

CANADA / JUDGMENT

United States v. Lim and Baruca

2022 BCSC 723

COURT

Supreme Court of British Columbia

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2022 BCSC 723 United States v. Lim and Baruca

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Lim and Baruca,

2022 BCSC 723

Date: 20220428

Docket: 28742-4

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

Requesting State

and

Dario Baruca

Person Sought

and

Tenny Guon Lim

Person Sought

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

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I. Introduction

- [1] The applicant, the Attorney General of Canada, on behalf of the requesting state, the United States of America, seeks orders committing Tenny Guon Lim and Dario Baruca to await surrender pursuant to s. 29(1)(a) of the Extradition Act, S.C. 1999, c. 18 [the Act] for the purposes of prosecution.
- [2] Mr. Lim and Mr. Baruca are sought for alleged conduct amounting to the Canadian-equivalent offence of 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]. Mr. Lim is the alleged leader of a cross-border drug trafficking organization that trafficked cocaine and MDMA between Canada and the United States (the "DTO"). Mr. Baruca, is alleged to have conspired to traffic cocaine with an unidentified associate of the DTO and Mr. Lim known by the name "Orange Tang".
- [3] With regard to Mr. Lim, two applications have been heard and decided. In Reasons reported at 2021 BCSC 329 I dismissed the application for disclosure (the "Disclosure Reasons"). The application for a voir dire and the renewed application for disclosure were dismissed in Reasons reported at 2021 BCSC 1367 (the "Voir Dire Reasons").
- [4] In this committal hearing, as is often the case with conspiracy, the evidence against Mr. Baruca and Mr. Lim is largely circumstantial. Here, most of the evidence consists of encrypted messages and recorded phone calls regarding the trafficking of cocaine and MDMA. Mr. Baruca and Mr. Lim are alleged to have been party to these calls and messages using code names - Mr. Baruca using the name "Ventura" and Mr. Lim using the name "The Goat" as well as his first name, "Tenny" and other names. In weighing circumstantial evidence, the question for an extradition judge is whether the evidence, if believed, could reasonably support an inference of guilt. The test for committal does not require that Mr. Lim and Mr. Baruca's guilt be the only possible inference that could be drawn from the evidence. All that is required is that the inference be reasonable.
- [5] The Requesting State submits that Mr. Baruca and Mr. Lim's membership in one or more drug trafficking conspiracies can be reasonably inferred from its evidence. As a result, it says Mr. Baruca and Mr. Lim should be ordered committed to await surrender to the United States of America for the purposes of prosecution pursuant to s. 29(1)(a) of the Act.
- [6] The first Person Sought, Mr. Lim, submits that the Requesting State has failed to demonstrate conduct that would justify committal for the named offence. The evidence purporting to implicate him includes:
 - (a) text messages between a person using the handle or username "The Goat" and a confidential police witness ("CW-1");
 - (b) a phone call on March 11, 2018 ("the March 11 phone call") with another confidential police witness ("CW-2"); and

- (c) subsequent messages involving CW-2.
- [7] Mr. Lim says that these three categories of evidence do not disclose a prima facie case. The evidence, assuming it to be true, is insufficient to reasonably found a conviction on the offence named in the Authority to Proceed. Specifically, he says that the Revised Record of the Case (the "ROC") fails to disclose evidence that The Goat handle or device was used by the Person Sought.
- [8] Further, Mr. Lim says the ROC relies on voice identification evidence from a statement he made to the RCMP in respect of an unrelated proceeding in order to allege that he was the individual on the March 11 phone call with CW-2. He says that the Requesting State has failed to prove the voluntariness and admissibility of the statement. He submits that the Requesting State has therefore failed to meet the requirements of s. 32(2) of the Act, that Canadian-gathered evidence be admissible according to Canadian rules of evidence.
- [9] As a result, Mr. Lim says the purported voice identification based on the statement to the police cannot be considered to support the Requesting State's case. He submits that without this voice identification, there are no grounds for committal, or in the alternative, insufficient grounds for committal.
- [10] In the alternative, if the voice identification evidence is not excluded from consideration, as Mr. Lim submits it should be, the March 11 phone call upon which the identification is made involves a conversation purportedly between the Person Sought and a cooperating police informant. This cannot form the basis for a conspiracy.
- [11] It is further submitted that the messages between the individual alleged to be the Person Sought and CW-1 and CW-2 before and after the March 11 phone call nevertheless do not disclose facts upon which a finding of guilt could be made. In part this is so because the ROC does not establish the author of those messages, but also because the conduct described could not satisfy the elements of a conspiracy.
- [12] Mr. Lim submits that the Requesting State has, although naming him throughout the ROC, not proven his identity as either being the person before the court, or the person who engaged in the alleged conduct that underlies the request for extradition. He says that the evidence is particularly insufficient to prove his identity.
- [13] Mr. Lim submits that he ought to be discharged. He says that the overall conclusion the Requesting State asks the Court to draw is unavailable on the facts provided in the ROC and the supplements to the ROC.
- [14] Mr. Baruca also submits that he should be discharged. The ROC, he says, does not demonstrate that he and "Orange Tang" agreed to traffic cocaine. Thus there is no evidence of a completed agreement to traffic cocaine, as would be necessary to ground a finding of conspiracy.

- [15] With Mr. Baruca, the issue is therefore whether the evidence of the Requesting State is sufficient to establish the elements of the alleged offence of conspiracy to traffic cocaine.

II. The Committal Application

- [16] The Minister of Justice through his representative issued two Authorities to Proceed (the "ATPs") on December 4, 2019, pursuant to s. 15 of the Act. The ATPs provide this Court with the jurisdiction to hear the Attorney General of Canada's application for committal under s. 29(1) of the Act.
- [17] One of the ATPs authorizes the seeking of an order of committal of "Tenny Guon Lim also known as The Goat; Max Power; Wild; Bruce; Phil". The other is with regard to "Dario Baruca also known as Ventura; Fat Dario".
- [18] Mr. Lim and Mr. Baruca are sought by the requesting state for prosecution in relation to conduct that corresponds to the Canadian offence of conspiracy to traffic in a Schedule I controlled substance contrary to s. 465(1)(c) of the Criminal Code and s. 5(1) of the CDSA.
- [19] The Attorney General of Canada (the "AGC") on behalf of the Requesting State now seeks orders of committal pursuant to s. 29(1)(a) of the Act and relies on the following evidence:
- (a) The ROC certified by Victoria A. Degtyareva, Assistant United States Attorney, Central District of California, on November 26, 2019.
 - (b) The Supplemental Record of the Case certified by Ms. Degtyareva on February 5, 2020 (the "SROC").
 - (c) The Second Supplement to the Revised Record of the Case for Prosecution certified by Ms. Degtyareva on November 17, 2020 (the "SSROC").
 - (d) The viva voce evidence of Royal Canadian Mounted Police ("RCMP") Cpl. Michael Pierce, who arrested an individual by the name of Dario Baruca pursuant to a warrant under the Act on September 5, 2019.
 - (e) The viva voce evidence of RCMP Cpl. Randy Ozaki, who assisted with the arrest of an individual by the name of Tenny Guon Lim pursuant to a warrant under the Act on September 5, 2019.
- [20] The Persons Sought did not call any evidence.

III. The Law

A. Comity

- [21] Comity plays a special role in the extradition context. It is a fundamental principle which underlies extradition law and, in part, distinguishes it from criminal law: *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779 at 844-845. It justifies deferral to evidentiary laws of the requesting state, even where they may not afford protections commensurate with our

own: *United States of America v. Ferras*, 2006 SCC 33 at paras. 31, 33. It prohibits second-guessing the requesting state's decision to proceed with prosecution in the first place: *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at para. 52. Most crucially, comity requires the extradition judge to recognize that the extradition hearing is not a trial, and must not become one; the business of finding facts is left to the courts in the requesting state: *M.M. v. United States of America*, 2015 SCC 62 at paras. 2, 38, 64. Comity can be described as the background music to extradition.

- [22] Comity, however, does not require the surrender of persons sought on the "demand or surmise" of the requesting state; it does not transform the judicial phase of the extradition process into a rubber stamping: *Ferras* at para. 21. It likewise does not permit Canadian authorities to run roughshod over the domestic constitutional guarantees owed to persons sought: *United States of America v. Cobb*, 2001 SCC 19 at para. 34. The liberty of the person sought and the dictates of comity must be carefully balanced: *Kindler* at 849-850; *United Mexican States v. Ortega*, 2005 BCCA 270 at para. 10, per Donald J.A. dissenting, rev'd 2006 SCC 34.

B. Sufficiency

- [23] Section 29 of the Extradition Act governs the assessment the sufficiency of the requesting state's evidence adduced to secure committal of the person sought. It reads, in part:

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

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

- [24] In determining whether a requesting state's evidence is sufficient to "justify committal", the test is a modified version of that which is applied on a preliminary inquiry: whether a reasonable jury properly instructed could return a verdict of guilty: *United States of America v. Shephard* (1976), [1977] 2 S.C.R. 1067 at 1080; *Ferras* at para. 48; *M.M.* at para. 37. This requires "at least some evidence on every element of the parallel Canadian crime": *Ferras* at para. 38.

- [25] The nature of the sufficiency inquiry is holistic, not piecemeal, requiring the extradition judge to appraise the "whole of the evidence": *Ferras* at para. 54.

- [26] In order to even determine sufficiency, the requesting state's evidence must possess a threshold level of detail. In *U.S.A. v. Yang* (2001), 56 O.R. (3d) 52 at para. 63 (C.A.), Rosenberg J.A. cautioned:

- [63] ... While the judicial phase is not a full-fledged trial, neither "is it a mere formality": *Shulman* at p. 307 C.C.C. Thus, the judge must be in a position to exercise that function. If the material presented in the record of the case is so bereft of detail, such as the witness'

means of knowledge, that the judge cannot determine its sufficiency, the judge will have to discharge the person sought for prosecution. This is not a question of the judge weighing the evidence or passing on its reliability, but of carrying out the function assigned by statute. For example, if the record of the case contained a statement that the police suspected the fugitive committed the offence, without stating the basis for this opinion, and this was the only evidence proffered by the extradition partner as proof that the fugitive committed the offence then, even if this opinion was admissible in the requesting state as proof of the offence, it would not be sufficient to meet the s. 29 test for committal because it would have no probative value.

This is a more detailed articulation of "the basic requirements of justice in the extradition context"; that is, that "[a] person cannot be sent from the country on mere demand or surmise": Ferras at para. 19 citing *Glucksman v. Henkel*, 221 U.S. 508 (1911), at p. 512.

- [27] The Shephard test for committal is modified in the extradition context. Historically, there was no scope for the extradition judge to evaluate the reliability of the requesting state's evidence; if there was some evidence on every element of the offence alleged, the extradition judge had no discretion to decline committal: *M.M.* at para. 49. However, a series of Supreme Court of Canada decisions have changed this.
- [28] In *R. v. Arcuri*, 2001 SCC 54 at para. 23, the Court confirmed that, where the evidence on an element of an offence is circumstantial, this "requires the judge to engage in a limited weighing of the evidence" to ensure the inference suggested by the Crown is reasonable. Justice Cromwell, for the majority, in *M.M.* at paras. 54-72, canvasses further changes to the extradition judge's role brought about by Ferras and *United States of America v. Kwok*, 2001 SCC 18. In *Kwok* at para. 57, the Court held that amendments to the Act had the effect of vesting extradition judges with the jurisdiction to grant remedies for Charter breaches. In Ferras at para. 49, the Court held that, in order to withstand constitutional scrutiny, the Act needed to be construed in such a way that it would not permit committal on the basis of manifestly unreliable evidence or evidence not available for trial.
- [29] While the availability of evidence for trial and possible exclusion of Charter non-compliant evidence are important aspects of sufficiency, the focus of much of the subsequent jurisprudence has been on the circumstances in which a requesting state's evidence will be so unreliable as to warrant a refusal to commit. Case law has confirmed that those circumstances will be limited. While Ferras did slightly expand the scope of the extradition judge's inquiry, its impact should not be overstated. In *M.M.*, Cromwell J. notes that:
- [63] there continues to be a high threshold for refusing committal on the basis that the supporting evidence is unreliable. It is only where the evidence supporting committal is "so defective or appears so unreliable" or "manifestly unreliable" that it would be "dangerous or unsafe" to act on it that the extradition judge is justified in refusing committal on this basis: Ferras, at paras. 54 and 40.

Justice Cromwell reinforces this point later in the reasons, where he makes clear that "[t]here is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial": M.M. at para. 71.

- [30] The inquiry into reliability is only concerned with threshold, as opposed to ultimate, reliability: Ferras at paras. 53-54; *United States of America v. Dhanda*, 2010 BCCA 200 at para. 16. The reason for this is that the extradition process is not a trial, and should not be permitted to become one: M.M. at para. 2. Ultimate reliability is a question for the finder of fact.
- [31] Unreliability may result from "problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors": M.M. at para. 71.
- [32] Where, as here, the evidence is adduced by way of a certified record of the case, the evidence benefits from a presumption of reliability, simply by virtue of having been certified: Ferras at para. 52. The person sought may rebut this presumption "either by reference to the requesting party's own material or by calling evidence to demonstrate fundamental inadequacies or frailties in the material relied on by the requesting state": *United States of America v. Anderson*, 2007 ONCA 84 at para. 31; see also Ferras at para. 54.

1. Sufficiency in circumstantial cases

- [33] Given that the evidence against Mr. Lim and Mr. Baruca is largely circumstantial, it is necessary to consider how the jurisprudence has found this factor to impact the sufficiency of the evidence. As noted, *Arcuri* provides for limited weighing of circumstantial evidence to determine whether the gap between evidence and conclusion is too wide to be reasonably bridged by way of inference. *Arcuri* was not decided in the extradition context, but courts have repeatedly confirmed its application to extradition hearings: see M.M. at para. 45; *United States of America v. Lorenz*, 2007 BCCA 342 at paras. 33-34.
- [34] As a starting point, the mere fact of its being circumstantial will not render evidence manifestly unreliable: *Dhanda* at para. 12. But where the evidence is circumstantial, the court must "conduct a limited weighing exercise to ensure the circumstantial evidence is reasonably capable of supporting the inferences the prosecution seeks to have drawn": *United States v. Viscomi*, 2015 ONCA 484 at para. 20. The extradition court is not to weigh competing inferences that arise from the evidence "other than in the limited sense noted in *Arcuri* of considering that the inferences sought to be drawn from circumstantial evidence are reasonable": M.M. at para. 71 citing *Anderson* at para. 28.
- [35] In the recent decision of *United States v. Akinbobola*, 2020 ONCA 331, Doherty J.A. discussed the circumstances in which committal on the basis of circumstantial evidence will be impermissible:

- [8] An extradition judge cannot commit for extradition if the evidence as a whole does not permit the drawing of the inferences necessary to establish a prima face case. The absence of a link in a circumstantial evidentiary chain will mean that a reasonable trier could not convict, and extradition must be refused: e.g. see *U.S.A. v. Viscomi*, 2015 ONCA 484; *The U.S.A. v. Huynh*, 2005 ONCA 305.
- [36] The cases referenced in *Akinbobola* provide examples of instances in which the requested inference will be too tenuous to withstand scrutiny even at the "modest screening device" that is the judicial phase of an extradition proceeding. In *United States of America v. Huynh* (2005), 200 C.C.C. 305 (Ont. C.A.), the person sought was accused of conspiring with others to launder the proceeds of trafficking. The requesting state's evidence did not explain the source of the funds sent to the person sought; rather, they relied on a number of circumstantial factors to support an inference that the money was the proceeds of trafficking, including the amount that had been transferred, the manner in which it had been concealed, the frequency of the transfers, and the coded conversations between the parties. The Court held that this evidence could not ground a reasonable inference that the money was the proceeds of trafficking:
- [7] The material identified by the respondent certainly permits the inference that the cash was the proceeds of some illicit activity. Drug trafficking comes readily to mind as one possible source. The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess. The gap between the inference that the cash was the proceeds of illicit activity and the further inference that the illicit activity was trafficking in a controlled substance can only be bridged by evidence. The trier of fact will assess that evidence in the light of common sense and human experience, but neither are a substitute for evidence. The requesting state has not offered any evidence as to the source of the funds even though its material indicates that one of the parties to this conspiracy is cooperating with the police. Despite the effective argument of counsel for the respondent, I do not think there is anything in the material that would reasonably permit a trier of fact to infer that the cash was the proceeds of drug trafficking and not some other illicit activity.
- [37] Put briefly, it is axiomatic that a reasonable inference cannot be grounded in speculation: *United States of America v. Heatherington*, 2019 BCSC 1809 at para. 60; *Viscomi* at para. 21.
- [38] Where the evidence supports a number of possible inferences, one of which is guilt, the court must commit: *M.M.* at para. 83; *Thailand v. Obi*, 2020 BCSC 1071 at para. 35. "An inference is a conclusion that may, not must, be drawn in the circumstances": *U.S.A. v. Cameron*, 2014 BCCA 314 at para. 31. The fact that one of the available inferences is also consistent with innocence is not sufficient to refuse committal: *United States of America v. Hislop*, 2009 BCCA 94 at para. 31. This is a crucial distinction between extradition law and criminal law: while guilt need only be one of a number of reasonable inferences to ground an order for committal, in criminal law, where the Crown's case is circumstantial, the accused's guilt must be the only reasonable conclusion available in order to ground a

conviction: *R. v. Villaroman*, 2016 SCC 33 at para. 55.

2. Sufficiency and identity

[39] Identification in the extradition context raises two issues discussed in *Danielson v. United States of America*, 2008 BCCA 519 at paras. 24-25:

1. on a balance of probabilities is the person before the court the person named in the RoC;
2. Is there a prima facie case that the person before the court is the person who engaged in the alleged conduct that underlies the request for extradition?

[40] The second consideration is part of the inquiry into the sufficiency of the requesting state's evidence because it involves proving identity as an element of the offence and, like the other elements of the offence, it need only be proven that there is some evidence on which a reasonable jury could find that the person before the court committed the conduct alleged in the ROC.

[41] Section 37 of the Act sets out what will constitute evidence for the purposes of identification:

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

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

[42] Courts have disagreed about whether this section is meant to specify evidence that can speak to both aspects of identification (see, for example, *United States of America v. Fraser*, 2021 BCSC 2090 at para. 116) or only the first (see, for example, *United States v. Wong*, 2015 BCSC 2276 at para. 9, *aff'd* 2017 BCCA 109; *Obi* at para. 19).

[43] Regardless of whether s. 37 is interpreted to speak to only the first or both aspects of identification, the case law indicates that the same evidence may speak to both aspects of identity, but will not always do so: *Danielson* at para. 25. The fact that s. 37 specifies that similarity in names or physical characteristics is evidence for the purposes of identification does not obviate the need of the extradition judge to scrutinize that evidence for reliability and ensure its sufficiency.

[44] Canadian criminal jurisprudence is replete with strong statements about the dangers of witness identification and its connection to wrongful convictions. Although extradition courts do not enter convictions, the case law demonstrates that these are also concerns at the committal stage. In *United States of America v. Walker*, 2008 BCCA 55, a witness for the requesting state, who was present when the incident at issue took place, identified a photo of the person sought as being of the assailant. This witness had no prior dealings with the

person sought. The Court held that the ROC was (to borrow a phrase from Yang) so "bereft of detail" that the reliability of the identification evidence could not be determined: at para. 30. In other words, it was not that the evidence was "manifestly unreliable", it was that no determination on that question could be made; given that the onus is on the requesting state to prove their case, where the ROC contains insufficient detail, the state will not meet its burden: at para. 19. This decision implies that witness identification evidence could be manifestly unreliable, having regard to things like the witness's prior knowledge of the person sought, their opportunity to observe, environmental factors, the circumstances in which they were shown the photos, and so on: at para. 26.

- [45] Courts have treated Walker with caution. For instance, in *USA v. Johal*, 2011 BCSC 1068 at para. 51, the Court made clear that "[t]here is no threshold requirement for reliability of identification evidence. Evidence that has been accepted by extradition judges ranges from a fleeting view by a victim during a traumatic crime to a friendship of many years." While Walker makes it clear that the requesting state's evidence must permit the court to assess its sufficiency, it is only where the evidence as a whole is manifestly unreliable that the court will be permitted to intervene.
- [46] The case law is likewise clear that, in criminal cases, voice identification evidence ought to be treated with "extreme caution": *R. v. Clouthier*, 2012 ONCA at para. 19; *R. v. Pabla*, 2013 BCSC 913 at para. 23. That said, voice identification is likewise frequently admitted in extradition cases and used to ground orders for committal. For instance, in *United States of America v. Guevara-Mendoza*, 2018 BCCA 55, much of the evidence came from a confidential witness in the requesting state, who was slated to testify that they had known the persons sought for years and could recognize their voices. The Court confirmed that, inherent frailties notwithstanding, the concerns about the reliability of voice identification evidence did not render it dangerous or unsafe to rely on in the circumstances at bar: at para. 44; see also *United States of America v. Fraser*, 2017 BCCA 136 at paras. 81-82, in which the Court of Appeal upheld the extradition judge's finding that voice identification evidence was sufficiently reliable to warrant committal.
- [47] Prior to considerations of sufficiency and reliability are those of admissibility. The proposition established in these cases assumes that, where the evidence has been gathered in Canada, it satisfies the rules of evidence under Canadian law, pursuant to s. 32(2) of the Act. Canadian-gathered evidence that would otherwise be inadmissible is not rendered admissible by virtue of having been included in a certified ROC: *Wacjman v. Canada* (Minister of Justice), [2003] R.J.Q. 71 at para. 89 (C.A.).

IV. The Evidence

- [48] The ROC states that Special Agent Hannah Monroe ("SA Monroe") of the Federal Bureau of Investigation ("FBI") is expected to testify that she has been a special agent with the FBI for approximately three and a half years and is currently assigned to the Violent Crime Major Offenders squad in Los Angeles, California. She has extensive experience in numerous

criminal investigations, including investigations into narcotics trafficking. She is expected to testify regarding undercover recordings, the use of confidential informants, and the use of undercover agents.

- [49] SA Monroe has participated in the investigation of the conspirators, reviewed numerous text messages, and gathered audio and video recordings. She can testify about the use of the type of digital devices used to send the encrypted messages referred to in the ROC.

A. Summary of the Submissions Regarding Mr. Lim

- [50] The Requesting State alleges that Tenny Guon Lim was the leader of a cross-border DTO that facilitated the movement of large shipments of cocaine, MDMA and other illegal drugs between the United States and Canada. Specifically, the Requesting State alleges that the DTO would arrange for couriers to deliver MDMA to associates in Los Angeles and/or pick up cocaine that U.S.-based associates had sourced from Mexico.
- [51] The conspiracy allegations against Mr. Lim stem from his alleged communications with two former co-conspirators turned cooperating witnesses (CW-1 and CW-2). Mr. Lim is alleged to have discussed drug trafficking with both CW-1 and CW-2; with CW-1, Mr. Lim is alleged to have primarily used the code name "The Goat" and with CW-2, Mr. Lim is alleged to have primarily used his first name, "Tenny". Mr. Lim's communications with CW-1 and CW-2 occurred mostly by way of encrypted messages sent using a series of digital devices. The FBI identified Mr. Lim as "Tenny" and "The Goat", based on the content of some of these encrypted messages as well as a voice comparison between the March 11 phone call and a 2.5 to 3 hour recorded RCMP interview of Mr. Lim that took place on May 22, 2014.
- [52] After explaining the evidentiary basis for the conclusion that Mr. Lim is "The Goat" and "Tenny", the ROC refers to the individual communicating with CW-1 and CW-2 as "LIM" or the "Person Sought". In order to track CW-1 and CW-2's evidence, the Requesting State's submissions referred to the individual communicating with CW-1 as "The Goat" and the individual communicating with CW-2 as "Tenny". These reasons will do the same as they refer to the AGC's submissions and as they accord with the evidence. A section explaining the evidence supporting the Requesting State's conclusion that Mr. Lim is "The Goat" and "Tenny" will follow. In other references to the ROC where there is evidence of other usernames, I will adopt the reference to Mr. Lim as LIM as utilised in the ROC.
- [53] However, although it is also noted in a footnote to the ROC that "[t]exts sent by LIM appear on CW-1's and CW-2's device as from various usernames, including 'The Goat,' 'Max Power,' and 'Wild'", there is only brief reference to the usernames of Max Power and Wild in the evidence of the Requesting State at para. 75 in the list of descriptors.
- [54] It is Mr. Lim's primary submission that the March 11 phone call is not admissible because voluntariness has not been proven. I will return to a discussion of this phone call as it is the basis for the key issues of law, being voluntariness and sufficiency.

- [55] Mr. Lim also submits that the ROC does not demonstrate sufficient evidence upon which a reasonable jury could convict him, particularly with regard to the evidence of identity.
- [56] The majority of the conduct described in the ROC and the Affidavit involves conversations between the individual(s) the Requesting State suggests was Mr. Lim and confidential informants who were acting as informants at the time. Mr. Lim says that these conversations cannot form the basis for a finding of a conspiracy because there could be no genuine agreement to commit a crime with a cooperating witness.
- [57] The conversations attributed to Mr. Lim can be broken down into two main time periods. The first involved CW-1 and spanned April 20, 2017 to June 5, 2017. The second involved CW-2 which began sometime before January 31, 2018 and continued until May 15, 2018.

B. Summary of the Submissions regarding Mr. Baruca

- [58] Dario Baruca is alleged to have conspired to traffic cocaine with an unidentified associate of Mr. Lim's who used the screen name "Orange Tang". "Orange Tang" discussed drug trafficking with an undercover Los Angeles Police Department ("LAPD") officer posing as an associate of CW-2 with connections to cocaine suppliers ("UC-3"). During these discussions, "Orange Tang" told UC-3 to call him, however when UC-3 called the number "Orange Tang" provided, a man using the name "Ventura" answered the phone. UC-3 then spoke with "Ventura" about a cocaine trafficking deal.
- [59] After explaining the evidentiary basis for the conclusion that Mr. Baruca was "Ventura", the ROC refers to the individual who spoke with UC-3 over the phone as "BARUCA". A section explaining the evidence supporting the Requesting State's conclusion that Mr. Baruca is "Ventura" follows.
- [60] Mr. Baruca submits that the entire case against him is in four paragraphs of the ROC, and only two paragraphs are relevant. He says that it does not make out a prima facie case of conspiracy against him.
- [61] It is also submitted by Mr. Baruca, and confirmed by the Requesting State, that the hearsay statements of the alleged co-conspirators are only admissible against him for context.

C. The Discovery of the DTO

- [62] The FBI and the LAPD conducted a joint investigation of the DTO with the assistance of various U.S. federal and local law enforcement agencies. U.S. investigators were able to infiltrate the DTO by securing the cooperation of CW-1 and CW-2, two DTO business associates in California turned confidential witnesses.
- [63] At the direction of the FBI, CW-1 and CW-2 continued to communicate with an individual they knew as "The Goat" or "Tenny" regarding the transportation of illicit drugs by way of encrypted message. In these communications, "The Goat"/"Tenny" would typically provide CW-1 or CW-2 with a telephone number and code name for a courier tasked with dropping

off MDMA or picking up cocaine in Los Angeles, and the serial number for a specific dollar bill to be used by the couriers conducting the exchange to confirm their respective identities. CW-1 and CW-2 would then pass the information to an undercover law enforcement agent who would play the part of CW-1 or CW-2's "associate" and contact the courier to set up the exchange.

- [64] Mr. Baruca also communicated with CW-2 and an undercover agent to arrange for the transportation of narcotics, while other conspirators helped facilitate the transportation of narcotics by arranging stash locations in the United States, communicating with co-conspirators, or transporting narcotics across the border of the DTO.

D. Summary of the Requesting State's Evidence against Mr. Lim

1. CW-1 Discusses Drug Trafficking with "The Goat" - First Time Period

- [65] CW-1 agreed to cooperate with the FBI after they searched CW-1's residence and a stash house they operated in California on May 10, 2017. CW-1 hoped their cooperation would be taken into account when the State considered charges and sentencing for CW-1's own drug trafficking activities.
- [66] Pursuant to search warrants and with CW-1's consent, the FBI searched numerous encrypted devices seized from CW-1 and found hundreds of messages between CW-1 and an individual using the name "The Goat". The messages had all been exchanged during the three-week period from April 20, 2017, to May 10, 2017. In these messages CW-1 used the screenname "Mr. G". The FBI later concluded that it was Mr. Lim who used the name "The Goat", primarily as a result of the March 11 phone call.
- [67] The messages exchanged between "The Goat"/"Tenny" and CW-1 and 2 make frequent reference to cross-border transport of "tiles" and "M". The ROC states that SA Monroe is expected to testify that these are slang terms for cocaine ("tiles") and MDMA ("M"). She is also expected to testify that other descriptors used in the messages refer to different qualities of MDMA, with "purple" being the highest, "brown" being mid-level and "black" being poor.
- [68] The messages CW-1 and The Goat exchanged in those three weeks included the following:
- (a) Discussions about sending drivers from Vancouver to Los Angeles to drop off "M" and pick up "tiles" using "prepay" (prepaid cellular phones) and "dollar bills" (serial numbers) for identification.
 - (b) Discussion about a driver named "Wheels" coming down to Los Angeles to deliver MDMA.
 - (c) In a message dated May 7, 2017, The Goat explained to CW-1 that his associate "George" (later identified to be Saysana Luangkhamdeng, also referred to as Wheels) was waiting for a load of cocaine from CW-1 in Long Beach, California. The Goat stated that "George" was "giving me a little stress because he can't go home unless he has a live load [i.e., load of cocaine]. There's some dynamics to it that he had to [do] a front haul and a back

haul". CW-1 and The Goat also discussed the prices of the MDMA in various markets in the United States.

- (d) In an encrypted message dated May 9, 2017, The Goat instructed CW-1 to tell Mr. Luangkhamdeng to return to Canada from the United States because the "tiles" that The Goat was supposed to receive were not yet ready for pick up.
- 2. The Goat Arranges for MDMA to be Delivered to CW-1 - First Time Period Continues
 - [69] The ROC does not state that all messages in this time frame were sent by The Goat. It does state that other usernames were used. I will therefore track the language of the ROC and use LIM. CW-1 continued to exchange encrypted messages with LIM at the direction of SA Monroe after CW-1 became a co-operating witness on May 10, 2017.
 - [70] On May 14, 2017, LIM sent CW-1 a message stating: "My group is asking when u will have tiles ready bro? And what are we doing. Are we sending down more M and u will have more tiles ready?"
 - [71] On May 15, 2017, LIM wrote to CW-1: "My partners want to send more M down to u. But asking about the tile situation?" CW-1 told LIM that a shipment of MDMA he previously received contained one "black" unit (referring, as mentioned, to poor quality MDMA) and that they "[c]an't even press it", referring to pressing MDMA powder into pill form. LIM replied "[l]emme know when u have some tiles ready. We are shopping another pack of purple for you as we speak."
 - [72] On May 23, 2017, CW-1 asked LIM via encrypted message when "wheels is hopping the ramp [i.e., crossing the Canada-U.S. border] and that way we can exchange #s [i.e., phone numbers] and won't have him waiting around " LIM replied that he would "set it up".
 - [73] On May 25, 2017, LIM told CW-1 "my guys r telling me they can't find any purple. Right now it's either black m or brown m." CW-1 replied that "brown" was fine.
 - [74] On May 26, 2017, LIM told CW-1 that the driver would likely arrive on May 28 or later and asked again if the "tiles" were ready. CW-1 replied that they were. LIM later sent CW-1 a message saying "we won't make it today. It's looking like Sunday or after".
 - [75] On May 29, 2017, LIM informed CW-1 that "wheels" might not be available but that he had another courier who could "jump" (cross the border) if CW-1 could pick up the "M" from the courier in Seattle. CW-1 responded that they could not meet in Seattle and LIM agreed to get "Wheels" to travel to the "beach" (Los Angeles).
 - [76] On June 2, 2017, LIM told CW-1 "we got 20 very nice brown. Been tested 3 times. It's leaving here Monday." CW-1 asked if "wheels is ready to roll" and LIM said "he can leave van [Vancouver] on monday." LIM asked CW-1 if "he's good to carry up ur tiles too" and CW-1 replied "he is".

- [77] On June 5, 2017, LIM told CW-1 that "Wheels" had not left yet because he was waiting for medication, but would leave the following day.
- [78] CW-1 died of a drug overdose on June 5, 2017. Prior to his death, CW-1 gave SA Monroe the phone number LIM had given CW-1 for the courier known as "Wheels" and "George". U.S. law enforcement obtained a court order for GPS location data for the "Wheels"/"George" phone number and determined that the person using that phone number was Saysana Luangkhamdeng.
- [79] On June 10, 2017, Mr. Luangkhamdeng, who uses a wheelchair, arrived at the Pacific Highway Port of Entry near Blaine, Washington and sought entry into the United States. Mr. Luangkhamdeng was driving a 2009 Hyundai Santa Fe that was registered to him. U.S. Customs and Border Patrol lawfully searched Mr. Luangkhamdeng's vehicle and found a secret compartment containing 24.2 kilograms of MDMA.
- [80] Mr. Luangkhamdeng pleaded guilty to importation of MDMA in the Western District of Washington on September 18, 2017.
3. CW-2 Discusses Drug Trafficking with "Tenny" - Second Time Period
- [81] On January 31, 2018, the FBI executed a search warrant at CW-2's residence. Following the execution of the search warrant, CW-2 agreed to cooperate with the FBI in the hopes of potential charge or sentencing considerations. CW-2 told the FBI that they had been in communication with an individual they knew as "Tenny". As CW-2 also communicated with other usernames after January 31, I will use the ROC reference to LIM. CW-2 continued to communicate with LIM using encrypted devices under SA Monroe's direction.
- [82] In mid-February 2018, after CW-2 became a cooperating participant, LIM sent CW-2 a series of messages about purchasing cocaine:
- (a) On February 10, 2018, LIM sent CW-2 a message asking "no word on the load [i.e, shipment of cocaine]?"
- (b) On February 12, 2018, LIM asked CW-2 "how many r being dropped off?" and CW-2 responded "20" referring to kilograms of cocaine. LIM asked if there was a "possibility to buy more on top" and CW-2 responded "20. How many more do you need?" LIM asked about the "stamps" (a brand of cocaine) and CW-2 responded that there were "25" and that they were "fr1" referring to the number of kilograms and the brand of the cocaine. LIM said that he would "take all 25" and told CW-2 to call a phone number and ask for "Ben Johnson". LIM also sent CW-2 a serial number for identification purposes.
- [83] The February 2018 cocaine transaction did not ultimately take place. Following the failed transaction, LIM exchanged numerous messages with CW-2 to set up a meeting between one of LIM's associates and CW-2's supposed "Mexican drug supplier". Those messages included the following:

- (a) On February 19, 2018, LIM asked CW-2 "If we do get this pack [i.e., 20 kilograms of cocaine] to pay ppl back. Are u able to sell purples again? And in a faster fashion? I want to reboot the program" and also "And how about sending Ms down again?"
 - (b) On February 20, 2018, CW-2 told LIM "going to set up meet and greet with mex guy and your guy. They passed those cause guy had to leave. But they should land by next Wednesday so we are ready. They want to land and drop not hold."
 - (c) On February 20, 2018, LIM replied to CW-2 with a message stating "Tp [a courier] wants mexi's number Monday so they can touchbase to confirm it's for sure a weds pickup. If there is no gear [cocaine] on weds to tp to pickup it'll be bad for me. I will be penalized".
- [84] The key phone call then occurred on March 11, 2018, when CW-2 placed a recorded phone call to LIM. During the phone call, LIM told CW-2 that he had a shipment of "purple" that would be ready for CW-2 soon. LIM and CW-2 also continued to discuss scheduling a meeting between LIM's associate and CW-2's Mexican drug supplier. During this phone call, CW-2 and LIM expressed concern about a news article that mentioned a recent takedown involving his organization. The article referred to LIM and the seizure of MDMA from Mr. Luangkhamdeng on June 10, 2017. CW-2 asked LIM if he believed the article had something to do "with your dude? The one in the wheelchair that got caught up?" and LIM replied that he did not think so because "he just pled". When CW-2 said again that he thought it had something to do "with your boy", LIM said "Maybe. It- it said like uh, I'm pretty sure he- he caught the heat from fuckin' Mr. G.". As set out in further detail below, RCMP Sgt. Shailven Singh can identify the voice on the call with CW-2 as belonging to Mr. Lim.
- [85] On March 14, 2018, LIM sent CW-2 a message regarding the "meet and greet" between his associate and CW-2's Mexican drug supplier. LIM asked "This is for sure right bro? My buddy will not be happy if there is no load. And tp is empty." CW-2 confirmed that the "meet and greet" had been scheduled and said "Mex will be p[i]ssed if they don't show again."
- [86] On March 15, 2018, LIM sent CW-2 a message saying "[b]uddy is there now will have prepay tomorrow for me to send to you" referring to a phone number. LIM explained that his associate was "running around getting his other legit loads first." On March 17, 2018, LIM sent CW-2 a phone number and serial number from a dollar bill and told him to ask for "Larry Bird".
- [87] An undercover FBI Special Agent posing as CW-2's Mexican drug supplier ("UC-1"), called the phone number LIM provided for "Larry Bird" and arranged to meet him on March 28, 2018. "Larry Bird" was later determined to be Jumsher Saroya.
- [88] On March 28, 2018, UC-1 met Mr. Saroya and the two discussed the logistics of a cocaine deal. Mr. Saroya explained to UC-1 that the DTO sends different individuals to pick up the cocaine in the United States and transport it into Canada. Mr. Saroya made a phone call during the meeting and asked someone "how many and how often you know for picking up?"

- [89] Mr. Saroya then left the restaurant and met with an individual later identified as Michael Shepherd. Mr. Shepherd had driven Mr. Saroya to the meeting but remained outside in the car. Mr. Saroya retrieved a phone from Mr. Shepherd and walked back inside the restaurant. Mr. Saroya showed the phone's screen to UC-1. The screen said 50 kilograms every week and Mr. Saroya confirmed the same stating "it says our ride is 50 max. And every week."
- [90] After Mr. Saroya and UC-1's meeting, LIM sent CW-2 an encrypted message stating that his "buddy" thought something about the meeting did not seem right and asked if UC-1 was "a pig" (i.e., a police officer) because he asked so many questions.
- [91] On March 29, April 4 and April 5, 2018, U.S. law enforcement conducted surveillance of Mr. Shepherd and Mr. Saroya who appeared to be driving and moving items between two storage lockers in Redlands, California. Mr. Saroya was arrested on April 5, 2018, after two suitcases containing 46.6 kilograms of methamphetamine were found in the car he was driving. Mr. Saroya and Mr. Shepherd had retrieved the two suitcases from one of the two storage lockers earlier that day. Mr. Shepherd was also arrested on April 5, 2018, when he returned to one of the two storage lockers. Mr. Shepherd admitted to police that he was renting the storage locker and that it contained five kilograms of cocaine. Five kilograms of cocaine were subsequently found inside the storage locker.

4. Mr. Lim as "The Goat" and "Tenny"

- [92] The Requesting State's identification of Mr. Lim as the person communicating with CW-1 as "The Goat" and CW-2 as "Tenny" relies primarily on the following circumstantial evidence:
- (a) The March 11 phone call, which CW-2 placed to an individual they knew as "Tenny", which is Mr. Lim's first name.
 - (b) RCMP Sgt. Singh has listened to a recording of the March 11 phone call and is able to identify the voice of the man communicating with CW-2 as Mr. Lim based on a 2.5 to 3 hour recorded interview of Mr. Lim that he conducted on May 22, 2014, and Mr. Lim's distinctive tone of voice and manner of speech.
 - (c) During the March 11 phone call, "Tenny" expressed concern about a news article that mentioned a recent takedown of his organization. The article referenced "The Goat" and the seizure of MDMA from Mr. Luangkhamdeng on June 10, 2017.
 - (d) During the March 11 phone call CW-2 asked "Tenny" if the article had something to do "with your dude? The one in the wheelchair that got caught up?" "Tenny" replied that he did not think so because "he just pled". Mr. Luangkhamdeng, who uses a wheelchair, pleaded guilty to importation of MDMA on September 18, 2017.
 - (e) During the March 11 phone call CW-2 told "Tenny" that he thought the article had something to do "with your boy" to which "Tenny" replied "Maybe. It- it said like uh, I'm pretty sure he- he caught the heat from fuckin' Mr. G". "Mr. G" is a screenname CW-1 used when communicating with "The Goat".

E. Summary of the Requesting State's Evidence against Dario Baruca

1. CW-2 Discusses Drug Trafficking with DTO Associate "Orange Tang"

[93] In November 2018, an unidentified individual using the screen name "Orange Tang" sent CW-2 a series of encrypted messages. In these messages, "Orange Tang" referred to various drug seizures from Mr. Lim's associates.

[94] For example, "Orange Tang" told CW-2 that "[t]he driver who has no legs in a wheelchair was handed a 14 year sentence due to this Mr G". As noted, "Mr. G" is a reference to CW-1 who used the screenname "Mr. G." The "driver who has no legs in a wheel chair" is a reference to Mr. Luangkhamdeng, a drug courier who used a wheelchair and was found in possession of 24.2 kilograms of MDMA on June 10, 2017 and convicted of importation.

[95] "Orange Tang" also told CW-2 that "when your so called mex kept asking for a 'meet and greet' with the other tp for the 18chicks. After the 2nd 'meet and greet' that worker had his safe house kicked in and inventory was lost" - referring to the cocaine and methamphetamine seized from Mr. Saroya and Mr. Shepherd on April 5, 2018, one week after Mr. Saroya met the undercover officer posing as CW-2's Mexican drug supplier.

[96] "Orange Tang" explained to CW-2 that the organization had been patient with CW-2 only because "Bruce" - a known nickname for Mr. Lim - spoke highly of CW-2.

2. "Orange Tang" Attempts to Source Cocaine from UC-3

[97] CW-2 and "Orange Tang" continued to exchange encrypted messages in the first few months of 2019. During these exchanges, CW-2 introduced "Orange Tang" to an LAPD undercover officer ("UC-3") who was posing as an associate of CW-2 with connections to cocaine suppliers.

[98] UC-3 began communicating with "Orange Tang" via encrypted message about a new source of cocaine. The communications between UC-3 and "Orange Tang" included the following:

- (a) On February 18, 2019, "Orange Tang" asked the UC-3 if there was "a shop where we can purchase chicks from in beach" referring to purchasing cocaine in the Long Beach area.
- (b) On February 19, 2019, UC-3 asked "Orange Tang", "how many chicks and how often" to which "Orange Tang" responded "20-30 every 10days."
- (c) On February 27, 2019, UC-3 told "Orange Tang" that he could get "15 from my shop to make it 20" but that "we expect papers once dropped to your tp". "Orange Tang" responded, "Yes that is standard. But we can only wire it to mex that work" and then confirmed that the payment would be in U.S. dollars.
- (d) "Orange Tang" and UC-3 continued to exchange messages and discussed opening transportation lines in Australia and Europe.

3. "Ventura" Takes Over Cocaine Negotiations for "Orange Tang"

[99] On April 12, 2019, "Orange Tang" told UC-3 to call him to continue discussing drug trafficking activities; however, when UC-3 called the number "Orange Tang" provided, a man using the name "Ventura" answered the phone. During this conversation UC-3 used the name "Kaiser". UC-3's conversation with "Ventura" included the following:

- (a) UC-3 told "Ventura" that his Mexican suppliers wanted to "work" but they wanted to make sure that all of the logistics and the money was "on board". In response, "Ventura" asked UC-3 "what do you have and I'll tell you if we can do it or not", referring to cocaine that UC-3 could provide.
- (b) UC-3 asked "Ventura" why his organization wanted to "fuck with us with 200" ("200" referring to kilograms of cocaine) if they were already moving so much "weight". "Ventura" clarified to UC-3 that he was "Orange Tang's" "buddy" and that "Orange Tang" told him to "go over everything with you and see what you guys can do" referring to the supply and transportation of cocaine.
- (c) "Ventura" and UC-3 then discussed starting a cocaine transportation line from Costa Rica to the European Union with about 200 kilograms of cocaine per load.
- (d) "Ventura" told UC-3 that he would talk to "Orange Tang" to clarify what "Orange Tang" wanted to do.

[100] Following the phone call with "Ventura", UC-3 contacted "Orange Tang" via encrypted message. "Orange Tang" told UC-3 by encrypted message that "the Italian buddy" UC-3 spoke to over the phone was his "partner" who "runs all the stuff up here", referring to Vancouver. "Orange Tang" also told UC-3 that he is in charge of operations on the east coast of Canada and that a "Serbian partner" handles all other matters.

4. Mr. Baruca as "Ventura"

[101] SA Monroe identified "Ventura" as Mr. Baruca because "Orange Tang" told UC-3 that CW-2 knows the person UC-3 spoke to on the phone. CW-2 has known Mr. Baruca, who he met through an associate of Mr. Lim, for many years and has spoken with him over FaceTime. Before CW-2 began cooperating with law enforcement, CW-2 would communicate with Mr. Baruca by encrypted message and using the online application WhatsApp regarding the transportation of cocaine and MDMA between Los Angeles and Canada.

[102] At SA Monroe's request, CW-2 reached out to Mr. Baruca over Facebook to discuss the phone call with UC-3. Mr. Baruca began communicating with CW-2 by encrypted message and confirmed that he was the one who spoke to "Kaiser" (again, UC-3's code name during the call with "Ventura"). Mr. Baruca specifically told CW-2 that he "was talking to a guy named Kaiser". In another encrypted message, Mr. Baruca asked CW-2 to vouch for him to UC-3 stating: "tell him im ur boy up here n that im cool to talk to."

V. analysis

A. The ROC, SROC and SSROC are Admissible

[103] The ROC, SROC and SSROC satisfy the requirements of s. 32(1) of the Act and are therefore admissible as evidence on the committal application. The ROC, SROC and SSROC bear statements from Ms. Degtyareva, Assistant United States Attorney for the Central District of California, certifying that the evidence summarized or contained in the ROC, SROC and SSROC is available for trial and sufficient under the laws of the United States to justify prosecution.

B. The Elements of Conspiracy to Traffic

[104] To commit Mr. Lim and Mr. Baruca for surrender to the Requesting State for the purposes of prosecution, this Court must be satisfied that the evidence summarized in the ROC and supplemental materials discloses a case on which a jury could convict Mr. Lim and Mr. Baruca for the Canadian equivalent offence of conspiracy to traffic in a Schedule I controlled substance. This requires that the evidence satisfy each of the elements of that Canadian offence.

[105] The offence of conspiracy is set out in s. 465 of the Criminal Code. Paragraph 465(1)(c) of the Criminal Code provides as follows:

465(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

[]

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; []

[106] At the core of the offence of conspiracy is the shared intention to do something unlawful and a completed agreement to bring that common design into effect. The offence can be broken down into the following essential elements:

- (a) an intention to agree;
- (b) completion of an agreement; and
- (c) a common design to do an unlawful act or do a lawful act by unlawful means.

United States of America v. Dynar, [1997] 2 S.C.R. 462 at para. 86.

[107] A conspiracy is complete when two or more persons agree to commit an indictable offence, regardless of whether all of the conspirators have been identified: Dynar at para. 88. In the conspiracy context, the crystallization of the agreement is often referred to as the "meeting of the minds" regarding the common design to do something unlawful, specifically committing an indictable offence.

- [108] As conspiracy must involve more than one person, there can be no conspiracy involving a person who is cooperating with the police, because such a person does not possess a genuine intention to carry out a common criminal design: *Dynar* at para. 88. In this case, therefore, CW-1 and CW-2 cannot form part of a conspiracy after May 10, 2017 and January 31, 2018 respectively. However, their evidence regarding the periods that they were cooperating witnesses is not rendered "manifestly unreliable": *Scarpitti. v. United States of America*, 2007 BCCA 498, paras. 40, 41.
- [109] Special evidentiary rules may apply to out of court statements made by a co-conspirator. Statements made or acts done by a person engaged in a common unlawful design are admissible against all persons acting in concert if those statements were made or acts done while the common unlawful design is ongoing and in furtherance of that common unlawful design: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2019) at 425. Ordinarily, where the Crown seeks the admission of such statements for their truth, they must be subject to the three-step analysis prescribed in *R. v. Carter*, [1982] 1 S.C.R. 938 at 947-948. However, in this instance the Requesting State has agreed that such evidence can only be used to provide narrative context.
- [110] Pursuant to ss. 5(1) and 5(3) of the CDSA, it is an indictable offence to traffic cocaine and MDMA as both substances are included in Schedule I of the CDSA. In s. 2, the CDSA defines "traffic" as follows:
- (a) to sell, administer, give, transfer, transport, send or deliver the substance;
 - (b) to sell an authorization to obtain the substance; or
 - (c) to offer to do anything mentioned in paragraph (a) or (b), otherwise than under the authority of the regulations.
- [111] Therefore, for conspiracy to traffic in a controlled substance, the offence is made out where the evidence establishes the existence of an agreement between two or more persons to obtain, transport or deliver a substantial quantity of controlled substances. The *actus reus* of conspiracy to traffic is the fact of the agreement.
- [112] Membership in a conspiracy can be shown by acts done in furtherance of the scheme, even if the individual did not participate in the planned offence itself: *United States of America v. Trotter*, 2013 BCSC 1985 at para. 55. Actual participation in the trafficking offence is not an essential element of the offence of conspiracy; therefore a person may be found guilty of conspiracy to do an illegal act without having actually committed that act: *Trotter* at para. 54. As noted by the Supreme Court of Canada, "where a person, with knowledge of a conspiracy; (which by definition includes knowledge of the unlawful object sought to be attained), does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred": *R. v. J.F.*, 2013 SCC 12 at para. 52.

- [113] The mens rea of conspiracy to traffic is some knowledge of the ultimate object of the plan to transport the prohibited substances. It is not necessary to prove that the individual knew every specific detail of the plan - for example, the identities of every member of the conspiracy or the ultimate destination of the narcotics - so long as they had some knowledge that the scheme ultimately had a goal of trafficking illicit substances: Trotter at paras. 53-54.
- [114] Furthermore, it is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object. The Supreme Court of Canada emphasized this point in R. v. J.F. at para. 54, noting that "members in a conspiracy need not personally commit, or intend to commit, the offence which each has agreed should be committed. Any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership as long as agreement to a common plan can be inferred and the requisite mental state has been established".

C. Tenny Guon Lim

- [115] As set out above, the Requesting State says that the following circumstantial evidence summarized in the ROC and SSROC grounds the reasonable inference that Mr. Lim was communicating with CW-1 using the name "The Goat" and with CW-2 using his first name, "Tenny":

Mr. Lim is "Tenny"

- (a) On March 11, 2018, CW-2 placed a recorded phone call to an individual they knew as "Tenny", which is Mr. Lim's first name.
- (b) RCMP Sgt. Singh listened to the March 11 phone call and identified the voice of the man communicating with CW-2 as Mr. Lim based on the 2.5 to 3 hour recorded interview of Mr. Lim that he conducted on May 22, 2014, as well as Mr. Lim's distinctive tone of voice and manner of speech.
- (c) Sgt. Singh has identified the person depicted in the photograph attached as Exhibit A to the ROC as Mr. Lim.

Mr. Lim/"Tenny" is "The Goat"

- (d) During the March 11 phone call, "Tenny" expressed concern about a news article that mentioned a recent takedown of his organization. The article referenced "The Goat" and the MDMA seizure from Mr. Luangkhamdeng on June 10, 2017.

- (e) During the March 11 phone call CW-2 asked "Tenny" if the article had something to do "with your dude? The one in the wheelchair that got caught up?" "Tenny" replied that he did not think so because "he just pled". Mr. Luangkhamdeng, who uses a wheelchair, (also referred to as "George" and "Wheels") pleaded guilty to importation of MDMA six months earlier (September 18, 2017) and "The Goat" was the one who had been communicating with CW-1 about "Wheels" delivering the MDMA.
- (f) During the March 11 phone call, CW-2 told "Tenny" that he thought the article had something to do "with your boy" (referring to Mr. Luangkhamdeng) to which "Tenny" replied "Maybe. It- it said like uh, I'm pretty sure he- he caught the heat from fuckin' Mr. G". "Mr. G" is the screenname CW-1 used when communicating with "The Goat" regarding "Wheels" (Mr. Luangkhamdeng) delivering MDMA to CW-1 in California.

[116] On behalf of Mr. Lim, three issues are raised: the admissibility of the March 11 phone call because of voluntariness and the law regarding voice identification; identity; and the sufficiency of the evidence, particularly with regard to identity.

1. Voluntariness

[117] Central to the committal hearing of Mr. Lim is the March 11 phone call. CW-2 placed this recorded call to "Tenny" in the presence of SA Monroe. The evidence regarding the intended use of the phone call as later identifying "The Goat"/"Tenny" as Mr. Lim is summarised in paragraph 7 of the ROC:

On CW-1's encrypted devices, SA Monroe found hundreds of messages dated between April 20, 2017 and May 10, 2017, between CW-1 and an individual using the name "The Goat," who was later identified as LIM, SA Monroe is expected to testify that she identified "The Goat" as LIM because, as described below, LIM admitted in a phone call with CW-2 on March 11, 2018 that "the one in the wheelchair" (referring to co-conspirator Saysana Luangkhamdeng, who is in a wheelchair) was his associate and that he "caught the heat from fuckin' Mr, G" (CW-1 used the screenname "Mr. G 3" in some of his/her encrypted messages with "The Goat"). In the messages between CW-1 and "The Goat," they discussed a driver named "wheels" coming down to Los Angeles to deliver MDMA, and law enforcement later found 25 kilograms of MDMA during a border search of Luangkhamdeng, who uses a wheelchair and was identified as "wheels" (as described herein).

[underlining added]

[118] The evidence regarding the basis upon which SA Monroe identified the recorded voice as being Mr. Lim is intended to be provided by RCMP Sgt. Singh and is set out in the SSROC:

RCMP Sgt. Shailven Singh (Sgt. Singh) is further expected to testify to the following: On May 22, 2014, Sgt. Singh conducted a post-arrest interview of LIM in person at the RCMP Detachment in Richmond, British Columbia, Canada. That interview took place over a period of between 2.5 and 3 hours. The interview was conducted after LIM had been provided his official warning and his Charter rights and given access to legal counsel. The interview was audio and video recorded and

preserved. Sgt. Singh is expected to testify that LIM has a distinctive tone of voice and manner of speech.

On March 11, 2018 Sgt. Singh listened to a recording of a telephone call which took place between CW-2 and another man, identified as LIM or "the Goat" and which is referenced in paragraphs 7, 23, and 26 of the Revised Record. He then reviewed the recording of the 2014 interview with LIM. Based on his independent recollection of the 2014 LIM interview and his review of the recording of that interview, he can testify that the man communicating with CW-2 on the March 11, 2018 telephone call is LIM.

[119] The link between the evidence of the Requesting State and Mr. Lim is the interview of Mr. Lim by Sgt. Singh in 2014 after his arrest on unrelated drug charges. Mr. Lim later pleaded guilty to those charges.

[120] Mr. Lim submits that because the Requesting State has not proven the voluntariness of his 2014 statement in a voir dire, it cannot be considered in these proceedings. The statement is not sought to be entered for its contents but for its use in voice identification. He says that as the requirements of s. 32(2) of the Act have not been met, any evidence, including voice identification, from his 2014 statement is inadmissible. Section 32(2) provides:

Exception - Canadian evidence

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

[121] It is first submitted by Mr. Lim that a voir dire is required for voice identification evidence. Although counsel provided thorough submissions on this issue, in my view the question of the admissibility of the statement is determined by the analysis on counsel's submissions on the effect of the guilty plea entered by Mr. Lim on the 2014 charges after the statement was taken.

[122] In the Disclosure Reasons and the Voir Dire Reasons I dismissed Mr. Lim's applications for disclosure regarding the interview with Sgt. Singh, and for a voir dire Charter application regarding the lawfulness of the statement taken by Sgt. Singh. I held that a guilty plea resulted in an offender having waived all Charter remedies flowing from that offence.

[123] The applications and Reasons are summarised in the Voir Dire Reasons:

[4] This application was brought for the purpose of seeking a voir dire with regard to the Canadian-gathered evidence of Sgt. Singh's interview of the applicant in 2014 when the applicant was being investigated for unrelated charges.

- [5] Two alternate bases are advanced for the voir dire. The first is the same basis as in the earlier disclosure motion relying on ss. 9 and 10 of the Charter. The applicant acknowledges that the Ruling on that disclosure motion would apply so as to result in a dismissal of this voir dire application on that basis. The relevant portions of the Ruling acknowledged by the applicant are:
- [85] Mr. Lim pleaded guilty to the charge that arose from the RCMP's 2014 investigation -- the investigation during which Sgt. Singh interviewed Mr. Lim subsequent to his arrest. The effect of well-established law is that by pleading guilty, Mr. Lim surrendered his right to make full answer and defence, including the right to pursue Charter-based arguments in defence of the offences charged -- including the Charter-based arguments Mr. Lim now seeks to raise in the context of his extradition hearing: Wong (SCC) at para. 96; Hexamer at para. 57.
- [86] The principle of finality of guilty pleas and the benefits therein conferred require that it not be open to Mr. Lim to raise Charter arguments during his extradition proceedings that he chose not to make during his Canadian criminal proceedings.
- [87] Permitting Mr. Lim to invoke the Charter rights he previously waived goes against the finality of his guilty plea as it raises the possibility that the extradition judge could find a breach of Mr. Lim's Charter rights and exclude evidence by way of ss. 24(1) or 24(2) despite his guilty plea. As the Court of Appeal found in Hexamer at para. 57, the fact that there may be arguable grounds to a Charter allegation does not invalidate a guilty plea. While the validity of Mr. Lim's plea would be unchanged in the face of the extradition judge finding a Charter breach, the situation where Mr. Lim's guilty plea co-exists with Charter breaches would call the certainty and finality of the plea into question and lead to a loss of public confidence in the administration of justice.
- [91] In the result, the case before me does not meet any of the exceptions to adherence to the principles of judicial comity as discussed in the cases cited above. I find also that it is in the best interests of justice to follow Pavlicevic. In finding that Pavlicevic is binding upon me, there can therefore be no order for disclosure of any materials arising from the former case that resulted in a guilty plea, including the 2014 interview conducted by Sgt. Singh.
- [6] The second basis for the voir dire application is founded on the Supreme Court of Canada cases of R. v. Harrer, [1995] 3 S.C.R. 562 and R. v. Terry, [1996] 2 S.C.R. 207. The applicant says that regardless of how the evidence of voice identification was gathered (as dealt with in the Ruling and which is applicable to the first basis advanced), the tendering of the evidence in the extradition hearing could render the proceedings unfair. He seeks that the court utilise its residual discretion to exclude the evidence pursuant to ss. 7 and 11(d) of the Charter.
- [18] However, the primary issue on this application does not engage the principles from Harrer and Terry. As I found in my previous Ruling, the decision in United States of America v. Pavlicevic, 2008 BCSC 410 is binding upon me. In that Ruling, I ultimately concluded "[t]he Charter issues Mr. Lim raises are not properly justiciable by the extradition judge due to the

procedural waiver of those rights that accompanied his guilty plea in the unrelated criminal proceedings": para. 109. More broadly, I described at para. 64 that "Pavlicevic can be said to stand for the notion that, where a person sought has pleaded guilty to Canadian charges, any Charter allegations arising in relation to those previous charges are not properly justiciable by the extradition judge. This is so even if those issues would have been properly justiciable but for the guilty plea."

- [19] This voir dire application simply seeks different Charter remedies, premised on the alleged breaches of Mr. Lim's ss. 7 and 11(d) rights, arising in relation to the same previous charges. These Charter issues are also subject to the Pavlicevic bar on Charter remedies and, consequently, they are not properly justiciable.
- [124] The issue which arises in this committal hearing is whether the law regarding the procedural protections being waived by a guilty plea extends to include non-Charter procedural safeguards.
- [125] Mr. Lim submits that it does not. Voluntariness is founded in the confessions rule which is a common law requirement that the Crown prove the voluntariness of a statement it relies upon and which exists in addition to the Charter. The common law principle provides broader protections and does not require a finding under s. 24(2) of the Charter. The failure to prove voluntariness beyond a reasonable doubt always warrants exclusion: *R. v. Oickle*, 2000 SCC 38 at paras. 30-31, 68. Thus, he says, the Disclosure Reasons and the Voir Dire Reasons, which only dealt with the waiver of Charter protections, have no application.
- [126] It is correct that those Reasons did not address the waiver of non-Charter procedural safeguards. However, the Requesting State submits that the dissenting reasons in *R. v. Wong*, 2018 SCC 25, relied upon in the Disclosure Reasons, provides support for the proposition that the effect of a guilty plea includes the waiver of other procedural safeguards one of which is the confessions rule, or voluntariness.
- [127] The statement in *Wong* at para. 62 is capable of being read to support both positions. It is unclear whether the "essential procedural safeguards" referred to as rights waived by an accused in pleading guilty are to be limited to "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."
- [62] While it is true that the plea bargaining process yields important benefits, it must also be fair. This Court has long recognized the importance of the rights waived by an accused in pleading guilty: *Adgey v. The Queen*, [1975] 2 S.C.R. 426, at p. 440. A guilty plea constitutes a formal admission of guilt to the crime with which the accused is charged. It relieves the Crown of its burden to prove guilt beyond a reasonable doubt and constitutes a waiver of essential procedural safeguards. An 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.

[Underlining added]

- [128] In addition to Wong, other cases have recognized the waiver of procedural safeguards, including those which are Charter-protected, resulting from a guilty plea: R. v. Parris, 2013 ONCA 515 at para. 121; R. v. Shaw, 2015 ABCA 25 at para. 11; R. v. Faulkner, 2018 ONCA 174 at para. 85; R. v. Lopez-Restrepo, 2018 ONCA 887 at para. 23; R. v. Hexamer, 2018 BCCA 142 at para. 57.
- [129] The Person Sought submits that the voluntariness rule is broader than the right to silence as enshrined in s. 7, and is not overridden by a guilty plea in an earlier proceeding.
- [130] Indeed, there appear to be open and vexing questions in this area of the law. In each of the cases cited by the Requesting State, the accused was disentitled from making arguments about the denial of procedural safeguards after they had made a guilty plea at trial in the same proceeding. There is no authority for the proposition that the guilty plea can have the effect of waiving an accused's non-Charter procedural guarantees in respect of future unrelated proceedings.
- [131] Part of the rationale for the harsh consequences that may attend a guilty plea is that, for a guilty plea to be valid, it must be "voluntary, unequivocal, and based on sufficient information concerning the nature of the charges against the accused and the consequences for the accused of a guilty plea"; that is, the plea must be informed: R. v. Taillefer; R. v. Duguay, 2003 SCC 70 at para. 85 citing R. v. T.(R.), 10 O.R. (3d) 514 at 519 (C.A.).
- [132] In the cases cited by the Requesting State, the appellants were aware of the charges against them. Here, it may be that this fundamental underpinning is not present on the facts. The Requesting State suggests a guilty plea arising out of unrelated facts can and does deprive the Person Sought of procedural protections in these proceedings, despite the fact that they could not have been in the contemplation of the parties at the time of the guilty plea. The notion that, by pleading guilty, a person can waive non-Charter procedural protections in a future, unrelated proceeding sits uneasily with the established proposition that a guilty plea must be informed to be valid.
- [133] From the passage in Wong at para. 62, the Requesting State places special emphasis on the notion that the plea "constitutes a waiver of essential safeguards"; however, the sentence which immediately precedes this gives context to this proposition: "A guilty plea constitutes a formal admission of guilt to the crime with which the accused is charged" (emphasis added). This could support the position that the effect of the guilty plea should only extend to proceedings arising from the same factual matrix or proceeding.
- [134] That said, the weight of the authorities support the Requesting State's position that the waiver of protections is to be interpreted broadly, for both Charter and non-Charter safeguards. Voluntariness is a procedural requirement meant to ensure the reliability and procedural fairness of a confession or other statement to a person in authority being

admitted into evidence. As a threshold for admissibility, voluntariness can be said to be a "procedural safeguard" waived by a guilty plea as described in Wong just as rights codified in the Charter, such as the right to silence and the right against self-incrimination, among others, are waived.

[135] In particular, the interconnected nature of the voluntariness or confessions rule and the s. 7 right to silence enshrined in the Charter supports the view that the "procedural safeguards" or "procedural protections" waived by a guilty plea include voluntariness. In *R. v. Singh*, 2007 SCC 48, the Supreme Court of Canada clarified that both the common law confessions rule and the constitutional right to silence are manifestations of the right against self-incrimination: at para. 21. While the common law confessions rule (or voluntariness) was not at issue in *Singh*, the Court gave considerable consideration to the interplay between the confessions rule and the Charter right to silence. There, the Court held that, in the context of a police interrogation, where the detainee knows they are speaking to a person in authority, the voluntariness analysis and the s. 7 review for a potential breach of the right to silence are functionally equivalent: at para. 25. This overlap supports the position that a guilty plea waives the procedural protection afforded by the voluntariness rule.

[136] I therefore find that the effect of the guilty plea entered by Mr. Lim in the prior proceedings extends to a waiver of his right to the procedural safeguard of requiring the state to prove voluntariness in this committal hearing. Thus, in resolution of the legal issue arising from the statements, the 2014 statement is admissible, including for voice identification, in these proceedings without the necessity of a voluntariness voir dire. The factual implications of the statement will be dealt with below after a general analysis of the ROC.

[137] In the result, it is not necessary to resolve the issue of whether a voir dire is required in order to lead evidence of voice identification.

2. Identity - Sufficiency of Requesting State's Evidence

[138] Mr. Lim submits that, despite being named in the ROC, the Requesting State has not proven his identity as either being the person before the court, or the person who engaged in the alleged conduct that underlies the request for extradition. He says that the evidence is particularly insufficient to prove the latter aspect of identity.

[139] The onus on the Requesting State to prove identity arises from s. 29(1) of the Act. The judge must be satisfied that the person before the court is the person sought by the extradition partner. I must be satisfied both that on a balance of probabilities Mr. Lim, who is the person before the court, is the person named in the ROC; and that there is a prima facie case that Mr. Lim, before the court, is the person who engaged in the alleged conduct that underlies the request for extradition: *Danielson* at paras. 24-25.

- [140] Mr. Lim submits that the evidence does not prove his identity as the person named in the ROC. He takes issue with the evidence of Cpl. Ozaki who arrested him on an extradition arrest warrant at Mission Institution on September 19, 2019.
- [141] Cpl. Ozaki testified that when he arrested Mr. Lim he confirmed his name as "Tenny Lim" and confirmed his date of birth. However, he gave no evidence regarding Mr. Lim's middle name, despite it being on the arrest warrant, and did not say how the date of birth was confirmed. Although there was an in-court identification of Mr. Lim by the officer, he did not testify regarding any of the usual descriptors such as height, weight, age, hair colour and eye colour.
- [142] However, Cpl. Ozaki's evidence establishes that the individual he arrested has the same first and last names and birthdate as Tenny Guon Lim named in the ROC. My comparison of Mr. Lim's physical characteristics with the photograph attached as Exhibit A to the ROC and the descriptors in the ROC is also evidence that Mr. Lim is the person sought by the requesting state for the purposes of prosecution. In addition, Sgt. Singh will identify the person depicted in the Exhibit A photograph attached to the ROC as Mr. Lim.
- [143] Similarity of name and physical characteristics are, pursuant to s. 37 of the Act, evidence that the person before the court is the person referred to in the documents.
- [144] I am therefore satisfied on a balance of probabilities that Mr. Lim is the person named in the ROC.

3. Sufficiency of the Evidence

- [145] It is now necessary to address whether there is a prima facie case that Mr. Lim is the person who engaged in the alleged conduct that underlies the request for extradition. This requires an analysis of the sufficiency of the Requesting State's evidence, and particularly the ROC and SSROC. I will then return to the March 11 phone call specifically in respect of the first and second time periods.
- [146] The submission of Mr. Lim is that there is no evidence, or insufficient evidence, to make out a prima facie case that he is the person who committed the acts alleged in the ROC, that is conspiring with others to traffic in the scheduled drugs. Specifically, he says that the texts and messages relied upon by the Requesting State do not provide any identifying phone number or device connected to him. Further, there is no evidence of a phone number related to the March 11 phone call.
- [147] What is clear is that CW-1 and CW-2 were communicating with someone alleged to be Mr. Lim, who used a number of monikers in the course of those communications. The ATP frames the extradition request as being between the Attorney General of Canada (on behalf of the United States of America) and Tenny Guon Lim also known as "The Goat; Max Power: Wild; Bruce; Phil". There are references to "The Goat" throughout the ROC. The only reference to Phil in the ROC is at para. 75 in the list of identifiers which includes all five names listed as "also known as". Bruce is also referred to in para. 67 in a discussion of the

evidence against Mr. Baruca as a "known nickname for LIM". The names Max Power and Wild are only also found in a footnote to para. 4 which states: "Texts sent by LIM appear on CW-1's and CW-2's device as from various usernames, including "The Goat," "Max Power," and "Wild." The inclusion of the "also known as" names for Mr. Lim other than The Goat is unexplained in the evidence. No messages are attributed to any moniker other than The Goat and Tenny.

[148] The ROC is drafted on the assumption that the person in each message or communication is Mr. Lim. The narrative of the ROC refers to "LIM" in interactions with CW-1 and CW-2 and others in the alleged conspiracies. As such, it reads as a narrative of an investigation which has identified Mr. Lim as that person, LIM. However, if the ROC is read with a reference, for example, to "UM" for "unknown male", or "UP" for "unknown person", as the gender of the sender of the messages is not known except for the March 11 phone call, the ROC is a different narrative document.

[149] Not only were there a variety of monikers being used, the ROC also indicates a variety of devices were used by the person it assumes to be Mr. Lim:

CW-1 and CW-2 regularly communicated with the leader of the DTO LIM by encrypted message on a series of digital devices. This type of device uses an encryption computer program with the sender encrypting the message with their publicly known key, and the recipient decrypting the message using their private key. There is no method by which the persons in the communications can determine the location of any other party to the communications.

[150] That there was a series of digital devices raises the possibility of there being a number of unidentified persons communicating with CW-1 and CW-2. The ROC does not address how SA Monroe determined that all messages were from one person, other than the footnote stating the usernames were identified as being used by LIM "based on a review of encrypted messages" and the March 11 phone call. Indeed, the ROC does not link each device to a given moniker; they are all simply attributed to "LIM."

[151] Although the ROC states that a variety of usernames were used in communication with both CWs, the ROC also states that, until CW-1 became a cooperating witness on May 10, 2017, CW-1 was communicating with "The Goat": "On CW-1's encrypted devices, SA Monroe found hundreds of messages dated between April 20, 2017 and May 10, 2017, between CW-1 and an individual using the name 'The Goat' who was later identified as LIM." As it relates to evidence gathered from CW-1 until May 10, the Requesting State must establish that a reasonable jury, properly instructed, could infer on all of the evidence that Mr. Lim was The Goat.

[152] Whether or not a reasonable jury could draw an inference that Mr. Lim committed the conduct alleged in the ROC depends, largely, on the March 11 phone call. The Requesting State argues that this call is evidence on which a reasonable jury could infer that Mr. Lim is "The Goat" in the first time period for the following reasons:

- d) During the March 11 phone call, "Tenny" expressed concern about a news article that mentioned a recent takedown of his organization. The article referenced [d] "The Goat" and the MDMA seizure from Luangkhamdeng on June 10, 2017.
- e) During the March 11 phone call CW-2 asked "Tenny" if the article had something to do "with your dude? The one in the wheelchair that got caught up?" "Tenny" replied that he did not think so because "he just pled". Luangkhamdeng, who uses a wheelchair, (also referred to as "George" and "Wheels") pleaded guilty to importation of MDMA six months earlier (September 18, 2017) and "The Goat" was the one who had been communicating with CW-1 "Wheels" [sic] delivering the MDMA.
- f) During the March 11 phone call CW-2 told "Tenny" that he thought the article had something to do "with your boy" (referring to Luangkhamdeng) to which "Tenny" replied "Maybe. It- it said like uh, I'm pretty sure he- he caught the heat from fuckin' Mr. G." "Mr. G" is the screenname CW-1 used when communicating with "The Goat" regarding "Wheels" (Luangkhamdeng) delivering MDMA to CW-1 in California.

[153] I have found above that the March 11 phone call is admissible; in other words, the voice identification evidence can be considered.

[154] Taken at its highest, the ROC suggests a connection between CW-2 and the speaker on the March 11 phone call, to be identified as Mr. Lim, and shared knowledge of Mr. Luangkhamdeng and the screen name "Mr. G" for CW-1. And this connection is made in the context of an article which refers to The Goat and the DTO. Are these circumstances sufficient to allow a reasonable jury, properly instructed, to find that the speaker on the March 11 phone call and The Goat are the same person? The answer turns on whether the requested inference is speculative or not. I return here to some of the case references set out above.

[155] The line between reasonable inferences and speculation was discussed in Huynh at para. 7. Justice Doherty was faced with determining whether material provided by the USA supported the inference that a sum of cash was the proceeds of drug trafficking, as opposed to some other illegal activity:

The material identified by the respondent certainly permits the inference that the cash was the proceeds of some illicit activity. Drug trafficking comes readily to mind as one possible source. The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess. The gap between the inference that the cash was the proceeds of illicit activity and the further inference that the illicit activity was trafficking in a controlled substance can only be bridged by evidence. The trier of fact will assess that evidence in the light of common sense and human experience, but neither are a substitute for evidence.

- [156] This distinction was retraced in *Viscomi*, where the person sought was accused of child luring on the internet. The requesting state could only trace the illegal activity to the IP address of the person sought. The question was whether that was sufficient to ground an inference that the person sought was using the computer at the time the offence was committed. The Court of Appeal found that such an inference was speculative. Adopting some of the language used in *Huynh*, the Court held:
- [35] Here, based on the [Internet Service Provider] information, the notion that Mr. Viscomi was the user of the IP address assigned to his subscriber account at the relevant time is one that may [at para. 7] "[come] readily to mind as one possible [conclusion]". However, the gap between the subscriber information and the factual inference that Mr. Viscomi was the user of the IP address at the relevant time [at para. 7] "can only be bridged by evidence". There is no such evidence in the ROC. As Doherty J.A. points out, speculation, educated guesses, and even common sense and human experience cannot provide a substitute for such evidence.
- [157] In the recent case of *R. v. Wong*, 2021 BCSC 1778, Mr. Justice Tammen addressed a belief that the accused was the user of a Blackberry device. At paragraph 39 he stated: "there is nothing from which that subjective belief can be verified or objectively assessed."
- [158] The caution from *Yang* at para. 63 is also worth reiterating:
- [63] ... While the judicial phase is not a full-fledged trial, neither "is it a mere formality": *Shulman* at p. 307 C.C.C. Thus, the judge must be in a position to exercise that function. If the material presented in the record of the case is so bereft of detail, such as the witness' means of knowledge, that the judge cannot determine its sufficiency, the judge will have to discharge the person sought for prosecution. This is not a question of the judge weighing the evidence or passing on its reliability, but of carrying out the function assigned by statute. For example, if the record of the case contained a statement that the police suspected the fugitive committed the offence, without stating the basis for this opinion, and this was the only evidence proffered by the extradition partner as proof that the fugitive committed the offence then, even if this opinion was admissible in the requesting state as proof of the offence, it would not be sufficient to meet the s. 29 test for committal because it would have no probative value.
- [159] The gap between the fact of Mr. Lim's knowledge of the DTO ("his organization") and its associates, as evidenced in the March 11 phone call, and the factual inference that he was a specific member in the DTO known as The Goat must be bridged by sufficient evidence.
- [160] The Person Sought suggests the sort of evidence that could be used to bridge this gap. He suggests that if the March 11 phone call involved the same number, device, or username, as The Goat this could serve as evidence that Mr. Lim is The Goat. I agree. That said, this likely ignores the realities of membership and communication in the drug trade. SA Monroe will give evidence that those involved in the DTO were particularly cautious about switching between devices and encrypting messages.

- [161] Even so, as the Person Sought suggests, there ought to be something unique, beyond shared knowledge, connecting the communications of The Goat in 2017 and the content of the March 11 phone call to permit the inference that Mr. Lim is The Goat. This is especially so given the gaps in evidence left in the ROC about the devices which CW-1 and The Goat were using to communicate and the several monikers under which the Requesting State says Mr. Lim communicated.
- [162] I find that it is speculation to interpret para. 23 of the ROC to mean that the person on the March 11 phone call, to be identified as Mr. Lim by Sgt. Singh, was The Goat. There was a news article which referenced The Goat and an apparent shared awareness of Mr. Luangkhamdeng and Mr. G as screen name. Knowledge of the contents of that article, the courier Luangkhamdeng, and Mr. G. is not sufficient to ground a reasonable inference that Mr. Lim is, in fact, The Goat.
- [163] Thus I cannot find that that prior to CW-1 cooperating with the FBI, Mr. Lim, and CW-1 and/or Mr. Luangkhamdeng had entered into an agreement to traffic cocaine and MDMA.
- [164] Similarly, I cannot find that it was Mr. Lim who was communicating with CW-1 after he began cooperating with the FBI. It is also possible, on a reading of the ROC as a whole, that those communications were by other individuals with use of the other usernames.
- [165] Someone communicated with CW-1 referring to the involvement of other unidentified co-conspirators being involved in the drug trafficking operation. These messages include: "My group is asking when u will have tiles [cocaine] ready bro?"; "My partners want to send more M [MDMA] down to u."; "My guys r telling me they can't find any purple [better quality MDMA]. However, it is speculation to attribute those messages to Mr. Lim in the first time period.
- [166] I turn now to the second time period which commenced prior to CW-2 becoming a co-operating witness on January 31, 2018. SA Monroe reviewed and preserved all messages that CW-2 had exchanged with a person they knew as Tenny. However, there is no evidence regarding the nature or content of those messages between CW-2 and Tenny.
- [167] On February 10, 2018, after CW-2 had become a co-operating witness, CW-2 communicated with Tenny regarding a load or shipment of cocaine. Communications through messages continued through February prior to the March 11 phone call.
- [168] With regard to the messages provided for the second time period, again the Requesting State takes the position that all messages are from the same person. As with the first time period, given that there was more than one device and other usernames, I cannot find that to be a reasonable inference. Further, it states that that same person throughout the ROC is Mr. Lim, referred to as LIM. I also do not find that to be a reasonable inference; it is a belief or a supposition.

[169] I have found above that the March 11 phone call does not provide a link between Mr. Lim and the identity of The Goat in the first time period. It is necessary to now examine the March 11 phone call in the context of the second time period.

[170] As discussed, that Mr. Lim discussed the article with CW-2 and his knowledge of CW-1 and CW-1's username or screen moniker, and Mr. Luangkhamdeng and his arrest was not sufficient to found an inference that Mr. Lim was The Goat. However, in paragraph 26, and out of sequence, is further evidence regarding the March 11 phone call:

In a recorded phone call on March 11, 2018, LIM told CW-2 that he had a shipment of MDMA ("purple") that would be ready for CW-2 soon, and they also continued to discuss scheduling a meeting between LIM's associate and CW-2's Mexican associate.

The evidence in the ROC is therefore that Mr. Lim told CW-2 that he had a shipment of drugs and they continued to discuss a future meeting with an associate of Mr. Lim, alleged to be Mr. Saroya, and CW-2's Mexican drug supplier, who was an undercover agent.

[171] The March 14, 15, 17 and 28, 2018 messages from LIM are sufficiently proximate in time to the March 11 phone call and consistent in topic that it is a reasonable inference that they were also from Mr. Lim. Those messages continue to discuss a meeting with a member of the DTO, Mr. Saroya, and the undercover agent which occurred on March 28, and Mr. Lim's concerns which arose after the meeting. The March 11 phone call is therefore a link to drug trafficking alleged in the second time period.

[172] I am mindful that CW-2 and UC-1 cannot be members of a conspiracy (Dynar at para. 88). However, their evidence is admissible subject to any Vetrovec arguments raised at trial: Thailand v. Obi at para. 33. The AGC has stated that it is not relying on the co-conspirator's exception to the hearsay rule, known as the Carter exception, but the evidence of Mr. Saroya is not relied upon - only that he was present at the meeting with UC-1.

[173] Therefore, in engaging in a limited weighing of the evidence in this section of the ROC, being part of the second time period, the evidence supports a reasonable inference that the Person Sought, Mr. Lim, conspired with Mr. Saroya to traffic cocaine. Mr. Lim arranged for Mr. Saroya to meet with CW-2's "Mexican drug supplier" (UC-1). When Mr. Saroya met with UC-1 on March 28, 2018, the two discussed the logistics of a cocaine transaction. After Mr. Saroya met UC-1, Mr. Lim sent CW-2 an encrypted message saying his "buddy" thought something about the meeting did not seem right. Mr. Lim asked if UC-1 was "a pig" and asked CW-2 to confirm that UC-1 was "safe".

[174] A conspiracy is complete when there is a meeting of the minds between two or more people regarding the common design to do something unlawful, specifically an indictable offence. The ROC establishes numerous transactions in a sophisticated cross-border drug trafficking operation. Although it does not establish that Mr. Lim was a party to every communication or transaction, on a limited weighing the inference can be reasonably drawn from the evidence summarized in paras. 23 and 26 to 33 of the ROC that Mr. Lim participated in this

part of the alleged conspiracy with Mr. Saroya.

- [175] The March 11 phone call contains evidence that Mr. Lim had a shipment of high quality MDMA ready for shipping to CW-2 shortly. During that call, Mr. Lim also discussed setting up the meeting between Mr. Saroya and UC-1. At the meeting, Mr. Saroya and UC-1 discussed the logistics of possible future drug exchanges. They discussed the process for pick up, quantity and delivery schedule. On March 28, Mr. Lim sent a message confirming his awareness of what occurred at the meeting.
- [176] Together, this might suggest that the agreement was incomplete or that it never went beyond negotiations. There is prima facie evidence of an intention to agree and of an unlawful purpose - both of these elements are contained in the March 11 phone call where "LIM told CW-2 that he had a shipment of MDMA ('purple') that would be ready for CW-2 soon". Mr. Saroya then discusses possible terms of the agreement with UC-1. The prima facie evidence of a completed agreement comes from the subsequent evidence of steps taken in furtherance of the agreement by a co-conspirator. That is, Mr. Saroya was subsequently arrested on April 5, 2018 in connection with the transportation of narcotics (i.e., trafficking) in Redlands, California. While the evidence does not establish that this trafficking was done pursuant to an agreement with Mr. Lim, it is "at least some evidence" on this element of the offence (Ferras at para. 38). This is a crucial factor distinguishing Mr. Lim's circumstances from those of Mr. Baruca. This evidence as a whole is sufficient to establish the Requesting State's case against Mr. Lim.
- [177] I therefore find that the requirements of s. 29(a) of the Act for committal for extradition are met. There is evidence admissible of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence of conspiracy to traffic drugs. I am satisfied that Mr. Lim is the person sought by the extradition partner. There is a prima facie evidence that he is the person named in the ROC.
- [178] Mr. Lim, I therefore order you committed into custody to await surrender to the United States of America. I must advise you sir that you will not be surrendered until after the expiry of 30 days, and that you have a right to appeal this order and a right to apply for judicial interim release.

D. Dario Baruca

- [179] The Requesting State submits that the ROC establishes a prima facie case that Mr. Baruca is the person who communicated with UC-3 on behalf of "Orange Tang" using the name "Ventura", and these communications disclose prima facie evidence of conspiracy to traffic a scheduled substance.

[180] Mr. Baruca's response focusses on the sufficiency of the evidence on the elements of the offence. He says that the discussions he had with UC-3 disclose nothing more than preliminary negotiations, not an agreement to traffic. As what exactly was agreed upon is not clear, and not even alleged, there can be no conspiracy between he and "Orange Tang."

1. Identity

[181] To establish the first aspect of identity, CW-2 has identified the person depicted in the photograph attached as Exhibit B to the ROC as Mr. Baruca.

[182] A comparison of Mr. Baruca's physical characteristics with the photograph attached as Exhibit B to the ROC is sufficient to establish on a balance of probabilities that Mr. Baruca is the Dario Baruca sought by the Requesting State for the purposes of prosecution. Both CW-2 and RCMP Detective Kal Patel have identified the person depicted in the photograph attached as Exhibit B to the ROC as Mr. Baruca. Pursuant to s. 37 of the Act, similarity of physical appearance can independently satisfy the identification requirement set out in s. 29(1)(a).

[183] The similarity of Mr. Baruca's name and date of birth to those of the Dario Baruca sought by the Requesting State provides further evidence of identification. Cpl. Pierce testified that on September 5, 2019, he arrested an individual on an extradition warrant who he identified as Dario Baruca, with the same name and date of birth provided for Mr. Baruca in the ROC. The fact that the Dario Baruca before this Court has a similar name to the person sought by the Requesting State is evidence that he is person sought by the Requesting State (s. 37(a) of the Act). The fact that the Dario Baruca before this Court also shares the same date of birth as the Dario Baruca described in the ROC further establishes that it is more probable than not that Mr. Baruca is the person sought for extradition.

[184] With regard to the second aspect of identity (that it was Mr. Baruca who engaged in the underlying conduct), SA Monroe identified "Ventura" as Mr. Baruca because "Orange Tang" told UC-3 that CW-2 knows the person UC-3 spoke to on the phone. CW-2 has known Mr. Baruca, who he met through an associate of Mr. Lim, for many years. Before CW-2 began cooperating with law enforcement, CW-2 would communicate with Mr. Baruca by encrypted message and using the application WhatsApp regarding the transportation of cocaine and MDMA between Los Angeles and Canada.

[185] At SA Monroe's request, CW-2 reached out to Mr. Baruca over Facebook to discuss the phone call with UC-3. Mr. Baruca began communicating with CW-2 by encrypted message and confirmed that he was the one who spoke to "Kaiser" (UC-3's code name during the call with "Ventura"). Mr. Baruca specifically told CW-2 that he "was talking to a guy named Kaiser". In another encrypted message, Mr. Baruca asked CW-2 to vouch for him to UC-3 stating: "tell him im ur boy up here n that im cool to talk to."

2. Sufficiency of the Evidence

- [186] The central issue as it relates to Mr. Baruca is whether there is sufficient evidence to establish a prima facie case that he committed a completed offence.
- [187] The Requesting State submits that the circumstantial evidence summarized in the ROC grounds the reasonable inference that "Orange Tang" and Mr. Baruca conspired to traffic cocaine either separately or as part of the DTO. Specifically, it says that Mr. Baruca's phone call with UC-3, considered in the context of "Orange Tang's" encrypted messages to CW-2 and UC-3, establishes a reasonable inference that Mr. Baruca and "Orange Tang" had formed an agreement to traffic cocaine.
- [188] The Requesting State suggests that this inference can be reasonably drawn from the following circumstantial evidence:
- (a) CW-2 introduced "Orange Tang" to UC-3 as his associate with connections to cocaine suppliers.
 - (b) Beginning in February 2019, "Orange Tang" had ongoing communications with UC-3 about UC-3 supplying cocaine.
 - (c) On April 12, 2019, "Orange Tang" told UC-3 to call him to continue their discussions. UC-3 called the phone number "Orange Tang" gave him and Mr. Baruca answered the call using the code name "Ventura".
 - (d) During his phone call with UC-3, Mr. Baruca continued the cocaine trafficking discussions with UC-3 using coded language to discuss the transaction.
 - (e) During his phone call with UC-3, Mr. Baruca discussed starting a cocaine transportation line from Costa Rica to the European Union just as "Orange Tang" and UC-3 previously discussed opening a transportation line in Europe.
 - (f) During his phone call with UC-3, Mr. Baruca told UC-3 that he would talk to "Orange Tang" to clarify what "Orange Tang" wanted to do.
 - (g) Following the April 12, 2019, phone call, UC-3 and "Orange Tang" exchanged encrypted messages. In one message, "Orange Tang" told UC-3 that "the Italian buddy" UC-3 spoke to on the phone was his "partner" who "runs all the stuff up here", referring to Vancouver.
 - (h) After speaking with UC-3, Mr. Baruca sent CW-2 an encrypted message asking CW-2 to vouch for him to UC-3 stating: "tell him im ur boy up here n that im cool to talk to."
- [189] Mr. Baruca says that, in order for a conspiracy to exist, the parties must be ad idem; the essence of conspiracy is an agreement, and, at most, the ROC discloses discussion of a potential negotiation to traffic cocaine. As UC-3 and CW-2 are both acting on behalf of the State, neither can be party to a conspiracy. Accordingly, the conspiracy must be between Mr. Baruca and "Orange Tang", but the ROC does not disclose any agreement between them to "purchase, sell, administer, give, transport, send or deliver cocaine."

[190] As it relates to the circumstantial evidence of agreement listed above, Mr. Baruca asserts that it merely:

Point[s] to an introduction and preliminary discussions between Orange Tang and UC-3, and to a subsequent telephone call on 12 April 2019 between Baruca and UC-3. Baruca appears to speak as Orange Tang's agent. Following the 12 April phone call, UC-3 and Orange Tang exchanged encrypted messages, but the ROC does not give any details of an alleged plan or agreement discussed in those messages.

[191] As evidence that the agreement (and, thus, the *actus reus*) was never completed, Mr. Baruca points to para. 71 of the ROC, where it says that "BARUCA said he would talk to 'Orange Tang' to clarify what 'Orange Tang' wanted to do."

[192] Mr. Baruca analogizes to *United States of America v. Akrami*, 2001 BCSC 781. In *Akrami*, the two persons sought, Akrami and Lessan, were accused of conspiring to export a 747 aircraft and to trade heroin in exchange for Klystron tubes which are used exclusively in missile defence systems. An FBI agent, acting undercover, met with the persons sought in San Francisco to discuss the transactions. Afterwards, Mr. Akrami gave the agent the contact information of his superior, with whom he exchanged photos of the missile tubes. No deal was reached.

[193] Justice Romilly found no conspiracy in respect of either the deal for the aircraft, or for the heroin and missile tubes on the basis that there was no evidence of an agreement, only potential negotiations toward an agreement. He noted:

[42] Whether an agreement has been reached between the parties to the alleged conspiracy or whether it is still in the stage of discussion and negotiations is a question of fact to be determined by the trier of fact. It is not necessary for each or any of the members to know all of the details of the plan so long as the agreement includes substantially all the elements of the offence which is being conspired to: *R. v. Lessard* (1982), 10 C.C.C. (3d) 61 (Que. C.A.).

[44] As a general statement, each member of the conspiracy must have knowledge of, and commit to, the common goal, the object of the agreement.

[194] In respect of the conspiracy to export prohibited goods, Justice Romilly stated:

[59] What is fundamentally important in the case before me is that before "negotiations" between S.A. Hamidi and Akrami could lead to a purported agreement, Akrami and at least one other person had to agree amongst themselves to commit the object of the conspiracy. There is not even a *prima facie* indication in the evidence that this occurred. In perusing the affidavit of S.A. Hamidi, I note that the last mention of Lessan's involvement is on July 27, 1995 when S.A. Hamidi received a fax from Lessan "in which defendant Lessan expressed his appreciation to me for meeting with him and defendant Akrami on July 21, 1995. In this letter defendant Lessan stated that he looked forward to a prosperous business relationship."

- [60] This is not prima facie evidence of an agreement to export anything. Following that fax, Akrami and S.A. Hamidi participated in other meetings and engaged in correspondence which, in my view, essentially consisted of negotiations to determine whether an agreement could be reached.
- [61] In my view, the evidence hardly indicates an agreement or that the parties were ad idem to export goods in an export control list without a permit.
- [62] The law on this issue is not complicated. The Crown must prove an agreement, which it has not done.
- [63] Lessan's intention is critical in this case to both his own fate and that of Akrami as Akrami could not conspire with an undercover agent, someone who manifestly had no intention to agree. As stated in *Dynar*, supra, at p. 512 "when one member of a so-called conspiracy is a police informant who never intends to carry out the common design, there can be no conspiracy involving that person."
- [195] I agree that Mr. Baruca's case is similar to that of Akrami and Lessan. While it is true that a conspirator need not know all of the details of the agreement, the agreement must nevertheless be complete. There is no evidence that Mr. Baruca and "Orange Tang" ever reached a completed agreement to traffic cocaine with UC-3; the evidence is to the contrary. As mentioned, after discussing the possible transport of 200 kilograms of cocaine to Costa Rica and Europe, Mr. Baruca said he would need to "clarify what 'Orange Tang' wanted to do." That is where the matter was left. There were subsequent exchanges between UC-3 and "Orange Tang", but none mention a possible agreement, its terms, or whether Mr. Baruca ever sought or obtained the clarification he said that he needed in his April 12 call with UC-3. Likewise, Mr. Baruca reached out to CW-2 requesting that CW-2 vouch for him to UC-3 ("tell him im ur boy"). This is further demonstrative of the preliminary nature of Mr. Baruca's discussions with UC-3; the parties were still building trust with one another. This evidence establishes that, as in Akrami, the exchanges were, at most, negotiations.
- [196] The intention to agree is only one element of the offence: *Dynar* at para. 86. The focus of the inquiry is on whether there was an agreement, and if so, what was agreed upon: *R. v. Correia*, 2016 BCCA 330 at para. 79 citing *R. v. Root*, 2008 ONCA 869 at para. 67. As noted in *R. v. Boekwa*, 2017 ONSC 705 at para. 61: "[a] distinction must be made between an intention to agree and an actual agreement. An intention to agree is not enough." While the ROC certainly contains evidence that "Orange Tang" and Mr. Baruca likely wanted and intended to traffic cocaine, there is no evidence that they agreed to do so, or if they had, what exactly they agreed upon.
- [197] While acts done in furtherance of the agreement are not necessary to prove conspiracy, they will often be circumstantial evidence that an agreement was reached in the first place. Here, there is no evidence of acts done in furtherance of any purported agreement. Such circumstantial evidence would be unnecessary where there is direct evidence of the contents of an agreement. As noted by Mr. Baruca, there is nothing in his discussion with

UC-3 to suggest that either of those conversations led to proposed prices, specific quantities, deliveries, or any other details. Indeed, these are details that would be expected, although not strictly necessary to form the basis of an agreement. Additionally, because UC-3, a police officer, would be the seller in this agreement scenario, if such details existed, they would be included in the ROC. They are not.

- [198] The ROC indicates that on February 19, 2018, UC-3 asked how much cocaine "Orange Tang" wanted and how often. "Orange Tang" replied that he wanted "20 - 30 every 10 days". Later, UC-3 told "Orange Tang" that he could provide more, and that he expected payment on delivery. "Orange Tang" said payment would be done through "wire" and in American dollars. These are the sorts of details that might be expected to form the basis of an agreement, but these terms, according to the ROC were not discussed in UC-3's April 12 call with Mr. Baruca. Even if I found that these terms were part of a completed agreement (which I do not), they would fall short of establishing a prima facie case of conspiracy because they were solely discussed between "Orange Tang" and an undercover officer, someone with no genuine intention to agree.
- [199] Additionally, "Orange Tang" and UC-3 apparently discussed "opening transportation lines in Australia and Europe"; in the April 12 call, UC-3 and Mr. Baruca discussed "starting a cocaine transportation line from Costa Rica to the European Union". Again, even if these discussions were more than preliminary and could serve as evidence of a completed agreement, it is not clear (nor is there evidence) that Mr. Baruca and "Orange Tang" were ad idem about this proposed transportation line, given that they refer to different destinations.
- [200] While conspiracy is an inchoate offence, it does not allow for the prosecution of inchoate agreements; there must be a completed agreement to carry out an unlawful design. I am mindful that an ROC is a summary of the Requesting State's evidence. The nature of summaries is that they inherently omit some evidence. However, this summary read as a whole and with limited weighing is bereft of sufficient evidence to ground a committal.
- [201] In the result, I cannot find that the requirements for committal under s. 29(1)(a) of the Act are met. Mr. Baruca, I therefore discharge you pursuant to s. 29(3) of the Act.

"The Honourable Madam Justice Watchuk"

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