

CANADA / JUDGMENT

United States v. Meng

2020 BCSC 1607

COURT

Supreme Court of British Columbia

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2020 BCSC 1607 United States v. Meng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Meng,

2020 BCSC 1607

Date: 20201028

Docket: 27761

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/Respondent

and

Wanzhou Meng, also known as

"Cathy Meng" and "Sabrina Meng"

Person Sought/Respondent

Before: The Honourable Associate Chief Justice H. Holmes

Ruling on (a) Application by Person Sought to Adduce Evidence under s. 32(1)(c) of the Extradition Act, and

(b) Vukelich Application by Requesting State

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Place and Dates of Hearing:

Vancouver, B.C.

September 28-30, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2020

INTRODUCTION

[1] Ms. Meng applies under s. 32(1)(c) of the Extradition Act to adduce evidence at her extradition hearing.

- [2] In a second application, argued in conjunction with the one just mentioned, the Attorney General makes a Vukelich application for dismissal of the third branch of Ms. Meng's proposed application for a stay of the proceedings based on abuse of process. In that third branch, Ms. Meng alleges that the requesting state deliberately misstated or omitted material evidence in the record of the case (ROC) on which it will rely in seeking Ms. Meng's extradition.
- [3] The evidence Ms. Meng seeks to adduce in the first application (under s. 32(1)(c)) overlaps substantially, but not entirely, with the evidence on which she would rely in support of the third branch of her abuse of process allegation. She brings her s. 32(1)(c) application to adduce evidence that, she submits, could challenge the reliability of the evidence in the ROC. The Attorney General, in his Vukelich application, submits that that same body of evidence, together with some additional evidence on which Ms. Meng relies, does not show her third branch allegations to have an "air of reality" or to be capable of supporting the remedy she seeks.
- [4] For the reasons I will give below, I conclude that some, but not all, of the evidence Ms. Meng seeks to adduce may be admitted, and that the Attorney General's Vukelich application should be dismissed.
- [5] I will begin by addressing the application under s. 32(1)(c), first outlining the legal principles governing how it must be addressed.

LEGAL PRINCIPLES GOVERNING APPLICATIONS UNDER SECTION 32(1)(c)

- [6] Extradition hearings are intended to be expeditious and efficient proceedings to determine whether the person sought should be surrendered to the foreign requesting state so that a trial may be held. Extradition hearings are not themselves trials.
- [7] The judge at an extradition hearing engages in an important screening function, but the task is circumscribed and limited. The task is described in s. 29(1)(a) of the Extradition Act, and (where a person is sought by another state for prosecution there) amounts to determining whether the requesting state's evidence establishes a *prima facie* case that would justify committal for trial if the conduct of the person sought had taken place in Canada: *United States v. Dynar*, [1997] 2 S.C.R. 462 at 513.
- [8] The requesting state's evidence is submitted mainly in the form of a record of the case, a document that summarizes the evidence available to the extradition partner for use in the prosecution: Extradition Act, s. 33(1)(a). The record of the case will not be admitted unless the requesting state certifies that the evidence summarized or contained in it is available for trial, and also that it: (i) is sufficient under the law of the extradition partner to justify prosecution, or (ii) was gathered according to the law of the extradition partner: Extradition Act, s. 33(3)(a).

- [9] Consistent with the principles of comity between Canada and the requesting state, the certification cloaks the evidence in the record of the case with a rebuttable presumption that it has the threshold reliability required for admission into the extradition proceeding: *United States of America v. Ferras*, 2006 SCC 33 at para. 52.
- [10] Despite this presumption of reliability, the extradition judge does not accept the record of the case at face value. In order to ensure a fair and meaningful hearing, the judge conducts a limited weighing of the evidence to ensure that it meets the standard of threshold reliability for admission to the extradition hearing, before assessing whether there is sufficient evidence to commit the person sought for trial for the crime alleged: *United States v. Wilson*, 2011 BCCA 514 at paras. 35-37.
- [11] If the threshold reliability of the evidence in the record of the case is successfully impeached, or if there is an absence of evidence, the evidence will not be sufficient under s. 29(1) of the Extradition Act and the extradition judge must refuse to commit the person sought. This applies to each element of the offence for which a *prima facie* case must be made out.
- [12] Although the extradition judge considers the threshold reliability issue, the judge is not entitled to engage in a broader weighing of evidence or consider the general strength of the case. Those tasks are left for the trial, where guilt and innocence are at issue: *United States of America v. Lucero-Echegoyan*, 2013 BCCA 149 at paras. 14-15.
- [13] As Ms. Meng seeks to do by way of this application, a person sought may challenge the sufficiency of the requesting state's evidence by tendering their own evidence to establish that the record of the case is manifestly unreliable: *United States v. Bennett*, 2014 BCCA 145 at para. 18.
- [14] Section 32(1)(c) of the Extradition Act allows for this if, in the language of that provision, the proposed evidence "is relevant to the tests set out in subsection 29(1)", and "the judge considers it reliable". The person sought must therefore show that the proposed evidence is both reliable and relevant before the evidence may be admitted: *M.M. v. United States of America*, 2015 SCC 62 at para. 74.
- [15] The reliability requirement is a modest one. Justice Cromwell helpfully explained it as follows (*M.M.* at para. 75):

The reliability requirement means that the evidence must possess "sufficient indicia of reliability to make it worth consideration by the judge at the hearing": *Ferras*, at para. 53. This "threshold reliability" requirement is not an onerous standard. It imposes "no greater evidentiary hurdle to the person sought" than the evidentiary requirements governing the requesting state: *ibid.*

- [16] In this case, the requesting state concedes that all of the evidence Ms. Meng seeks to adduce is reliable evidence. I will therefore discuss the reliability requirement no further, and will turn instead to the relevance requirement.

[17] For that requirement, relevance relates not to the guilt or innocence of the person sought, but rather to the matter for determination in the extradition hearing, namely whether a prima facie case is established that the person sought committed the offence set out in the authority to proceed - in this case, fraud. For that reason, evidence will almost never be admitted if it is adduced for purposes relating to, for example, the credibility of witnesses, or the weight of evidence, or to offer defences or inferences or explanations alternative to those suggested by the requesting state's evidence. Those purposes are not relevant to the task of the judge in the extradition hearing, which is limited to determining whether a prima facie case is established.

[18] Justice Fitch (then of this Court) in *India v. Badesha*, 2013 BCSC 2260 at para. 28, expanded on the types of evidence that courts in British Columbia have consistently refused to admit because they are irrelevant to the question on committal:

Since *Ferras*, *Mach* and *Anderson* courts in British Columbia have consistently refused to admit under s. 32(1)(c): proposed evidence inviting the extradition judge to consider "alternative explanations for the certified evidence, to make findings of credibility, or weigh defence evidence comparatively against that of the requesting state" (see *United States of America v. Multani et al.*, unreported (30 August 2007) Vancouver Registry #23818 (S.C.) at para. 13, *United States of America v. Graham*, 2007 BCCA 345, 222 C.C.C. (3d) 1, per Hall J.A., concurring in the result, at para. 41, and *United States of America v. U.A.S.*, 2013 BCCA 483 at para. 44); evidence that would only "supplement the evidence of the requesting state with an innocent exculpatory explanation" which, if it is accepted or gives rise to reasonable doubt, could lead to an acquittal at trial (see *United States of America v. Graziani*, 2007 BCSC 178 at para. 10 and *Edwards*, at paras. 4 and 35); and evidence of an innocent explanation or evidence that might found an inference inconsistent with guilt in a circumstantial case where that evidence does not render the requesting state's evidence manifestly unreliable or otherwise lay a foundation to dispute that the prosecution will be in a position to lead the evidence constituting its case against him (*United Kingdom v. Aziz*, 2013 BCCA 414 at paras. 36-37).

[19] To meet the relevance requirement, the person sought must generally establish that the evidence, taken at its highest, is realistically capable of satisfying the exacting standard required in order to justify refusing committal on the basis that the requesting state's evidence is unreliable. In *M.M.* at para. 78, *Cromwell J.* described the standard as follows:

I conclude that in order to admit evidence from the person sought, directed against the reliability of the evidence of the requesting state, the judge must be persuaded that the proposed evidence, considered in light of the entire record, could support the conclusion that the evidence essential to committal is so unreliable or defective that it should be disregarded.

[20] Nonetheless, there may be some very rare and unusual cases where evidence of a type normally considered irrelevant to the extradition judge's task may be admitted if it could meet the high threshold for demonstrating that the requesting state's evidence is unreliable, justifying a refusal to commit. Justice *Cromwell* explained in *M.M.* at para. 85:

This is not to say that courts must always reject evidence which (1) invites the judge to assess credibility, (2) establishes a basis for competing inferences, or (3) provides for an exculpatory account of events. It is possible that such evidence may in certain, and likely fairly unusual, cases meet the high threshold for showing that the evidence of the requesting state should not be relied on. Ferras leaves open the possibility that, for example, evidence of virtually unimpeachable authenticity and reliability which contradicts the ROC could rebut the presumption of its reliability and could justify refusal to commit. Such situations I would expect to be very rare.

- [21] In summary, "[e]vidence that strikes directly at the reliability of the requesting state's materials" is relevant to the s. 29 inquiry and will be admissible. Evidence that is not realistically capable of challenging the threshold reliability of the requesting state's case will not be received: Lucero-Echegoyan at paras. 15-16.
- [22] With those principles in view, I turn to consider the seven items of evidence Ms. Meng seeks to adduce.
- [23] In this discussion, and also in the discussion later in these reasons of the Attorney General's Vukelich application, my references to the ROC should be taken as also encompassing the supplemental record of the case (SROC).

SHOULD THE EVIDENCE BE ADMITTED UNDER SECTION 32(1)(c)?

- [24] As I mentioned, the requesting state concedes that all of the evidence Ms. Meng seeks to adduce is reliable evidence. The issue, for each item of evidence, is whether it is relevant to the test in the extradition hearing.

1. The Full PowerPoint Presentation

- [25] The allegations against Ms. Meng, who is the Chief Financial Officer of Huawei Technologies Co. Ltd., are based at their foundation on a PowerPoint presentation she delivered when she met with a senior HSBC executive on August 22, 2013 in the back room of a Hong Kong restaurant. Ms. Meng had requested the meeting after various inquiries from HSBC management to Huawei executives about allegations in two Reuters articles associating Huawei with Skycom Tech. Co. Ltd., a company said to have engaged in sanctions-violating business conduct in Iran. As I will discuss below, Ms. Meng is alleged to have falsely denied that Huawei controlled Skycom.
- [26] The ROC includes a summary of Ms. Meng's statements in the PowerPoint presentation, but Ms. Meng submits that the summary is misleading. She submits that the full PowerPoint should be admitted as evidence in her extradition hearing so that the judge can carry out a meaningful assessment of the reliability of the evidence in the ROC, including the summary. It is her position that the full PowerPoint shows that she was not, in fact, untruthful, and that the ROC, through its summary, is misleading in implying that she was. As I will explain, I agree that some additional evidence from the PowerPoint may be admitted, but I do not agree that the entire PowerPoint meets the test for admission.

- [27] I pause to note that both Ms. Meng's oral presentation in the meeting and the PowerPoint were in Chinese and translated by her interpreter into English for the HSBC executive. The ROC indicates that after the meeting, HSBC requested, and was sent, an English translation of the PowerPoint, and that the HSBC executive has confirmed that the English version is consistent with Ms. Meng's statements in the meeting. For this reason, and because counsel in the hearing did not distinguish Ms. Meng's oral statements in the meeting from the content of the PowerPoint, I will refer only to the PowerPoint in the following discussion.
- [28] The Attorney General responds that any content omitted from the ROC's summary is irrelevant, because it could not undermine the threshold reliability of the ROC. The Attorney General says that Ms. Meng is merely attempting to add to the record in order to invite competing inferences of innocence, something the law, as discussed, does not permit her to do.
- [29] To assess whether the full PowerPoint could challenge the reliability of the ROC, it is necessary to understand how the statements in the PowerPoint are said to support the general allegation that Ms. Meng committed the offence of fraud.
- [30] The Attorney General submits that the PowerPoint statements amount to the actus reus of fraud, reflected in the words in s. 380(1) of the Criminal Code, "deceit, falsehood or other fraudulent means". The Attorney General relies also on the PowerPoint statements as indicating the necessary fraudulent intent, or mens rea, for fraud.
- [31] The Attorney General describes the alleged fraud in the passage quoted below from the overview of his written submissions on committal. These submissions were filed at an early stage in the process to provide context for this application and others. I have underlined the portion relating to the PowerPoint statements:
2. [US] authorities allege that when HSBC banking officials learned that a subsidiary of Huawei was engaged in business activities in violation of US sanctions laws, HSBC investigated the activities of that subsidiary with the aim of eliminating the economic risk that might arise from its relationship with Huawei. Ms. Meng, the Chief Financial Officer of Huawei, answered HSBC's concerns by falsely denying that the offending company, [Skycom], was a subsidiary of Huawei, and by falsely representing that Huawei had previously divested itself of all shares and control of Skycom. Reassured by Ms. Meng's misrepresentations, HSBC decided to continue its relationship with Huawei, exposing itself to significant civil liability and criminal penalties.
- [Emphasis added.]
- [32] The PowerPoint statements are thus said to have been false in denying that Skycom was a subsidiary of Huawei and under Huawei's direct control. (To show that the alleged denials were false, the ROC includes a significant amount of information indicating that, in Iran, Skycom and Huawei were very closely affiliated.)

- [33] Ms. Meng submits that the ROC's summary of the PowerPoint, the key evidence on which the requesting state relies, is incomplete and therefore misleading in its account of what she said about Huawei's relationship with Skycom. The PowerPoint focussed on ongoing trade compliance, Ms. Meng submits, not Huawei's relationship to Skycom. She submits that material portions omitted from the summary show that she made clear that Huawei controlled Skycom, and that Huawei and Skycom did business together in Iran, and that she focussed her presentation on showing how Huawei and Skycom complied nonetheless with US sanctions and all other laws that applied. Ms. Meng says that the inferences the requesting state suggests flow from the ROC are untenable, when the full PowerPoint is taken into account.
- [34] I cannot agree with Ms. Meng that the ROC's summary misrepresents her presentation as focussing on Huawei's control of Skycom, rather than on trade compliance.
- [35] Trade compliance is a strong theme in the ROC summary. The summary begins by quoting an assurance that Huawei operates in Iran in strict compliance with applicable laws, regulations, and sanctions of the UN, US, and EU. It then says that Huawei requires Skycom to make commitments on observing applicable laws, regulations, and export control requirements. The summary also explains that, at an earlier time, Huawei supervised Skycom's Board in order to ensure trade compliance and to strengthen and monitor Skycom's compliance. Indeed, the word "compliance" (or a variant of it) appears at least once in five of the seven short paragraphs of the summary, and the concept underlies the other two paragraphs as well.
- [36] Further, the ROC notes that when the HSBC executive reported afterwards being "pretty much reassured" by the meeting, the executive noted that Huawei said it complies with all laws and sanctions.
- [37] However, I do agree with Ms. Meng that the summary in the ROC should have included certain statements from the PowerPoint that add further precision to Ms. Meng's statements about Huawei's business relationship with Skycom in Iran.
- [38] The most notable omission is a single phrase in the last slide: "Huawei[s] engagement with Skycom is normal and controllable business cooperation, and this will not change in the future" (emphasis added). A similar statement is included earlier in the summary, but that statement did not include the word "controllable", reading, "Huawei's engagement with Skycom is normal business cooperation".
- [39] The requesting state's case, at its foundation, alleges that Ms. Meng lied in denying that Skycom was a subsidiary of Huawei and in representing that Huawei had divested itself of Skycom's shares and control. It asserts that in reality Huawei exercised control over Skycom such that Skycom "was" essentially Huawei in Iran. Ms. Meng's use of the word "controllable" therefore carries potential significance. The omission is realistically capable of establishing that the ROC's summary is unreliable as a representation of Ms. Meng's statements to HSBC about whether Huawei controlled Skycom. Fairness therefore requires the admission of this

evidence.

[40] The evidence of this statement will not be admitted to offer an alternative explanation or inference to those suggested by the ROC, or for the purpose of supporting credibility findings. Rather, this evidence will be admitted to ensure that the extradition judge is in a position to engage in a meaningful assessment of the reliability of the ROC.

[41] This brings the evidence squarely within the scope of admissible evidence according to the principles articulated by Fitch J. in *Badesha*, at paras. 33-34 (referring to *United States of America v. Wilson*, 2011 BCCS 514):

As I read the Court of Appeal's judgment in *Wilson*, what was found to be objectionable was the failure of the extradition judge to admit reliable evidence concerning the entirety of the transaction said to amount to the fraud. In the absence of that evidence, the extradition judge could not engage in a meaningful judicial assessment of the reliability of the selected (and incomplete) portion of that transaction summarized in the Record of the Case, nor could the extradition judge determine whether the requesting state's evidence, viewed as a whole, was sufficient to justify Wilson's committal for trial in Canada on the offence of fraud.

So understood, I do not believe that Wilson is inconsistent with the jurisprudence summarized above. The proposed evidence did not amount to an alternative, innocent explanation for the certified evidence nor did it oblige the extradition judge to make findings of credibility. Indeed, the notion that the proposed evidence would necessarily entail findings of credibility appears to have been rejected by the Court of Appeal (see para. 41). The proposed evidence did not oblige the extradition judge to engage in a comparative weighing of defence evidence against that tendered by the requesting state. Further, the proposed evidence was not merely evidence of a defence more properly evaluated at trial. Rather, it was evidence that tended to directly impeach the evidence summarized by the requesting state in the Record of the Case and was highly relevant to the judicial determination of whether the entirety of the evidence underlying the transactions said to be fraudulent was sufficient to justify Wilson's committal - a core component of the test the extradition judge was obliged to apply.

[42] These principles were applied in *United States of America v. Michell*, 2017 BCSC 2114, where Justice Groves allowed the person sought's application under s. 32(1)(c) to adduce the actual Facebook messages that were summarized in the record of the case. He concluded that a full reading of the messages themselves provided greater context for the person sought's statements and challenged the reliability of the requesting state's assertions (in the record of the case) about the inference appropriately to be drawn from the messages.

[43] In one sense, the evidence Ms. Meng would adduce could set up competing inferences from those said to be available from the requesting state's evidence as summarized in the ROC. As the Attorney General notes, and as discussed above, s. 32(1)(c) generally does not permit the admission of evidence that offers no more than competing inferences: the extradition hearing involves only a very limited weighing of evidence (threshold reliability), leaving the ultimate weight and reliability of the evidence to the trier of fact: *M.M.* at para. 77. However,

in this case, any alternative inferences would flow not from the admission of additional evidence into the extradition hearing, but rather from the correction of an inaccuracy in, or potentially misleading aspect of, the summary of the requesting state's evidence.

- [44] For these reasons, evidence of the following statement in the PowerPoint may be admitted: "Huawei[s] engagement with Skycom is normal and controllable business cooperation, and this will not change in the future".
- [45] Although the statement is but one of many on slide 16, the full content of the slide may be admitted for context.
- [46] The other statement that I conclude may be admitted as evidence is, "As a business partner of Huawei, Skycom works with Huawei in sales and services in Iran".
- [47] While the summary in the ROC quotes similar statements, and the ROC seems to indicate that at the time of the meeting HSBC knew that Skycom did business in Iran, this statement is perhaps the clearest indication of what Ms. Meng said about Huawei's and Skycom's operations in Iran. In my view, the evidence is realistically capable of showing that the ROC's summary is misleading without it.
- [48] In a portion describing other evidence than the PowerPoint presentation, the ROC does include (at para. 34) a statement with similar content: ". . . Skycom is a business partner of Huawei and works with Huawei in sales and services in Iran". However, the ROC attributes that statement originally to Huawei, without specifying through which individual. Huawei is said, in the ROC, to have made the statement to HSBC employees, who then included it in a briefing paper for HSBC's risk committee. Since the ROC does not attribute the statement specifically to Ms. Meng, the inclusion of that statement in the ROC does not obviate the need to include the statement omitted from the summary of the PowerPoint.
- [49] In concluding that the omission of this statement is realistically capable of affecting the reliability of the summary in the ROC, I appreciate that the requesting state's case against Ms. Meng alleges that she made false statements about the extent of Huawei's control of Skycom, and not, specifically, about whether one or both of those entities did business in Iran. However, I nonetheless conclude that the evidence of the statement about both entities doing business in Iran should be admitted, because, in my view, it may bear on the causation element of the alleged fraud, namely whether the alleged misrepresentations caused the alleged risk of sanctions violations. More will be said about the causation element below in relation to other types of evidence Ms. Meng seeks to adduce.
- [50] In determining whether to allow the admission of the two statements mentioned above, I am mindful of the limited role of the extradition judge, as discussed earlier, but am taking a cautious approach to ensuring that the extradition hearing is fair.
- [51] Next, I cannot agree with Ms. Meng that the ROC's summary is misleading for including her statement that Huawei would do business in Iran through its local subsidiary, but failing to include her further statement that the new subsidiary would not, and did not, have a bank

account or any business transactions with HSBC. Both the ROC (para. 28g) and the SROC (para. 27) already include that information, albeit in relation to Huawei subsidiaries generally. This statement in the PowerPoint is therefore not capable of affecting the reliability of the ROC, and will not be admitted as evidence.

- [52] Finally, I do not find the ROC's summary capable of misleading because of its omission of Ms. Meng's offer to continue discussions about compliance, and to share any information with HSBC in a spirit of openness and transparency. If - and I stress that this is hypothetical at this stage - Ms. Meng had given false information and deceived HSBC in the PowerPoint presentation, her offer of further information and discussions would have been equivocal in their effect. The statement could have no effect on the reliability of the summary, and will not be admitted.
2. Evidence about US Sanctions Laws - Report of John Bellinger
- [53] The defence seeks to adduce the expert report of John B. Bellinger III. Mr. Bellinger is a partner, based in Washington DC, of an international law firm, and heads the firm's Global Law and Public Policy practice. He has held several senior Presidential appointments in the US government including as the Legal Adviser to the Department of State (2005-2009), Senior Associate Counsel to the President and Legal Adviser to the National Security Council at the White House (2001-2005). Prior to these appointments, he served as Counsel for National Security Matters in the Criminal Division of the US Department of Justice. In these various roles, Mr. Bellinger has worked extensively on international extradition matters as well as on issues related to US sanctions on Iran.
- [54] As the Attorney General acknowledges, Mr. Bellinger clearly has very significant expertise in the areas of law and practice engaged in this case.
- [55] Nonetheless, I conclude that most of his report is not admissible in the extradition hearing. I will explain.
- [56] Several of Mr. Bellinger's opinions or observations describe perceived weaknesses in the requesting state's case for committal, on the basis of the facts described in the ROC. For example, in relation to the issue of causation (which Mr. Bellinger describes as the legally relevant nexus between the alleged misrepresentation and the alleged Iran sanctions violations by HSBC), Mr. Bellinger observes that the ROC includes no evidence to indicate that HSBC would have taken a different approach in processing Skycom-related payments had Ms. Meng made more complete statements than she is said to have made. He also notes that the ROC indicates that HSBC knew before the PowerPoint presentation that Skycom was operating in Iran.

- [57] These and some other observations and opinions are not capable of revealing unreliable aspects of the requesting state's evidence. There is no realistic possibility that the admission of Mr. Bellinger's evidence on these points could correct any material omissions or other types of inaccuracies in the requesting state's evidence. Rather, they amount to arguments that Ms. Meng's counsel will be free to make in the extradition hearing about the sufficiency of the requesting state's case.
- [58] Next, I view as irrelevant to the issues in the extradition hearing Mr. Bellinger's opinion that the US's charges against Ms. Meng are of an unprecedented nature. Whether or not the charges are unprecedented in the US is not related to whether a prima facie case of fraud has been made out in this instance. Accordingly, Mr. Bellinger's extensive discussion (at pp. 7-12) of the circumstances of other US cases involving criminal charges or civil proceedings based on a similar theory of liability will not be admitted in the extradition hearing.
- [59] Now I will address Mr. Bellinger's comments on the fact that HSBC could have chosen not to clear the transactions through the US to avoid sanctions risk, and that HSBC had the necessary information on which to make an informed decision about whether or not to do so.
- [60] The latter proposition is one of the matters that Ms. Meng's counsel may argue in the extradition hearing on the basis of the requesting state's evidence. Mr. Bellinger's evidence could have no impact on the reliability of the requesting state's evidence on that point.
- [61] The former proposition - that HSBC could have avoided sanctions risk by not clearing the transactions through the US - is discussed in greater detail by Mr. Eric Wong, the admissibility of whose report I will discuss next. My conclusions about Mr. Wong's report will apply equally to the brief portion of Mr. Bellinger's report dealing with the same issue. As I will discuss, I find neither of these pieces of evidence to be admissible.
- [62] I turn now to a section of Mr. Bellinger's report titled, "Denominating Payments in U.S. Dollars is Not Prohibited by U.S. Iran Sanctions" (pp. 3-4). That portion relies on knowledge and expertise about US sanctions laws beyond those of the extradition judge. However, I view the opinions in the "Denominating Payments" part of the report as irrelevant to the issues in the extradition hearing, for these reasons.
- [63] There is no suggestion in the ROC, or in the Attorney General's submissions on committal, that for the transactions in issue to have been denominated in US dollars was, by itself, a basis for sanctions-related risks. Rather, the risks were said to arise from the fact that HSBC processed the transactions through the US (albeit presumably because they were denominated in US dollars) on a faulty understanding (because of the alleged misrepresentations) of certain details about the parties involved in or behind the transactions.

- [64] If the Attorney General has suggested, or will do so in the future, that the simple fact that transactions were denominated in US dollars triggered a risk of sanctions violations, then the admission of this portion of Mr. Bellinger's report may be reconsidered.
- [65] Now I will address evidence from Mr. Bellinger's report that, I conclude, should be admitted.
- [66] I agree with Ms. Meng that Mr. Bellinger's evidence should be admitted on the issue of the relationship between the conduct alleged in the ROC, on one hand, and the sanctions-related risks it is said to have triggered, on the other. This evidence is relevant to the element of causation in the offence of fraud as it goes directly to whether the requesting state's evidence is reliable and sufficient in that regard. For the reasons I will give shortly, I conclude that Mr. Bellinger's evidence is capable of demonstrating that the ROC is potentially misleading on this point.
- [67] The Attorney General submits that Mr. Bellinger's evidence on the causation element is inadmissible in the extradition hearing because it is evidence of foreign law and there is no basis for the extradition judge to delve into expert evidence of US law that may be considered at trial. He submits, relying on *USA v. McVey*, [1992] 3 S.C.R. 475 at 527-529 and *USA v. Cheema*, 2003 BCSC 1483 at paras. 18-19, that the evidence should be adduced instead in the trial, if Ms. Meng is extradited for prosecution, where it can be assessed and weighed against other evidence.
- [68] This submission cannot succeed because, as discussed in the ruling on double criminality (*United States v. Meng*, 2020 BCSC 785 at paras. 61, 80), the operation of US sanctions laws is part of the factual matrix underlying the alleged fraud. US sanctions laws explain why the alleged misrepresentations mattered. Their operation, in relation to Ms. Meng's alleged conduct, is part of the prima facie case that the Attorney General must establish in the extradition hearing, to show how the allegedly deceitful conduct caused the alleged risk of deprivation. US sanctions laws thus inform the deprivation element of the alleged fraud, and, inherently, the causation element as well. The threshold reliability and sufficiency of the requesting state's evidence on that element will be at issue in the extradition hearing.
- [69] I am concerned that the ROC has the potential to mislead, concerning the operation and effects of US sanctions laws, because of the generality of some of the ROC's statements on that topic, coupled with the complexity of the subject matter. The ROC offers a broad overview of US sanctions laws as they relate to financial transactions, but it does not appear to relate the operation of those laws to the particular situations of Huawei and Skycom or to Ms. Meng's alleged denial that Huawei controlled Skycom. As a result, the import of some of the broad and general statements for the alleged conduct and circumstances in this case is not clear to me at this stage. The Attorney General's advance written submissions on committal do not assist on this point, though they are very helpful on many other points.

[70] Mr. Bellinger's evidence will therefore be admitted to the extent that it is relevant to whether the requesting state's evidence is sufficient as to the relationship between the alleged deceitful conduct set out in the ROC and the risk of deprivation as a result of US sanctions laws. On that point, the evidence meets the test in M.M. of being realistically capable of supporting the conclusion that the requesting state's evidence essential to committal is so unreliable or defective that it should be disregarded. The material passages in Mr. Bellinger's report appear to be these:

p. 3, para. 13

It is important to note that it would be a violation under the ITSR for "causing" another violation of the regulations whether the parties to any Iran-related payment are affiliates, partners, unrelated third parties, or the same entity transferring funds among its own accounts. It has no bearing on the U.S. government's theory of liability whether the payors or payees have any relationship at all, or whether the same party is on both sides of the payment. The only relevant facts for such a violation to be found are that the relevant payment results in the export of financial services in the form of dollar clearing from the United States to Iran by a U.S. bank (or other U.S. person).

p. 13, para. 50

Whether Skycom was an affiliate, distant relative, or stranger of Huawei was at all times irrelevant.

[71] It is important to note that this evidence is relevant to the issues to be determined in the extradition hearing, not to support an examination of whether the requesting state will be able to prove its case in the trial. The evidence is relevant because it helps explain the legal backdrop on which the requesting state relies in the extradition hearing for proof of the element of deprivation, as explained in the double criminality ruling at para. 61.

[72] Thus, when Mr. Bellinger speaks (p. 3, para. 13) of "the U.S. government's theory of liability", his words are to be read as relating to the operation of the sanctions laws generally, and not as speaking specifically to the theory of liability in the US prosecution of Ms. Meng. Other portions of his opinion make clear that Mr. Bellinger intended the quoted words to read as I have indicated.

[73] If the Attorney General has concerns for this or other reasons that the admission of the two passages from Mr. Bellinger's report quoted above would present the content without certain necessary context, he and Ms. Meng's counsel may agree to the admission of additional passages from the report, or may apply.

3. Evidence about the Processing of USD Transactions - Report of Eric Wong

- [74] Ms. Meng seeks to adduce the report of Eric Wong, a recently retired representative of Standard Chartered Bank in Hong Kong and elsewhere in Asia, where he held various senior and executive roles through which he acquired knowledge of and expertise with the mechanics used by financial institutions outside the US to initiate, process, and settle US Dollar payments.
- [75] Mr. Wong's evidence is offered to explain that HSBC could have cleared the transactions in issue outside the US, even though the transactions were denominated in US dollars, or could have blocked the transactions. Had HSBC done so, HSBC would have avoided triggering US sanctions laws and the risks associated with them.
- [76] Ms. Meng submits that the ROC is misleading on these points because it implies that the only way in which HSBC could clear US dollar transactions was by way of its US-based subsidiary (thus triggering sanctions risks in the circumstances alleged by the requesting state). She refers to the following statement in the ROC (para. 15): "HSBC clears dollar transactions through its U.S.-based subsidiary, HSBC U.S., the deposits of which are insured by the U.S. Federal Deposit Insurance Corporation". She submits that in failing to disclose the risk-free options available to HSBC, the ROC presents a wholly unreliable picture, especially since HSBC had all the necessary information to determine which clearing route to take.
- [77] In my view, the proposed evidence is not relevant. This is because, as I read the ROC, it does not appear to rely on any inevitability in HSBC processing US dollar transactions through the US. This reading is reinforced by a statement in the Attorney General's written submissions in this hearing (as part of the Requesting State's Compendium) to the effect that it is irrelevant that banks clear transactions through other countries, because in this case HSBC did clear the transactions in issue through the US. I take from this that the requesting state does not suggest that HSBC had no other options.
- [78] It appears, therefore, that the Attorney General will seek to establish a prima facie case on the causation element on the basis that potential alternative options available to HSBC were irrelevant to whether HSBC was put at risk by the alleged false statements. With that aspect of the causation element framed in that way, the proposed evidence will not assist in the determination of whether a prima facie case is made out.
- [79] The evidence is inadmissible, as is the evidence in Mr. Bellinger's report on the same point.
- [80] If I am mistaken in thinking that the requesting state does not take the position that HSBC had no option but to clear US dollar transactions through the US, then Ms. Meng may reapply and I will reconsider whether Mr. Wong's evidence (and the related evidence in Mr. Bellinger's report) should be admitted.
4. Evidence of Knowledge on the Part of "Junior Employees"

- [81] Ms. Meng seeks to adduce the evidence of Hou Jianguang (a Huawei forensic expert in computer science and IT) to show that HSBC knew more than the ROC represents about the true relationship between Huawei and Skycom. She submits that the ROC diminishes the seniority of the HSBC personnel who knew of the true relationship by describing them in general terms as "junior employees".
- [82] Ms. Meng would tender evidence of emails retrieved by Hou Jianguang showing that the HSBC personnel who had information indicating that Huawei and Skycom were closely associated included two individuals who held titles of, respectively, "Vice President, Global Banking" and "Senior Vice President, Global Payment".
- [83] She submits that this evidence could challenge the reliability of the ROC's statements about what HSBC as an entity knew about Huawei's relationship with Skycom at the time Ms. Meng gave the PowerPoint presentation, and could therefore affect whether a *prima facie* case is established that HSBC was deceived by the alleged false statements.
- [84] It is true that, as the Attorney General submits, the proposed evidence says nothing about whether the titles in issue placed the individuals holding them in "junior" or, rather, "senior" positions in the HSBC chain of command. The Attorney General submits that the evidence is therefore incapable of having any impact on the committal decision.
- [85] However, the ROC does not simply offset "junior" from "senior", in its description of those at HSBC who had material information about Huawei's relationship with Skycom and those who did not. It increases the disparity between the two categories by repeatedly offsetting "junior employees" (who knew) against "senior executives" (who did not). While the titles in issue may well have placed the individuals holding them lower in the chain of command than those of "senior executives", it seems unlikely that the titles indicated the level of "junior employee", as opposed to "junior executive", or even "senior employee".
- [86] The Attorney General argues further that the fact that HSBC personnel may have known of a connection between Huawei and Skycom in 2011 does not challenge the requesting state's evidence that in late 2012, the Reuters articles sparked concern within HSBC in light of its obligations under a deferred prosecution agreement, discussed below, prompting the meeting with Ms. Meng in 2013 at which she made the allegedly false statements.
- [87] However, I cannot agree with the Attorney General that the evidence sought to be adduced is therefore irrelevant because of its timing, and because any knowledge of the Huawei-Skycom relationship in 2011 was overtaken by the PowerPoint presentation. The proposed evidence is responsive to the requesting state's own evidence set out at paras. 31 and 32 of the ROC.
- [88] The evidence may be admitted because it could challenge the reliability of the statements in the ROC.

5. Evidence of the Terms of HSBC's Deferred Prosecution Agreement

- [89] The ROC refers to the deferred prosecution agreement (DPA) HSBC made with the US Department of Justice in December 2012 in relation to failing to maintain an effective money-laundering program, and sanctions violations, including against Iran. Specifically, the SROC states that under the DPA, HSBC forfeited US \$1.256 billion and also paid US \$665 million in civil penalties, committed to undertaking enhanced anti-money laundering measures and other compliance obligations, and agreed to various other measures designed to avoid a repetition of the conduct that led to the prosecution. The requesting state refers to the DPA, and the consequences to HSBC of breaching its terms, as one of the bases for economic risk to HSBC of further sanctions violations.
- [90] Ms. Meng seeks to tender the DPA in its entirety because, she contends, it is only selectively summarized in the ROC, and the omitted portions are capable of showing that the requesting state's evidence is manifestly unreliable. She refers in particular to two omissions from the ROC. I will address those omissions in turn.
- [91] First, Ms. Meng notes that the ROC does not mention s. 5(i) of the DPA, which required HSBC to have or keep in place a new automated monitoring system, described in the DPA as follows:

The new system monitors every wire transaction that moves through HSBC Bank USA. The system also tracks the originator, sender and beneficiary of a wire transfer, allowing HSBC Bank USA to look at its customer's customer.

- [92] Ms. Meng submits that the ROC is unreliable in failing to disclose HSBC's obligation to automatically screen, in this way, all of the wire transactions through its US subsidiary, because the screening system would have enabled HSBC to block potentially sanctions-violating transactions. She submits that the requirement of an automated screening system may thus affect the reliability of the requesting state's evidence supporting the necessary causal link between the alleged deceit and the alleged economic loss or risk of loss.
- [93] I am unable to agree that this evidence could affect the reliability of the ROC in this way. The evidence is, in my view, irrelevant to the issues in the extradition hearing. True, the requesting state's responsibility to establish a prima facie case of fraud will include showing a causal link between the alleged deceit and the alleged economic loss or risk of loss. However, HSBC's failure to protect itself from the economic consequences of a deceit, if established, will be of no relevance. A duped victim is no less a victim because they could or should have protected themselves against the fraud. See, for example, *R. v. Hansen*, [1983] 4 W.W.R. 52 (Alta.C.A.) at 54.

[94] The second omission is of the DPA's description of how further sanctions violations (or other conduct in breach of the DPA) could expose HSBC to criminal liability by reviving the charges deferred through the DPA, as well as by forming the basis of new charges. Specifically, the DPA states that HSBC may be liable if it acted "knowingly", but the ROC omits mention of this. The material passages from the SROC and the ROC, respectively, read as follows:

21. Had United States authorities determined that HSBC had violated the DPA in connection with conduct related to Huawei and Skycom, the United States could have instituted criminal charges against HSBC for the prior conduct alleged in the Criminal Information. In addition, United States authorities also could have considered instituting civil or criminal proceedings related to HSBC's conduct regarding Huawei and Skycom

18 . . . As a result, as of December 2012, HSBC faced significant liability had it processed Iran-based transactions for Huawei or Skycom - and could have faced criminal liability for the conduct that originally resulted in the DPA, as well as civil or criminal liability for the conduct related to Huawei and Skycom.

[95] For the reasons given below, I agree with Ms. Meng that the proposed evidence (from sections 6(g) and 16 of the DPA) is realistically capable of affecting the reliability of the requesting state's evidence. The proposed evidence reads as follows:

6(g) Except as otherwise permitted by United States law, not knowingly undertake any USD cross-border electronic funds transfer or any other USD transaction for, on behalf of, or in relation to any person or entity resident or operating in, or the governments of, Iran, North Korea, Sudan (except for those regions and activities exempted from the United States embargo by Executive Order No. 13412), Syria or Cuba;

[]

16 If, during the Term of this Agreement, the Department determines, in its sole discretion, that the HSBC Parties have (a) committed any crime under U.S. federal law subsequent to the signing of this Agreement, (b) at any time provided in connection with this Agreement deliberately false, incomplete, or misleading information, or (c) otherwise breached the Agreement, the HSBC Parties shall thereafter be subject to prosecution for any federal criminal violation of which the Department has knowledge, including the charges in the Information described in Paragraph 1, which may be pursued by the Department in the United States District Court for the Eastern District of New York or any other appropriate venue....

[96] The Attorney General submits that the omission of any reference to knowing conduct, as a basis for liability under the DPA, cannot affect the reliability of the ROC, because it is not for the extradition judge to determine whether HSBC violated or could have violated the DPA (or any other US laws) or not. He submits that the relevance of the DPA is, rather, to the potential prejudice to which HSBC was exposed, and to HSBC's heightened cause for concern about the Reuters reports.

- [97] However, the main, and possibly the only, form of economic loss or risk of loss the requesting state alleges is of HSBC "exposing itself to significant civil liability and criminal penalties" (Attorney General's committal submissions, at para. 2). The ROC briefly outlines the state of mind or fault element (*mens rea*) required for each of civil liability and criminal penalties under the applicable US law (ROC, at paras. 3, 6), but, as noted, it does not address that matter in respect of liability that could arise for HSBC under the DPA.
- [98] Since the requesting state appears to rely on the DPA as a basis for potential liability, the proposed evidence concerning the basis for that liability could affect the reliability of the ROC's statements on that topic.
- [99] Evidence of sections 6(g) and 16 of the DPA may be adduced in the extradition hearing. I see no basis for the entire DPA to be adduced.
6. Evidence about Huawei's Iran Subsidiary
- [100] The ROC's summary of the PowerPoint presentation at para. 28 includes these extracts:
- e. "Huawei will do business in Iran through its local subsidiary. Holding shares or sitting on the Board of Skycom is no longer necessary to ensure compliance".
 - g. "Huawei subsidiaries in sensitive countries will not open accounts at HSBC, nor have business transactions with HSBC."
- [101] Ms. Meng submits that without more context than the ROC offers, these statements are misleading because they imply that Ms. Meng falsely assured HSBC that its subsidiaries in Iran would not open accounts or conduct business transactions with HSBC, when, in fact, Skycom (a subsidiary, according to the requesting state) did so.
- [102] She therefore seeks to adduce the brief evidence of Yi Lei, chief financial officer of Huawei Technologies Services (Iran) Co. Ltd. (Huawei Iran), which was incorporated in the month before the PowerPoint meeting, to show that Huawei Iran was the local subsidiary referred to in the statements, and that it never opened an account or conducted any business transactions with HSBC. She submits that this evidence could challenge the reliability of the ROC by providing a basis to reject as unreasonable the inference suggested by the requesting state, namely that Ms. Meng led HSBC "to believe that Huawei did not control Skycom, when in fact it did, and that Huawei's subsidiaries in Iran would not conduct business transactions with HSBC, which in fact Skycom, a subsidiary did" (Attorney General's written submissions on committal, at para. 59).
- [103] The difficulty for Ms. Meng is that the proposed evidence does not appear to relate to the inference on which the requesting state may rely. The proposed evidence relates only to the banking and business activities of Huawei Iran. It says nothing directly about Skycom.
- [104] To the extent that the statements may speak inferentially about Skycom, as the Attorney General submits, the proposed evidence could not assist in that situation either. The Attorney General submits that in pointing to a local subsidiary, Ms. Meng did so to offer "a

counterpoint to Skycom in an attempt to distance Huawei from Skycom . . . not disclosing that Skycom was also a subsidiary" (Attorney General's written submissions, at para. 43, emphasis in original). But the proposed evidence could not assist to either support or weaken that inference, because it speaks only to the single subsidiary, Huawei Iran. Nor could it strengthen or weaken the inference, if one is to be drawn, that Ms. Meng was denying that Skycom was a Huawei subsidiary.

[105] I agree with the Attorney General that evidence that Huawei Iran was the "local subsidiary" referred to in Ms. Meng's statements, and that it had no business with HSBC, is of no assistance to the Court on committal as it is not material to the requesting state's case.

7. Evidence about Huawei's Credit Facility with HSBC

[106] The SROC says that in March and April 2014, Huawei entered negotiations for a US \$700-900 million credit facility from a syndication of international banks, including HSBC, and HSBC eventually sent Huawei a signed letter describing terms for the proposed credit facility.

[107] The submissions of the defence and the Attorney General also refer to HSBC participating, in July 2014, in a syndicated credit facility of US \$1.6 billion for Huawei, of which HSBC's share was US \$80 million.

[108] Ms. Meng seeks to adduce evidence that the first proposed credit facility never came into being, and that, although the second credit facility did, Huawei cancelled it in 2017 without ever drawing on it. She submits that this evidence could show the ROC to be unreliable in stating or implying that these examples demonstrate that HSBC was at economic risk in retaining Huawei as a client.

[109] It is not clear that for the harm element of the alleged fraud (economic loss or risk of loss), the requesting state intends to rely on risk to HSBC flowing from credit it extended to Huawei. Rather, in the committal submissions filed in advance to give context for this or other applications, the Attorney General says in overview that the alleged harm was in HSBC "exposing itself to significant civil liability and criminal penalties" in continuing its relationship with Huawei, as a result of Ms. Meng's alleged false statements (committal submissions, para. 2, quoted at greater length earlier). Much later in the committal submissions (at para. 51), the Attorney General states, "the evidence demonstrates that Ms. Meng persuaded HSBC to continue its credit relationship with Huawei knowing that the ongoing relationship exposed HSBC to risk of economic loss", and the ROC also includes references to a risk of economic loss. However, the details of the alleged risk are not spelled out in the ROC, and the committal submissions do not directly or clearly relate the risk to the requesting state's theory of the alleged fraud. As a result, it is not clear whether the references to a risk of economic loss are intended as part of the theory of the fraud or, rather, as context for a theory based on alleged harm in the form of civil or criminal liability.

[110] But even if the requesting state relies on the risk of economic loss related to the extension of credit for the harm element of the alleged fraud, the evidence Ms. Meng proposes to adduce could have no relevance. Whether or not Huawei actually drew on the second credit facility, the facility was open to Huawei. With the credit facility in place, Huawei was in a position to draw on it, arguably leaving HSBC at risk of not being repaid.

[111] This evidence is not admissible in the extradition hearing.

Conclusion re s. 32(1)(c) Application

[112] Ms. Meng's application to adduce seven items of evidence succeeds to a limited extent. Some of the evidence may be admitted in the extradition hearing.

[113] For some of the seven items of evidence, I have concluded that only certain portions may be admitted. In discussing some of those instances, I quoted the applicable portions of the admissible evidence in order to address their content and to make clear to which portion my reasons refer. Limited additional evidence may also be adduced, if it is necessary to give context to the portion discussed.

[114] I turn now to the Attorney General's Vukelich application, first briefly describing the application and outlining the legal principles that govern.

THE ATTORNEY GENERAL'S VUKELICH APPLICATION

[115] As I indicated, Ms. Meng has filed an application for, mainly, a stay of the extradition proceedings based on abuse of process. Her application has three branches, each alleging a separate form of abuse of process. In the third branch, she alleges that the requesting state deliberately withheld or misstated evidence in the ROC. In the present Vukelich application, the Attorney General asks for an order summarily dismissing this branch of the abuse of process application.

[116] In Canadian criminal proceedings, a Vukelich hearing may be held to screen out applications devoid of merit. The purpose is to balance fair trial interests with the public interest in the efficient management of criminal proceedings. Generally, applications should not be allowed to occupy court time and the parties' and witnesses' attention if they have no reasonable possibility of success, especially if the applications are lengthy: *R. v. McDonald*, 2013 BCSC 314 at para. 21.

[117] Vukelich hearings are available in the extradition context.

[118] In a Vukelich hearing relating to an application such as Ms. Meng's, the person sought must satisfy a two-part test by showing: (1) that there is an "air of reality" to the allegations in the application, and (2) that the allegations are capable of supporting the remedy sought: *United States of America v. Ranga*, 2012 BCCA 81 at paras. 16, 27; *Bennett* at para. 30; *United States of America v. Rogan*, 2014 BCSC 2370 at para. 8.

- [119] For the first part of the test, allegations of abuse of process will have an air of reality if there is a realistic possibility that the allegations can be substantiated: *United States v. Kerfoot*, 2016 BCCA 306 at para. 61; *Rogan* at para. 9. Bald assertions, vague and unsubstantiated suggestions, or mere conjecture or speculation will not satisfy this part of the test: *United States of America v. Doak*, 2012 BCSC 1788 at para. 54.
- [120] For the second branch of the test, the person sought must establish that the allegations are significant enough to be capable of justifying the remedy sought.
- [121] The Attorney General submits that Ms. Meng has not satisfied either part of the test.
- [122] However, in support of his position that Ms. Meng has shown no air of reality to her allegations, the Attorney General submits that the evidence she would offer in support raises only issues that are not relevant to the extradition hearing, and I have found (in my consideration, above, of Ms. Meng's application to adduce that evidence in the extradition hearing) that some of that evidence is realistically capable of challenging the reliability of the ROC on issues relevant in the hearing.
- [123] In so finding, I have concluded that there is an air of reality to Ms. Meng's allegations of abuse of process in relation to the requesting state's conduct in certifying the ROC.
- [124] As to the second part of the test, I agree with the Attorney General that a stay of proceedings for the type of conduct alleged will only rarely be granted and in only the clearest of cases, and, at this stage, Ms. Meng's third branch allegations do not appear to have that character. However, as is cautioned in *India v. Sidhu*, 2018 BCCA 25 at paras. 22-26, this second part of the test may be met if it is not possible, without full argument, to rule out that an applicant's application will succeed. In my view, such is the situation here.
- [125] I note also that Ms. Meng seeks not only a stay of proceedings, but also, in the alternative, the less drastic remedy of excision of certain evidence from the ROC.
- [126] Further, Ms. Meng applies - whether for a stay of proceedings or for excision of evidence from the ROC - not only on the basis of each branch of her abuse of process allegations, independently considered, but also on the basis of their cumulative effect. It is possible, therefore, that her third branch allegations would not themselves support a remedy, but may be capable of doing so when considered together with allegations from the first or second branches.
- [127] For these reasons, the Attorney General's Vukelich application is denied.

"The Honourable Associate Chief Justice H. Holmes"

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