Pedulla, who arrested an individual by the name of Abate Erasto pursuant to the warrant to arrest on September 5, 2019; and

- d) the evidence of Vancouver Police Department Detective Doug Dodd, who assisted with the arrest of an individual by the name of Abate Erasto on September 5, 2019.

[14] The Attorney General submits that the evidence is sufficient to order the committal of Mr. Erasto into custody to await surrender.

The Test for Committal

[15] The test for committal is set out in s. 29(a) of the Extradition Act which provides:

29 (1) A judge shall order the committal of the person into custody to await surrender if

- (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner;

[16] Sections 32-33 of the Extradition Act discuss the evidence that is admissible at an extradition hearing and what evidence must be included in the record of the case:

32 (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.
- (2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

33 (1) The record of the case must include

- (a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution;

[17] The Attorney General filed the ROC and SROC described above in conformity with ss. 32(1)(a), 33(1)(a). The Extradition Act provides that a summary of the evidence certified by a judicial or prosecuting authority is considered to be admissible. The judicial or prosecuting authority must certify that the evidence is available for trial and is either sufficient under the law of the Requesting State to justify prosecution or was gathered according to the law of the Requesting State. Such certification imbues the summary of the evidence with presumptive reliability and availability.

- [18] I recite below the Attorney General's summary of the evidence from the ROC and the SROC as it relates to Mr. Erasto.
- [19] The role of an extradition judge on committal is not to determine guilt or innocence, make findings based on evidence, or assess reliability. Instead, my role as the extradition judge is significantly limited. As discussed in *M.M. v. United States of America*, 2015 SCC 62 at para. 22:
- [22] If, as here, the Minister issues an ATP, the extradition moves to the committal phase. This phase plays an important, although carefully circumscribed, role in protecting the rights of the person sought. That role is defined by s. 29(1)(a) and (3) of the Extradition Act. The extradition judge is to determine two things: (1) whether "there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed"; and (2) "that the person [before the court] is the person sought by the extradition partner" (s. 29(1)(a)). Committal is ordered if the judge finds that these conditions exist; if not, the person must be discharged: s. 29(1)(a) and (3). This means that the requesting state must show that it has evidence available for trial that would justify committal for trial in Canada for the Canadian offences specified in the ATP.
- [20] Hence, my role is to determine:
- a) whether there is admissible evidence of conduct that, had it occurred in Canada, would justify Mr. Erasto's committal for trial in Canada on the offence of conspiracy to traffic controlled substances; and
 - b) whether Mr. Erasto is the person before the court and is the person sought by the Requesting State.
- [21] The test for the sufficiency of the Requesting State's evidence is essentially the same as the test applied at a preliminary inquiry. That is, considering the evidence as a whole, is there any admissible evidence that, if believed, could result in a conviction? (*M.M.* at para. 22.)
- [22] This stage of the proceeding does not consider the weakness or strength of the evidence. In other words, the test is whether a jury, properly instructed, could convict, not whether a jury would convict: *United States of America v. Hislop*, 2009 BCCA 94 at para. 31.
- [23] Thus, the test requires at least some evidence on every element of the offence.
- [24] There is, however, a limited weighing of the evidence. In this case, the Attorney General accepts that much of the evidence produced is circumstantial. The Attorney General also concedes that its case requires certain inferences to be drawn from the evidence. Any inferences to be drawn from circumstantial evidence must be supportable and reasonable. The test is not whether the inference sought by the Requesting State is the only or most reasonable inference to be drawn. It must simply be a reasonable inference (*R. v. Arcuri*, 2001 SCC 54 at para. 30).

[25] Other cases have used other wording, indicating that the prosecution's inference cannot constitute a "leap of logic so large that it would be a dangerous or unsafe basis for a conviction": (*USA v. Fraser*, 2015 BCSC 604 [Fraser] at para. 168, rev'd on other grounds by the Court of Appeal).

[26] Counsel for Mr. Erasto accepts the law as stated, and also notes the decision of the Supreme Court of Canada in *United States of America v. Ferras*, 2006 SCC 33. In addressing all of the issues in this application, I have kept in mind the role of the court as set out at para. 58 of *Ferras*:

58 an extradition judge does not make a prediction about the future state of the evidence. He or she makes a common sense determination about whether the evidence exists and is available for trial -- at the time of the extradition hearing -- based on the evidence itself, any circumstantial guarantees of availability (such as certification) and any evidence tendered to dispute the presumption of availability for trial.

[Emphasis in original.]

[27] The test to be applied on the issue of identity of the person sought was described by Justice Chiasson in *Danielson v. United States of America*, 2008 BCCA 519, as follows in upholding a lower court decision, at para. 21:

[21] On a plain reading of s. 29 of the Extradition Act, there are two issues of identification in an extradition proceeding: one, is the person named in the [record of the case] the person who committed the alleged conduct; two, is the person named in the [record of the case] the person before the court? As noted, the extradition judge expressed these issues at para. 3 as follows:

There [are] two aspects of the identity issue. They are:

1. that there be prima facie evidence that the person sought is the person who committed the acts alleged; and
2. that there be evidence proving on the balance of probabilities that the person before the court is the person sought by the requesting state.

[28] The Attorney General also notes s. 37 of the Extradition Act, which sets out what constitutes evidence that the person before the court is the person sought:

37 The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and

- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.
- [29] I return to address the two-part test below when dealing with Mr. Erasto's submissions. As noted, Mr. Erasto submits that there is insufficient evidence regarding both identity and the essential elements of the alleged offence.

Summary of Evidence on the Record of the Case (as revised and supplemented)

- [30] I now turn to set out the evidence submitted by the Attorney General from the ROC and the SROC. I address the evidence relating to the arrest of Mr. Erasto when dealing with the issue of identity.
- [31] The following recital is taken almost directly from the Attorney General's submission on committal.
- [32] Mr. Erasto is alleged to have been a member of a cross-border drug trafficking organization based in British Columbia that began operating as early as 2016. I refer to that as the "Organization". The Organization was led by Mr. Tenny Guan Lim and facilitated the movement of large shipments of cocaine, methamphetamine, and 3,4-Methylenedioxyamphetamine, (or "MDMA"), and other illegal drugs between the United States and Canada. Specifically, the Organization would send multi-kilogram quantities of MDMA to the United States in exchange for multi-kilogram quantities of cocaine that U.S.-based associates of the Organization had sourced from Mexico. The drug transactions involved a courier dropping off MDMA and/or picking up cocaine in Los Angeles, California.
- [33] The U.S. Federal Bureau of Investigation (FBI) and the Los Angeles Police Department (LAPD) conducted a joint investigation of the Organization with the assistance of various U.S. federal and local enforcement agencies with jurisdiction over locations where law enforcement operations occurred.
- [34] U.S. investigators were able to infiltrate the Organization by cooperation of two confidential witnesses who were Organization business associates in California. I refer to them as "Confidential Witness 1" and "Confidential Witness 2".
- [35] Confidential Witnesses 1 and 2 agreed to cooperate with U.S. law enforcement and continued to pose as Organization business associates, regularly communicating with Mr. Lim regarding the transportation of illicit drugs by way of encrypted messages. In these communications, Mr. Lim would typically provide Confidential Witness 1 or Confidential Witness 2 with:
- a) a telephone number and code name for the courier tasked with dropping off MDMA or picking up cocaine in Los Angeles; and
 - b) the serial number for a specific dollar bill to be used in the couriers conducting the exchange to confirm each others' identities.

- [36] Confidential Witnesses 1 and 2 would then pass information from Mr. Lim to an undercover law enforcement agent who would then play the part of an associate of Confidential Witness 1 or 2 and contact Mr. Lim's courier to set up an exchange.
- [37] Over the course of the FBI/LAPD investigation, Mr. Lim directed a number of drug transactions that were tracked and documented by the FBI with the assistance of other law enforcement agencies.
- [38] Mr. Erasto is alleged to have furthered the drug trafficking operation by flying from Vancouver to California and renting a storage locker in the Los Angeles suburb of Redlands to be used as a drug stash location.
- [39] On March 6, 2018, Mr. Erasto flew from Canada to California along with an alleged co-conspirator, Mr. Galic. The next day, March 7, 2018, Mr. Erasto and Mr. Galic attended at a business named Extra Space Storage located in Redlands, California, where Mr. Erasto rented a storage locker. Mr. Erasto and Mr. Galic then returned to Canada on March 11, 2018.
- [40] Two days after returning to Canada, on March 13, 2018, both Mr. Erasto and Mr. Galic were seen meeting with another alleged member of the drug trafficking conspiracy or Organization, Mr. Vincent Chiu, in Vancouver, B.C.
- [41] An undercover Homeland Security investigation special agent, who I refer to as "Undercover Officer 2", had been communicating with Mr. Chiu by encrypted messages, and during these messages Mr. Chiu instructed Undercover Officer 2 to meet with a person code-named "Matt Sundine" to discuss the transportation of drugs from the United States to Canada. Mr. Chiu provided Undercover Officer 2 with Matt Sundine's phone number. Undercover Officer 2 later identified Matt Sundine as Mr. Jumsher Saroya.
- [42] On March 14, 2018, Undercover Officer 2 called the phone number provided by Mr. Chiu and arranged to meet Mr. Chiu's associate, Matt Sundine.
- [43] On March 15, Undercover Officer 2 met Mr. Saroya in Huntington Beach, California, and the two discussed the transportation of cocaine as directed by Mr. Chiu.
- [44] Mr. Lim was unable to purchase cocaine through Confidential Witness 2 in February 2018. Thereafter, Mr. Lim and Confidential Witness 2 arranged for Mr. Lim's associate to meet Confidential Witness 2's "Mexican drug supplier". For the purposes of the meeting on March 17, 2018, Mr. Lim sent Confidential Witness 2 a phone number and serial number from a dollar bill and told him to ask for "Larry Bird".
- [45] An undercover FBI special agent posed as Confidential Witness 2's Mexican drug supplier. He was "Undercover Officer 1". Undercover Officer 1 called the phone number Mr. Lim provided for Larry Bird and arranged to meet him. On March 28, 2018, Undercover Officer 1 met with Larry Bird at a Los Angeles restaurant.

- [46] Larry Bird was later determined to be the same Mr. Saroya. He was the same individual who met with Undercover Officer 2 using the code name "Matt Sundine" two weeks prior.
- [47] During the March 28, 2018, meeting between Mr. Saroya and Undercover Officer 1, the two discussed the logistics of the cocaine deal. Mr. Saroya explained to Undercover Officer 1 that the Organization sends different individuals to pick up the cocaine in the United States and transport it to Canada. During the meeting, Mr. Saroya made a phone call and asked someone, "How many and how often, you know, for picking up?"
- [48] Mr. Saroya then left the restaurant and met with an individual later identified to be Mr. Michael Shepherd. Mr. Shepherd had driven Mr. Saroya to the meeting with the Undercover Officer 1 in a rental car, but remained outside the restaurant in the car. Mr. Saroya retrieved a phone from Mr. Shepherd and walked back inside the restaurant. Mr. Saroya showed the phone screen to Undercover Officer 1. The screen said "50 kilograms every week", and Mr. Saroya confirmed the same, stating, "It says our ride is 50 max. And every week."
- [49] The next day, March 29, 2018, a Hawthorne Police Department officer, Thomas Heffner, conducted surveillance on the rental car which was being driven by Mr. Saroya and Mr. Shepherd. Officer Heffner observed the rental car arrive at Public Storage, a storage facility in Redlands, California, the same municipality where Mr. Erasto rented his locker at Extra Space Storage.
- [50] Officer Heffner saw Mr. Shepherd leave Public Storage Unit 75 carrying a large duffel bag that he placed into the trunk of the rental car. Officer Heffner then observed Mr. Saroya and Mr. Shepherd make multiple trips between the rental car and Storage Unit 75.
- [51] Mr. Saroya and Mr. Shepherd then left Public Storage in the rental car and were seen arriving at Extra Space Storage, the facility where Mr. Erasto had rented a locker. Los Angeles Sheriff's Department Deputy Barry Fitchu saw Mr. Saroya and Mr. Shepherd drive into the Extra Space Storage facility, but could not see what they did within that facility.
- [52] On April 4, 2018, three weeks after renting the locker at Extra Space Storage, Mr. Erasto is alleged to have exchanged a series of text messages with Mr. Saroya regarding a storage locker. The messages were located on a phone seized from Mr. Saroya on April 5, 2018. The messages were between Mr. Saroya and an individual using the name "Robert". Mr. Erasto is alleged to be Robert. Robert's telephone number is the same number that Mr. Erasto used to book airline tickets for himself and Mr. Galic.
- [53] In the text messages on Mr. Saroya's phone, first, Mr. Erasto tells Mr. Saroya that he was trying to cancel his "storage down there" and asked Mr. Saroya if he had anything in the locker. Second, Mr. Saroya responds to Mr. Erasto with three consecutive messages, "Yeah don't cancel it yet", "It'll be empty tonight", and "Not empty yet". Mr. Erasto asks Mr. Saroya whether to keep the unit for later, asking, "Like are we gon' use it again". Mr. Saroya responds, "I don't think we are when I go there tonight I'll just empty it n take lock with me."

- [54] A few hours after Mr. Erasto and Mr. Saroya exchanged the messages on April 4, 2018, U.S. investigators observed Mr. Saroya and Mr. Shepherd driving two vehicles in tandem, a red 2017 Hyundai Sonata with a Nevada licence plate, described as Vehicle 1, and a white 2015 Dodge Journey with a California licence plate, described as Vehicle 2.
- [55] Mr. Shepherd was observed getting out of Vehicle 1 and getting into Vehicle 2, which Mr. Saroya was driving. Mr. Saroya and Mr. Shepherd then drove Vehicle 2 into Extra Space Storage and disappeared from view. After approximately ten minutes, Vehicle 2 backed out of Extra Space Storage and parked behind Vehicle 1. Mr. Shepherd got out of Vehicle 2, retrieved two large suitcases from the trunk of Vehicle 1, and placed those suitcases into the passenger area of Vehicle 2. Mr. Shepherd then got into Vehicle 1, and each of Mr. Saroya and Mr. Shepherd left in Vehicle 2 and Vehicle 1 respectively.
- [56] Shortly after Mr. Saroya and Mr. Shepherd left Extra Space Storage, they were observed arriving at Public Storage in Redlands and parking in front of Storage Unit 75.
- [57] Mr. Shepherd was observed getting out of Vehicle 1, retrieving two large suitcases from Vehicle 2, and placing them inside Storage Unit 75. Mr. Shepherd and Mr. Saroya then both entered Storage Unit 75 and closed the door behind them. Mr. Shepherd and Mr. Saroya left Public Storage a short time later in Vehicle 1 and Vehicle 2.
- [58] On April 5, 2018, U.S. investigators observed Mr. Shepherd and Mr. Saroya drive Vehicle 1 into Extra Space Storage and go out of view. Less than ten minutes later, Mr. Saroya and Mr. Shepherd left Extra Space Storage in Vehicle 1. The two then drove to a restaurant parking lot where Vehicle 2 was parked. Mr. Saroya got out of Vehicle 1 and entered Vehicle 2.
- [59] Mr. Shepherd and Mr. Saroya then drove Vehicle 1 and Vehicle 2, respectively, to Public Storage. At Public Storage, Mr. Shepherd got out of Vehicle 1 and into Vehicle 2, driven by Mr. Saroya. Mr. Saroya then drove Vehicle 2 to Storage Unit 75. Mr. Shepherd and Mr. Saroya entered Storage Unit 75 and left carrying two large suitcases each. Mr. Shepherd and Mr. Saroya placed all four suitcases into Vehicle 2 and drove to Public Storage's front gate. At the front gate, Mr. Shepherd got out of Vehicle 2 and returned to Vehicle 1. Mr. Shepherd and Mr. Saroya left the grounds of Public Storage driving Vehicle 1 and Vehicle 2, respectively.
- [60] Later, on April 5, 2018, Officer Bryan Bostrom of the California Highway Patrol conducted a traffic stop of Vehicle 2 for speeding. During the traffic stop, Officer Bostrom's trained drug-detection dog conducted a sniff search of the exterior of Vehicle 2 and alerted to the presence of controlled substances on the centre of the rear cargo hatch. The dog conducted a further sniff search of the interior of Vehicle 2. Inside Vehicle 2, the dog alerted to the presence of drugs in the four suitcases stored in the rear cargo area. These were the same four suitcases Mr. Shepherd and Mr. Saroya removed from the Public Storage Unit 75 and loaded into Vehicle 2. Two of the suitcases were found to contain a total of approximately 47 kilograms of methamphetamines. The other two were empty. Officer Bostrom also found and seized three cellular phones from Mr. Saroya. Mr. Saroya was arrested and taken into custody.

- [61] After Mr. Saroya's arrest, U.S. investigators re-established surveillance at Public Storage and observed Mr. Shepherd return and drive up to Storage Unit 75. Officer Gonzo Cetina of the Baldwin Park Police Department approached Mr. Shepherd and asked about Storage Unit 75. Mr. Shepherd confirmed that he was renting Storage Unit 75 and stated there were five kilograms of cocaine inside the unit. Mr. Shepherd provided written consent to search Storage Unit 75 and approximately five kilograms of cocaine were located inside a brown cardboard box. Mr. Shepherd was subsequently arrested and taken into custody
- [62] This concludes the Attorney General's summary of the facts from ROC and the SROC. As noted, there is further evidence relating to Mr. Erasto's arrest that I discuss below.

Position of the Parties

- [63] It is on the basis of these facts, plus the evidence from the arrest, that the Attorney General seeks the committal of Mr. Erasto.
- [64] Again, Mr. Erasto submits that these facts do not establish that he is the person sought and do not contain sufficient evidence of all essential elements of the alleged offence.
- [65] I deal with each submission in order.

Identity

- [66] Mr. Erasto's submission on the issue of identity arises from the information on a target sheet.
- [67] At the hearing, the Attorney General called Constable Pedulla of the RCMP and Detective Dodd of the Vancouver Police Department.
- [68] Constable Pedulla testified that she received by email a target sheet for Mr. Abate Samuel Erasto. The target sheet contained a name, birthdate, and phone number. It also contained a photo and indications of height and weight. In cross-examination, Constable Pedulla conceded that the quality of the photo of the subject on the target sheet was poor. She also conceded that the height and weight listed on the target sheet were significantly different than the person she arrested.
- [69] Constable Pedulla received information that the subject of the target sheet was working at a building on Hastings Street. Constable Pedulla and Detective Dodd arrived at the Hastings Street building at 10:25 a.m. on September 5, 2019. Constable Pedulla phoned the number on the target sheet. She conceded that she did not provide any warning to the person who answered the phone. She asked the person on the other end whether he was willing to come down to the lobby to be arrested. The person on the phone agreed to come to the lobby. At 10:39 a.m., a male entered the lobby. Constable Pedulla asked the person whether he was Mr. Erasto. He answered, "Yes", and he was arrested. At 10:41 a.m., Constable Pedulla read him his rights.

- [70] During the same period of time, Detective Dodd learned from building security that the subject had obtained a day pass to the building by swapping a piece of his personal identification. Detective Dodd obtained the security day pass from the subject and walked with the security guard to another building. Detective Dodd exchanged the day pass for Mr. Erasto's identification. Detective Dodd then returned to Constable Pedulla and provided her with the identification, a British Columbia Services Card in the name of Abate Samuel Erasto, with a date of birth of September 17, 1997. The name and the date of birth matched the information on the target sheet.
- [71] The submissions of counsel for Mr. Erasto focus on the photo on the target sheet, as well as the indications of height and weight. He says that the photograph on the target sheet is unrecognizable as Mr. Erasto. He also notes that the estimates of height and weight are wrong. As noted, Constable Pedulla conceded that the quality of the photo of the subject on the target sheet was poor, and the height and the weight were not correct.
- [72] In response, the Attorney General, again, notes that the threshold for identity is the balance of probabilities shown by the evidence. That test is set out in s. 37 of the Extradition Act, which I discussed above.
- [73] The Attorney General submits that the court's reasoning and assessment in the Danielson decision, which I discussed above, applies to the facts of this case. In Danielson, the extradition judge found that he could not identify Mr. Danielson from a photograph, but still committed him for extradition. The Court of Appeal, in upholding the lower court decision, addressed the circumstances as follows:
- [36] Neither the photographs nor the identification particulars in para. 41 can assist the United States in establishing a prima facie case Mr. Danielson undertook the alleged illegal conduct.
- [37] Section 37 of the Extradition Act provides the required link: the similarity of Mr. Danielson's name to the name of the person in the [case] is evidence he is that person; the evidence of witnesses in the [record of the case] links the named person to the alleged illegal conduct.
- [74] The court in Danielson later addressed Mr. Danielson's submission that there was insufficient proof of his identity at para. 80:
- [80] In my view the wording of the statute makes it clear that this part of the test does not require a link to the evidence that will be available at trial in the prosecution of the appellant. At this point the Attorney General had only to show that the person before the court was the person that the extradition partner seeks to prosecute. The material provided by the extradition partner makes it clear that the extradition partner seeks to prosecute a person by the name of "Joshua Danielson" who has the [same] name and fits the description of the person arrested by Canadian authorities and who was in court for the extradition hearing.

- [75] The Attorney General submits that the court can use a combination of photographic evidence, physical descriptors, and witness identification to determine whether the person described in the target sheet and sought by the Requesting State is before the court. The Requesting State seeks a person named Abate Samuel Erasto with a birthdate of September 17, 1997. The B.C. Services card of the person arrested by Constable Pedulla matches that name and birthdate. While the photograph and the physical description of the subject's height and weight on the target sheet are unclear, I accept the submission of the Attorney General that I am entitled to any or all of the identifiers, including the name and date of birth. This finding is supported by the language of s. 37 of the Extradition Act.
- [76] It is evident to me that there is prima facie evidence that Mr. Erasto is the person sought by the Requesting State. Further, there is evidence establishing, on a balance of probabilities, that the person before the court is the same person sought by the Requesting State.
- [77] On that basis, I do not accept the submissions of Mr. Erasto's counsel in relation to the issue of identity.
- [78] I now move on to sufficiency of evidence for committal.

Sufficiency of Evidence for Committal

- [79] Mr. Erasto's submission in this respect is that there is no evidence of one of the essential elements of the offence of conspiracy to traffic in controlled substances. He argues that there is no evidence that he had either direct knowledge of, or was wilfully blind to, the fact that the storage locker was being used to store controlled substances. Hence, he argues that there is no evidence that he had the mens rea required for involvement in a criminal conspiracy.
- [80] Mr. Erasto relies on the reasoning of the Ontario Supreme Court of Justice in *R. v. McDonald*, 2018 ONSC 1270, in relation to the mens rea required for participation in a conspiracy, at paras. 77, 103:
- [77] In summary, it is essential that the person has an understanding of the unlawful nature of the plan, and voluntarily and intentionally joins it. An accused must actually agree and intend to agree to achieve the common unlawful purpose. Merely being present when something happens, merely acting in the same way as others or merely associating with others who are said to be members of the conspiracy does not prove that the accused has joined the agreement with knowledge of its nature and purpose. A person who knows nothing of a conspiracy, but who happens to act in a way that advances one of its purposes, does not thereby become a member.
- [103] In order to adhere to an existing conspiracy, more is required than knowing of its existence, discussing it, having an interest in its success or even giving approval - it requires agreement to co-operate in the attainment of the evil end.

- [81] I deal with the Attorney General's submission in full below. However, in answer to Mr. Erasto's submissions regarding the McDonald case, the Attorney General notes that the Ontario court's decision was delivered in a criminal trial; hence, the discussion does not address the applicable standard for this extradition proceeding.
- [82] Counsel also points to the language from para. 78 of the McDonald decision where the court stated that:
- [78] To determine beyond reasonable doubt whether [the accused] was a member of the conspiracy the trier is to consider all the evidence arising while the conspiracy remained in existence and in furtherance of the object or purpose of the conspiracy.
- [83] The Attorney General says that Mr. Erasto's submissions require the court to view a number of facts in isolation and not in the context of the whole evidence.
- [84] The overarching theme of Mr. Erasto's submission is that there is no evidence that he had either direct knowledge of, or was wilfully blind to, the fact that the storage locker was being used to store controlled substances. Mr. Erasto submits:
- a) the Requesting State alleges that a group of individuals are part of a conspiracy, but there is no evidence to establish any actual membership in what was referred to as the Chiu drug trafficking Organization;
 - b) there is no evidence that Mr. Erasto was aware that the storage locker was being used to store drugs;
 - c) there is no evidence of Mr. Erasto having rented the storage locker at the direction of Mr. Chiu, and there is no evidence of any communication between Mr. Erasto and Mr. Chiu about the locker;
 - d) there is no communication between Mr. Saroya and Mr. Erasto about any conspiracy to traffic drugs, and no evidence that would support an inference to that effect;
 - e) there is no evidence of Mr. Saroya ever having met with Mr. Chiu;
 - f) there is no evidence upon which a reasonable person or properly instructed jury could infer that Mr. Erasto rented the storage locker with knowledge of what Mr. Saroya was going to do with it.
- [85] Mr. Erasto submits that while there might be evidence that he took some step that furthered the conspiracy (renting the locker), there is no evidence that he had knowledge of a conspiracy or that he was furthering a conspiracy. In the absence of evidence establishing the facts set out above or any evidence of knowledge by Mr. Erasto that the storage locker was used to store drugs, he submits that the ROC and the SROC provide insufficient evidence to order his committal.

- [86] In response to the defence submissions, the Attorney General again notes that the case against Mr. Erasto is circumstantial and will necessarily be made by inferences. The Attorney General submits that the "missing pieces" alleged by the defence are not, in fact, missing if one looks at the entirety of the evidence, in line with the reasoning at para. 78 of the McDonald decision. The Attorney General submits that the court must consider all of the evidence in context, and that Mr. Erasto's involvement in the conspiracy is a reasonable inference from that evidence.
- [87] In that respect, the Attorney General submits that the context and proximity of the timing of events leads to sufficient inferences of Mr. Erasto's knowledge of, and involvement in, the conspiracy.
- [88] The Attorney General notes the following facts from the months of March and April 2018. I am going to divide these into brief periods of time followed by the Attorney General's submission:
- a) on March 6, Mr. Erasto flew to California with Mr. Galic;
 - b) on March 7, he rented a storage locker;
 - c) on March 11, he returned to Canada.
- [89] The Attorney General submits that this brief trip and rental of the storage locker support the inference that Mr. Erasto rented the locker for the purpose of cross-border drug trafficking.
- [90] Next:
- a) on March 13, Mr. Erasto met with Mr. Chiu;
 - b) on March 14, Mr. Chiu directed Undercover Officer 2 to call a number and arranged a meeting with a man who turned out to be Mr. Saroya;
 - c) on March 15, Undercover Officer 2 met with Mr. Saroya and discussed the transportation of drugs to and from the United States;
 - d) Mr. Saroya accessed the locker rented by Mr. Erasto three times in the following three weeks, including a visit on March 29.
- [91] The Attorney General submits that the timing and content of the meeting between Undercover Officer 2 and Mr. Saroya to discuss the movement of drugs further supports the inference that Mr. Erasto's rental of the storage locker was for the purpose of the criminal conspiracy. Mr. Chiu contacted Undercover Officer 2 the day after his meeting with Mr. Erasto. Undercover Officer 2 then met with Mr. Saroya. Mr. Saroya's subsequent access of the locker at Extra Space Storage provides still further foundation for the inference.
- [92] Next, the occurrences in April:

- a) On April 4, Mr. Erasto had the text message exchange with Mr. Saroya regarding whether Mr. Erasto should cancel the locker at Extra Space Storage. Mr. Saroya told Mr. Erasto that he would be emptying it that night.
 - b) Later, on April 4, Mr. Saroya went to Extra Space Storage.
 - c) On April 5, Mr. Saroya went back to Extra Space Storage.
 - d) Also, on April 5, Mr. Saroya was arrested in possession of 47 kilograms of methamphetamines.
- [93] The Attorney General submits that the proximity in time between Mr. Saroya advising Mr. Erasto that he would empty the locker and actually attending at the locker facility, although out of view of surveillance, supports the inference that Mr. Saroya accessed the locker.
- [94] The Attorney General submits that the exchange of text messages refers to the storage locker at Extra Space. Mr. Erasto was aware that Mr. Saroya was accessing that locker. Further, the fact that Mr. Erasto sought Mr. Saroya's agreement for cancelling the storage locker supports the inference that Mr. Saroya was accessing the locker with Mr. Erasto's knowledge and approval for a common purpose. Further, the Attorney General submits that Mr. Erasto's and Mr. Saroya's use of the word "we" in the text messages discussing the use of the locker indicates a common purpose. Still further, the fact that Mr. Erasto intended to cancel the storage locker rental less than one month after he rented it indicates that he rented the storage locker in California for a short term. The inference is that he rented it for the purpose of the drug trafficking operation.
- [95] The Attorney General submits that taken together with the direct evidence of the five kilograms of cocaine stored at the other locker and the 47 kilograms of methamphetamines in the suitcases, and the pattern of Mr. Saroya and Mr. Shepherd accessing the two storage lockers on the same day, in addition to their unusual coordinated driving of Vehicles 1 and 2, supports the inference that they were moving controlled substances between the two storage lockers. The Attorney General submits that a reasonable inference can be drawn from this condensed version of the facts that Mr. Erasto was a member of the conspiracy who, in fact, furthered the conspiracy by renting the storage locker that was accessed by Mr. Saroya and others for drug trafficking activity. Not only was Mr. Erasto in contact with members of the alleged conspiracy, events occurred within the conspiracy soon after the actions of Mr. Erasto.
- [96] I return to the test on this application for committal. That is, whether there is admissible evidence of conduct that, had it occurred in Canada, would justify committal for trial in Canada. My job is equivalent to that of a judge during a preliminary inquiry who considers whether there is sufficient evidence to commit the accused for trial. This role requires me to engage in a limited weighing of evidence. With respect to the inferences to be drawn from circumstantial evidence, the question is whether the inferences that the Requesting State asks to be drawn are reasonably supportable.

- [97] The question then is whether the evidence is capable of proving that a conspiracy to traffic in Schedule I substances existed, and that Mr. Erasto was a member of that conspiracy. The Attorney General submits that the core of the offence, the conspiracy, is properly described in Fraser at paras. 77-81. Those core elements are: an intention to agree; completion of the agreement; and a common design to do an unlawful act or to do a lawful act by unlawful means. Further, membership in a conspiracy can be shown by evidence of acts done in furtherance of the scheme: Fraser at para. 79.
- [98] In the trafficking context, the offence is made out where the evidence establishes the existence of an agreement to obtain, transport, or deliver a quantity of controlled substances. The actus reus of the conspiracy is the fact of the agreement to take those steps: Fraser at para. 80.
- [99] The Attorney General submits that a conspiracy can be established based on acts done in furtherance of the scheme. A person can be guilty of conspiracy to do an illegal act without actually having committed that act. The mens rea of conspiracy to traffic is some knowledge of the ultimate criminal object of the plan. It is not necessary to establish that the individual knew every aspect of the plan. The mens rea is established if there is some knowledge that the scheme ultimately had a goal of trafficking illicit substances: Fraser at para. 81.
- [100] The Attorney General also submits that on the facts of the ROC and the SROC, the existence of the conspiracy is an undeniable inference and Mr. Erasto's membership in the conspiracy is a reasonable inference, based on the entirety of the circumstances and, in particular, the series of events in which he was involved.
- [101] I return to the submissions of Mr. Erasto and the gaps that he says exist in the Attorney General's evidence. In reviewing those gaps, I combine them into the following groupings.
- [102] First, with regard to the storage locker, Mr. Erasto submits that there is no evidence that he rented it at the behest of Mr. Chiu or communicated with Mr. Chiu about it. However, as noted, the inference that Mr. Erasto had knowledge of the use of the locker in furtherance of the conspiracy could be drawn from:
- a) his travel to California for a short trip, March 6 to 11;
 - b) his renting of the locker;
 - c) the timing of his meeting with Mr. Chiu upon return from California, March 13;
 - d) the subsequent message from Mr. Chiu to Undercover Officer 2 on March 14.
- [103] Second, Mr. Erasto submits that there is no evidence that he was aware of what Mr. Saroya was going to do with the locker or that the locker was being used to store drugs. However, there is evidence of communication between Mr. Erasto and Mr. Saroya. The timing and content of those communications, in combination with other circumstances, could lead to the reasonable inference that Mr. Erasto knew what Mr. Saroya was doing. Further, as noted, the two men both used the word "we" in their communications, leading to an

inference that they were acting in concert.

- [104] Third, with respect to Mr. Erasto's alleged involvement in the so-called Chiu drug-trafficking Organization, Mr. Erasto submits that there is no evidence to establish any actual membership in what was referred to as the Chiu drug-trafficking Organization. However, the entirety of the evidence supports the inference that Mr. Erasto was involved in some of the criminal activities of the Organization. It is not necessary to establish that he knew, or was involved in, every aspect of the organization.
- [105] Mr. Erasto also submits that there is no evidence of Mr. Saroya ever having met with Mr. Chiu. In response, the Attorney General submits, and I accept, that this is not a gap in the case against Mr. Erasto. I accept the Attorney General's submissions with respect to the reasonable inference that can be drawn from the totality of the evidence. Mr. Erasto's submissions invite a compartmentalization of the evidence. His submissions put forward the events as being disjointed and unconnected. However, when viewed in context with a view to the timing and sequence of events that occurred after the actions of Mr. Erasto, there is a reasonable inference that could be drawn that Mr. Erasto had knowledge of, or was involved in, criminal conspiracy and took steps to move that conspiracy forward.
- [106] I find there is sufficient evidence, both direct and circumstantial, such that a properly-instructed jury could draw the necessary inferences to find that Mr. Erasto had the requisite mens rea with respect to the offence charged.
- [107] Having reviewed all of the evidence and the submissions of counsel, I am satisfied that the evidence in the ROC and the SROC, in addition to the evidence of Constable Pedulla and Detective Dodd, are sufficient to meet the evidentiary requirements. Put another way, there is evidence from which the reasonable inference could be drawn that a conspiracy existed to traffic Schedule 1 substances and Mr. Erasto was a member of that conspiracy.
- [108] I find that it is a reasonable conclusion or inference to draw from the evidence that Mr. Erasto was a member of the conspiracy. Although much of the evidence is circumstantial, as set out above, the totality of the evidence, including the proximity of timing of Mr. Erasto's actions to the actions of others involved in the conspiracy, allow for the reasonable inferences that he was aware of and involved in the conspiracy to traffic Schedule I substances.
- [109] On the basis set out above, I find the requirements for an order for committal under s. 29(1) of the Extradition Act are met. As a result, I commit Abate Samuel Erasto for prosecution in the United States for the offence specified in the authority to proceed.
- [110] Mr. Erasto is remanded in custody to await surrender on the offence specified in the authority to proceed to the United States as extradition partner.

"A. Ross J."

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