

CANADA / JUDGMENT

U.S.A. v. Lim

2021 BCSC 329

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2021 BCSC 329 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 329

Date: 20210226

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 - Disclosure Application

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Place and Dates of Hearing:

Vancouver, B.C.

August 26, 2020

November 26, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 26, 2021

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I. INTRODUCTION

- [1] The applicant or Person Sought, Tenny Guon Lim, applies for disclosure in these extradition proceedings brought by the Requesting State, the United States of America ("the USA"). 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.

A. The Application

- [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.
 - (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; and
- [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 defence is applying for full disclosure of the RCMP investigation into the applicant, as relied upon by the United States in the identification portion of its request for extradition. This is information in the hands of the Canadian authorities, is directly relevant to the test for extradition, and ought to be disclosed.

Any information the United States is relying on in the hands of the police or Canadian authorities, to meet the test for committal, that information must be disclosed. This includes, but is not limited to, surveillance reports and intelligence information stemming from the earlier 2014 investigation of the applicant.

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 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.

B. The Position of the Requesting State

- [9] The Requesting State submits that Mr. Lim's application for disclosure should be dismissed in its entirety. Its position is that disclosure in the extradition context is necessarily circumscribed, and an extradition hearing is not a trial. The question for the extradition judge is whether the evidence summarized in the ROC, which is presumptively reliable and available, establishes a prima facie case that the person sought committed the alleged offence. As a result, the person sought is only entitled to disclosure of the materials that the Requesting State relies on to establish a prima facie case of committal and materials relevant to an issue, including a Charter issue, properly justiciable at the extradition hearing and to which there is an "air of reality".
- [10] The Requesting State also submits that with respect to the American-gathered evidence, Mr. Lim has failed to establish that there is an "air of reality" to any allegations that the recorded phone call and encrypted messages described in the ROC are so defective, unreliable or unavailable that the ROC is rendered insufficient to support committal. Accordingly, it says that Mr. Lim is not entitled to disclosure of the requested foreign materials.
- [11] Further, the Requesting State submits that this Court does not have jurisdiction to order disclosure from a foreign state; it says the most that can be done is a direction to the Attorney General to request the materials from the Requesting State.
- [12] The primary issue on this application arises from the Requesting State's submissions that Mr. Lim is also not entitled to any of the requested Canadian-gathered evidence. Mr. Lim entered a guilty plea in relation to the Canadian charge arising from the 2014 RCMP investigation. Pursuant to *United States v. Pavlicevic*, 2008 BCSC 410, the Requesting State says that effect of Mr. Lim's guilty plea is that his Charter allegations are no longer a properly justiciable issue for the extradition judge. It submits that a guilty plea constitutes a waiver of Charter protections including the right to make Charter-based arguments in relation to the investigation to which the plea relates, and following *Pavlicevic*, Mr. Lim's waiver of his Charter rights represented by his guilty plea extends to his extradition proceedings.
- [13] Further, the Requesting State says that even if Mr. Lim had not pleaded guilty, he would not be entitled to the far-reaching disclosure he originally requested. Absent the guilty plea, it says that the only relevant disclosure for extradition proceedings would be materials relevant to establishing the lawfulness of his 2014 arrest and subsequent interview and not the entirety of the investigative file. With the alternate submission of Mr. Lim, I understand that it is now these materials which are the subject of this application.

II. FACTual context

A. The Requesting State's Case against Mr. Lim

- [14] The Requesting State's evidence against Mr. Lim is summarized in the ROC. The "Certification of the Revised Record of the Case", certifies that the evidence summarized in the ROC is available for trial and is sufficient under the laws of the United States to justify prosecution. The evidence summarized in the ROC includes the following.
- [15] Between at least April 2017, and May 2019, Mr. Lim is alleged to have operated an international drug trafficking operation based out of British Columbia. Mr. Lim arranged to purchase bulk quantities of cocaine in the United States to be smuggled into Canada in exchange for bulk quantities of MDMA.
- [16] Mr. Lim used encrypted digital devices to communicate with his co-conspirators and arrange for drugs to be picked-up or dropped-off. The encrypted digital devices employed a data encryption and decryption program called "Pretty Good Privacy", or "PGP".
- [17] Two confidential witnesses ("CW-1" and "CW-2"), who were cooperating with the Federal Bureau of Investigation (the "FBI"), communicated with a person alleged to be Mr. Lim regularly using several encrypted devices. The encrypted messages on these devices show that person communicated with CW-1 and CW-2 using various usernames including "The Goat", "Max Power" and "Wild".
- [18] The lead case agent is Hannah Monroe ("SA Monroe"), a Special Agent with the FBI.
1. CW-1 AND CW-2
- [19] CW-1 began co-operating with the FBI after the execution of a search warrant at their home and a stash house on May 10, 2017. The FBI seized numerous encrypted devices from CW-1 during the execution of the warrant, and searched those devices pursuant to the warrant and with CW-1's consent.
- [20] The FBI located hundreds of encrypted messages between CW-1 and "The Goat" in which there was a discussion of aspects of the drug trafficking operation including specific details for drug drop-offs and pick-ups. These messages were dated between April 20, 2017, and May 10, 2017.
- [21] CW-1 continued messaging with the person alleged to be Mr. Lim after he began cooperating with the FBI, including specifically messaging him at the direction of SA Monroe. SA Monroe preserved in FBI custody all messages that CW-1 exchanged with that person.
- [22] SA Monroe used information provided by CW-1 and messages exchanged between CW-1 and The Goat to build her theory that Mr. Lim was The Goat and the leader of the DTO.
- [23] CW-1 died of a drug overdose on June 5, 2017.

- [24] CW-2 began cooperating with the FBI after execution of a search warrant at their home on January 31, 2018. CW-2 told the FBI that they had been communicating with a person alleged to be Mr. Lim, whom they knew as "Tenny". CW-2 continued communicating with using encrypted devices at SA Monroe's direction. SA Monroe preserved in FBI custody all messages that CW-2 exchanged with that person.
- [25] On March 11, 2018, CW-2 placed a phone call to the person alleged to be Mr. Lim, or "Tenny", in the presence of SA Monroe. The call was recorded. During the call that person expressed concern about a news article that mentioned a recent takedown involving his organization and referred to "The Goat". The person told CW-2 that he had a shipment of MDMA that would be ready for him soon, and they spoke about scheduling a meeting between CW-2 and another individual.
- [26] 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.
- [27] The ROC does not provide any information as to how CW-2 knows the person he was speaking to via untraceable encrypted messages was named Tenny. The ROC states that the PGP makes the encrypted messages impossible to trace. Therefore, the only evidence in the ROC that could identify the applicant and link him to the DTO is the March 11, 2018, phone call. This was not a video call; therefore, a voice identification of the applicant as the other person on this call is central to the USA's case.

2. The Voice Identification Evidence

- [28] Sgt. Singh interviewed Mr. Lim in 2014 and can identify him as the person shown in the photograph attached to the ROC. Sgt. Singh has also listened to the March 11, 2018, recorded phone call between "Tenny" and CW-2, and can identify the voice on the recorded call as belonging to Mr. Lim.

B. The 2014 Canadian Investigation

- [29] Sgt. Singh's 2014 interview of Mr. Lim took place after Mr. Lim's arrest on May 22, 2014, on other unrelated charges. On that date, Mr. Lim drove a vehicle to a bonding warehouse at the Vancouver airport where he picked up 34.3 kilograms of heroin packaged inside beeswax. When Mr. Lim was stopped by police shortly after leaving the warehouse, police located the shipment of heroin.
- [30] Mr. Lim pleaded guilty to possession of heroin for the purpose of trafficking contrary to s. 5(2) of the CDSA on August 27, 2018. Mr. Lim was sentenced following a joint submission on May 7, 2019.

III. THE LAW

- [31] An extradition hearing is not a criminal trial. It is intended to be an expeditious means of responding to Canada's international obligations. The limited function of the extradition judge is to determine whether they are satisfied that: (1) the person before the court is the person sought; and (2) whether there is evidence admissible under the Act and available for trial of conduct that, had it occurred in Canada, would justify committal for trial in Canada. The extradition hearing does not involve a determination of guilt or innocence or the ultimate reliability of the evidence: *M.(M.) v. United States of America*, 2015 SCC 62 at paras. 36 and 62. As a consequence, the scope of disclosure in the extradition context is also limited and requests for additional disclosure require careful scrutiny: *United States v. Kwok*, 2001 SCC 18 at para. 99.

A. The Right of Disclosure in the Extradition Context

- [32] In extradition proceedings, the person sought is generally only entitled to those materials upon which the requesting state relies to establish a *prima facie* case for extradition as required by s. 29 of the Act. In a majority of cases, the only material relied on by the requesting state is the ROC summarizing the evidence in accordance with s. 33 of the Act. However, an extradition judge may order the production of additional materials where those materials are relevant to issues properly raised at the extradition hearing, including Charter issues within the circumscribed authority of the extradition judge as long as there is an "air of reality" to those issues: *Kwok* at para. 100.
- [33] Evidence summarized in a ROC and certified in accordance with s. 32(1) of the Act is presumptively admissible at the extradition hearing: *United States of America v. Anekwu*, 2009 SCC 41 at para. 21. Certification of the ROC vests the evidence summarized therein with a presumption of threshold reliability and availability. While the presumption of reliability and availability is not absolute, the threshold for refusing committal on the basis that the evidence is unreliable is high -- it is only where evidence summarized in the ROC is so unreliable that it would be "dangerous or unsafe" to act on it that the extradition judge is justified in refusing committal on this basis: *M.(M.)* at paras. 62-63.
- [34] The threshold reliability and availability as a result of the certification applies equally to any Canadian-gathered evidence summarized in the ROC. However, pursuant to s. 32(2) of the Act, the requesting state must provide sufficient information regarding the Canadian-gathered evidence to allow a determination of whether that evidence is admissible according to Canadian rules of evidence: *United States of America v. Fraser*, 2017 BCCA 136 at para. 54; and *Anekwu* at para. 21. The extradition judge's scrutiny of Canadian-gathered evidence includes a consideration of whether that evidence was obtained in breach of the Charter and, if such a breach occurred, whether the evidence should be excluded by way of s. 24(2) of the Charter: *Fraser* at para. 1. As long as the Canadian-gathered evidence would be admissible in a Canadian court, the extradition judge can rely on that evidence for the purposes of committal: *Anekwu* at paras. 21, 23.

B. The "Air of Reality" Standard

- [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.
- [36] The "air of reality" threshold for disclosure applications in the extradition context was first set out in *R. v. Larosa* (2002), 166 CCC (3d) 449 (ONCA). In *Larosa*, the Court enumerated three criteria for disclosure in relation to allegations of state misconduct at para. 76:
- (a) the allegations must be capable of supporting the remedy sought;
 - (b) there must be an air of reality to the allegations; and
 - (c) it must be likely that the allegations sought and the testimony sought would be relevant to the allegations.
- [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.
- [39] The applicant must also provide an evidentiary foundation in order to meet the "air of reality" threshold -- "vague and unsubstantiated suggestions" or "conjecture and speculation" are not enough: *Wong* (BCCA) at paras. 24 and 26. While a disclosure application may lack particularity because the necessary information to substantiate the claim may be in the possession of the requesting state, an "air of reality" can only be established with evidentiary support. As the Court of Appeal stated in *Wong* (BCCA) at para. 27 referring to the "air of reality" threshold, "[a]n applicant seeking disclosure cannot evade the need to meet this minimal but essential burden by claiming, as Mr. Wong does, that he is in a 'Catch 22' situation and unable to meet the test unless the disclosure is made".

[40] The "air of reality" threshold is necessary to ensure that extradition proceedings are not derailed by unsubstantiated demands: Wong (BCCA) at para. 27. Extradition hearings are intended to be efficient and expeditious proceedings. As the Court of Appeal stated in Wong (BCCA) at para. 27, quoting Larosa at para. 74, "fishing expeditions are not tolerated in any judicial proceeding, particularly one which is intended to provide a simple and expeditious means of responding to Canada's international obligations."

IV. DISCUSSION

A. First application - Voice ID Evidence

[41] Sgt. Singh's voice identification evidence summarized in the ROC is Canadian-gathered evidence within the meaning of s. 32(2) of the Act. Therefore, in the normal course of extradition proceedings, the Charter compliance of Sgt. Singh's evidence would be a properly justiciable issue at the committal hearing. Section 32 states:

Evidence

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.

Exception -- Canadian evidence

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

[42] Mr. Lim's extradition proceedings, however, are unusual. The issue arises because Mr. Lim pleaded guilty to the charge arising from the unrelated 2014 RCMP investigation during which Sgt. Singh's interview took place. The Requesting State submits that as a result of this Court's decision in Pavlicevic, Mr. Lim's guilty plea means that it is no longer open to him to make Charter-based arguments in relation to Sgt. Singh's interview. It says that a guilty plea constitutes a waiver of constitutionally protected procedural safeguards which extend to related proceedings such as extradition proceedings. It says that it is therefore not possible for this Court to determine the Charter issues Mr. Lim raises at the extradition hearing due to his guilty plea in those other unrelated proceedings.

1. Pavlicevic

- [43] The circumstances of Pavlicevic are similar to this case. In both cases the person sought to exclude from the ROC identification evidence obtained during an unrelated Canadian investigation on the basis that the police acted without grounds prior to the identification evidence being obtained.
- [44] In Pavlicevic, the identification evidence summarized in the ROC included a witness identification based on a booking photograph taken by the RCMP some years earlier after an unrelated arrest in Canada. The person sought applied for the exclusion of the booking photograph pursuant to s. 24(2) of the Charter and for additional disclosure relating to the search that led to his arrest and the booking photograph being taken.
- [45] The extradition judge noted that the booking photograph was evidence gathered in Canada within the meaning of s. 32(2) of the Act and therefore its admissibility must be determined according to the rules of evidence under Canadian law: at para. 48. However, the extradition judge found that it was not open to the person sought to raise a Charter challenge to the admissibility of the booking photograph when he had not alleged any Charter breaches in his criminal proceedings. The person sought had entered a guilty plea and received a conditional sentence.
- [46] In rejecting the Person Sought's Charter application, the extradition judge stated:
57. In the criminal proceedings relating to the marihuana grow-op found at the Respondent's residence, the defence did not challenge the validity of the ITO or the Search. In fact, there was no trial. Mr. Pavlicevic pleaded guilty and received a conditional sentence. I agree with Mr. Bolton that those validity issues are not *res judicata* or the subject of issue estoppel as there were no judicial proceedings or determinations and the parties are not the same. However, the issue of the validity of the ITO and the search was relevant only to the criminal proceedings at the time. Mr. Pavlicevic had the opportunity to challenge the ITO, the warrant, and the legality of the Search but he chose to not do so. Those issues cannot be adjudicated several years later in the context of these extradition proceedings. I do not agree with Mr. Bolton that I have any jurisdiction to sit as the reviewing judge on the legality of the Search. [emphasis added].
59. I find that it is not open to the Respondent in these extradition proceedings to raise a Charter challenge to the admissibility of the Booking Photograph which derived from the ITO, warrant and Search which were unchallenged in the criminal proceedings.
- [47] The Requesting State submits that, following the principle of judicial comity set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), the Court is bound to follow Pavlicevic and find that it is not open to Mr. Lim to raise Charter arguments in relation to Sgt. Singh's evidence due to his guilty plea.
- [48] The Requesting State submits that there is no basis upon which to distinguish this case from Pavlicevic. It says this Court's decision in Pavlicevic aligns with the legal principles that a guilty plea involves a waiver of Charter protections and is meant to be final. While the

Ontario Superior Court declined to follow Pavlicevic in *United States v. Hibbert*, 2018 ONSC 7400, it says that case was wrongly decided -- misstating the judge's conclusion in Pavlicevic and failing to consider the case law regarding the procedural significance of a guilty plea and corresponding principle of finality. As such, it argues that Hibbert is not a decision that bears on the present validity of Pavlicevic.

[49] The Applicant says that the subsequent Supreme Court of Canada decision of Anekwu has changed the law and rendered the Pavlicevic decision invalid.

2. Judicial Comity

[50] As stated in *Hansard Spruce Mills* at 592, this Court should only decline to follow a judgment of another judge of this Court if:

- (a) subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered; or
- (c) the judgement was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to consult authority.

[51] I must therefore consider the principle of stare decisis to determine if Pavlicevic is binding on the Court in this application. In the unreported decision of *R. v. Kang*, 2019 BCSC 2109[1], Justice Kerr discussed the related principles of horizontal stare decisis and judicial comity:

[42] Briefly stated, stare decisis is the principle under which a court must follow earlier judicial decisions when the same legal issues arise again in litigation. The shorthand, stare decisis, comes from a longer Latin phrase meaning "to stand by decisions and not to disturb settled matters". Stare decisis has also been described as one of the "basic tenets" of the Canadian legal system and an element of "fundamental justice": *Canada (Minister of Citizenship and Immigration) v. Fast*, 2001 FCA 373 at para. 2.

[43] In *R. v. Hummel* (1987), 60 O.R. (2d) 545 (H. C.), Mr. Justice Ewaschuk observed (at para. 7) that stare decisis "is the glue that holds together the various levels of Canadian courts and it is the principle that elevates the rule of law above the rule of individual judges."

[44] The concept of stare decisis has two facets: (i) vertical stare decisis and (ii) horizontal stare decisis.

[47] Judges of this court generally do not depart from decisions of their fellow judges. This practice promotes certainty and consistency in the law. It is not, however, an invariable requirement. It is a practice rather than a rule because certainty and consistency are not the only desirable characteristics in the law -- it should also be open to change. The principle is sometimes described as the principle of judicial comity, or "horizontal stare decisis", to distinguish it from the rule of "vertical" stare decisis, which requires judges to follow

binding precedents from higher courts: *Chief Mountain v. British Columbia (Attorney General)*, 2011 BCSC 1394 [Chief Mountain] at para. 74.

- [48] The principles from *Re Hansard Spruce Mills* are well known. The decision embodies a rule of judicial comity. It was propounded by Mr. Justice Wilson, later Chief Justice, as a guide for one trial court judge examining an issue that had already been considered and decided by another judge of the same court: *John Carten Personal Law Corporation v. British Columbia (Attorney General)* (1997), 40 B.C.L.R. (3d) 181 (C.A.) at para. 7 [John Carten].
- [50] In *R. v. Sipes*, 2009 BCSC 285 [Sipes], Mr. Justice Smart (at para. 9) observed that the principles from *Re Hansard Spruce Mills* have been consistently applied by judges of this court for over 50 years. Ten years later it can safely be said that the principle has been consistently applied by judges of this court for over 60 years. The reasons of Wilson J. are consonant with the practice that is usually followed by trial judges across the country.
- [52] And, as Smart J. observed in *Sipes*:
- [10] The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court.
- [54] In *Hernandez*, Mr. Justice Silverman determined that he would not revisit the same constitutional challenge that Mr. Justice Davies had considered in *R. v. Tse*, 2008 BCSC 211, aff'd, 2012 SCC 16, Applying the principles from *Re Hansard Spruce Mills*, Silverman J. noted:
- [58] It was clear early on in the pre-trial conferences relating to this matter that I indicated I would be inclined, in the absence of a very good reason not to do so, to rely upon the principle in *Hansard Spruce Mills* and follow Judge Davies' decision: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 13 W.W.R. (N.S.) 285 (B.C.S.C.).
- [59] I have been made aware of a decision which in many ways disagrees with Mr. Justice Davies, the decision of *R. v. Riley*, [2008] O.J. No. 2887 (Sup. Ct. J.) (QL). However, in my view I am bound by *Hansard Spruce Mills* and by Judge Davies and for the same reasons that he did, I conclude that s. 184.4 is unconstitutional, and all calls obtained pursuant to that were therefore obtained in breach of Charter rights, no matter when they were intercepted.
- [56] Justice Smart was clear in his examination of the principles from *Re Hansard Spruce Mills*, noting that blind adherence to the principles is not how matters should be assessed:
- [11] In my view, both the rule in *Re Hansard Spruce Mills* and the exceptions to it are based on common sense and a consideration of the interests of justice. At all times, the application of the rule should advance the interests of justice, not undermine them. It is for this reason

that I am also of the view that the determination as to whether to follow a decision of another judge of the same court should not begin and end with a rote application of *Re Hansard Spruce Mills*; instead, that determination should also be informed by all relevant factors that bear upon whether it is in the best interests of justice in the context of the particular case at hand to do so. I refer to the circumstances of the present case by way of example.

- [15] I do not suggest that adhering to the rule in *Re Hansard Spruce Mills* will not usually be the correct course of action. It will be, because it will almost always be in the interests of justice for judges to follow the applicable decisions of other judges of the same court. What I do suggest, however, is that judges should always be mindful of the interests of justice and ensure that applying *Re Hansard Spruce Mills* will advance those interests in the particular circumstances. This will necessarily entail having regard to the broader context of the case.
- [16] There very well may be exceptional circumstances where it will be appropriate in the interests of justice for a judge to decline to follow another judge's decision for reasons other than those described by Wilson J. I hasten to add that the present application is not such a circumstance, as I do not suggest that the decision in *Tse* is incorrect or that I would not agree with it if the constitutionality of s. 184.4 of the Criminal Code were litigated before me.

[Emphasis added.]

(a) Subsequent decisions

- [52] In this case, of the three reasons stated in *Hansard Spruce Mills* for declining to follow a judgment of this Court, the issue is whether subsequent decisions have affected the validity of the impugned judgment. The Applicant submits that Anekwu has changed the law since the time of *Pavlicevic*, and the Requesting State argues that the case of *Hibbert* is not indicative of the validity of *Pavlicevic* because *Hibbert* was wrongly decided.
- [53] In *Hibbert*, the Superior Court of Ontario declined to follow *Pavlicevic* and allowed the person sought's Charter challenge to proceed at the extradition hearing when the same challenge had not been brought during the domestic criminal proceedings. The Court also found more than an air of reality to the person sought's claim that evidence, which formed the basis for the proposed American prosecution, was obtained in violation of his Charter rights.
- [54] The circumstances of *Hibbert* were that the person sought was staying with a friend and her young daughter in Kingston, Ontario, when the girl's father found a camera hidden in the bathroom. The girl's parents notified the police and handed over the person sought's electronic devices that they had found in the home. The police obtained a warrant to search the person sought's electronic devices and located images of recordings of several children including the girl.

- [55] The child pornography the Canadian authorities located on the person sought's electronic devices included images of the young child of friends the person sought had recently stayed with in Tennessee. The Kingston police shared the images with the American authorities, which led to the parents of the Tennessee child identifying their child in the images.
- [56] The person sought was charged in Canada and in the United States in relation to the child pornography found on his electronic devices. The Canadian charges related to the images of children in Ontario while the American charge related to the images of the child in Tennessee. The person sought pleaded guilty to the Canadian charges and did not challenge the legality of the search and seizure of his electronic devices by the Kingston police. The United States requested the person sought's extradition for the purposes of prosecution in relation to the Tennessee images.
- [57] In declining to follow Pavlicevic, the Court in Hibbert stated that this Court in Pavlicevic ultimately refused to allow the person sought to bring a Charter application on the grounds of relevance: at para. 37. The Court in Hibbert went on to distinguish Pavlicevic on the basis that Anekwu clearly established that the Charter compliance of Canadian-gathered evidence is an issue that an extradition judge can consider at committal.
- [58] The Applicant also submits that the law as stated in Pavlicevic has been overtaken by Anekwu. In Anekwu the Supreme Court of Canada considered s. 32(2) of the Act to determine whether hearsay summaries of Canadian-gathered evidence in the ROC met the requirements of s. 32(2), that it "satisfy the rules of evidence under Canadian law in order to be admitted."
- [59] The Court decided that the entirety of s. 32(1) is subject to the specific provision contained in s. 32(2): at para. 16. This question arose because some of the language of s. 32(1) seems to exempt the contents of the ROC from compliance with Canadian rules of evidence under s. 32(2), the underlying rationale for this interpretation being that the evidence contained in the ROC has already met the threshold for reliability, due to the certification process under s. 33(3): see *United States of America v. Ferras*, 2006 SCC 33 at para. 66. The Court rejected this argument, finding it "more consistent with the basic principles of statutory interpretation to conclude that the entirety of s. 32(1) is subject to the specific provision contained in s. 32(2)": at para. 16. "In short, the Act requires that our extradition partners comply with Canadian law when gathering evidence in Canada.": at para. 21.
- [60] As a result of Anekwu, it is necessary for extradition judges to scrutinise all Canadian-gathered evidence for Charter compliance. In this case, that would encompass the evidence regarding the traffic stop of Mr. Lim and the subsequent interview of Sgt. Singh. The extradition judge clearly has the jurisdiction to do so.
- [61] Mr. Lim submits that the statement at para. 57 of Pavlicevic indicates that the extradition judge did not have, or did not understand that she had, such jurisdiction: "I do not agree with Mr. Bolton that I have any jurisdiction to sit as the reviewing judge on the legality of the search." However, in my view, the "jurisdiction" referred to is not the s. 32(2) jurisdiction

with regard to Canadian-gathered evidence, but the jurisdiction to review a criminal court proceeding on an unrelated matter. Implicitly the extradition judge was relying on the finality of criminal proceedings resolved by a guilty plea.

- [62] Further, contrary to the Court's comments in Hibbert, this Court in Pavlicevic explicitly referred to the fact that the booking photograph was Canadian-gathered evidence and therefore its admissibility had to be determined according to the Canadian rules of evidence, which include the Charter: at paras. 48-49. As a result, this Court's decision in Pavlicevic does not conflict with Anekwu or s. 32(2) of the Act.
- [63] This Court in Pavlicevic also alludes to the principle of finality and the procedural significance of a guilty plea -- namely, that a guilty plea constitutes a waiver of Charter protections. These are concepts not addressed by the Court in Hibbert.
- [64] In effect, 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.
- [65] I do not find that subsequent decisions have affected the validity of the impugned judgment.
- (b) The interests of justice
- [66] In addition to the three factors set out in Hansard Spruce Mills at 592, discussed above, judges must also determine if it would be in the interests of justice to follow the applicable decisions of other judges of the same court: *R. v. Sipes*, 2009 BCSC 285 at para. 11.
- [67] It is here that other subsequent decisions regarding the procedural significance of a guilty plea must be considered. The courts have long recognized and recently affirmed that a guilty plea, such of that by Mr. Lim in the 2014 unrelated charge, constitutes not only a formal admission of guilt but also a waiver of both the accused's right to require the Crown to prove its case beyond a reasonable doubt and essential procedural safeguards including those that are constitutionally protected: *R. v. Wong*, 2018 SCC 25 at para. 62 [Wong (SCC)].
- [68] The importance of the rights waived by a guilty plea were recently stated by the Supreme Court of Canada in Wong (SCC) at para. 62, "[a]n accused who pleads guilty forfeits such constitutionally enshrined protections as the right to make full answer and defence, the right to silence, the right against self-incrimination and the presumption of innocence." The Court found that a guilty plea operates as both a procedural and an evidentiary device. As an evidentiary device, a guilty plea substitutes for proof beyond a reasonable doubt: at para. 96. However, it is also "a procedural device in that it obviates the need for a trial on the merits and results in a renunciation of the accused person's rights": Wong (SCC) at para. 96 [reference omitted]. The requirement that a plea be voluntary, unequivocal and sufficiently informed ensures that the accused relinquishes their rights in a fair process that compensates for the absence of further procedural protections afforded by the criminal process: Wong (SCC) at para. 96.

- [69] The principle that a guilty plea results in the waiver of a broad range of Charter protections and that waiver applies regardless of whether there may have been merit to alleged Charter breaches has been discussed in other recent cases. In *R. v. Hexamer*, 2018 BCCA 142, the appellant appealed the dismissal of his application to withdraw his guilty plea. One of the appellant's grounds of appeal was that the conduct of the police in gathering evidence in the course of the investigation violated his Charter rights and those Charter breaches required a remedy pursuant to ss. 24(1) and 24(2).
- [70] In dismissing the appeal, the Court of Appeal stated that by pleading guilty the appellant had "surrendered his right to make full answer and defence, including by pursuing Charter-based arguments in defence of the offences charged": at para. 57 [citations omitted]. As a result, unless the appellant's guilty plea was invalid it did not matter that he may have had arguable grounds to seek the exclusion of evidence in the trial court.
- [71] Similarly, in *R. v. S.C.W.*, 2018 BCCA 346, leave to appeal ref'd 2019 CarswellBC 701, the Court, citing *Hexamer*, concluded that the rights waived by a guilty plea include the right to allege a breach of s. 11(b) for the period prior to the guilty plea. The Court commented at para. 42 that while a subsequent delay in sentencing may itself result in an infringement of s. 11(b), the "convicted offender cannot resurrect delay waived by the entry of a guilty plea." The Court then stated, "[t]o hold otherwise would have a deleterious effect on guilty plea proceedings, and the principle of finality, both of which are instrumental to the efficient functioning of the criminal justice system": at para. 42 [citations omitted].
- [72] The principle that a valid guilty plea constitutes a waiver of constitutionally protected procedural safeguards applies regardless of the reason for the guilty plea. In *R. v. Hobbs*, 2018 BCCA 250, the thrust of the appellant's submission in seeking to withdraw his guilty plea was that the true purpose of his guilty plea was strategic -- he simply wished to avoid a more severe sentence that might be imposed were he convicted after trial. The appellant contended that his guilty plea was not an admission of the version of events alleged by the Crown. In dismissing the appeal, the Court noted at paras. 20 and 22 that it is not unusual for an offender to enter a guilty plea for strategic reasons and the strategic nature of the decision does not invalidate the guilty plea.
- [73] The courts have also found the waiver of Charter rights resulting from an admission of guilt extends to the offender's civil forfeiture proceedings. In *Ontario (Attorney General) v. Lok*, 2008 ONCA 632, the Court upheld the lower court finding, at [2007] O.J. No. 2015 [Lok (ONSC)], that any Charter arguments the appellant may have had in relation to his criminal charges could not be raised in the context of civil forfeiture proceedings after he had taken responsibility for the related offences. The Ontario Court of Appeal specifically found, at para. 3, that any such Charter arguments had "been subsumed into his agreement to accept the Crown's offer to enter into the diversion program."

- [74] The appellant in Lok specifically sought the exclusion of evidence by way of s. 24(2) of the Charter on the basis that his s. 9 right was breached by an arbitrary detention and his ss. 10(a) and (b) rights were violated before he gave a statement to the police. The lower court found that allowing the appellant's Charter application would amount to an abuse of process since he had an opportunity to contest the charges in his criminal proceedings but instead chose to take responsibility for his unlawful activity: Lok (ONSC) at paras. 35-36.
- [75] In the civil forfeiture case of Alberta (Justice and Solicitor General) v. Bassett, 2019 ABQB 759, Mr. Bassett had advanced a s. 8 argument in his criminal trial. Upon receiving an adverse ruling, he pleaded guilty. The question was whether he could raise the alleged s. 8 violation in the context of the civil forfeiture proceedings. After concluding that the attempt to re-litigate the s. 8 issue was not precluded by either the doctrine of issue estoppel or collateral attack, the Court considered whether it was an abuse of process. The Court cited the law on the finality of guilty pleas in paras. 85 and 86, but then relied on an erroneous understanding of the facts in a British Columbia case, British Columbia (Civil Forfeiture) v. Langdon, 2019 BCSC 1021, in arriving at an unsupported conclusion at para. 88:
- [75] In Toronto (City) v CUPE, Local 79, "O" was convicted of sexually assaulting a boy under his supervision. At his criminal trial, the trial judge found that the complainant was credible and that "O" was not credible. "O" was convicted. The City of Toronto fired "O" a few days later. "O" grieved the arbitration, and at the arbitration hearing "O" testified that he never sexually assaulted the boy. The arbitrator, who did not hear evidence from the complainant, found that the criminal conviction was admissible evidence, but held that the criminal conviction was not conclusive as to whether the sexual assault occurred. The arbitrator held that "O" has been dismissed without just cause.
- [76] All nine justices of the Supreme Court of Canada held that the re-litigation of the criminal conviction was precluded on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. While Arbour J observed that the doctrine of abuse of process was a flexible doctrine meant to be unencumbered by the technical aspects of res judicata (Toronto (City) v CUPE, Local 79, at para 38), she held that the "attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent re-litigation, essentially for the purpose of preserving the integrity of the court's process" (Toronto (City) v CUPE, Local 79, at para 42).
- [77] Mr. Bassett responds to the suggestion of impermissible re-litigation by pointing out that he is not attempting to re-litigate the outcome of his criminal proceeding. Mr. Bassett suggest, that unlike "O", he is not attempting to circumvent the substantive findings of his guilt. To put it another way, Mr. Bassett argues that he is not suggesting, as did "O", that he is not guilty of the criminal offences to which he plead guilty.

- [78] While I agree with Mr. Bassett has to some extent distinguished himself from the factual circumstances underlying *Toronto (City) v CUPE, Local 79* and *Ontario v O.P.S.E.U.*, this does not mean that Mr. Bassett is not engaging in an abuse of the court's process. In my view, I must consider whether the court's process is abused by permitting Mr. Bassett to in effect, once again, argue that his s. 8 Charter rights have been infringed, albeit now in the civil context.
- [85] The basis for finding that the future right to complain of a Charter violation is subsumed by a guilty was recently the subject of some discussion by Watt JA in *R. v. Faulkner*, 2018 ONCA 174 at para 93. As Justice Watt identifies, the British Columbia Court of Appeal has long regarded a plea of guilty as a bar to further litigation of an interlocutory ruling, unless the plea of guilty is set aside on some basis: *R. v. Duong*, 2006 BCCA 325 at para 16-18; *R. v. Carter*, 2003 BCCA 632 at paras 6-7; *R. v. Chuhaniuk*, 2010 BCCA 403 at para 46-49.
- [86] The notion that the entry of a guilty subsumes any further complaint about an alleged Charter violation also finds some favour in recent jurisprudence from the Alberta Court of Appeal. In *R. v. TML*, 2019 ABCA 176 at para 24, the Court of Appeal stated as follows:
- As pointed out in *Faulkner* at para. 102, when the accused agrees to plead guilty to a number of counts, and the Crown stays the remaining counts, everyone is entitled to assume that the matter has been finally concluded. Any complaints about the pre-guilty plea trial procedures are subsumed in the guilty plea. [emphasis mine]
- [87] Mr. Bassett refers me in argument to *British Columbia (Civil Forfeiture) v Langdon*, 2019 BCSC 1021, and suggests that this decision supports the conclusion that *Ontario v Lok* should not be followed. Mr. Bassett points out that Mr. Langdon pleaded guilty to offences under the Controlled Drugs and Substances Act, and was later permitted to raise Charter arguments in the civil forfeiture proceeding.
- [88] While I agree with Mr. Bassett that an accused who has not received a contrary ruling to the Charter arguments he first advances in his criminal trial, will then be permitted raise those Charter arguments in the subsequent civil proceedings; Mr. Bassett is in a very different position.
- [76] The Court in *Bassett* went on to conclude that Mr. Bassett's attempt to re-litigate the s. 8 Charter issue in the civil proceedings constituted an abuse of process, as that issue had already been decided in the criminal proceedings. However, the Court did not accurately discern the factual basis of *Langdon* when it relied on that case to suggest that an accused who pleads guilty can raise Charter issues in subsequent civil proceedings, provided there has been no adverse ruling on the alleged Charter breach. Although there had been a guilty plea in *Langdon*, the alleged Charter breach arose from police actions after the guilty plea and sentencing had been concluded. It was when the items seized in the investigation remained held after the guilty plea that the alleged wrongful search and seizure of the hard drive with Bitcoins occurred thus leading to an application for a remedy for a s. 8 Charter breach. In other words, the Charter breach that the Court permitted Mr. Langdon to pursue

after the guilty plea was not part of the facts of the offence that was the subject of the guilty plea. The Court's conclusion in para. 88 of Bassett was based on an erroneous understanding of the facts of the case it relied upon, and does not therefore support a view of the law that differs from that followed in Pavlicevic.

- [77] The consistent application of the law regarding the finality of guilty pleas and maintaining their finality is indicative of the importance of ensuring the stability, integrity and efficiency of the administration of justice.
- [78] In addition to the importance of finality of guilty pleas, the plea bargaining process, the negotiation of joint submissions on sentence and agreements to plead guilty have been the subject of judicial comment regarding their important place in the administration of justice. In Wong (SCC) at para. 61, the Supreme Court of Canada recently noted that:

...such agreements are 'commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large': see R. v. Anthony-Cook, 2016 SCC 43, [2016] 2 S.C.R. 204, at para. 25. The plea bargaining process is fundamental to the administrative of justice: the disposition of cases by means of plea bargains benefits all participants in the justice system, preserves limited resources and introduces certainty into the criminal process: Anthony-Cook, at paras. 35-40.

- [79] The benefits a guilty plea confer on a convicted offender provide further support for Pavlicevic and the necessary finality of a guilty plea. A guilty plea, and in particular an early guilty plea, is a mitigating factor at sentencing. In addition to a guilty plea being a show of remorse, the sentencing judge must also give weight to the court time and expense saved by the accused's guilty plea: R. v. Randhawa, 2007 BCCA 598 at para. 7. As the Alberta Court of Appeal stated in R. v. Sandercock, 1985 ABCA 218 at para. 23, referring to mitigating factors that must be considered in fixing a fit sentence: "[a]side entirely from any remorse, however, an accused should receive substantial recognition... for waiving some of his constitutional rights in deference to expeditious justice."

3. First Application - Conclusion

- [80] This Court should only depart from Pavlicevic if the applicant has established that the principles of judicial comity ought not to apply. To repeat, the three factors in Hansard Spruce Mills that justify departing from a decision of the same court are:
- (a) subsequent decisions have affected the validity of the impugned judgment;
 - (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered; or
 - (c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to consult authority.

- [81] Here, it has not been established that subsequent decisions have affected the validity of the impugned judgment. The factors of not considering binding authority, or an unconsidered judgment were not raised.
- [82] Further, the Court is not to adhere to a rote application of these principles when considering the issue of judicial comity. Rather, the determination of whether to follow a decision of another judge of this Court "should be informed by all relevant contextual factors that bear on whether it is in the best interests of justice to do so": Kang at para. 113, citing Sipes at para. 11.
- [83] The context of both Pavlicevic and this case are similar; they are both extradition cases with evidence arising from guilty pleas in earlier unrelated cases. This similarity of context does not mandate toward an abrogation of judicial comity.
- [84] In my view, the interests of justice arising from that context must be given significant weight. The Supreme Court of Canada and the Court of Appeal of this province have discussed the finality of guilty pleas in cases post-Pavlicevic. It also follows that the waiver of Charter protections resulting from a guilty plea must extend to extradition proceedings in order to ensure the finality of the guilty plea and the stability, integrity and efficiency of the administration of justice. To find otherwise would allow Mr. Lim to renege on the waiver of his Charter rights that occurred when he entered his guilty plea. Allowing Mr. Lim to now litigate his Charter allegations also brings the finality of his guilty plea into question and raises the possibility of the extradition judge finding a Charter breach in the face of his guilty plea.
- [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.

- [88] Further, Mr. Lim's guilty plea possibly co-existing with potential Charter breaches would allow Mr. Lim to retain the benefits of his guilty plea while simultaneously challenging the investigation that resulted in that plea. Mr. Lim would be invoking in his extradition proceedings the very rights he was given credit for waiving in his criminal proceedings -- a situation the Ontario Superior Court found amounted to an abuse of process in *Lok* (ONSC).
- [89] In addition, Mr. Lim's guilty plea was, rightfully, a mitigating factor at sentencing. Mr. Lim's guilty plea was also entered as part of a joint submission -- a further benefit of his guilty plea. As the sentencing judge noted when sentencing Mr. Lim, the Crown's agreement to a joint submission is of particular importance given the fact that "the judge [must] pay very substantial regard to the joint submission.": *R. v. Lim*, 2019 BCSC 839 at para. 3.
- [90] Going behind the finality of Mr. Lim's guilty plea also undermines the principle that extradition is meant to be an efficient and expeditious process, permitting prompt compliance with Canada's international obligations: (M)(M.) at paras. 38 and 64. It is established law that Mr. Lim waived his Charter rights by entering a guilty plea in his Canadian criminal proceedings. To permit him to allege breaches of his Charter rights and reopen an issue concluded by his guilty plea in the context of his extradition is neither efficient nor expeditious. The principle arising from *Pavlicevic* that the waiver of Charter rights arising from a guilty plea extends to related extradition proceedings accords with efficient and expeditious nature of the extradition process. Charter allegations should not be a properly justiciable issue for the extradition judge in the face of a guilty plea.
- [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.
- [92] The application for disclosure of all of those materials is dismissed.
- [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.
- [94] Given that Mr. Lim's interview occurred after his arrest on May 22, 2014, the disclosure that would be ordered would relate to the circumstances of that arrest, the period leading up to the interview and the interview itself.

[95] The order in the alternative would not extend to the broad disclosure sought by Mr. Lim, for which there is no evidentiary foundation or assertion to support the broad request. Mr. Lim alleges that his ss. 9 and 10 Charter rights were breached by a "traffic stop ruse" prior to his arrest and the post-arrest interview. However the alleged conduct giving rise to the latter breach is not described, and the relevance of additional materials to the allegations is not established. Therefore, any order made in this alternative would not include the requested complete RCMP materials related to the 2014 investigation that led to Mr. Lim's arrest, including emails, memoranda, operational plans and surveillance logs. The full extent of the 2014 investigation is not relevant to the extradition proceedings.

B. Second Application - The American-Gathered Evidence: the Phone Call and Encrypted Messages

1. Air of Reality

[96] Mr. Lim also seeks disclosure of American gathered evidence. He submits that the applicable law was recently set out in *U.S.A. v. Meng*, 2020 BCSC 1607 at paras. 39 to 50. There, the court allowed an application to admit evidence, an omission, that was "realistically capable of establishing that the ROC's summary is unreliable.". The court found that admission of the evidence would allow the extradition judge to engage in a meaningful assessment of the reliability of the ROC. The additional evidence would also "allow the correction of an inaccuracy in, or potentially misleading aspect of the ROC."

[97] Mr. Lim submits that without the disclosure he seeks regarding the recorded phone call and encrypted messages, he is without the context necessary for there to be a judicial determination at the extradition hearing. The principles of fairness require disclosure of more than is briefly outlined in the ROC.

[98] The Requesting State distinguishes *Meng* on four grounds. Most importantly, at issue in that case was s. 32(1)(c), and not disclosure. Here, the test is "air of reality" in an application to obtain additional information, whereas in *Meng* the Person Sought was already in possession of the impugned document and sought to put additional parts of the document before the court. The issue in this application of Mr. Lim is whether there is the evidence necessary to establish an air of reality.

[99] I agree with the Requesting State that Mr. Lim has failed to establish the requisite air of reality to his allegation that the foreign disclosure he seeks will reveal that the evidence in the ROC is defective, manifestly unreliable or unavailable such that it would be unsafe to commit. I would also agree with the characterisation of the Requesting State which submits that Mr. Lim's application for disclosure of the encrypted messages with the CWs and agents is aptly described as a fishing expedition.

- [100] It is my view that the death of CW-1 does not call the availability of those encrypted messages into question. The ROC, which states that he has died, certifies that the evidence summarized in the ROC relating to him is available for trial. The encrypted messages exist independently of CW-1, and form records which presently exist.
- [101] It is not apparent how the death of CW-1 could be said to affect the availability of the encrypted messages, particularly to the point where it would be unsafe to commit. The certification of the ROC refers to the availability of the evidence, not the witness. As stated in *United States v. Costanzo*, 2009 BCCA 120 at para. 36, "the mere fact that a witness may be deceased does not mean that their evidence is not available. The admissibility of evidence is, of course, a matter for determination by the court hearing the case in the Requesting State."
- [102] With regard to the reliability or availability of the March 11, 2018, phone call, the disclosure application does not meet the air of reality threshold. Although the phone call itself is relevant, as it was between CW-2 and a person alleged to be Mr. Lim, CW-1's death is not relevant to this aspect of the disclosure application. Rather, I understand the concern to be the lack of information regarding Sgt. Singh's identification of Mr. Lim's voice on the March 11, 2018, phone call.
- [103] Section 33(1)(a) of the Act contemplates a summary of the evidence available to the requesting state. That the ROC does not provide a transcript of the phone call or the details of how Sgt. Singh came to listen to the March 11, 2018, phone call does not undermine the threshold reliability of the ROC. In *United States of America v. Doak*, 2015 BCCA 145 at para. 43, the Court of Appeal held that to require the ROC to detail a precise chain of events concerning how an expected witness came to learn the Blackberry screen names of the person sought would "hold the ROC to a practical standard of detail well beyond that contemplated by s. 33(1)(a)."
- [104] I conclude that Mr. Lim has not established that there is an air of reality to his allegations that the encrypted messages and the recorded phone call described in the ROC are so defective, unreliable or unavailable that the ROC is rendered insufficient to support committal. There is no evidentiary foundation provided, nor are there indications regarding the nature of the evidence anticipated from the requested disclosure. I understand the general assertion that the phone call and the messages could assist with, and are important to, the proceedings, but that does not meet the test for disclosure in the extradition context.
- [105] In the result, this application for disclosure of the American-gathered evidence is dismissed.

2. Lack of Jurisdiction to Order Disclosure from the Requesting State

[106] Further, as the American-gathered evidence sought by the application is in the possession of a foreign state, this Court does not have jurisdiction under the Act to order disclosure of those materials: *United States of America v. Fraser*, 2014 BCSC 1132 at paras. 68-76, *aff'd* 2016 BCCA 444.

[107] If I am wrong in my dismissal of this disclosure application I would in the alternative direct counsel for the Attorney General of Canada to ask the requesting state's authorities to provide the materials sought.

V. Conclusion

[108] This application for disclosure is dismissed in its entirety.

[109] With respect to the Canadian-gathered evidence, this Court is bound to follow *Pavlicevic*. The 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.

[110] If I am wrong in that determination of judicial comity, disclosure is limited to that which is necessary to establish the circumstances of Mr. Lim's May 22, 2014, arrest and interview.

[111] With respect to the American-gathered evidence, Mr. Lim has failed to establish that there is an "air of reality" to any allegations that the recorded phone call and encrypted messages described in the ROC are defective, unreliable or unavailable such that the ROC is rendered insufficient to support committal.

[112] If I am wrong in that determination, and as this Court has no jurisdiction to order disclosure from a foreign state, I would direct counsel for the Attorney General of Canada to ask the requesting state's authorities to provide the materials sought.

[113] Accordingly, Mr. Lim is not entitled to disclosure of the requested foreign materials.

[114] The disclosure applications are therefore both dismissed.

"The Honourable Madam Justice Watchuk"

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