

CANADA / JUDGMENT

U.S.A. v. Lim

2021 BCSC 1367

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Supreme Court of British Columbia

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2021 BCSC 1367 U.S.A. v. Lim

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. Lim,

2021 BCSC 1367

Date: 20210713

Docket: 28742-4

Registry: Vancouver

Between:

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

Requesting State

And:

Tenny Guon Lim

Applicant/Person Sought

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

April 16, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 13, 2021

I. Introduction

- [1] The applicant or Person Sought, Tenny Guon Lim, applies for a voir dire in these extradition proceedings brought by the Requesting State, the United States of America ("USA"). He is also renewing his application for disclosure.
- [2] In a ruling dated February 26, 2021, and reported at 2021 BCSC 329 (the "Ruling"), I denied Mr. Lim's first application for disclosure. He applies for a voir dire based on the same factual circumstances. As background to this application, the following is the introduction from the Ruling:
 - [1] Mr. Lim's extradition is sought for the purposes of prosecution in relation to his alleged involvement in an international drug trafficking operation from April 2017 to May 2019.
 - [2] The Canadian offence which corresponds to the alleged conduct is conspiracy to traffic in a Schedule I controlled substance contrary to s. 465(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46 and s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ("CDSA").
 - [3] At the extradition hearing, the Requesting State will rely on the evidence summarized in the Revised Record of the Case for Prosecution certified by Victoria A. Degtyareva, Assistant United States Attorney, Central District of California on November 26, 2019, (the "ROC") in order to satisfy the test for committal under s. 29(1)(a) of the Extradition Act, S.C. 1999, c. 18 (the "Act").
 - [4] In the affidavit for a provisional arrest warrant pursuant to s. 12 of the Act, the USA alleges that the applicant and others operated a drug trafficking organization (the "Lim DTO"), based in British Columbia. The USA alleges that the Lim DTO facilitated the movement of large shipments of cocaine, methamphetamine, 3, 4-Methylenedioxyamphetamine ("MDMA") and other illegal drugs to numerous parts of the USA and Canada.

- [5] Specifically, the affidavit states that the USA alleges that the Lim DTO arranged to purchase bulk quantities of cocaine and methamphetamine in the USA in exchange for bulk quantities of MDMA or currency. The cocaine and methamphetamine were transported to Canada, while the MDMA was transported from Canada into the USA for re-sale.
- [6] Mr. Lim seeks disclosure of two main categories of records:
- (a) Canadian-gathered evidence relating to a 2014 Canadian investigation during which Mr. Lim was interviewed by Royal Canadian Mounted Police ("RCMP") Sgt. Shailven Singh. The ROC refers to the 2014 interview as the basis for Sgt. Singh's ability to identify Mr. Lim's voice[;and]
 - (b) American-gathered evidence relating to the investigation of Mr. Lim, specifically a recorded phone call and copies of encrypted messages described in the ROC.
- [7] In the Notice of Application, the Person Sought submits as follows with regard to his requests for disclosure:

According to the ROC, the March 11, 2018, recorded phone call was the only communication between CW-2 and the alleged leader of the DTO that was not made using the PGP program. Therefore, this was the only communication that was not encrypted, untraceable and made using a username.

*The applicant seeks disclosure of the intercepted March 11, 2018 phone call. Sgt. Singh relied on this phone call in his purported voice identification of the applicant.

The US is relying on a 2014 RCMP interview (from another investigation) for identification.

The applicant challenges the lawfulness of that interrogation and seeks exclusion under Section 24(1) and 24(2) of the Charter, such that it cannot be relied upon in any way in the extradition proceedings, including for voice identification.

The ROC states that RCMP Sgt. Shailven Singh can testify that he has personally met with the applicant when he interviewed him in 2014. Furthermore, Sgt. Singh has listened to the March 11, 2018 recorded phone call, and he can testify that the person on the recorded call talking to CW-2 is the applicant.

*Sgt Singh's interview of the applicant in 2014 is being challenged on constitutional grounds. These Charter arguments will be addressed in a voir dire scheduled for December 2020, The second area of disclosure sought, namely information in relation to the arrest, detention and interrogation of the applicant, is relevant to those proceedings.

The applicant submits that the disclosure sought is relevant to both the sufficiency of the evidence to justify committal and Charter breaches which resulted in the discovery of evidence relied upon by the United States. Both of these issues are relevant to the extradition judge's function, and the applicant submits that the disclosure ought to be ordered. The disclosure sought will allow the applicant to place a full evidentiary picture for the court so that it can properly adjudicate these issues.

The applicant is entitled to additional disclosure relating to Charter issues he intends to raise in the extradition proceedings if the Charter issue is within the circumscribed authority of the extradition judge, and the issue has an "air of reality" (United States of America v. Meng, 2019 BCSC 2137, at para. 37).

- [8] At the hearings, the [applicant] Mr. Lim varied his requests for disclosure so as to seek only the materials regarding the March 22, 2014 detention and arrest on the first application at this time. On the second application, only the messages and phone call specifically referred to in the ROC are being sought, rather than everything that was obtained in the investigation.
- [3] The Requesting State has also filed a Second Supplement to the Revised Record of the Case ("SSROC") which was signed on November 17, 2020.

II. The Voir Dire Application

- [4] This application was brought for the purpose of seeking a voir dire with regard to the Canadian-gathered evidence of Sgt. Singh's interview of the applicant in 2014 when the applicant was being investigated for unrelated charges.
- [5] Two alternate bases are advanced for the voir dire. The first is the same basis as in the earlier disclosure motion relying on ss. 9 and 10 of the Charter. The applicant acknowledges that the Ruling on that disclosure motion would apply so as to result in a dismissal of this voir dire application on that basis. The relevant portions of the Ruling acknowledged by the applicant are:
 - [85] Mr. Lim pleaded guilty to the charge that arose from the RCMP's 2014 investigation -- the investigation during which Sgt. Singh interviewed Mr. Lim subsequent to his arrest. The effect of well-established law is that by pleading guilty, Mr. Lim surrendered his right to make full answer and defence, including the right to pursue Charter-based arguments in defence of the offences charged -- including the Charter-based arguments Mr. Lim now seeks to raise in the context of his extradition hearing: Wong (SCC) at para. 96; Hexamer at para. 57.
 - [86] The principle of finality of guilty pleas and the benefits therein conferred require that it not be open to Mr. Lim to raise Charter arguments during his extradition proceedings that he chose not to make during his Canadian criminal proceedings.

- [87] Permitting Mr. Lim to invoke the Charter rights he previously waived goes against the finality of his guilty plea as it raises the possibility that the extradition judge could find a breach of Mr. Lim's Charter rights and exclude evidence by way of ss. 24(1) or 24(2) despite his guilty plea. As the Court of Appeal found in *Hexamer* at para. 57, the fact that there may be arguable grounds to a Charter allegation does not invalidate a guilty plea. While the validity of Mr. Lim's plea would be unchanged in the face of the extradition judge finding a Charter breach, the situation where Mr. Lim's guilty plea co-exists with Charter breaches would call the certainty and finality of the plea into question and lead to a loss of public confidence in the administration of justice.
- [91] In the result, the case before me does not meet any of the exceptions to adherence to the principles of judicial comity as discussed in the cases cited above. I find also that it is in the best interests of justice to follow *Pavlicevic*. In finding that *Pavlicevic* is binding upon me, there can therefore be no order for disclosure of any materials arising from the former case that resulted in a guilty plea, including the 2014 interview conducted by Sgt. Singh.
- [6] The second basis for the voir dire application is founded on the Supreme Court of Canada cases of *R. v. Harrer*, [1995] 3 S.C.R. 562 and *R. v. Terry*, [1996] 2 S.C.R. 207. The applicant says that regardless of how the evidence of voice identification was gathered (as dealt with in the Ruling and which is applicable to the first basis advanced), the tendering of the evidence in the extradition hearing could render the proceedings unfair. He seeks that the court utilise its residual discretion to exclude the evidence pursuant to ss. 7 and 11(d) of the Charter.
- [7] The applicant says that the SSROC is significant because the Requesting State has seen it fit and necessary to provide further evidence on the issue of the voice identification. Thus the central and dispositive nature of the evidence is demonstrated and, if the applicant is denied a voir dire, he will be denied an ability to challenge this evidence at the committal stage.
- [8] The Requesting State relies on the law regarding Charter voir dres in extradition cases as set out in *U.S.A. v. Ranga*, 2012 BCCA 81 at para. 16:
- [16] In the extradition context, the party seeking a Charter voir dire bears the onus of establishing one should be held. As stated by Chief Justice Finch in *United States of America v. Earles*, 2003 BCCA 20, 171 C.C.C. (3d) 116, "before a fugitive will be allowed to embark on a Charter inquiry, there must be some 'air of reality' to a contention that the extradition hearing risks being unfair" (para. 34, citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462).
- [9] The air of reality requirement referred to in *Ranga* is explained in *USA v. Cameron*, 2012 BCSC 1788 at paras. 53 and 54:
- [53] An air of reality requires something more than mere assertion that something has occurred. Indeed, as Mr. Justice Doherty noted in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (ONCA) at para. 76, in the context of disclosure applications, an air of reality means some realistic probability that the allegations can be substantiated. The BC Court of Appeal in *Ranga*

appears to endorse this approach. An applicant is therefore required to provide a concrete evidentiary basis to justify an extradition judge embarking on an inquiry to adjudicate an alleged Charter breach: see *U.S.A. v. Wacjman*, [2002] Q.J. No. 5094 (QCA) at paras. 68, 86, and 87.

[54] The air of reality test mandated by the evidentiary threshold requirement will not be satisfied on:

- i. the basis of "bald assertions" in the notice of motion (see *Larosa*, at para. 85);
- ii. "vague and unsubstantiated suggestions" (see *Turenne v. Canada*, 2004 MBCA 79 at para. 5);
- iii. "conjecture or speculation" (see *Wacjman*, at para. 86); or
- iv. allegations made in the absence of an "offer of proof" (see *Freimuth*, at para. 13).

[10] In this application, the Requesting State submits that the necessary air of reality has not been established. It says that there is no evidence proffered which would support the contention that the extradition hearing risks being unfair.

[11] Further, it submits that, with regard to *Harrer*, there is no evidence to suggest unfairness, but rather the applicant makes the submission that cross-examination of the officers would assist in determining whether something else occurred. That, it submits, is not the test for a *voir dire*.

[12] In addition, the Requesting State submits that it cannot be said that the application of the law of judicial comity in the Ruling would be unfair so as to engage ss. 7 and 11(d) of the Charter.

A. Discussion

[13] In *Harrer*, relied upon by the applicant, the issue was whether and to what extent evidence obtained by foreign peace officers in a manner that, if obtained by Canadian police in Canada, would be in contravention of the Charter is admissible at the trial of an accused in Canada for an offence committed here. The appellant had been interviewed in the United States by immigration agents and the Marshals first on immigration matters and then on alleged criminal participation in her boyfriend's escape in Canada. Prior to the interrogation on the more serious Canadian charge, the Marshal did not give a second warning as would be required by the Charter, but which was not required under American law with the *Miranda* rule.

[14] The issue set out by the court at para. 14 is whether the admission of the impugned evidence, obtained in the interview held in the U.S. without a second warning, would result in an unfair trial. The discussion and decision of the court was with regard to the application of the Charter to foreign authorities acting outside Canada and with regard to whether the principles of fundamental justice and the right to a fair trial permit exclusion of evidence obtained outside Canada. In the course of that discussion the court said this about the

meaning of a fair trial at paras. 45-48:

- [45] At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.
- [46] Evidence may render a trial unfair for a variety of reasons. The way in which it was taken may render it unreliable. Its potential for misleading the trier of fact may outweigh such minimal value it might possess. Again, the police may have acted in such an abusive fashion that the court concludes the admission of the evidence would irremediably taint the fairness of the trial itself. In the case at bar, police abuse or unfairness is the only ground raised, and hence the only one with which we need concern ourselves.
- [48] The question is whether the failure of the foreign police to comply with the procedures required under the Charter in Canada so taints the evidence that its admission would result in an unfair trial. In my view, it does not. This is because the police conduct of which Harrer complains was, viewed in all the circumstances of this case, including the expectations of Harrer in the place where the evidence was taken, neither unfair or abusive. Since the police conduct was not unfair, it follows necessarily that its admission cannot render the trial unfair.
- [15] The Terry case followed Harrer in 1996. It too dealt with the application of the Charter to foreign gathered evidence. The applicant also cites *United States of America v. Dynar*, [1997] S.C.J. No. 64, *R. v. Hape*, 2007 SCC 26, *R. v. Shulman*, 2001 SCC 21, and *USA. v. Cobb*, 2001 SCC 19.
- [16] At paragraph 2 of Shulman, released concurrently with *R. v. Kwok*, 2001 SCC 18 and Cobb, the court found that both s. 7 of the Charter and the common law doctrine of abuse of process require that the judicial phase of the extradition process be conducted in accordance with the procedural fairness which is part of the principles of fundamental justice.
- [17] It is established law, and the Requesting State does not disagree, that the fundamental justice principle applies in extradition cases. Where it is breached, remedies can be granted.
- [18] However, the primary issue on this application does not engage the principles from Harrer and Terry. As I found in my previous Ruling, the decision in *United States of America v. Pavlicevic*, 2008 BCSC 410 is binding upon me. In that Ruling, I ultimately concluded "[t]he Charter issues Mr. Lim raises are not properly justiciable by the extradition judge due to the procedural waiver of those rights that accompanied his guilty plea in the unrelated criminal proceedings": para. 109. More broadly, I described at para. 64 that "Pavlicevic can be said to stand for the notion that, where a person sought has pleaded guilty to Canadian charges, any

Charter allegations arising in relation to those previous charges are not properly justiciable by the extradition judge. This is so even if those issues would have been properly justiciable but for the guilty plea."

- [19] This voir dire application simply seeks different Charter remedies, premised on the alleged breaches of Mr. Lim's ss. 7 and 11(d) rights, arising in relation to the same previous charges. These Charter issues are also subject to the Pavlicevic bar on Charter remedies and, consequently, they are not properly justiciable.
- [20] Even if I am wrong about the effect of Pavlicevic, I am not convinced that the test for a voir dire has been met. In the present case, the police conduct questioned by the applicant occurred in Canada with the police vehicle stop, arrest and interview of Mr. Lim in 2014 by Sgt. Singh. Without this vehicle stop leading to the interview, there would be no voice identification from the phone call recorded in the US in 2018 and from which the voice comparison is sought to be made. The applicant submits that a voir dire is necessary because the interview is foundational evidence.
- [21] However, the applicant does not say what about the interview was unfair or potentially unfair. The SSROC includes the evidence that: "The interview took place over a period of between 2.5 and 3 hours. The interview was conducted after LIM had been provided his official warning and his Charter rights and given access to legal counsel." There are no allegations made by the applicant that would cast any aspersions on this evidence of a Charter-compliant police interview. In other words, there is no submission in support of an air of reality of the allegation of unfairness other than that the evidence is important to the Requesting State and it is important to be able to explore the evidence at a voir dire. That circumstance alone does not fulfil the test for a voir dire as set out in Ranga based on the requirement for an air of reality as described in Cameron.
- [22] The application for a voir dire is therefore dismissed.

III. Renewed Application for Disclosure

- [23] In the course of the applicant's submissions on the voir dire issue, he renewed his application for disclosure on the basis of the Harrer and Terry line of authority which has domestic application and provides an alternate basis for the disclosure sought. That disclosure, he says, would provide the evidentiary basis for the air of reality for the voir dire. He also relies on R. v. Simard, 2019 BCSC 530, and R. v. Caster, 2001 BCCA 633 which recognise the Harrer authority applying in Canada.
- [24] The Requesting State also opposes disclosure on this basis, as it did previously as discussed in the Ruling.
- [25] As I understand the renewed disclosure application, the applicant says that it would render the extradition hearing unfair if he was not permitted to explore the circumstances surrounding the 2014 vehicle stop, arrest, right to counsel, and police interview.

Notwithstanding the Ruling regarding the effect of the guilty plea preventing disclosure, he submits that in order to preserve trial fairness he ought to be entitled, under this alternate ground, to the disclosure previously sought or to the alternate disclosure from para. 93 of the Ruling:

- [93] However, if I am wrong in the determination of judicial comity, I would in the alternative accede to Mr. Lim's alternate application which I understand to be the same as the requesting state's alternate position regarding the disclosure of materials relating to the 2014 RCMP investigation. Pursuant to *Anekwu* and s. 32(2) of the Act, the requesting state would then provide sufficient information about circumstances of Sgt. Singh's interview of Mr. Lim to enable a determination of whether that Canadian-gathered evidence meets the Canadian rules of evidence: *Fraser* at para. 59.
- [26] With regard to disclosure in extradition proceedings, the law was summarised at paras. 35-40 of the Ruling. Disclosure orders also require an air of reality.
- [35] When seeking disclosure, the person sought is required to not only establish that the materials they seek are relevant to an issue properly raised at the extradition hearing, but they must also establish that there is an "air of reality" to that issue: *Kwok* at para. 100.
- [37] The "air of reality" standard applies regardless of whether the disclosure sought relates to an alleged Charter breach or to an allegation that the disclosure will reveal that the evidence in the ROC is defective, manifestly unreliable or unavailable such that the ROC is insufficient to support committal: *United States v. Rosenau*, 2010 BCCA 461, leave to appeal ref'd (2011), [2010] SCCA No. 465; *United States v. Heatherington*, 2019 BCSC 82 at para. 30. The "air of reality" test represents a "restrictive approach" to disclosure such that disclosure orders in extradition will be a "rare situation": *Rosenau* at paras. 56, 59-60; and *Heatherington* at para. 26.
- [38] The "air of reality" threshold "means some realistic possibility that the allegations can be substantiated if the orders requested are made": *United States of America v. Wong*, 2017 BCCA 109 at para. 24 [*Wong* (BCCA)], citing *Larosa* at para. 78. The burden of establishing the requisite "air of reality" rests on the applicant and cannot be met by the mere assertion that the disclosure sought, if ordered produced, will assist in determining the issue that the person sought seeks to raise: *Wong* (BCCA) at paras. 24, 26; *Larosa* at para. 74. Rather, the applicant must provide some indication of what evidence is anticipated from the disclosure and how that evidence could render the ROC so defective or unreliable that it could not support an order for committal: *Heatherington* at para. 31.
- [27] Here, as with the application for a *voir dire*, the applicant has not provided an evidentiary basis for the renewed disclosure request. He proffers a "mere assertion" that the disclosure sought, if ordered produced, will assist in determining the issue that he seeks to raise, being that the evidence, if tendered, would render the trial unfair.

- [28] As the Requesting State has submitted, it appears that the unfairness faced by the applicant is the Ruling which has resulted in disclosure, to any degree, being prevented. However, it is the procedural effect of the guilty plea entered by Mr. Lim in the 2014 proceedings which has resulted in the unavailability of the disclosure. The law regarding Charter applications brought after guilty pleas is not, at this point, demonstrated to be unfair.
- [29] Further, the effect of the decision in the Ruling extends to the application for the limited disclosure discussed as an alternative in para. 93 of the Ruling in the event that "I am wrong in the determination of judicial comity". Since this renewed application is also based on alleged Charter breaches, "[i]n finding that Pavlicevic is binding upon me, there can therefore be no order for disclosure of any materials arising from the former case that resulted in a guilty plea, including the 2014 interview conducted by Sgt. Singh." (para. 91 Ruling)
- [30] In the result, the renewed application for disclosure, either broadly or limited as described in para. 93 of the Ruling, is dismissed.

IV. CONCLUSION

- [31] For the reasons above, the applications of the Person Sought for a voir dire and for disclosure are dismissed.

"The Honourable Madam Justice Watchuk"

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