
CANADA / JUDGMENT

U.S.A. v. Hollaus

2020 BCSC 1600

COURT

Supreme Court of British Columbia

DECIDED

1 October 2020

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

2020 BCSC 1600 U.S.A. v. Hollaus

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE EXTRADITION ACT, S.C. 1999, c.18, AS AMENDED

Citation:

U.S.A. v. Hollaus,

2020 BCSC 1600

Date: 20201001

Docket: 27435

Registry: Vancouver

Between:

The Attorney General of Canada on behalf of the United States of America

Requesting State

And:

Wayne Steven Hollaus

Person Sought

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment on Voir Dire No. 2

Counsel for the Attorney General of Canada on behalf of the Requesting State:

C.C. Benton

R. Dawodharry

Counsel for the Person Sought:

M. Klein, Q.C.

Place and Dates of Hearing:

Vancouver, B.C.

September 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 1, 2020

I. INTRODUCTION

- [1] These are the Reasons on the second voir dire in an extradition proceeding. The United States of America (the "Requesting State") seeks the extradition of Wayne Steven Hollaus, (the "Person Sought"), for prosecution for the corresponding Canadian offence of conspiracy to traffic in Schedule I controlled substances.
- [2] In this voir dire, Mr. Hollaus alleges infringements of his rights pursuant to s. 7 of the Canadian Charter of Rights and Freedoms in the gathering of Canadian evidence. In Reasons indexed at 2020 BCSC 1165 ("the Reasons"), I found that there was not a breach of his ss. 8 or 9 Charter rights, and that there was a breach of his s. 10 rights for a four-minute period. As such, there is a s. 24(2) application remaining to be dealt with in that regard. In the first voir dire, the Crown also had the onus to show that Canadian gathered evidence is admissible in an extradition hearing.
- [3] The background to the Charter applications is as follows. On October 24, 2014, members of the Vancouver Police Department (the "VPD") assisted an ongoing American Department of Homeland Security ("DHS") investigation by conducting an undercover controlled delivery of a suitcase containing 26 kilograms of fake cocaine in Vancouver. The Canadian undercover officer arranged for the cocaine to be picked up by calling a phone number provided by Homeland Security for David Oliynyk and the applicant, Mr. Hollaus. Following the undercover officer's instructions, Mr. Oliynyk retrieved the suitcase of fake cocaine from the undercover officer's vehicle, parked in Vancouver, and placed it in the flatbed of a pickup truck driven by Mr. Hollaus. In a pre-determined operational plan, referred to internally as Tuxedo 25, the VPD used a traffic stop ruse in order to retrieve the suitcase and arrest Mr. Hollaus and Mr. Oliynyk for possession of a controlled substance for the purpose of trafficking without exposing the ongoing American investigation.

II. The Application

- [4] The s. 7 Application states the remedy sought and grounds as follows:

1. A declaration that the Applicant's right to life liberty and security of the person as protected by s. 7 of the Canadian Charter of Rights and Freedoms was violated;
2. That notwithstanding the Court's finding that the Vancouver City Police had grounds to effect a stop, arrest and search of the Applicant, the real purpose of the actions of the police was to further an investigation being conducted by Homeland Security and to determine the Applicant's identity in furtherance of that Homeland Security investigation.
3. Even though the Vancouver City Police could have investigated the Canadian offence of attempted possession of cocaine in the context of a transnational offence, they did not nor did they ever intend to investigate a Canadian offence but at all material times were acting as agent for Homeland Security, and thus they were acting without jurisdiction and possessed an oblique motive for stopping, arresting and searching the Applicant.
4. As a result, the actions of the police are an abuse of process by in effect using their powers of arrest, detention and search to advance the Homeland Security investigation and to do what Homeland security could not: Further the investigation of a United States offence on Canadian soil.
5. That the evidence derived from the stop should be excluded from the proceedings pursuant to s. 24(1) of the Charter as to do otherwise would bring the administration of justice into disrepute.
- [5] This voir dire commenced with the necessary step of a hearing to determine if there is an air of reality to the allegation of a Charter breach because there is no automatic right to a voir dire in an extradition proceeding. If the air of reality is found, the voir dire will proceed on the substance of the s. 7 application. In his able written and oral submissions, the applicant has provided the Court with all arguments on both the air of reality issue and the s. 7 application.
- [6] Therefore, at issue in this hearing is whether there is an air of reality to the allegation of a Charter breach, and whether the alleged breach is capable of supporting the remedy sought: *U.S.A. v. Ranga*, 2012 BCCA 81 at paras. 16 and 21.
- [7] The remedy sought in the s. 7 application is exclusion of the evidence of the identity and voice identification of the applicant from the extradition proceedings per s. 24(1). The applicant states that the breach, if found, does not rise to the level of founding a stay of proceedings.
- [8] This Court discussed the air of reality requirement in the case of *U.S.A. v. Cameron*, 2012 BCSC 1788. It requires more than the mere assertion that something has occurred. It means that there is some realistic possibility that the allegations can be substantiated. The applicant is therefore required to provide a concrete evidentiary basis to justify an extradition judge embarking on an enquiry to adjudicate the alleged Charter breach: *Cameron* at para. 53. As stated at para. 54 of *Cameron*, the test will not be satisfied by: "'bald assertions' in a notice of motion"; "vague and unsubstantiated suggestions"; conjecture or

speculation"; or, "allegations made in the absence of an 'offer of proof'".

- [9] The application, in seeking a remedy for a s. 7 Charter breach, alleges an abuse of process. In *R. v. Babos*, 2014 SCC 16 at para. 1, the Supreme Court of Canada stated that the law recognises two categories of abuse of process: the main category, which captures state conduct that affects the fairness of the trial; and the residual category, which captures state conduct that contravenes notions of fundamental justice. The applicant in his written submissions alleges that both categories of abuse of process are relevant in this application.
- [10] When the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is ongoing fairness to the accused.

III. SOVEREIGNTY

- [11] The applicant says that the conduct of the VPD and the DHS in Tuxedo 25 was contrary to the fundamental principle of Canadian territorial sovereignty. As such, the admission of the evidence gathered from the operation would undermine the integrity of the justice system. In the alternative, the applicant submits the evidence gathered was conscriptive and its admission would taint the fairness of the proceedings.
- [12] Sovereignty, the fundamental principle of international law, was discussed thoroughly in *R. v. Hape*, 2007 SCC 26. The applicant relies on, in particular, the following statements of the Supreme Court of Canada:

42 Sovereignty also has an internal dimension, which can be defined as "the power of each state freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a 'monopoly of legitimate physical coercion': L. Wildesber, "Sovereignty and International Law", in R. St.J. Macdonald and D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 425, at p. 436.

45 In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention. Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law. (For a discussion of these principles, see the comments of Arbitrator Huber in the *Island of Palmas Case* (Netherlands v. United States) (1928), 2 R.I.A.A. 829, at pp. 838-39.)

- [13] Sovereignty encompasses the right of each state to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference: *Hape* at para. 45.
- [14] However, sovereignty is not absolute. The limits are those "to which the state consents or that flow from customary or conventional international law": *Hape* at para. 43. In other words, and put colloquially, states can contract out of their own sovereignty. The most

common example of a limit on sovereignty to which a state consents is an extradition arrangement where states agree to assist each other with cross-border criminal matters. In Canada, that arrangement can take the three forms set out in the Extradition Act, S.C. 1999, c. 18: an extradition agreement (s. 2); a specific agreement (s. 10); or by way of the Schedule listing certain Commonwealth members, States or entities (s. 9). In this case, Canada and the Requesting State have a Treaty, or an extradition agreement. Canada has thus agreed to a limit on its sovereignty.

- [15] How has that limit been dealt with in these circumstances? The applicant submits that there is no evidence of a process that mandated or governed co-operation between states; the VPD acted on an ad hoc basis. As such, as stated in *U.S.A. v. Licht*, 2002 BCSC 1151 at para. 60, the repression of crime was not done in a way that reflected our fundamental values as a society.
- [16] With regard to *Licht*, the judgment must be considered in the context of the case itself. The facts in *Licht* were far different from those in the case at bar. There, an American officer entered Canada without the knowledge or consent of Canada.
- [17] In this case, there is an issue of evidence. As a result of the sequence of the proceedings where the initial application alleged ss. 8, 9, and 10 breaches on which both parties had an onus, the Court heard evidence from three officers involved in Tuxedo 25. That evidence is to form part of the committal hearing. No additional evidence was heard on this application. It is common ground that this application can rely on submissions of counsel.
- [18] There is however an evidentiary vacuum with regard to the important issue of whether or not there was an arrangement or agreement by which the VPD provided assistance to and co-operated with the DHS. In order to take the evidence at its highest, as I must, I will take into account the oral evidence at the first voir dire. There Det/Cst Munro testified that she was not aware of any arrangement. Further, counsel for the applicant advises that in correspondence with counsel for the Requesting State he requested evidence of any arrangements and was advised in May 2019 that, "there was no memorandum or document available which outlines the relationship between the DHS and VPD in October 2014".
- [19] Thus, there is no evidence of an agreement or arrangement, and no evidence that an agreement or arrangement did not exist. There is no evidence either way. It is speculative to state that the DHS attempted to avoid the Canadian judicial process in making the request of the VPD and that the VPD in Tuxedo 25 acted without authority or outside their lawful abilities as a Canadian police force.
- [20] There is much law on the necessity of and benefits of international co-operation. That cooperation between law enforcement agencies can take many forms and occur both formally -- pursuant to a treaty or other agreement -- as well as informally. The following cases provide examples of international cooperation by law enforcement considered by the courts:

- a. Canadian law enforcement assisted American law enforcement by gathering evidence in Canada by way of judicial authorizations and sharing the results outside of the process set out in the Mutual Legal Assistance in Criminal Matters Act ("MLACMA"): *United States of America v. Mathurin*, 2015 ONCA 581. Following a request for assistance by U.S. investigators, Canadian authorities obtained a production order for the subscriber information associated with an impugned IP address, pursuant to s. 487.012 of the Criminal Code, R.S.C. 1985, c. C-46. This information corroborated the appellant's involvement in the fraud scheme. Investigators subsequently obtained and executed a warrant to search the appellant's residence pursuant to s. 487 of the Criminal Code. The Court held that the evidence was lawfully gathered and shared. There was no requirement for the Canadian authorities to proceed under the MLACMA in the circumstances. Further, the Canadian police were permitted to share the information that they had gathered with the American authorities without obtaining judicial authorization.
- b. The RCMP informally shared lawfully intercepted communications with U.S. authorities: *United States of America v. Wakeling*, 2014 SCC 72. The Court held that s. 193(2)(e) of the Criminal Code, which implicitly authorizes cross-border disclosure of lawfully intercepted wiretap information, did not breach s. 8 of the Charter. Following the s. 8 framework, the disclosure in this case was authorized by the procedural and substantive steps in s. 193(2)(e).
- c. The RCMP conducted a Canadian investigation in the Turks and Caicos Islands with the permission of law enforcement in that jurisdiction. The accused sought to have the documentary evidence obtained by the RCMP excluded pursuant to s. 24(2) of the Charter because the searches did not comply with s. 8 of the Charter. The Supreme Court confirmed the lower courts' dismissal of the application. First, the Court held that the Charter did not generally apply to searches and seizures in other countries. Second, the Court held that the actions of the RCMP officers were not unreasonable or unfair, as they were acting under the authority of the Turks and Caicos police. They had a genuine and reasonable belief that they were complying with Turks and Caicos law. Thirdly, the RCMP officers acted in good faith at all times and their actions were not improper. Finally, there was no basis for concluding that the procedural requirements for a lawful search and seizure under Turks and Caicos law failed to meet basic standards commonly accepted by free and democratic societies: *Hape* at paras. 120-121.
- d. The U.S. Drug Enforcement Agency (the "DEA") conducted a portion of their investigation in Canada with RCMP permission. When done without RCMP permission, the DEA's conduct amounted to an abuse of process: *United States of America v. Licht*, 2002 BCSC 1151.
- e. An American police officer interviewed a detainee awaiting extradition to Canada based on an informal request from the RCMP. Although the U.S. police complied with all the American legal requirements upon detention, they did not comply with the s. 10(b) Charter requirement to advise a detainee forthwith of their right to counsel. The Court held that the evidence gathered by the American police was admissible at the accused's murder trial in Canada, as the U.S. police gathering evidence in the U.S. were not subject to the Canadian

Charter. Finding that the American police were subject to and in breach of the Charter when detaining a fugitive under a U.S. warrant would run contrary to the rule that a state is only competent to enforce laws within its territorial boundaries. *R. v. Terry*, [1996] 2 SCR 207.

[21] Here, the following facts are known:

- a. In approximately June 2014, Homeland Security requested the VPD's assistance with a controlled delivery of fake cocaine. Homeland Security is able to request assistance from Canadian law enforcement agencies. Where Homeland Security requires assistance in the area of Vancouver, B.C., Homeland Security must first ask the Royal Canadian Mounted Police (the "RCMP") for assistance. If the RCMP declines -- as occurred in this case -- the VPD can agree to assist if it has the resources to do so.
- b. Det/Cst. Matthew Smart of the VPD was the initial investigator in charge of the Tuxedo 25 investigation. The controlled delivery did not take place in June 2014 as anticipated and instead took place in October 2014. Special Agent Omar Maldonado of Homeland Security (SA Maldonado) called on October 16, 2014, and requested assistance with the controlled delivery. However, Det/Cst. Smart was on holidays. As a result, Det/Cst. Tara Munro took control as lead investigator on Tuxedo 25.
- c. As the lead investigator and the file coordinator for Tuxedo 25, Det/Cst. Munro liaised with Homeland Security as well as with her own department. She was also in communication with SA Maldonado.
- d. It was Det/Cst. Munro who formulated the plan for the controlled delivery of the suitcase of fake cocaine. Det/Cst. Munro created the operational plan for Tuxedo 25 with the assistance of Det/Cst. Leboutillier of the VPD. Det/Cst. Munro and Det/Cst. Leboutillier created the operational plan so that their VPD Sergeants and Inspectors would know the plan and how it was going to be executed.
- e. To further operation Tuxedo 25, the VPD also put together a suitcase containing bricks of fake cocaine to serve as the replacement for the 26 kilograms of cocaine Homeland Security had intercepted. The operational plan depended on the targets picking up the suitcase of fake cocaine as the VPD's authority to stop and arrest the targets would be the reasonable belief that an offence had been committed under the Controlled Drugs and Substances Act.
- f. The VPD executed operation Tuxedo 25 on October 24, 2014. In accordance with the operational plan created by Det/Cst. Munro and Det/Cst. Leboutillier, a VPD undercover operator ("UCO") called a phone number provided by SA Maldonado to arrange for the delivery of the "cocaine". Mr. Hollaus and Mr. Oliynyk picked up the suitcase of fake cocaine from the location provided by the UCO and drove away. VPD Gang Squad Unit ("GCU") members stopped Mr. Hollaus and Mr. Oliynyk's truck in accordance with the operational plan and both targets were arrested after the "cocaine" was "found" in the back of the truck. GCU member Cst. Tyler Dodds identified Mr. Hollaus subsequent to his arrest by comparing Mr. Hollaus' likeness to the photograph on the driver's license found inside his wallet. This

Court concluded in Voir Dire No. 1 that the GCU members who stopped and arrested Mr. Oliynyk and Mr. Hollaus did so lawfully as they possessed reasonable and probable grounds to arrest in accordance with s. 495 of the Criminal Code.

- h. Det/Cst. Matt Smart interviewed Mr. Hollaus subsequent to his arrest and was able to identify Mr. Hollaus' voice because of that interview. The VPD has a policy to attempt to interview every arrestee. Det/Cst. Munro had no recollection of Homeland Security requesting that the VPD attempt to interview Mr. Hollaus.
- [22] Again, there is no evidence before this Court of the official channels through which DHS is able to make requests for assistance to Canadian law enforcement nor how the relevant request was made in this case.
- [23] With regard to the submission that the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) ("MLACMA") process was available and subverted, I note that s. 3(2) of the MLACMA states:

Inconsistency of Acts

3(2) Nothing in this Act or an agreement shall be construed so as to abrogate or derogate from an arrangement or practice respecting cooperation between a Canadian competent authority and a foreign or international authority or organization.

- [24] As the Ontario Court of Appeal stated in Mathurin at para. 42, the MLACMA procedure is not the exclusive means for gathering and sending evidence from Canada to a foreign state.
- [25] In addition to any agreed limit on sovereignty, the principle of comity is applicable in these circumstances. As stated in Hape at para. 52: "In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so."
- [26] I find that this VPD operation, (and it was a VPD operation: see Reasons at para. 57) conceived and executed by the VPD, was a part of international cooperation in the investigation and policing of transnational crime. The principle of comity encourages such cooperation. It did not contravene or derogate from Canadian sovereignty nor was it unlawful.

IV. PURPOSE

- [27] The applicant also submits that the purpose and character of his arrest contravenes s. 7 because it was an unlawful arrest - meant to facilitate the DHS operation without triggering the Canadian judicial process.
- [28] In the Reasons, I dealt with the purpose of the arrest in the context of the allegation of a s. 10 Charter breach:

- [74] The primary issue between the parties concerns whether Mr. Hollaus was given sufficient information about the reasons for his arrest after the discovery of the fake drugs. Mr. Hollaus argues that the failure of police to inform him of the true purpose for his arrest was a breach of his right to know the reasons for his arrest.
- [75] It is not disputed that the purpose of the stop was to further the American cross-border investigation. There was no intention at that time to hold and charge the applicant in Canada, but rather to release him and recover the fake drugs.
- [76] In my view, s. 10(a) and 10(b) together require that the accused be told both the reasons (here the grounds for arrest) for the detention, and the general purpose of the detention if necessary for the effective exercise of the right to counsel.
- [80] Crucially, these cases establish that the right to be informed of the reasons for a detention is an adjunct of the effective exercise of the right to counsel, and must be interpreted purposively in light of that right. It does not require the police to always divulge details of the purpose of a broader investigation. Rather, it requires that the accused be given sufficient information to make an informed decision about whether and how to exercise their right to counsel, and for their counsel to provide sound advice if they do so. In some circumstances, as here, the reasons given for a detention may be narrower than the entire purpose of the investigation, and that compliance with s. 10(a) will be sufficient for exercise of the s. 10(b) rights.
- [29] At paragraph 63 of the Reasons I held that the arrest of the applicant was a lawful arrest.
- [30] On this application, the Attorney General submits and I agree that an otherwise lawful arrest is lawful regardless of whether the police had a secondary purpose for affecting the arrest.
- [31] In *R. v. Kaddoura*, 2009 BCCA 113 at para. 12, the British Columbia Court of Appeal stated that "[t]he fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one." The law as set out in that case and in *R. v. Storrey*, [1990] 1 S.C.R. 241, in my view, establishes that Tuxedo 25, in assisting the DHS with the identities of the individuals picking up the 26 kilos of cocaine in Vancouver, does not render the process utilized and the arrest effected unlawful or an abuse of process. With or without the involvement of the DHS, there was an offence committed in Canada and a lawful arrest in Canada. It would shock the conscience of Canadians if the VPD was barred from making the arrest. The purpose of international co-operation to investigate the cross-border drug trade does not in my view change the conclusion that this was not an abuse of process.
- [32] Indeed, the applicant is in the process, in these court proceedings, of asserting his rights pursuant to the Canadian Charter of Rights and Freedoms. The arrest at the request of the DHS did not abrogate those rights or due process.

- [33] In conclusion, the applicant has not established the threshold air of reality required for this Court to consider his allegation of abuse of process. Although there are cases where international operations have resulted in Charter breaches, on this evidence this is not such a case. The allegations that the DHS acted improperly and in violation of our sovereignty in its request of the VPD for assistance is without an evidentiary foundation. It is conjecture, and contrary to the well-established law with regard to international co-operation.
- [34] I find no serious violation of the community's sense of fair play or conduct that would shock the conscience of the community. Therefore, the applicant has not met the first branch of the test for establishing an air of reality, and it is not necessary to consider the second branch with regard to the remedy.
- [35] The application is therefore dismissed.
- "The Honourable Madam Justice Watchuk"

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1600.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/u-s-a-v-hollaus-2020>

Prepared on 25 October 2026 · Esheria