

CANADA / JUDGMENT

U.S.A. v. Sari

2021 BCSC 286

COURT

Supreme Court of British Columbia

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2021 BCSC 286 U.S.A. v. Sari

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. Sari,

2021 BCSC 286

Date: 20210122

Docket: 27796-1; 27796-3

Registry: Vancouver

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

- AND -

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

Respondent / Requesting State

- AND -

Sayed Abood Sari

Applicant / Person sought

Before: The Honourable Justice Winteringham

Oral Ruling

(Defence Application for Disclosure)

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on behalf of the Requesting State:

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Place and Date Hearing:

Vancouver, B.C.

January 14-15, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2021

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I. OVERVIEW

- [1] The United States of America has requested that Seyed Abood Sari be extradited for prosecution in the United States District Court, Southern District of New York in relation to conduct corresponding to the offence of fraud as described in s. 380(1) of the Criminal Code of Canada, R.S.C., 1985, c. C-46.
- [2] On this application, Mr. Sari seeks disclosure of documents in the possession of Canadian authorities and documents likely in the possession of U.S. authorities. The disclosure sought is said to be relevant on two fronts.
- [3] First, the disclosure sought is said to demonstrate the unreliability of the evidence summarized in the Record of the Case (ROC) and Supplemental Record of the Case (SROC) and hence relevant to whether the requesting state has satisfied the statutory requirements for committal.
- [4] Second, the disclosure sought is said to be relevant to an allegation that there was an abuse of process and violations of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms (the "Charter"), particularly with respect to the authorities' dealings with Mr. Sari once he arrived in Canada.
- [5] Regarding the unreliability of the ROC and SROC, Mr. Sari contends that the documents sought will demonstrate that the extradition request is incapable of satisfying the dual criminality requirement of Canada's extradition laws. He submits that the ROC and SROC are very unclear as to the conduct that is alleged to form the basis of the U.S. charges against him. In particular, Mr. Sari is sought for extradition on the basis that he made misrepresentations to U.S. financial institutions to cause them to unwittingly conduct international U.S. dollar transfers on behalf of Mahan Air, an Iranian airline that was designated by the U.S. department of Treasury, Office of Foreign Assets Control (the "OFAC") for violating U.S. economic sanctions against Iran.
- [6] Mr. Sari worked for Jahan Destinations, a travel agency performing limited functions at the Dubai International Airport. He is said to have conducted limited functions at the Dubai airport on behalf of Mahan Air because the airline did not have its own offices in Dubai. Mr. Sari takes the position that he was never a principal of Mahan Air nor was he remunerated by Mahan Air.
- [7] Mr. Sari alleges that the ROC and SROC convey an unreliable description of the banking transactions said to make out the fraud offences. Mr. Sari submits that the documents sought will demonstrate two things.
- [8] First, that the transactions as particularized in the ROC and SROC fail to establish fraud contrary to s. 380 of the Criminal Code. Mr. Sari submits that the evidence presented fails to prove deprivation or risk of deprivation, an essential element of the crime of fraud in the Canadian context.

- [9] Second, Mr. Sari submits that the ROC and SROC do not establish that Mr. Sari was a principal in any of the banking transactions involving Mahan Air nor did he negotiate with any of the banks or have any dealings with the banks. As such, the transactions as described in the ROC and SROC do not provided any basis for demonstrating that Mr. Sari engaged in deceitful conduct as alleged.
- [10] The second reason that disclosure is sought relates to an allegation of abuse of process and Charter infringements.
- [11] Mr. Sari intends to file an application to stay the extradition proceedings on the ground that there has been an abuse of process and infringements of ss. 7 and 8 of the Charter. In short, Mr. Sari alleges that he arrived in Canada to celebrate his birthday with his two adult sons who were enrolled in educational programs at Simon Fraser University (SFU). On his arrival at the Vancouver International Airport (YVR), Mr. Sari was met by the Canadian Border Service Agency (CBSA). Mr. Sari alleges that the CBSA officers compelled statements from him and searched his electronic devices to assist with the gathering of evidence of a charge from the U.S. He contends that the CBSA officers, in the guise of assessing his admissibility to Canada, were really conducting an investigation for their U.S. counterparts regarding a charge of fraud of which he was unaware.
- [12] The Attorney General of Canada (the "AGC") on behalf of the U.S., the requesting party, says the disclosure application should be dismissed in its entirety stating that all relevant disclosure for the extradition hearing has already been produced to Mr. Sari including: the ROC, SROC and notes of the arresting officer relating to his arrest on a provisional arrest warrant.
- [13] The AGC submits that Mr. Sari has failed to establish all facets of the tri-partite Larosa test including an air of reality to his abuse of process claim or his allegation that the ROC and SROC are manifestly unreliable stating that the broad-ranging disclosure sought amounts to the type of fishing expedition Canadian courts have repeatedly cautioned against.

II. FACTUAL BACKGROUND

- [14] I will first set out the allegations underlying the extradition request, then I will set out the chronology of events and finally, I will provide a brief description of the events relating to Mr. Sari's immigration and extradition proceedings.
- [15] I wish to address first, however, an evidentiary objection brought by the AGC with respect to an affidavit tendered by Mr. Sari. In part, Mr. Sari relied on an affidavit from a legal assistant which appends some documents. The AGC objects to paragraph 4 of the affidavit. Paragraph 4 is an "information and belief" statement of the legal assistant where she is said to believe certain statements were made to her by Mr. Sari. The AGC is quite correct that this paragraph constitutes hearsay. I would note, however, that the balance of the paragraph contains facts that are established elsewhere in the record and, as I understand, are not controversial on this disclosure application. However, I have determined that I will not rely

on the statements found at paragraph 4(d) of Exhibit #2. Subparagraph (d) deals with the suggestion that CBSA officers requested Mr. Sari's passwords from him. The AGC submits there is dispute about the substance of paragraph 4(d). As such, I have not relied on it. At further proceedings, Mr. Sari will need to put forward admissible evidence should he wish the court to consider the facts stated therein. I understand that it is not disputed that Mr. Sari was interviewed by CBSA officers. However, I have not relied on the portions of Exhibit #2, paragraph 4 that particularize the details of those interviews. Rather, I have simply accepted the fact that the interviews occurred.

A. The Allegations underlying the Extradition Request

- [16] The Requesting State alleges that Mr. Sari was part of a group of individuals who conspired to cause U.S. banks to conduct international financial transactions for the benefit of Mahan Air, a private Iranian airline against whom the U.S. government had imposed sanctions. The charges arose as a result of information obtained following the execution of a search warrant of some email accounts, including an email account of Mr. Sari. The search warrant was executed on January 15, 2016.
- [17] Michael Lockard certified the ROC on March 15, 2019 and SROC on April 16, 2019. In so doing, he certified that there was evidence against Mr. Sari to prove the allegations and he summarized that evidence in the ROC to be:
- a) An employee of OFAC would testify about the operation of the U.S. sanctions and the fact that Mahan Air had been designated by OFAC as a company subject to the U.S. sanctions;
 - b) An expert witness would provide evidence about correspondent banking, banking sanction compliance and anti-money laundering, how those schemes operate and demonstrating that:
16. The result of these compliance and anti-money laundering policies is that sanctioned entities like Mahan Air are effectively shut out of the U.S. financial system, making it very difficult to send or receive U.S. dollar payments. . . .

This evidence is generic in the sense that the witness is expected to describe these methods of deceiving the U.S. banks but not necessarily what Mahan Air is alleged to have done:

24. Concealing information about the true parties to a transaction, especially that one party is sanctioned or is in a sanctioned country, can expose the bank to a variety of legal, financial, and reputational risks. Concealing that one of the parties is sanctioned or operates in a sanctioned country exposes the bank to several different kinds of legal risks. First is the risk of civil or administrative penalties for participating in a prohibited transaction. While regulators typically consider a variety of factors in determining whether a civil or administrative penalty is appropriate and, if so, what the penalty should be, under the ITSR and the GTSR the bank's knowing participation is not required. If the bank is determined to have acted negligently, recklessly, or knowingly, a substantial penalty is more likely.

Penalties can be imposed if the regulator determines that the bank had reason to know that a transaction was prohibited, even if the bank lacked actual knowledge. If the bank acted knowingly, it can also be exposed to criminal liability, fines, forfeiture, and monitorship requirements.

- c) An employee of the Federal Deposit Insurance Corporation (FDIC) is expected to testify about records maintained by FDIC showing the subject banks were insured;
 - d) The ROC then details the anticipated witnesses specific to the impugned Mahan Air transactions, including descriptions of the expected evidence from individual financial institutions and examples are provided of where Mr. Sari and/or the co-conspirators are said to "dupe" the financial institutions, including:
 - i. An employee from Bank of North America;
 - ii. An employee from the Bank of New York Mellon;
 - iii. An employee of Citibank;
 - iv. An employee of Deutsche Bank Trust Company of the Americas;
 - v. An employee of HSBC Bank U.S.A.;
 - vi. An employee of JP Morgan Chase Bank;
 - vii. An employee of Wells Fargo;
 - e) Special Agent Robert Tringale from the FBI is expected to testify about a search warrant he obtained on January 15, 2016 for five email accounts. Emails connected to Mr. Sari are stated to be the basis for the allegations against him. The email threads are stated to demonstrate how it was that Mahan Air deceived the U.S. banks by describing the transactions, the use of front companies and/or intermediaries. With respect to Mr. Sari, the emails are said to demonstrate his role with Mahan Air's Dubai office and affiliate. In particular, Mr. Lockard certified that the email evidence demonstrates Mr. Sari's role was such that he was directly involved in some of the impugned transactions such as to prove the charges against him.
- [18] Mr. Lockard certified the SROC on April 16, 2019. Here, he describes evidence that will be coming from an employee of OFAC to describe settlements entered into with some of the financial institutions. Additionally, Mr. Lockard states that a second search warrant was executed on February 12, 2019 authorizing the search of an email account (mahanuae.sas@gmail.com) said to be linked to Mr. Sari and the allegations against him.
- [19] There appears to be an error at paragraph 6 of the SROC because the date of the second warrant is missing. It appears that Mr. Lockard is likely referring to the search warrant of February 2019 though that information is missing from paragraph 6.

B. Chronology of Events

- [20] The search warrant was executed in January 2016. The ROC does not indicate what investigative steps occurred thereafter.
- [21] On March 19, 2018, the Southern District of New York issued an arrest warrant for Mr. Sari.
- [22] Mr. Sari traveled from his home in Dubai to Vancouver to visit his two adult sons who were attending SFU. He states that the purpose of the trip was to celebrate his birthday with his children.
- [23] Mr. Sari arrived at YVR on January 17, 2019. Once he arrived, he was detained by CBSA officers. The CBSA officers took his baggage and personal belongings, including electronic devices, Iphone6, iPhone 8, and an iPad Mini.
- [24] The CBSA officers interviewed Mr. Sari that evening. He was detained by CBSA after the interview on January 17, 2019.
- [25] The next day, Mr. Sari was interviewed a second time by CBSA Officer P. Ridgley. He was formally arrested at YVR on January 18, 2019 by CBSA officers for a deportation hearing which would have been held under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (the "IRPA"). He was held in CBSA custody until January 21, 2019.
- [26] On January 21, 2019, an ex parte warrant of provisional arrest pursuant to s. 13 of the Extradition Act, S.C. 1999, c. 18 (the "Act") was sought and granted. In support of the provisional warrant, Corporal Paul Meyer, a member of the Federal Serious Organized Crime Unit of the RCMP, presented an affidavit attaching the Authorization to Apply for a Provisional Arrest Warrant dated January 21, 2019 from the Minister of Justice of Canada (the "Minister") through his authorized official. The affidavit set out the background to the investigation and included the following information:
- a) That Cpl. Meyer reviewed the Request for a Provisional Arrest Warrant from the U.S. government and his review of the Request forms the basis for his grounds to believe:
 - i. The charges in the U.S. Indictment arise out of a scheme by Mahan Air[1] to violate and evade U.S. sanctions and to defraud U.S. financial institutions by inducing them to conduct financial transactions against their sanctions and anti-money laundering compliance policies;
 - ii. U.S. financial institutions would not process any "funds transfers by", on behalf of or for the benefit of Mahan Air because of its OFAC designation in place since October 12, 2011;
 - iii. To make international payments, Mahan Air used a network of front companies and payment intermediaries to deceive U.S. banks about Mahan Air's role in the transaction - inducing the banks to conduct international funds transfers and correspondent banking transactions that the banks would otherwise not conduct;
 - iv. Mr. Sari and others created and executed a fraudulent scheme to deceive the banks by concealing Mahan Air's connection to the international transfers to evade the sanctions;

- v. Mr. Sari has been the general manager of Mahan Air's Dubai office since approximately 2011. He is also the general manager of the Dubai office of Jahan Destination Travel and Tourism (Jahan). Before 2011, Mr. Sari was the general manager of Mahan Destinations, the predecessor of Jahan;
- vi. Business and financial records sent to or from email accounts used by Mr. Sari and other Mahan Air officers show that a major responsibility of the Mahan Air's Dubai Office is to make international payments to Mahan Air's suppliers and service providers. Mahan Air's international payments were made using other companies established in the UAE, Turkey, Russia and elsewhere that had no apparent connection to Mahan Air, to fraudulently conceal from banks the fact that the payments violated the sanctions and the banks' compliance policies. U.S. banks were thus unaware that the payments were connected to Mahan Air;
- vii. Co-conspirator Ayyappankutty Kidaparambil controls several of these companies and his emails show that he is the principal of Ascot General Trading, Grandeur General Trading and Sirjanco Trading in the UAE, among others. Each of these companies were used to make international payments on behalf of Mahan Air;
- viii. Megasource Business Ltd. and Torex Management Ltd. were other companies used by Mahan to make international payments - these companies would also sometimes be used for false invoices;
- ix. Mahan Air also used front companies to execute wire transfers to hide the fact that they were the entity corresponding with the U.S. banks;
- x. In July 2015, Mahan Air instructed a Dubai-based money services business to make payment to a company located in Hong Kong, to settle invoices for shipping charges. This business emailed the wire transfer information to Mr. Sari, where the purpose of the payment was represented as "IMP (ie. import) of Glassware." Emails also show that co-conspirators created fraudulent invoices purporting to show that the payments were for a transaction between the Hong Kong company and the Turkey based company that executed the wire transfer on behalf of Mahan Air;
- xi. Mr. Sari acted as a principal player in the front companies and payment intermediaries. Between 2011 and 2016, he was the general manager of the Dubai office. He communicated regularly with individuals and companies that were conducting international financial transactions on Mahan Air's behalf, providing payment instructions and receiving information about completed payments;
- xii. The evidence of Mr. Sari's involvement in the offences is shown through numerous email communications, obtained as a result of a search warrant, executed on email accounts used by Mr. Sari and his co-conspirators. Three transactions were described at paragraph 6(l) of the affidavit, and said to demonstrate Mr. Sari's involvement in the alleged fraudulent transactions;

- b) Cpl. Meyer next refers to and attaches the outstanding warrant for the arrest of Mr. Sari from the Southern District of New York showing that Mr. Sari is charged^[2] with the following, at paragraph 7 of his affidavit:
- a. Title 18, United States Code, Section 371 - Conspiracy to Defraud the United States;
 - b. Title 50, United States Code, Section 1705 - Conspiracy to violate IEEPA;
 - c. Title 18, United States Code, Section 1349 - Conspiracy to commit bank fraud;
 - d. Title 18, United States Code, Section 1344 - Bank Fraud;
 - e. Title 18, United States Code, Section 1956 - Conspiracy to Commit Money Laundering; and
 - f. Title 18, United States Code, Section 1956 - Money Laundering.
- c) Regarding Mr. Sari's custodial status, Cpl. Meyer's learned the following on January 21, 2019, from Jennifer Mensink, CBSA Hearing Officer, that:
- i. Mr. Sari is in CBSA custody pending a hearing to occur at 1:00 p.m. on January 21, 2019;
 - ii. Mr. Sari was arrested at YVR by CBSA on January 18, 2019 for the purpose of a deportation hearing and that the provisions of the arrest allow for 48 hour detention;
 - iii. Mr. Sari entered Canada for the purpose of visiting his children; and
 - iv. The CBSA believes Mr. Sari is an Iranian citizen and a resident of the United Arab Emirates.
- ^[27] On January 21, 2019, Mr. Sari was ordered detained for an IRPA admissibility hearing with a detention review to be held on January 23, 2019. After the provisional arrest warrant was executed, Mr. Sari was taken to North Fraser Pretrial Centre.
- ^[28] On January 23, 2019, an order for detention under s. 55 of the IRPA was issued indicating that Mr. Sari was detained for a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of IRPA. No further IRPA process or hearing has occurred.
- ^[29] Following a bail hearing in February 2019 dealing with Mr. Sari's custodial status on the extradition warrant, Justice Kelleher ordered his detention on the primary ground relying, in part, on a letter from Mr. Lockard, an assistant U.S. Attorney. In his letter, Mr. Lockard acknowledges that Mr. Sari was provisionally arrested in Canada on January 21, 2019 at the request of the U.S. and that the U.S. was in the process of preparing the full extradition package to be submitted to Canada by March 22, 2019. That same letter was filed as an exhibit at the disclosure application. In the letter, at paragraph 3, Mr. Lockard states:

Sari has been charged for his role in making misrepresentations to U.S. financial institutions to cause them unwittingly to conduct international, U.S. dollar transfers on behalf of Mahan Air. If convicted of certain of the charges in this case, Sari faces up to 105 years imprisonment.

[Emphasis added.]

[30] The detention order was reviewed by Justice Skolrood in July 2019. Having presented evidence to address the primary grounds concerns, Skolrood J. released Mr. Sari on July 27, 2019, on a surety type release order with conditions.

C. Notice of Application for Disclosure

[31] This disclosure application was scheduled to commence in September 2020 but was adjourned to January 2021 and proceeded before me for two days.

[32] In Mr. Sari's Notice of Application, he seeks disclosure of the following:

- a. A copy of the Request for a Provisional Warrant. This was referenced in the affidavit of Royal Canadian Mounted Police Corporal Paul Meyers filed on January 21, 2019 in support of the ex parte provisional warrant at paragraphs 2 and 6.
- b. A copy of the Extradition Request seeking the extradition of Mr. Sari from Canada.
- c. A copy of the USA Indictment.
- d. Copies of all correspondence, memoranda, notes and reports of all personnel pertaining to the detention, interrogation, and provisional arrest of Mr. Sari, including but not limited to those belonging to:
 - i. CBSA Border Services Officer Michael Christopoulos;
 - ii. CBSA Border Services Officer S. Katragadda, in particular notebook 222775 pages 42-29;
 - iii. CBSA Border Services Officer Truong in particular notebook 221139 pages 4-9;
 - iv. CBSA Border Services Officer P. Ridgley;
 - v. CBSA Hearings Officer Jennifer Mensink; and
 - vi. CBSA Hearings Officer Jennifer O'Connell.
- e. Copies of any and all notes and records of conversations between CBSA Border Services Officers, Royal Canadian Mounted Police ("RCMP") Officers and/or the United States Customs and Border Protection ("USCBP").
- f. Copies of any and all correspondence between CBSA Border Services Officers and agents of the United States Federal Bureau of Investigation (FBI), including but not limited to:
 - i. FBI Special Agent Jennifer McReynolds;
 - ii. FBI Agent Ed Meade;
 - iii. FBI Agent John Mauceri;
 - iv. FBI Legal Attaché Jonarthur Sgroi at the United States Embassy in Ottawa;

- v. The US Department of Justice and the Canadian Department of Justice's International Assistance Group.
 - g. Copies of any and all CCTV or audio or video footage the detention, search and interrogation of Mr. Sari at YVR.
 - h. A copy of the settlement agreements with the following banks which are referenced in paragraphs 11-14 of the Supplemental Record of the Case (SROC):
 - i. GP Morgan Chase Bank;
 - ii. City Bank;
 - iii. Deutsche Bank Trust Co America; and
 - iv. HSBC Bank USA.
- [33] During the hearing, Mr. Sari recognized that some of the material sought could be subject to privilege. Additionally, some of the material sought could be in the possession of those in the U.S. and that this court's jurisdiction is limited accordingly. I will address those matters momentarily.
- [34] I turn then to the legal framework guiding a disclosure application, such as this one, in the extradition context.
- [35] The parties agree that where additional disclosure is sought in connection with alleged state misconduct and regarding the reliability of the ROC, the test an extradition judge must apply is set out in *R. v. Larosa*, [2002] O.J. No. 3219.

III. LEGAL FRAMEWORK

- [36] I start with the general principles of extradition law. I then turn to an analysis of the legal principles relating to disclosure applications in the extradition context.

A. General Principles of Extradition Law

- [37] A basic principle of extradition law is that when a person is alleged to have committed a crime in another country, they should be expected to be answerable to that country's justice system: *United States v. Burns*, 2001 SCC 7. Justice Cromwell, in *M.M. v. United States of America*, 2015 SCC 62 stated at para. 14 that "Extradition is the process by which one state assists another in putting that principle into practice. . . ." As stated by Justice Moldaver in *India v. Badesha*, 2017 SCC 44:
- [33] Goepel J.A., writing in dissent, held that the Minister's decision to order the surrenders of Mr. Badesha and Ms. Sidhu was not unreasonable given the assurances provided by India.

- [34] Goepel J.A. disagreed with the majority that the Minister erred in failing to appreciate that India's assurances did not meaningfully address the health and safety risks faced by Mr. Badesha and Ms. Sidhu. The Minister reviewed information provided by India's MEA and the Canadian Department of Foreign Affairs, which detailed the availability of medical treatment in India's prisons. In his reasons for Ms. Sidhu's surrender, the Minister concluded that based on this information, India had the ability to comply with its assurances. The Minister was satisfied that India was committed to addressing the problem of violence and torture in Indian prisons. He also considered the diplomatic incentive for India to comply with the assurances and that India and Canada's relationship as extradition partners had value to both parties. Given these considerations, it could not be said that the Minister failed to address India's capacity to fulfill its assurances regarding Mr. Badesha and Ms. Sidhu's health and safety.
- [35] It is a basic principle of extradition law that when a person is alleged to have committed a crime in another country, he or she should expect to be answerable to that country's justice system: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 72. As Cromwell J. stated in *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973, extradition is "the process by which one state assists another in putting that principle into practice": para. 14. The Act implements Canada's international obligations under extradition treaties to surrender persons for prosecution, or to serve sentences imposed, in another country: *M.M.*, at para. 14. The extradition process is founded on principles of "reciprocity, comity and respect for differences in other jurisdictions": *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 51, quoting *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 844.
- [36] The Act does not merely fulfill Canada's international obligations. It also serves pressing and substantial domestic objectives. It protects the public against crime through its investigation, it brings fugitives to justice for the proper determination of their criminal liability, and it ensures -- through international cooperation -- "that national boundaries do not serve as a means of escape from the rule of law": *M.M.*, at para. 15, citing *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 10.
- [37] That being said, the extradition process also protects the rights of the person sought. At each stage of the process, including the Minister's decision to order the person's surrender to its treaty partner, there is a careful balancing of the broader purposes of the Act with the individual's rights and interests: *M.M.*, at para. 16.
- [Emphasis added.]
- [38] In its submission, the AGC described the three phase process of extradition recognizing that the process requires the balancing of Canada's international obligations to combat international crime with the rights and interests of the person sought for extradition. Briefly, the three phases are these:

- a) The process begins when the Minister receives an extradition request from a foreign state. If the Minister decides to authorize the request, they issue an authority to proceed authorizing the AGC to initiate extradition proceedings before a superior court to seek an order of committal;
- b) The second phase is the judicial committal or discharge of the person sought. Section 24(1) of the Act authorizes the court to conduct an extradition hearing upon the filing of an authority to proceed. The extradition judge must apply the test set out in s. 29(1) of the Act to determine whether the person sought should be committed or discharged; and
- c) Should the judge order a committal, the third and final phase of the extradition process (the surrender stage) requires the Minister to decide whether to order the person's surrender to the requesting state. At this stage, the Minister may consider whether surrender would be unjust or oppressive under s. 44(1)(a) of the Act.

B. Immigration and Extradition Proceedings

- [39] I pause to comment very briefly about the distinction between immigration and extradition proceedings. I do so because it is an issue raised before me as it relates to the CBSA officers' initial dealings with Mr. Sari when he arrived at YVR.
- [40] It is clear that when Mr. Sari landed in Vancouver, the Requesting State had not commenced extradition proceedings in Canada by presenting to the appropriate Canadian authority the request for extradition. The extradition request was made after Mr. Sari's dealings with CBSA authorities.
- [41] In *United States v. Rogan*, 2014 BCSC 1016, Justice Fitch provided a helpful summary of the relevant immigration provisions describing the admissibility scheme at paras 30 - 35:
- [30] The Canada Border Services Agency ("CBSA") is charged with enforcing the IRPA. Under ss. 36(1)(c) and 36(1)(d), foreign nationals are inadmissible to Canada if there is a sufficient basis to believe they have engaged in criminal conduct that, if committed in Canada, would be punishable by a term of imprisonment of at least 10 years, or would constitute an indictable offence.
- [31] A criminal conviction is not a condition precedent to an inadmissibility finding under s. 36; a reasonable belief that an act has been committed outside Canada that is an offence in the place where it was committed, and would also be a defined offence if committed here, is enough: *Bankole v. Canada (Citizenship and Immigration)* (2011), FC 373 at paras. 44-45.
- [32] Section 33 of the IRPA establishes "reasonable grounds to believe" as the standard of proof for finding a foreign national inadmissible under s. 36.
- [33] Under s. 44(1) of the IRPA, an enforcement officer "who is of the opinion that a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister".

- [34] Where the Minister's delegate concludes that a report prepared pursuant to s. 44(1) is well-founded with regard to a foreign national, he or she may refer the person concerned to an admissibility hearing before the Immigration Division.
- [35] As noted by Campbell J. in *Bembenek v. Canada (Minister of Employment and Immigration)* (1991), 69 C.C.C. (3d) 34 (Ont. Ct. (Gen Div.)) at p. 50, "If there is apparently a good-faith basis to seek deportation, then it takes a very strong evidence to show that there is some disguised reason for the immigration officials to do what it is ordinarily their duty to do."
- [42] In *Rogan*, Justice Fitch described the distinction between the deportation and extradition proceedings in this way:
- [114] Deportation and extradition have fundamentally different underlying objectives. Deportation is a discretionary decision made by Canadian immigration authorities aimed at protecting the public good. Extradition, which is initiated by foreign authorities, is aimed at delivering a person sought for prosecution to that foreign authority: *Canada (Attorney General) v. Kissel*, [2006] O.J. No. 5020 (S.C.), at para. 137.
- [115] A person subject to extradition proceedings has a panoply of constitutionally-enshrined protections not available to a person subject to an IRPA admissibility hearing. For example, a person ordered extradited is immune from prosecution in the requesting state for offences that have not been identified in the surrender order. By contrast, there are no restrictions on what a deported person can be prosecuted for once removed from Canada.
- [116] The essence of a "disguised extradition" claim is that removal proceedings were not instituted to pursue a valid immigration objective, but to procure, on behalf of a foreign state, a person's return for prosecution: *Bembenek*, at p. 40; *R. v. Brixton Prison (Governor)*, [1962] 3 All E.R. 641 per Lord Denning at p. 661.
- [117] A heavy onus rests on the party advancing a disguised extradition claim to establish, on clear and convincing evidence, that deportation proceedings were a mere artifice, sham, façade or device to achieve the ulterior objective of extradition.
- [118] In the face of such a claim, it is open to the Court to inquire whether the conduct of government reflects good faith pursuit of a legitimate Canadian immigration objective, or bad faith utilization of the power to deport for the collateral purpose of surrendering a person to a foreign state for prosecution. To succeed with a claim of disguised extradition, a person must first demonstrate that the Minister did not genuinely consider it to be in the public interest to expel the person in question in pursuit of a legitimate Canadian immigration objective: *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839 at p. 844; *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (F.C.T.D.) at p. 12.

- [119] Where, as in this case, a stay of proceedings is sought, the remedy will only be granted in the clearest of cases where the conduct at issue so shocks the conscience of the community that preservation of the integrity of the justice system requires termination of the proceedings by judicial order: *R. v. Power*, [1994] 1 S.C.R. 601 at paras. 6-12.
- [120] Given the high bar erected by the governing tests, it has been said that "disguised extradition" claims will succeed only in extremely rare cases: *Halm v. Canada*, per Rothstein J., quoting with approval Anne Warner La Forest ed., *La Forest's Extradition to and from Canada*, 3rd ed. (Aurora: Canada Law Book, 1991) at 45.
- [Emphasis added.]
- [43] Mr. Sari raises an abuse of process claim with respect to the CBSA's authorities' dealings with him. In particular, he contends the CBSA authorities conducted an improper search and improper interview of him on his arrival at YVR, done in the guise of admissibility under IRPA when, according to Mr. Sari, these were evidence gathering exercises conducted at the behest of the requesting state.

C. Disclosure Applications in the Extradition Context

- [44] Disclosure rights in the extradition context differ from those in a criminal proceeding. Someone in Mr. Sari's position does not have the right to "Stinchcombe" disclosure. That is because an extradition hearing is not a trial. Associate Chief Justice Holmes made this point very recently in *United States v. Meng*, 2019 BCSC 2137 when she described disclosure in the extradition proceedings in this way:
- [35] An extradition proceeding differs in many ways from a criminal trial. Although the extradition hearing must be conducted in accordance with the principles of fundamental justice, more attenuated levels of procedural safeguards have been held to be appropriate due to the limited scope of the proceeding: *United States v. Dynar*, [1997] 2 S.C.R. 462 at paras. 128-134.
- [36] In light of the purpose and scope of the extradition hearing, a person sought from Canada through extradition proceedings is not entitled to the level of disclosure enjoyed by an accused facing criminal charges for trial in Canada (according to the well-known principles set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326). Generally, in an extradition proceeding the person sought is entitled only to the material submitted by the requesting state to establish a *prima facie* case for committal: *United States v. Rogan*, 2014 BCSC 1016 at para. 121.
- [37] The person sought may nonetheless be entitled to additional disclosure relating to a Charter issue they intend to raise in the extradition proceedings. This additional body of disclosure will be available only if the determination of the Charter issue is within the circumscribed authority of the extradition judge, and the issue has an "air of reality" in the sense I will outline below. The Attorney General does not disagree that Ms. Meng's abuse of process claim refers to a Charter issue within the authority of the extradition judge to determine,

but, as I will discuss, denies that the issue has the necessary air of reality in this case.

[Emphasis added.]

[45] I also note *United States of America v. Kwok*, 2001 SCC 18 at para. 100 where Justice Arbour set out the rules of disclosure in the Canadian criminal context do not apply in extradition:

The extradition judge may only order the production of materials relevant to the issues properly raised at the committal stage of the process, subject to his or her discretion to expand the scope of that hearing to allow the parties to establish the factual basis for a subsequent Charter challenge, when it is expedient to do so, including, obviously, when there is at least an air of reality to the Charter claims (*Dynar*, supra, per Cory and Iacobucci JJ., at para. 141). Requests for disclosure of materials related to issues which properly belong to the executive phase of extradition, and to the judicial review thereof, have no independent relevance before the extradition judge and are subsumed in his or her discretion to hear evidence related to such issues.

[46] Attenuated disclosure is consistent with the difference between a judge presiding over a criminal trial and the role of the extradition judge as defined by s. 29 of the Act. Under s. 29 of the Act, the extradition judge's role is confined to determining whether or not the conduct set out in the Requesting State's evidence is sufficient to justify committal. The role is described as an "important, but circumscribed and limited screening function." (para. 36 of M.M.). For a summary of the principles engaged in determining the sufficiency of the evidence in a committal hearing, I refer to Justice Pearlman's decision of *U.S.A. v. Hall*, 2016 BCSC 1004 at para 12:

In his written submissions, counsel for the Requesting State has provided a concise summary of the principles applicable to the assessment of the sufficiency of evidence under s. 29(1) of the Act, as stated by the Court in M.M. and Ferras:

- (a) The inquiry into sufficiency of the evidence to commit for extradition under s. 29(1) involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada: M.M. at para. 65, Ferras at para. 46;
- (b) There is a high threshold for refusing committal on the basis that the supporting evidence is unreliable that will only be reached when the evidence is so defective or appears so unreliable that it would be dangerous or unsafe to act on it: M.M. at para. 63, Ferras at paras. 40, 54 and 65;
- (c) The extradition judge is concerned with whether the underlying facts of the charge would, prima facie, have constituted a crime if they had occurred in Canada: M.M. at para. 65;
- (d) The extradition hearing is not a trial and it should never be permitted to become one. The process is intended to be expeditious and efficient so as to ensure prompt compliance with Canada's international obligations: M.M. at para. 64;

- (e) The extradition judge must consider whether evidence exists upon which a reasonable jury, properly instructed could return a verdict of guilty: Ferras at paras. 38 and 48;
 - (f) The extradition judge's role, like that of the preliminary inquiry justice, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden: M.M. at para. 65;
 - (g) The extradition judge does not determine the guilt or innocence of the person sought or to engage in the ultimate assessment of reliability: M.M. at para. 62, Ferras at paras. 46 and 54;
 - (h) The extradition judge is not to weigh competing inferences that may arise from the evidence other than in a limited sense of considering that the inferences sought to be drawn from the circumstantial evidence are reasonable: M.M. at para. 71;
 - (i) In assessing the reliability of the evidence, the extradition judge does not make an actual determination that the evidence is in fact reliable. The issue is threshold reliability: whether the evidence tendered possesses sufficient indicia of reliability to make it worth consideration by the extradition judge: Ferras at para. 53; and
 - (j) Certification of evidence by the requesting state vests the evidence with a presumption of threshold reliability. The evidence in the ROC is presumed to be reliable and "[unless rebutted, this presumption of reliability will stand and the case will be deemed sufficient to commit for extradition": M.M. at para. 62, Ferras at para. 66. See also *United States of America v. Fester*, 2009 BCSC 1331 at para. 10 and *Attorney General of Canada v. Rosenau*, 2009 BCSC 805 at para. 47.
- [47] Additionally, s. 32 of the Act sets out an evidentiary regime that is different from the rules of evidence applicable in Canadian prosecutions. Certification of the evidence by the requesting state vests the evidence with presumptions of threshold reliability and availability for trial: M.M. at para. 6 and *United States of America v. Ferras*, 2006 SCC 33 at para. 66.
- [48] Unless rebutted, the presumptions hold.
- [49] Although Mr. Sari is not entitled to the level of disclosure constitutionally mandated for one facing a criminal prosecution in Canada, he may very well be entitled to more than "the material submitted by the requesting state to establish a prima facie case for committal."
- [50] In this case, Mr. Sari applies for disclosure because he submits that:
- a) The ROC is insufficient to establish the threshold reliability necessary for committal and the material sought will demonstrate that this is so; and
 - b) The CBSA authorities committed an abuse of process in the manner in which they dealt with him on his arrival from at YVR, including an unlawful search and interrogation.

- [51] Counsel agree that in deciding this disclosure application, I am to apply the tri-partite Larosa test. The AGC, in its written submission, framed the analysis as follows:
38. Certification of the record of the case vests the requesting state's evidence with a presumption of threshold reliability. As such, further disclosure stemming from allegations of unreliability are greatly circumscribed. Disclosure will only be ordered if there is an "air of reality" to allegations that [1] either the record of the case is manifestly unreliable; or [2] to proposed claims of a Charter breach that is properly justiciable in the extradition context. An "air of reality" means that there must be some realistic possibility that the allegations can be substantiated.
- [52] To support an abuse of process claim, the Larosa test must be met. The British Columbia Court of Appeal adopted the Ontario Court of Appeal's Larosa test in *United States v. Costanzo*, 2009 BCCA 120 at para. 28, citing Larosa at para. 76:
- [120] The test for additional disclosure in furtherance of alleged state misconduct before the extradition judge was stated by Doherty J.A. in *R. v. Larosa* (2002), 2002 CanLII 45027 (ON CA), 166 C.C.C. (3d) 449 at para. 76, 98 C.R.R. (2d) 210 (Ont. C.A.):
- [76] [B]efore ordering the production of documents and compelling testimony in support of allegations of state misconduct, this court should be satisfied that the following three criteria have been met by the applicant:
- the allegations must be capable of supporting the remedy sought;
 - there must be an air of reality to the allegations; and
 - it must be likely that the documents sought and the testimony sought would be relevant to the allegations
- [53] In an application for disclosure, the Larosa test requires the applicant to establish:
- a) The allegations must be capable of supporting the remedy sought. In other words, that the allegations manifest unreliability of the ROC and abuse of process;
 - b) There is an air of reality to the allegations; and
 - c) It is likely that the documents sought (and/or the testimony sought) would be relevant to the allegations.
- [54] Justice Smith, for the BC Court of Appeal, in *United States v. Rosenau*, 2010 BCCA 461, found that the Larosa test also governs applications for disclosure where the record of the case is challenged as manifestly unreliable, holding, at para. 55:

In my view, the "air of reality" test from Larosa, Scarpitti and Constanzo provides an appropriate standard for assessing allegations of threshold unreliability or manifest unreliability of the admitted evidence for committal. In other words, in the absence of an allegation of a Charter breach, state misconduct and/or an abuse of process, the sufficiency of the certified evidence

must be challenged through arguments that demonstrate an apparent defect (an omission or discrepancy) in the record or supplemental record of the case, or from evidence adduced that goes to the issue of threshold reliability or availability of the evidence. To adopt the broader standard suggested by the appellant would, in my view, change the focus of an extradition hearing from the sufficiency of the evidence to justify committal, to the ultimate reliability of the evidence for guilt or innocence.

[Emphasis added.]

[55] To satisfy the Larosa test, the applicant must provide an evidentiary foundation to justify an extradition judge embarking on an inquiry to adjudicate a Charter breach or an allegation that the evidence in the ROC is manifestly unreliable. The authorities make very clear that an air of reality will not be established on the basis of vague and unsubstantiated suggestions, or conjecture and speculation: *United States of America v. Wong*, 2017 BCCA 109 at para. 26.

[56] Moreover, the applicant must present more than a submission simply asserting that the disclosure sought, if ordered produced, will assist in determining the issue.

[57] The Larosa test helps to screen out those disclosure applications not worthy of further consideration, particularly in circumstances where the applicant raises, without basis, allegations of improper or unlawful conduct on the part of the state. The Court of Appeal addressed this concern in *Wong* at para. 27 when the court stated:

... allegations of misconduct made against the officials of foreign states should not be given credence in the absence of an evidentiary foundation sufficient to meet the Larosa test . . . misconduct allegations directed at foreign authorities are very serious because they impugn the motives and actions of a neighbouring and friendly power with whom Canada has an extradition treaty.

[58] I note Justice Crossin's decision of *Korea v. Jung*, 2020 BCSC 1978 where he stated that, in his view, "the record does not reveal a basis for calling into question the good faith of the investigative authorities in Korea." (para. 93).

[59] The AGC here takes the position that misconduct allegations raised here are matters for the Minister to consider.

[60] I also wish to address a specific issue regarding particularity of the evidentiary foundation. That is, the applicant cannot succeed on a disclosure application purely on the basis that they are in a "Catch-22." The BC Court of Appeal in *Wong* examined the predicament in this way, at para. 27:

While disclosure request will sometimes lack particularity because information necessary to substantiate the claim will be in the possession of the state against which the allegations of misconduct have been made (*Larosa* at para. 74), this does not relieve the Charter claimant from his or her obligation to meet the air of reality test. An 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 order is made: *U.S. v. Earles* 2003 BCCA 20 at paras. 36 - 37.

- [61] Finally, I recognize that s. 25 of the Act limits the jurisdiction of an extradition judge to consider Charter breaches to those that relate directly to the limited issues relevant at the committal stage of the extradition process: *Korea* at para. 15. Further, I recognize that, where allegations of misconduct of state authorities are brought, the allegations must rise to a level sufficient to justify a stay of proceedings. Justice Crossin wrote in *Korea*:
- [22] Prosecutor Park determined that Mr. Jung had defrauded Mr. Gwon and on September 23, 2008, in accordance with the process in place in South Korea, a judge of the Seoul Central District Court issued an arrest warrant for Mr. Jung. The arrest warrant was based on probable cause that Mr. Jung had committed a crime and may fail to attend an investigative proceeding

IV. ANALYSIS

- [62] Before turning to an analysis of the Larosa factors in the circumstances presented here, I wish to address how I have assessed the evidentiary foundation for the application.
- [63] I have not embarked on a detailed analysis of the evidence and submissions presented during the hearing. As stated by Holmes A.C.J. in *Meng*:
- [43] . . . To do so would run the risk identified by Fitch J. (as he then was) in *United States v. Rogan* of "the premature adjudication of factual issues on what might turn out to be an incomplete record": para. 130.
- [64] I have thus been careful to not make factual findings regarding the allegations on this application. I have focused solely on whether the Larosa factors have been satisfied so as to justify the disclosure order sought.
- [65] I turn to the three Larosa factors now.

A. Are the allegations capable of supporting the remedy sought?

1. Abuse of process

- [66] If Mr. Sari successfully proves on a balance of probabilities that the extradition proceedings would constitute an abuse of process, he will seek to remedy the abuse by requesting a stay of the extradition proceedings.
- [67] In *United States v. Cobb*, [2001] 1 S.C.R. 600 at paras. 39-40, the Supreme Court of Canada made it clear that an extradition judge has authority to grant a stay of the proceedings, either as a remedy for an abuse of process under s. 7 of the Charter, or in the exercise of the court's inherent powers at common law to control its own process and prevent harm to the integrity of the judicial system. At the same time, a stay will only be granted in the rarest of

cases, where the Charter breach directly affects the fairness of the Canadian judicial process and the breach is so serious that no lesser remedy will protect the integrity and repute of the administration of justice: Wong at para. 18.

[68] Here, Mr. Sari alleges an abuse of process regarding the CBSA authorities' search of his electronic devices and conducting interviews of him that were in the guise of an interview under IRPA but in reality, the interviews were an evidence gathering exercise in relation to the U.S. charges. Mr. Sari framed his abuse of process allegation as follows:

39. Acts of the CBSA Border Service Officers, in compelling statements from a detainee directly related to the underlying foreign charge, and in obtaining access to supporting evidence through Mr. Sari's electronic devices are significant section 7 and section 8 violations which in the context of this case may amount to an abuse of process.

40. The CBSA did not engage in routine immigration examination in their questioning or searches, as permitted under IRPA or the Customs Act but instead engaged in gathering evidence for the Requesting State. It is an abuse of process to exercise a statutory power for a reason that is unrelated to the purpose for which that power was granted.

[69] At this stage, my inquiry is limited to whether Mr. Sari's allegations, if proven, could support the extreme and rarely granted remedy of a stay of proceedings. Similar to Holmes A.C.J.'s determination in Meng, it is not clear whether the abuse of process Mr. Sari alleges, if proven, would constitute "circumstances serious enough to require a stay of proceedings to protect the integrity of the judicial process. However, I cannot rule out the possibility that it would."

2. Sufficiency of evidence for committal

[70] Mr. Sari would be entitled to be discharged if he is successful in his challenge to the sufficiency of the evidence admissible under the Act "of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed," as required by s. 29(1) of the Act.

[71] With respect to the sufficiency of the evidence to be tendered at the committal hearing, Mr. Sari submits that there is a serious question as to whether the conduct underlying the extradition request is capable of satisfying the dual criminality requirement of Canada's extradition laws. This is a statutory requirement for committal. As such, Mr. Sari may be entitled to a remedy should his challenge to the sufficiency of the evidence be successful.

[72] I am satisfied that the first criterion in the Larosa test is satisfied.

B. Is there an air of reality to the allegations?

[73] It is my view that this is where this application falls to be determined. I set out select judicial commentary addressing specifically this aspect of the Larosa test.

[74] First, as stated in *U.S.A. v. Welch and Romero*, 2007 BCSC 1567, the air of reality test is relatively low. At para. 26 of *Welch and Romero*, Justice Bennett cites para. 78 of *Larosa*, that:

. . . An "air of reality: means some realistic possibility that the allegations can be substantiated if the orders requested are made.

[75] Second, I have considered the remarks of Justice Molloy in *United States of America v. Tollman*, [2006] O.J. No. 5588 at para. 21 where she described the "air of reality" test as somewhat amorphous. In that regard, she stated:

The function of the "air of reality" test is two-fold. First, it provides a mechanism to weed out frivolous applications before incurring the expense and delay of a lengthy evidentiary hearing. Second, it imposes a threshold of plausibility before the applicant will be entitled to relief such as production of documents, particulars, or the compelling of viva voce testimony [citations omitted]. The level of plausibility required to survive the air of reality test is somewhat amorphous. Typically, when cases are dismissed as having no air of reality, the allegations can fairly be characterized as ludicrous or preposterous. However, in my opinion, the actual test is, and must be, higher than that. Obviously, at this point, the applicant cannot be expected to reach the standard of proof on a balance of probabilities, as that is the ultimate standard to be applied at the abuse of process hearing itself. However, it is not enough for the applicant to demonstrate that his allegations are not ridiculous; he must be able to show some reasonable prospect of success on the application.

[Emphasis added.]

[76] Having considered the threshold test as articulated in the jurisprudence and the submissions submitted on this application and the evidentiary record presented, I am not satisfied that this is a fishing expedition. Nor do I accept that the allegations are mere conjecture or speculation. Rather, I am satisfied that Mr. Sari has demonstrated that the allegations (both the abuse of process and sufficiency of the evidence) show some reasonable prospect of success.

[77] In making that determination, I have not embarked on a detailed analysis of the allegations supporting the disclosure order Mr. Sari seeks being cautious of any premature adjudication of factual issues on what will most certainly be a very different and contested evidentiary record.

[78] I also wish to note that I have not relied on the hearsay evidence regarding the exchange of passwords to which objection was taken. Should Mr. Sari wish to advance that allegation, admissible evidence will be required.

[79] Regarding the abuse of process allegation, I am satisfied on the record presented that there is an air of reality to Mr. Sari's allegation that information was gathered and may have been subsequently shared with U.S. authorities during the time he was in the custody of CBSA officers. There is support in the ROC and SROC for inferring that the search warrant

obtained in February 2019 authorizing the search of an email address connected to Mr. Sari, was connected to the events at YVR between January 18 and 21, 2019. The inference that might be drawn from the chronology of investigative steps as revealed in the ROC and SROC was that there was sharing of information to the U.S. authorities.

- [80] Regarding the sufficiency of the evidence submission particularly with respect to dual criminality, I agree with Mr. Sari that there is a question about whether the conduct underlying the extradition request is capable of satisfying the dual criminality requirement of Canada's extradition laws. In making this determination, I have considered the ROC and SROC. I have also considered Cpl Meyer's affidavit which was presented in support of the request for a provisional warrant. In his affidavit, Cpl. Meyer's attached the arrest warrant from the Southern District of New York dated March 19, 2018 which states that Mr. Sari is charged with six offences, including bank fraud. The provisional arrest warrant was issued in reliance on Cpl. Meyer's affidavit.
- [81] Additionally, Mr. Lockard's letter of February 14, 2019 is before me on this application noting that Mr. Sari
- . . . has been charged for his role in making misrepresentations to U.S. financial institutions to cause them unwittingly to conduct international, U.S. dollar transfers on behalf of Mahan Air. If convicted of certain of the charges in this case, Mr. Sari faces up to 105 years imprisonment.
- [82] It is unclear from this letter what specifically Mr. Lockard is referring to in support of this profound statement. In light of the available materials, it seems that this statement would relate to all of the charges listed on the warrant for arrest.
- [83] On April 17, 2019, the International Assistance Group for the Minister issued an Authority to Proceed on "fraud, contrary to s. 380(1)(a) of the Criminal Code."
- [84] The provisional arrest warrant and Mr. Lockard's February 14, 2019 letter indicate conduct that could include charges other than fraud as expressed in the authority to proceed. There is at least a reasonable prospect that the disclosure Mr. Sari seeks could refute his culpability, to the extent necessary on a committal hearing, with respect to establishing a prima facie case of fraud because it is not clear from the chronology of material presented on the application, the nature of the conduct that forms the basis for the extradition request.
- [85] In my view, Mr. Sari has demonstrated on the material presented on the disclosure application that there is an air of reality to the allegation that the ROC and SROC are presented in a manner where Mr. Sari's role, with respect to the charge of fraud, is somewhat unclear and complicated by the number of charges referenced in the U.S. arrest warrant. As such, the material sought may refute the suggestion that any action on the part of Mr. Sari deceived or caused any risk to the financial institutions at issue, an essential element of the offence of fraud.

C. Is it likely that the disclosure sought would be relevant to the allegations?

- [86] Mr. Sari seeks disclosure of material that includes documents in the possession and control of the CBSA, the RCMP and the Department of Justice as they relate to the allegations he has raised. He also seeks production of documents that would be in the possession of the U.S. authorities.
- [87] At this stage I am dismissing the application relating to the settlement agreements and as particularized at paragraph (h) of the Notice of Application. In part, because those documents are not in the possession of Canadian authorities. I am also not satisfied, at this stage, that those documents are relevant to the issues presented on the disclosure application.
- [88] However, I am satisfied that Mr. Sari has established the third criterion in the Larosa test, subject to the limits I will set out below. In particular, I am satisfied that some of the documents are relevant to either the abuse of process allegations regarding ss. 7 and 8 of the Charter and to the sufficiency of the evidence for committal. This is the order that I am granting.

V. ORDER GRANTED

- [89] Again, the granting of this disclosure order does not indicate that his allegations will ultimately succeed. However, Mr. Sari has met the test for the disclosure of further documents. I, therefore, grant disclosure of copies of the following documents in the possession of Canadian officials:
- a) Request for a Provisional Arrest Warrant referred to by Cpl. Meyer's in his affidavit;
 - b) Request for Extradition of Mr. Sari;
 - c) U.S. Indictment;
 - d) Correspondence, memoranda, notes and reports of the following individuals pertaining to the detention, interview and provisional arrest of Mr. Sari:
 - i. CBSA Border Services Officer Michael Christopoulos;
 - ii. CBSA Border Services Officer S. Katragadda;
 - iii. CBSA Border Services Officer Truong; and
 - iv. CBSA Border Services Officer P. Ridgley;
 - e) I also order the production of documents in the possession of Canadian officials with respect to notes, records of communication, and correspondence, from U.S. authorities to CBSA Border Services Officers or the RCMP dated January 19, 2019 through January 22, 2019, inclusive, relating to the detention, interview and/or provisional arrest of Mr. Sari.

- [90] There may be documents particularized in this list that do not exist or are subject to privilege. In addition, there may be documents, such as the Indictment, that are not in the possession of Canadian authorities. This order does not compel the production of documents not in the possession of Canadian authorities. The AGC simply needs to indicate to Mr. Sari whether they are in possession of such documents.
- [91] In addition, this order does not require the disclosure of privileged documents. If a privilege is asserted, the AGC may provide a statement to that effect, together with a description of the documents to which the claim applies. Mr. Sari can then decide how to proceed.
- [92] If there are issues regarding the scope or timing of this disclosure order, or if claims of privilege are to be determined, the parties may request through scheduling an additional hearing.
- [93] I am dismissing the application for production of the documents particularized at subparagraphs (f) through (h) of the Notice of Application because I am not satisfied on the record before me that the relevance of these documents has been established as required by the Larosa test. Leave is granted to Mr. Sari to renew the application for production should new information be learned.
- [94] Those are my reasons with respect to the application for disclosure.

"Winteringham J."

- [1] Mahan Air was designated by OFAC (United States Department of the Treasury, Office of Foreign Assets Control) for providing support to Iran's Islamic Revolutionary Guard Corps - Qods Force and terrorist organizations like Hezbollah.
- [2] Of note, the provisional warrant of arrest issued for all of the offences. The Authority to Proceed dated April 17, 2019 names one offence, "bank fraud."

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