

CANADA / JUDGMENT

# United States v. Oliynyk

2020 BCSC 521

## COURT

Supreme Court of British Columbia

## DECIDED

2 April 2020

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2020 BCSC 521 United States v. Oliynyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Oliynyk,

2020 BCSC 521

Date: 20200402

Docket: OTR2018046

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

and

David James Oliynyk aka Nick Oliynyk

**Before: The Honourable Mr. Justice Crossin**

The Reasons for Judgment are sealed; form part of an in-camera proceeding; and there shall be no publication of the content of these Reasons in the absence of further court order.

These Reasons for Judgment have been redacted for publication purposes.

Reasons for Judgment

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of the Requesting State:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

August 6, 7, 9, 12-16 and

December 11, 2019

Place and Date of Ruling given to Parties with Reasons to follow:

Vancouver, BC

March 31, 2020

Place and Date of Reasons:

Vancouver, B.C.

April 2, 2020

## Overview

- [1] The United States of America (the "Requesting State") seeks the extradition of David James Oliynyk for prosecution for drug trafficking offences allegedly committed in the State of Washington.
- [2] The Requesting State has provided a certified record of the case ("ROC"), a supplemental record of the case ("SROC"), and a second supplemental record of the case ("SSROC") (collectively, the "Record") containing the evidence and information it relies on in support of its request for committal.
- [3] It is submitted this evidence supports the allegation that Mr. Oliynyk was part of a group that planned and initiated the transportation of cocaine and heroin from the United States into Canada.
- [4] The evidence indicates the group consisted of Mr. Oliynyk, Gurpreet Singh Sandhu, Wayne Stephen Hollaus, Nikolai Terletsky, and Charles Pak. All persons are the subject of separate extradition proceedings.

- [5] It specifically alleges that Mr. Oliynyk and Mr. Sandhu trafficked in cocaine and heroin, while Mr. Hollaus, Mr. Terletsky, and Mr. Pak allegedly trafficked in cocaine. The offences are said to have been committed between May 2014 and October 2014.
- [6] The Requesting State claims that Mr. Oliynyk recruited an American citizen to assist in coordinating the delivery and pickup of controlled substances in the United States for transport into Canada. This individual eventually became a Confidential Witness ("CW") for the US Homeland Security Investigations ("HSI").
- [7] Based on the evidence gathered by the CW in cooperation with HSI undercover agents, Mr. Oliynyk is alleged to have orchestrated various transactions in cocaine and heroin in the United States from his home in Canada. Accordingly, the Requesting States seeks his extradition on the basis of conduct corresponding to the Canadian offence of trafficking in a controlled substance, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].

## The Application

- [8] Mr. Oliynyk resists the extradition request. In response to the Requesting State's allegations, he has filed a series of affidavits, purporting to reveal fundamental deficiencies in the Record provided by the Requesting State. In addition, the affidavits contain evidence of alleged wrongdoing by the CW on Canadian soil in the course of the investigation.
- [9] The submissions of Mr. Oliynyk are made up of an array of arguments, tethered, to one degree or another, to the evidence of declared innocence as contained in the affidavit material.
- [10] The main thrust of Mr. Oliynyk's argument against the extradition request is contained in an application filed August 6, 2019. This application was heard together with the committal hearing. The orders sought in the application challenge both the evidentiary basis for the extradition request, and the conduct of the Requesting State in the course of its investigation. In my view, what is ultimately revealed in the application is the seeking of the following orders:
  - 1) an order excluding the product of the Requesting State's investigation from consideration at the committal hearing;
  - 2) an order striking the ROC and SROC from consideration at the committal hearing on the grounds of manifest unreliability; and
  - 3) an order staying the proceedings as an abuse of process.
- [11] As I understand the submissions, Mr. Oliynyk's application seeks to undermine the basis of the extradition request in two primary ways: first, by undermining its evidentiary foundation; and second, by challenging its legitimacy. If the evidence on which the Requesting State relies is reliable, Mr. Oliynyk contends it is inadmissible; if it is admissible,

he contends it is unreliable; if, finally, it is both admissible and reliable, he argues the Requesting State's conduct has been sufficiently egregious that I should stay the proceedings. Any of these orders would be sufficient to bring the extradition proceedings against Mr. Oliynyk to a halt.

[12] Generally, the affidavits proffer as follows:

- 1) [CONTENT REDACTED]
- 2) The CW committed unlawful acts in Canada in the course of his dealings with Mr. Oliynyk; and
- 3) The U.S. authorities committed a premediated breach of Mr. Oliynyk's Charter rights by instigating a warrantless search of his vehicle in Canada (this point was not really pressed, and the person sought offered no legal analysis in relation to this issue; but it was not formally abandoned).

[13] The Requesting State opposes the admission of the affidavits in the committal hearing itself on the grounds they are not relevant to the tests set out in s. 29(1) of the Extradition Act, S.C. 1999, c. 18 [Act]. As such, they do not meet the statutory requirements for admissibility under s. 32(1)(c). Those sections read as follows:

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

32(1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

- (c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

[14] With respect to the abuse of process application, the Requesting State points to the fact that the gravamen of the factual allegations underpinning the application are wholly inconsistent with the Record filed in the committal hearing; and, in any case, it argues the affidavit material does not disclose a basis for a stay of proceedings.

[15] It is submitted, Mr. Oliynyk's application invites the court to weigh competing accounts of events, as well as to consider evidence of a possible defence to the charges against Mr. Oliynyk. Both of these, it contends, are outside the limited purview of an extradition judge, which is confined to determining whether the Requesting State has established a prima facie case against Mr. Oliynyk. In effect, Mr. Oliynyk's application asks this Court to usurp the function of the trial court -something it is neither appropriate, nor within its powers to do.

[16] Pending the resolution of these issues, the affidavit material has been marked for identification only in the committal hearing. On the abuse of process application, the affidavit material has been marked as exhibits proper. Again, however, the Requesting State submits the affidavit material does not disclose a basis in fact or law for a stay of proceedings.

## Issues

[17] Practically speaking, the only relief that was probably required to be the subject matter of a separate application was the order for a stay of proceedings as an abuse of process. The balance of the application simply seeks to resist extradition upon various substantive grounds. This did not require an application.

[18] Nevertheless, I will consider Mr. Oliynyk's evidentiary arguments as part of the committal analysis, before turning to his abuse of process allegations. The evidentiary issues that arise in the committal context I see as follows:

- 1) Is the evidence contained in the Record admissible for the purposes of the extradition hearing?
- 2) Is the evidence contained in the Record reliable?
- 3) If so, does the Record disclose a basis for ordering Mr. Oliynyk's committal? This, in turn, requires a consideration of the following:
  - i) Has the Requesting State established a prima facie case?
  - ii) Is the person before the court the person named in the Record?

[19] Finally, if the Record contains sufficient admissible and reliable evidence to justify Mr. Oliynyk's committal, the issue becomes whether Mr. Oliynyk has demonstrated an abuse of process sufficient to warrant a stay of proceedings.

[20] For the reasons that follow, I find that the evidence on which the Requesting State relies is admissible, reliable, and sufficient to justify his committal. As the Requesting State argues, I find that Mr. Oliynyk's affidavit evidence is not only irrelevant to the extradition hearing itself, but also fails to disclose the basis for a stay of proceedings. I would therefore dismiss Mr. Oliynyk's application in its entirety, and order his committal into custody to await surrender

## The Committal Hearing

Is the evidence contained in the Record admissible?

- [21] Mr. Oliynyk seeks an order declaring the investigation giving rise to the extradition proceeding to have been conducted contrary to the rules of evidence under Canadian law. In addition, he seeks orders under s. 32(2) of the Act and s. 24(2) of the Charter, excluding the product of the Requesting State's investigation from consideration at the committal hearing.
- [22] The basis of this argument lies in an allegation that the CW engaged in unlawful conduct in Canada in the early stages of the investigation. Specifically, Mr. Oliynyk alleges that the CW either attempted to traffic in controlled substances, contrary to s. 5 of the CDSA, or did in fact traffic in such substances. He did so by offering to transport drugs for a third party, Andy Alexiou, in the course of an initial meeting in Canada between the CW, Mr. Oliynyk, and Mr. Alexiou. This initial meeting, he contends, gave rise to all of the subsequent transactions on which the Requesting State relies. In other words, the CW's unlawful act was the starting point for all of the evidence subsequently gathered and as contained in the Record. According to Mr. Oliynyk, this merits the exclusion of substantially all of the evidence in the Record, without which there would be no evidentiary basis for the extradition request.
- [23] In addition, Mr. Oliynyk seeks to exclude the product of the warrantless search of Mr. Oliynyk's vehicle on October 24, 2014, which he argues was a breach of his s. 8 Charter rights.
- [24] In seeking these orders, Mr. Oliynyk relies on s. 32(2) of the Act, which reads as follows:
- 32(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.
- [25] This section forms an exception to the rule under s. 32(1) of the Act under which evidence contained in a certified record of the case is deemed to be admissible, regardless of whether it complies with the Canadian rules of evidence or not.
- [26] In response, the Requesting State says that it does not intend to rely on any of the Canadian-gathered evidence in this case, including the warrantless vehicle search. It has filed redacted versions of the ROC and SROC with all references to such evidence removed. Citing *R. v. Terry*, [1996] 2 S.C.R. 207 [Terry] and *United States of America v. Dynar*, [1997] 2 S.C.R. 462 [Dynar], it argues s. 32(2) applies only to evidence physically gathered in Canada. Since it does not intend to rely on any such evidence, Mr. Oliynyk's admissibility argument is purely academic, and of no practical consequence to the committal hearing itself.
- [27] I agree that s. 32(2) of the Act is confined to evidence physically gathered in Canada. The plain meaning of the phrase "gathered in Canada" can admit of no other reasonable interpretation. This interpretation also finds support in the jurisprudence: *Terry*; *Dynar*; *Attorney General of Canada v. Ebanks*, 2018 ONSC 3857 [Ebanks] at para. 14, *aff'd* 2019 ONCA 390.

- [28] Moreover, it is open to the Requesting State to choose not rely on certain aspects of the Record, as it sees fit. Where the Record is sufficient to establish the basis for committal without the inclusion of potentially controversial evidence, the admissibility of that evidence is irrelevant.
- [29] In my view, this principle is sufficient to dispose of Mr. Oliynyk's application to exclude the product of the warrantless search on October 24, 2014. The Requesting State does not intend to rely on the product of that search. Its admissibility is irrelevant to the committal hearing. It follows that any evidence going to the lawfulness of that search is inadmissible under s. 32(1)(c) of the Act since it is not relevant to the test under s. 29(1).
- [30] This principle is also sufficient, I find, to dispose of Mr. Oliynyk's primary argument for the exclusion of the entire product of the Requesting State's investigation. This argument relies ultimately on a somewhat far-reaching proposition that s. 32(2) applies not only to evidence physically gathered in Canada, but also to evidence gathered subsequent to a breach of Canadian law in Canada.
- [31] In my view, this interpretation of s. 32(2) stretches the provision so far beyond its ordinary and grammatical meaning that it simply cannot be sustained. I adopt the definition of "gathered in Canada" articulated by the Ontario Superior Court of Justice in *Ebanks* as "evidence that is collected, assembled, or put together in Canada" (at para. 14).
- [32] Regardless of how, ultimately, the Requesting State's evidence came to be gathered, nothing it proposes to rely upon was gathered in Canada in this sense. The proper place to consider such allegations is part of an abuse of process claim, and it is there that I will consider them.
- [33] I conclude that the evidence on which the Requesting State proposes to rely is admissible for the purposes of the committal hearing. The evidence Mr. Oliynyk seeks to tender in this regard is incapable of supporting the orders he seeks on this issue: it is irrelevant and thus inadmissible. I would dismiss this aspect of Mr. Oliynyk's application accordingly. The foreign-gathered components of the Record are admissible for the purposes of the extradition hearing.

Is the Record reliable?

- [34] Mr. Oliynyk's second point concerns the reliability of the Record. Specifically, he seeks an order striking the Record from consideration at the committal hearing. He argues that the evidence contained in the Record is so manifestly unreliable that it would be dangerous to rely on it.
- [35] Mr. Oliynyk appears to base this argument on two grounds: first, that his own contradictory account of events fundamentally calls the accuracy of the Record into question; and second, that the Record mischaracterizes, conceals, or ignores the manner in which the Canadian-gathered evidence was collected, and as such, cannot be relied upon.

[36] The issue of the reliability of the ROC forms an exception to the general rule that committal judges have no power to weigh the evidence before them: *M.M. v. United States of America*, 2015 SCC 62 [M.M.] at para. 40. The scope of this exception is limited, however. Under the Act, the evidence contained in a certified ROC is presumptively reliable. To rebut this presumption, the person sought must adduce evidence that fundamentally undermines its reliability, such that it would be "unsafe" or "dangerous" to rely upon it. This is not a question of the ultimate reliability or accuracy of the evidence, which are for the trier of fact to determine, but rather, of its threshold reliability. As explained by Justice Cromwell in *M.M.* (at para. 72):

"it is only where the concerns with respect to the reliability of the evidence, whatever the source or sources, are sufficiently powerful to justify the complete rejection of the evidence, that these concerns become germane to the s. 29(1)(a) inquiry": *Anderson*, at para. 30. The extradition judge's starting point is that the certified evidence is presumptively reliable: see *Ferras*, at paras. 52-56. This presumption may only be rebutted by evidence showing "fundamental inadequacies or frailties in the material relied on by the requesting state": *Anderson*, at para. 31.

[37] It follows 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": *M.M.* at para. 78.

[38] In my view, nothing in Mr. Oliynyk's affidavits approaches establishing this threshold to allow such a finding. At best, the affidavits set out an alternative, exculpatory account of events, in which Mr. Oliynyk presents himself as the coerced innocent victim [CONTENT REDACTED]. The mere existence of an alternative account of events, however, does not fundamentally compromise the presumptive reliability of the Record. I say this even if there were some corroborative or confirming evidence of the critical pieces of Mr. Oliynyk's account of events; which there is not. An assessment of reliability and credibility is ill-suited for determination within the legislative framework of an extradition. It must be for the finder of fact in the context of all of the evidence to make findings of credibility or assess competing accounts of events.

[39] As explained in *M.M.* (at para. 84):

evidence that establishes a defence or attempts to establish a different or exculpatory account of events will generally be inadmissible as it does not affect the reliability of the requesting state's evidence. Extradition judges should generally decline to consider different or innocent accounts of events as it requires an assessment of the evidence's ultimate reliability, which is within the realm of the trier of fact: see *Doak*, at para. 55. It is for the foreign court to assume this role, not the extradition judge.

[40] Similarly, I would not give effect to Mr. Oliynyk's submission that the Record cannot be relied upon because it mischaracterizes the manner in which evidence was gathered in Canada. This submission appears to rely primarily on amendments made to the Record by the Requesting State at an earlier stage of the proceedings. [CONTENT REDACTED].

[CONTENT REDACTED].

[41] In addition, Mr. Oliynyk alleges that the Record fails to provide sufficient information to allow the court to determine whether evidence gathered in Canada is admissible according to Canadian rules of evidence, as required by s. 32(2) of the Act; contrary to the duty affirmed in *United States of America v. Fraser*, 2017 BCCA 136 at para. 54.

[42] In my view, neither of these concerns undermines the presumptive reliability of the Record. As discussed above, the Requesting State is no longer relying on any of the Canadian-gathered evidence. Any deficiencies in the gathering of this evidence are only relevant insofar as they undermine the reliability of the Record as a whole.

[43] The omissions and mischaracterizations alleged by Mr. Oliynyk fall far short of doing this. It may be that "irregularities" in the record of a case are capable of raising reliability concerns in certain circumstances, [CONTENT REDACTED]. In my respectful view, however, the irregularities alleged by Mr. Oliynyk are not sufficiently numerous, serious, or consequential to raise any such concerns in this case.

[44] This is borne out by comparison with other cases in which the reliability of a record of the case has been seriously contested. In *United Kingdom of Great Britain and Northern Ireland v. Tarantino*, 2003 BCSC 1134, for example, the requesting state was repeatedly challenged on the accuracy of its certification of evidence critical to its case as being available for trial. After a progression of multiple demonstrably inaccurate certifications, Madam Justice Stromberg-Stein ordered a stay of proceedings on the grounds the requesting state's conduct had amounted to "a complete failure of due diligence": para. 46.

[45] In *Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337, the Ontario Superior Court of Justice considered nine separate allegations of misrepresentations in the record of the case, but declined to give effect to any of them, on the grounds they were either unsubstantiated, or had no bearing on the committal hearing itself.

[46] In this case, Mr. Oliynyk relies on a single instance of misrepresentation, since corrected, and a general allegation of vagueness, in relation to evidence on which the Requesting State has decided not to rely. To the extent the Requesting State is guilty of misrepresenting the facts, this misrepresentation is limited in scope and inconsequential in effect. In my view, this is not enough to impugn the presumptive reliability of the Record as a whole.

[47] In summary, nothing in Mr. Oliynyk's affidavits is capable of undermining the threshold reliability of the evidence summarized in the Record. Although much may turn on the ultimate reliability of his evidence at trial, as previously stated, this is an issue for the trier of fact to determine, not the committal judge. Since the committal process is concerned only with threshold reliability, I conclude that Mr. Oliynyk's proposed evidence is irrelevant to his challenge to the reliability of the Record.

[48] I would dismiss this aspect of his application accordingly. The Record as certified meets the required threshold of reliability for the purposes of the extradition hearing.

Has the Requesting State established a basis for committal?

[49] The test for committal for a person sought for prosecution is set out in s. 29(1)(a) of the Act. For ease of reference, I reproduce this section below:

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

[50] The test for committal has two components. As explained in M.M. (at para. 22):

The extradition judge is to determine two things: (1) whether "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 (2) "that the person [before the court] is the person sought by the extradition partner" (s. 29(1)(a)). Committal is ordered if the judge finds that these conditions exist; if not, the person must be discharged: s. 29(1)(a) and (3). This means that the requesting state must show that it has evidence available for trial that would justify committal for trial in Canada for the Canadian offences specified in the ATP.

Has the Requesting State established a prima facie case?

[51] The inquiry under s. 29(1)(a) is confined to whether the requesting state has established a case that "could go to trial in Canada" for the Canadian offence corresponding to the foreign offence. In *United States of America v. Ferras*, 2006 SCC 33 [Ferras], the Supreme Court of Canada explained the limited scope of this inquiry as follows:

[46] Section 29(1)'s direction to an extradition judge to determine whether there is admissible evidence that would "justify committal" requires a judge to assess whether admissible evidence shows the justice or rightness in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot "justify committal". The evidence need not convince an extradition judge that a person sought is guilty of the alleged crimes. That assessment remains for the trial court in

the foreign state. However, it must establish a case that could go to trial in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.

[52] The approach is well-established in our jurisprudence; to assess the "sufficiency of evidence for committal", an extradition judge must determine two issues: 1) what evidence is admissible under the Act; and 2) whether the admissible evidence is sufficient to justify committal, including a consideration of its reliability and availability for trial: Ferras at para. 36. The question is whether "there is any admissible evidence that could, if believed, result in a conviction" with respect to each of the essential elements of the offence: M.M. at paras. 45-46.

[53] I have already found that the evidence proffered by the Requesting State is both admissible and reliable. As certified, that evidence is also presumptively available for trial: Ferras at para. 58. That presumption was not challenged before me. At this stage of the analysis, therefore, the sole question is whether the evidence set out in the Record is "demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty" for the offence set out in the authority to proceed (the "ATP"): Ferras at para. 46.

[54] The ATP in this matter states as follows:

The Minister of Justice of Canada authorizes the Attorney General of Canada to proceed before the Supreme Court of British Columbia to seek an order for the committal of David James Oliynyk aka Nick Oliynyk, and Gurpreet Singh Sandhu who are being sought for prosecution by the United States of America. The Canadian offence which corresponds to the alleged conduct is:

Trafficking in Schedule I substances, contrary to section 5(1) of the Controlled Drug and Substances Act.

[55] Section 5(1) of the CDSA provides that:

5(1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.

[56] Subparagraph 5(3)(a) establishes that trafficking in a Schedule I substance is an indictable offence. Both cocaine and heroin are included in Schedule I of the CDSA.

[57] "Traffic" is defined in s. 2 of the CDSA to include selling, transferring, transporting, sending, or delivering a controlled substance.

[58] In *R. v. Harrington*, [1964] 1 C.C.C. 189 at 195 (B.C.C.A.), the Court of Appeal defined the term "transport" (under what was then the Narcotic Control Act) as follows:

the word "transport" in the definition of "traffic" is not meant in the sense of mere conveying or carrying or moving from one place to another, but in the sense of doing so to promote the distribution of the narcotic to another. In my opinion, there must be something more extensive than mere conveying, or carrying or moving incidental to one's own use of the drug to warrant a conviction under s. 4(1) for trafficking.

[59] Madam Justice Watchuk defined the term "deliver" as follows in *R. v. Fraser*, 2015 BCSC 604, rev'd on other grounds 2017 BCCA 136 (at para. 69):

The term "deliver" contemplates a physical act, without reference to ownership or a change of ownership in the object delivered: *R. v. Taylor* (1974), 17 C.C.C. (2d) 36 at 40 (B.C.C.A.). Further, the act of delivering in and of itself promotes the distribution of the drug in question so as to constitute trafficking within the meaning of s. 2 of the CDSA: *R. v. Larson* (1972), 6 C.C.C. (2d) 145 at 151 (B.C.C.A.) per Branca J.A. These decisions determine that a person can traffic in a prohibited substance without owning the substance that they are transporting and without coercing or pressuring the recipient to accept the substance.

[60] The mens rea of the offence requires knowledge that what is being transported is a controlled substance. Willful blindness will suffice: *R. v. Blondin*, [1971] B.C.J. No. 656.

## Overview of the Evidence

[61] The specific evidence of Mr. Oliynyk's wrongdoing consists of several separate transactions he is alleged to have arranged and facilitated. Very briefly, the evidence put forward in the Record and as articulated by the Requesting State is summarized as follows:

[62] In 2014, HSI initiated an investigation into a cross-border drug smuggling operation involving Mr. Oliynyk and the other related individuals. The investigation involved the co-operation of a CW, who was a drug smuggler known to Mr. Oliynyk.

[63] The CW was recruited by Mr. Oliynyk to smuggle drugs from the United States into Canada. The CW's involvement with Mr. Oliynyk pre-dates the investigation. The CW was involved in various trafficking activities, as directed by Mr. Oliynyk, throughout the course of the investigation. The CW was subsequently recruited by the HSI as a confidential source of information for the investigation.

[64] HSI Special Agent Van Kirk ("SA Van Kirk") operated as an undercover agent throughout the course of the investigation. The CW relayed information from Mr. Oliynyk to SA Van Kirk specifically pertaining to the delivery and transportation of the cocaine and heroin, and Mr. Oliynyk's involvement in the operation.

### **Sandhu Transactions--May 2014**

[65] The CW arranged with Mr. Oliynyk to deliver cocaine to another drug trafficker named Mr. Sandhu, who is also a person sought by the Requesting State. Mr. Oliynyk put the CW in contact with a man named Andy to continue the operation to provide drugs to Mr. Sandhu and smuggle them across the border into Canada. With the information provided from Mr. Oliynyk, the CW assisted SA Van Kirk to insert himself in this transaction between Mr. Oliynyk, Andy, and Mr. Sandhu.

[66] SA Van Kirk met Mr. Sandhu in Bellingham, Washington and delivered a suitcase containing packages of fake cocaine and heroin to him. Mr. Sandhu was arrested at the Canada/US border and subsequently interviewed by HSI special agents. He admitted he had received instructions to meet a man (SA Van Kirk) and that he understood he was carrying controlled substances for delivery into Canada.

### **Mr. Pak Transaction--June 2014**

[67] In June 2014, Mr. Oliynyk arranged for the CW to pick up a shipment of 20 kilograms of cocaine from Mr. Pak. Mr. Oliynyk instructed the CW to transport the cocaine into Canada and provided the CW with a meeting plan to contact Mr. Pak and complete the transaction. During these discussions, Mr. Oliynyk used codenames and the serial number from US currency to identify Mr. Pak. Mr. Pak was arrested in Oregon before the transaction could be completed.

### **Clark & Apollo Transaction--September 2014**

[68] In September 2014, Mr. Oliynyk arranged for the CW to pick up drug shipments from individuals with code names "Clark" and "Apollo". The CW provided information to SA Van Kirk, who completed the drug transactions in his undercover capacity based on the information provided by Mr. Oliynyk to the CW. After SA Van Kirk completed the transactions, the CW informed Mr. Oliynyk that the drug shipments had been received.

### **Discussion**

[69] The scope of the committal inquiry is limited to "the offence set out in the authority to proceed" under s. 29(1) of the Act. The ATP in this case refers only to the offence of trafficking under s. 5(1) of the CDSA. It does not charge Mr. Oliynyk with conspiracy to traffic, contrary to s. 465 of the Criminal Code, R.S.C. 1985, c. C-46. It does not charge him with possession for the purposes of trafficking under s. 5(2) of the CDSA.

[70] The sole issue therefore is whether the Record is capable of supporting a finding that Mr. Oliynyk is guilty of trafficking "in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance", contrary to s. 5(1) of the CDSA.

- [71] I am so satisfied that the evidence contained in the Record discloses a prima facie case of trafficking. Although there is no evidence of Mr. Oliynyk's direct involvement as a principal to the offence, in my view, the Record, if believed, could establish his guilt as a party under s. 21(1)(b) and (c) or s. 22 of the Criminal Code. In other words, I am satisfied that there is at least a prima facie case that he aided, abetted, or counselled the commission of the offence of trafficking. This is sufficient to justify his committal.
- [72] The actus reus of aiding the commission of an offence is an act that assists the perpetrator to commit the offence. The mens rea is the intent to assist the principle in the commission of the offence together with the knowledge that the perpetrator intends to commit the crime: *R. v. Briscoe*, 2010 SCC 13 at paras. 14-17; *United States of America v. Fester*, 2009 BCSC 1331 at paras. 43-45. Abetting is simply to encourage. The evidence must be capable of establishing any words or actions that would encourage the principal.
- [73] Counselling is made out where an accused deliberately encourages or actively induces the commission of an offence, where the accused "either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct": *R v. Hamilton*, 2005 SCC 47 at para. 29.
- [74] In my view, there is sufficient evidence to establish that Mr. Oliynyk intentionally aided, abetted, or counselled others to traffic controlled substances, including Andy, Mr. Sandhu, "Clark", and "Apollo". In particular, there is a prima facie case that Mr. Oliynyk intentionally directed or encouraged these individuals to transport or deliver controlled substances and assisted in coordinating their trafficking activities. The Record contains evidence upon which a reasonable jury, properly instructed, could find or infer the necessary elements of aiding, abetting, or counselling the commission of the offence of trafficking under s. 5(1) of the CDSA. I conclude there is sufficient evidence to justify an order of committal for that offence.

Is the person before the court the person sought for extradition?

- [75] The second aspect of the committal inquiry concerns the identity of the person sought. As explained in *Danielson v. United States of America*, 2008 BCCA 519, this inquiry involves two considerations (at para. 24):
- 1) whether the person before the court is the person named in the record of the case on a balance of probabilities; and
  - 2) whether there is 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.

[76] The first consideration requires the requesting state to prove, on a balance of probabilities, that the person before the court is in fact the person whose extradition it seeks. The second consideration requires the requesting state to demonstrate a link between the evidence summarized in the record of the case and the person before the court, or in other words, to demonstrate that it could realistically prove his identity as the perpetrator of the alleged conduct at trial.

[77] Under s. 37 of the Act, the court may consider the following as evidence of identification:

- (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.

[78] Identification was conceded by Mr. Oliynyk at the hearing. In any case, I am satisfied the Requesting State has proven identification to the requisite standard.

[79] The first element of identification is clearly established. The Record contains a photograph of the person sought, who is named as David James Oliynyk, along with the following description:

Alias: Nick Oliynyk

Date of Birth: September 16, 1950

Place of Birth: Manitoba, Canada

Citizenship: Canada

Eye Color: Brown

Hair Color: Brown

**Tattoos: Left Arm, Right Arm, Back (Hell's Angels symbol), Left Shoulder, Right Shoulder**

[80] The name, photograph, and description set out in the Record match that of Mr. Oliynyk. I am satisfied he is the person named in the Record.

[81] I am also satisfied that the Record is sufficient to establish a prima facie case that Mr. Oliynyk is the person who engaged in the alleged conduct. According to the Record, the CW identified a photo of Mr. Oliynyk as the person who orchestrated the transactions set out in the Record. In addition, the name given by the CW--David James Oliynyk--matches that of Mr. Oliynyk, as does the CW's description of his physical characteristics. The evidence from undercover investigators, as well as voice identification evidence further supports this conclusion.

[82] For these reasons, I conclude that both aspects of identification have been proven.

[83] In summary, I am satisfied that the person before the court is the person named in the Record, and that the Requesting State has established a prima facie case against him for the offence set out in the ATP.

### The Abuse of Process Application

[84] Mr. Oliynyk submits it remains open to the court to order a stay of proceedings where the requesting state is shown to have committed a sufficiently egregious abuse of process.

[85] Mr. Oliynyk claims that the Requesting State has committed just such an abuse.

[86] As I understand it, this claim rests on three possible bases. The first lies in Mr. Oliynyk's allegation that [CONTENT REDACTED] induced him to act [CONTENT REDACTED] with [CONTENT REDACTED] threats [CONTENT REDACTED]--conduct that amounts, in Mr. Oliynyk's submission, to entrapment. Mr. Oliynyk specifically does not rely upon an allegation of state conduct in the nature of duress. [CONTENT REDACTED] The final basis lies in the same allegedly unlawful conduct that Mr. Oliynyk argued merited the exclusion of the Requesting State's evidence.

[87] As I understand the position of the Requesting State, it points to the case for the prosecution, as made out in the committal hearing, and submits the affidavit material simply amounts to a contrary factual response on the merits and, in any case, it argues his evidence fails to disclose a sufficient basis for a stay of proceedings.

### Legal Framework

[88] In *R. v. Babos*, 2014 SCC 16 [Babos], the Supreme Court of Canada described a stay of proceedings as "the most drastic remedy a criminal court can order": para. 30. A stay of proceedings permanently halts the prosecution of an accused, and frustrates the truth-seeking function of court. As such, a stay of proceedings will only be ordered in the "clearest of cases": para. 31.

[89] Babos set out the applicable test as follows (at para. 32):

- 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
- 2) There must be no alternative remedy capable of redressing the prejudice; and
- 3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".

[90] Certainly a stay of proceedings is available in the extradition context. As stated in *United States of America v. Licht*, 2002 BCSC 1151 (at para. 36), the abuse of process doctrine:

draws on the notion that a state is limited in the way that it deals with its citizens. In the context of extradition proceedings, this could be restated that a requesting state may be limited in the way that it exercises its own powers when it acts in Canada as a litigant or when it gathers evidence within Canada.

[91] Abuse of process cases generally fall into one of two categories: "(1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category)": *Babos* at para. 31.

[92] In my view, the conduct alleged by Mr. Oliynyk falls squarely within the "residual" category. Neither the circumstances that compelled Mr. Oliynyk to act, nor the allegedly unlawful conduct of the U.S. authorities on Canadian soil has any bearing on the fairness of the committal hearing itself. To the extent this conduct could possibly justify a stay of proceedings, it is only insofar as it may have undermined the integrity of the Canadian judicial process.

[93] For the reasons that follow, I would dismiss Mr. Oliynyk application on the grounds it fails to disclose a basis for a stay of proceedings. Regardless of whether Mr. Oliynyk's allegations are true, they do not merit the extreme remedy of a stay of proceedings, even taken at their highest.

#### Evidentiary Issues

[94] Two evidentiary issues surfaced during the proceedings. They related to the admissibility of evidence.

[95] The first issue arises as a result of the Requesting State tendering certain evidence in the abuse of process application. I pause to note the Requesting State takes the position that the evidence presented on committal is in clear contrast to the alternative narrative offered by Mr. Oliynyk and, as such, it is all that is really required to resist the application for abuse of process.

[96] Nevertheless, the Requesting State took the additional step during the proceedings of tendering evidence in the abuse of process application. This evidence included the Record as well as a Third Supplemental Record of the Case ("TSROC"). The content and assertions in the TSROC takes more direct aim at particular aspects of the narrative of Mr. Oliynyk; namely [CONTENT REDACTED].[1]

[97] The second point concerned the admissibility of certain portions of the affidavit material of Mr. Oliynyk.

- [98] In support of the application Mr. Oliynyk relies on the information contained in his affidavits. He claims [CONTENT REDACTED]. In answer the Requesting State says the material filed in support of committal clearly indicates it was Mr. Oliynyk [CONTENT REDACTED].
- [99] In addition, however, the Requesting State argues the affidavits are replete with inadmissible hearsay, opinion, and speculation; and seeks to exclude from consideration some of the evidence contained in the affidavits in this regard.
- [100] The fact is, given the basis upon which I have ultimately rested the abuse of process application, I do not find it strictly necessary to decide these particular points of admissibility. Nevertheless, I do consider it appropriate to address the issue of the use of the evidentiary exceptions, set out in s. 32(1) and s. 34 of the Act, in the context of an abuse of process application.
- [101] I do not find it appropriate nor particularly helpful to parse the affidavit material concerning admissibility, but will address certain specific points raised in argument.
- [102] The TSROC is of course hearsay. The evidence is inadmissible unless the Requesting State can rely on the evidentiary exceptions set out in ss. 32(1) and 34 of the Act.
- [103] As already mentioned, s. 32(1) of the Act establishes the following exceptions:
- 32(1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:
- (a) the contents of the documents contained in the record of the case certified under subsection 33(3);
  - (c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.
- [Emphasis added.]
- [104] Section 34 of the Act additionally provides that "[a] document is admissible whether or not it is solemnly affirmed or under oath."
- [105] Ultimately, I do not accept that the evidentiary provisions of the Act apply to an abuse of process application. In my view, the plain wording of s. 32(1) limits its application to the "extradition hearing" itself. For the reasons I have already discussed, an abuse of process application is separate from the extradition hearing itself, even if the two are heard together for the sake of convenience. As the Requesting State itself points out, it involves a separate application, and is determined according to a different test. It is logical, in light of the scheme of the Act, that this limitation would apply also to s. 34.

- [106] The interpretation is also borne out by the wording of s. 32(1)(c), which limits the exception under that subsection to evidence "relevant to the tests set out in subsection 29(1)". As I have already explained, an abuse of process allegation is external to the extradition hearing itself. Such allegations have no direct bearing on the tests under s. 29(1), which are addressed to whether the requesting state has established a *prima facie* case, regardless of the propriety of its conduct. In other words, the provision itself does not appear to contemplate the use of this exception in this context.
- [107] Moreover, allowing a certified record of the case to be put to this use would, in my view, stretch the exception under s. 32(1) well beyond the purposes of the Act. This provision exists to provide an evidentiary shortcut for the purposes of the extradition hearing itself. The usual evidentiary safeguards are not necessary in this context, because the extradition judge is not concerned with the ultimate reliability or accuracy of the evidence. In an extradition hearing, an extradition judge does not weigh competing evidence, assess credibility, or make findings of fact. In these circumstances, the strictures of the rules of evidence may be relaxed without prejudice to the fairness of the limited inquiry the extradition judge is called upon to conduct.
- [108] The calculus of prejudice is different where an abuse of process has been alleged. In these circumstances, the court may, depending on the circumstances, have to determine whether an abuse has occurred or not, on a balance of probabilities: *United States of America v. Tollman* (2006), 212 C.C.C. (3d) 511 at para. 22. To the extent the facts underlying the allegations are in dispute, the court may have to weigh evidence. In these circumstances, it would be unfair to afford a requesting state the same evidentiary shortcuts it enjoys in the extradition hearing itself.
- [109] I conclude that the evidentiary provisions of the Act do not apply to an abuse of process application. The usual rules of evidence apply to such an application.
- [110] It follows the evidence tendered by the Requesting State in the abuse of process application is inadmissible.
- [111] In relation to the affidavit evidence filed by Mr. Oliynyk; there are three affidavits germane to the core issue.
- [112] Certainly a good deal of the evidence consists of a wholly unhelpful mix of factual assertion, hearsay, opinion, speculation and argument. Much of it cannot be constructively parsed and is not admissible in its present form.
- [113] Nevertheless, the material was placed before me and entered as exhibits. It was however accompanied by certain objections raised by the Requesting State. As previously stated, while I do not find it necessary for my decision to address this issue, there was argument and I will deal with some of those submissions.

- [114] The Requesting State raise the issue of inadmissible hearsay. There was no application brought based upon the principled exception analysis.
- [115] Broadly speaking, the person sought takes the position much of the hearsay is lead only for the purpose of demonstrating the belief or state of mind of the person sought.
- [116] The Requesting State also points to certain specific paragraphs as follows:

#### **Affidavit No. 1: December 1, 2018**

- [117] Paragraph 18: the portion of this paragraph objected to by the Requesting State is contained in the first few lines of the paragraph ending with the words " couple of weeks". The person sought conceded he didn't know what use could be made of this evidence and allowed, "it didn't add much". I conclude this evidence to be inadmissible.
- [118] Paragraph 21: I find the only admissible part of this paragraph is the last line.
- [119] Paragraph 23: the Requesting State objects to the admissibility of the last ten lines of this paragraph. The person sought submits this evidence is lead as an expression of the belief of the person sought. It is my view there is little or no admissible evidence providing a factual underpinning in support of the declared belief; the expression of belief is not particularly relevant, and I afford it no weight.
- [120] Paragraph 24: the last sentence is inadmissible. It is simply speculation.
- [121] Paragraph 25: the evidence contained in this paragraph stating purportedly what [CONTENT REDACTED] said to Mr. Oliynyk is, again, led for the limited purpose as previously referenced. The balance of the paragraph is a concoction of opinion, speculation, hearsay and argument and, as such, is inadmissible.
- [122] Paragraphs 26 and 29: the person sought has declared he no longer relies on these paragraphs.

#### **Affidavit No. 2: August 2, 2019**

- [123] Paragraph 14: the person sought, once again, has stated the hearsay statements contained in this paragraph are led for the fact it was said, not for the truth of its contents. Nevertheless, the paragraph contains such a knot of hearsay, conjecture, and argument that it is my conclusion, as a whole, the paragraph is inadmissible.

#### **Affidavit No. 3: August 7, 2019**

- [124] Paragraph 3: again, paras. 7 and 8 are so intertwined with hearsay, opinion, argument, and musings that it cannot be unbundled. These paragraphs are inadmissible.

## Summary

[125] Certainly the use to be put concerning much of the hearsay evidence, coupled with certain conclusions as set out above, dilute the evidentiary value of the narrative. In addition, however, evidentiary issues aside, I remain sceptical concerning the reliability and credibility of the assertion [CONTENT REDACTED].

[126] In my opinion, the evidence, on its face, and standing alone, uncorroborated, even in a minor way, does not reveal an air of reality in relation to the fundamental assertion. However this is not the final word. This issue cannot be fully and properly assessed in this forum. The ultimate determination and findings of fact, if necessary, must await the appropriate venue and a complete airing of the evidence.

[127] That said, the fact is, as I began, even if the evidence of Mr. Oliynyk was entirely admissible and credible, I find there is not a basis for the relief sought by Mr. Oliynyk.

[128] My conclusions in this regard are as follows:

The Aspects of the Abuse of Process Claim

## Entrapment

[129] The first basis for Mr. Oliynyk's abuse of process claim lies in his allegations that he was entrapped by U.S. authorities. This claim is based on the various threats [CONTENT REDACTED] the U.S. authorities allegedly employed [CONTENT REDACTED].

[130] The Requesting State rests its argument on jurisdictional grounds. It submits I have no power to consider this claim, as an extradition judge has no jurisdiction to consider defences, or other aspects of the crime on which the accused may bear an evidentiary or persuasive burden of proof: M.M. at para. 65; United States of America v. Chandler, 2019 BCCA 92 at para. 7. That function belongs exclusively to the trier of fact.

[131] The nature of entrapment was explained by the Court of Appeal in R. v. Nuttall, 2018 BCCA 479 (at para. 294):

[t]he guilt or innocence of the accused is not the issue in an entrapment claim. Entrapment is not a defence; in most cases, police conduct caught by the doctrine will not have the effect of negating either the actus reus or mens rea of the offence: Mack at 941 and 943. Rather, the central issue on an entrapment claim is the "avoidance of the improper invocation by the state of the judicial process and its powers" (Mack at 942, quoting Amato at 461, per Estey J., dissenting). In the context of entrapment, "the court's sense of justice is offended by the spectacle of an accused's being convicted of an offence which is the work of the state": Mack at 942, citing Amato at 447, per Estey J., dissenting.

- [132] While entrapment is not a true defence in that sense, I am nevertheless of the view that it is an issue that is wholly unsuitable for determination in the context of an extradition hearing. There is ample authority for this proposition: see *United States of America v. Reumayr*, 2003 BCCA 375 at para. 17; *U.S.A. v. Foran*, 2016 BCSC 713 at para. 37; *Republic of India v. Singh*, 2007 BCCA 157 at para. 56.
- [133] In addition, there are compelling practical and procedural reasons why it would be inappropriate to consider an allegation of entrapment at this stage of these proceedings. A finding of entrapment amounts to a declaration that the state improperly induced the commission of a crime. It is thus contingent upon finding that the accused actually committed the crime in question. In my view, it should not be raised until after the accused's guilt has been proven beyond a reasonable doubt: Nuttall at para. 295. This, of course, is not for extradition judge to determine, but the ultimate trier of fact.
- [134] There are also important practical considerations that militate against the consideration of such allegations at this stage of the proceedings. An entrapment claim is likely to share much of its factual matrix in common with the primary claim against the accused. The same witnesses who are best positioned to speak to the entrapment claim--those who allegedly induced the commission of the crime--are also likely to be key witnesses in the trial itself. For these reasons, the trial court will certainly be better situated to adjudicate an entrapment claim than a committal judge.
- [135] As such, this ground for his abuse of process claim must fail.
- [CONTENT REDACTED]
- [136] [CONTENT REDACTED]
- [137] [CONTENT REDACTED]
- [138] [CONTENT REDACTED]

## Unlawful Conduct

- [139] The final possible basis for Mr. Oliynyk's abuse of process claim, at least as these claims were put before me, lies in the allegedly unlawful conduct of the CW on Canadian soil. While I have concluded these allegations cannot justify the exclusion of foreign-gathered evidence in this case, it is nevertheless well established that unlawful police conduct may amount to an abuse of process in certain circumstances, which could potentially justify a stay of proceedings: Licht at para. 37.
- [140] In Licht, U.S. authorities sought to conduct a reverse sting operation on Canadian soil, which directly targeted the person sought. To that end, a U.S. agent entered Canada illegally, unbeknownst to the Canadian authorities, and despite having been made aware of the legal requirements in Canada for conducting such an operation. While in Canada, the agent met with the person sought, and offered to sell him cocaine, contrary to s. 5 of the

CDSA. This offer, in turn, led to the gathering of crucial evidence in the United States. Madam Justice Dillon found that this conduct amounted to an abuse of process, and ordered a stay of proceedings accordingly. She characterized the abusive conduct as follows (at para. 63):

The wrongdoing here is so offensive to Canadian society as to warrant a stay. The need to combat international drug trafficking is recognized in specific exceptions that allow legitimate police operations to engage in controlled illegal activity. The conduct here went beyond criminal illegality. There were no drugs introduced into Canada, but the illegal conduct is extremely offensive because of the violation of Canadian sovereignty without explanation or apology. One could suggest that the accused voluntarily went to the United States and that nobody forced him to purchase drugs there. However, a meeting in Canada was a condition precedent to any transaction by Licht and the DEA knew this. The cooperation of the RCMP could have been sought again but was not. Why this was not done is not explained. The situation is further exacerbated by the illegal entry into Canada.

- [141] In my view, the narrative alleged by Mr. Oliynyk differs in several significant respects from the facts in Licht. The conduct he alleges does not approach the level of an abuse of process sufficient to justify a stay of proceedings.
- [142] Briefly, Mr. Oliynyk alleges that he approached a former contact in the drug smuggling trade with an offer to traffic cocaine and heroin, after having been coerced into acting [CONTENT REDACTED]. Mr. Oliynyk offered to introduce the contact by telephone to the CW, whom he described as his "transport guy". In the course of two subsequent phone calls between the CW, Mr. Oliynyk, and Mr. Oliynyk's contact, the CW allegedly made an offer to the contact to transport and deliver drugs into Canada. According to Mr. Oliynyk, all three individuals were present on Canadian soil for these conversations.
- [143] Mr. Oliynyk argues this conduct amounts to trafficking within the meaning of s. 5 of the CDSA. The Requesting State disputes this claim.
- [144] In my view, however, it is not necessary decide this point. Other than this arguable violation of the CDSA, the conduct alleged by Mr. Oliynyk shares none of the characteristics that justified the extreme remedy of a stay of proceedings in Licht.
- [145] Regardless of whether Mr. Oliynyk's allegations are true, and regardless of whether the CW's actions constitute a crime in Canadian law, I cannot conclude a stay of proceedings would be warranted in these circumstances.
- [146] In the first place the conduct alleged by Mr. Oliynyk falls well below the conduct alleged in Licht, where the Requesting State deliberately violated Canadian law and sovereignty, as well as a number of other extradition-related decisions: see *United States of America v. Khadr*, 2011 ONCA 358 [Khadr], *United States of America v. Cobb*, 2001 SCC 19 [Cobb], *United States of America v. Shulman*, 2001 SCC 21 and *United States of America v. Tollman* (2006), 212 C.C.C. (3d) 511 [Tollman]. The conduct of the Requesting State in these cases was

either so egregious that merely entertaining its extradition request would have irreparably tainted the integrity of the justice system (Khadr), or involved deliberate attempts to undermine (Cobb) or evade (Tollman) the procedural protections provided for under the extradition process.

- [147] In this case, I do not find that conduct alleged by Mr. Oliynyk seriously threatens the integrity of these proceedings. The allegedly unlawful offer in question was only made because Mr. Oliynyk had arranged a phone call between the parties, precisely in order to facilitate the making of such an offer. In these circumstances, allowing the extradition to proceed will not, in my view, "leave the impression that the justice system condones conduct that offends society's sense of fair play and decency": Babos at para. 35.
- [148] Even if there is potential prejudice in allowing the extradition to proceed, that prejudice would, in my view, be outweighed by the prejudice to the justice system in staying an otherwise meritorious prosecution for a serious offence. This balancing exercise is of particular importance where, as here, the "residual" category is invoked. As explained in Babos:
- [41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.
- [149] The misconduct alleged by Mr. Oliynyk was facilitated by his own conduct, and committed in the context of his own possible wrongdoing. At the same time, Mr. Oliynyk is faced with serious charges, which it is in the broader interests of society, and consistent with Canada's international obligations, to see adjudicated on their merits. Without condoning the potentially illegal conduct of the CW, I do not consider his alleged misconduct sufficient to shock the community's conscience, or otherwise offend its sense of fair play and decency. In these circumstances, it would be more prejudicial to the justice system to stay the proceedings than to allow them to proceed in spite of the CW's misconduct. For these reasons, I would not order a stay of proceedings, even if Mr. Oliynyk's allegations were true.
- [150] In short, Mr. Oliynyk's evidence discloses no basis for a stay of proceedings, whether on account of entrapment, [CONTENT REDACTED], or unlawful conduct. I would dismiss his claim accordingly.

## Summary and Order

[151] For these reasons, I conclude the evidence proffered by the Requesting State is both admissible and reliable. As certified, it is sufficient to justify his committal under s. 29(1) of the Act. At the same time, I find there is no basis for Mr. Oliynyk's abuse of process claim. I dismiss Mr. Oliynyk's application in its entirety.

[152] I therefore order Mr. Oliynyk's committal into custody to await surrender.

[153] In accordance with s. 38(2) of the Extradition Act the person sought is informed that he will not be surrendered until after the expiry of 30 days and he has a right to appeal the order and to apply for judicial interim release.

"Crossin, J."

[1] The Requesting State has filed the ROC; SROC and SSROC as exhibits in the committal hearing (the original versions). The Requesting State has also filed those same documents in the committal hearing with certain evidence in the documents redacted ("final redacted versions"). The final redacted versions were also re-filed and marked as exhibits, without objection, in the abuse of process application. The TSROC was not filed as an exhibit in the committal hearing; however was filed as an exhibit in the abuse of process application. In addition, in relation to a somewhat collateral evidentiary point, during the course of proceedings both parties tendered a letter. The same letter. The letter was authored by Ms. Erin Becker, Assistant United States Attorney. The letter addressed certain of the allegations contained in the material of Mr. Oliynyk. Both parties purported to rely on the letter for different purposes. When questioned, neither party could articulate how the letter was admissible evidence. The letter is inadmissible.

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