

CANADA / JUDGMENT

United States v. Wong

2015 BCSC 2276

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Supreme Court of British Columbia

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2015 BCSC 2276 United States v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Wong,

2015 BCSC 2276

Date: 20151208

Docket: 26661

Registry: Vancouver

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

Between:

The Attorney General of Canada on Behalf of

the United States of America

Applicant/Requesting State

And

Justin Carl Wong

Respondent/Person Sought

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Applicant/Requesting State:

Amanda Lord

Counsel for the Respondent/Person Sought:

Robert C. Claus

Place and Date of Hearing:

Vancouver, B.C.

October 23, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 8, 2015

Introduction

- [1] The Respondent, Justin Carl Wong, is sought for extradition by the United States for prosecution for child pornography offences. The offences relate to allegations that, while Mr. Wong was in Canada, he requested and accessed electronic communications from two minor girls in the United States. These communications are said to be child pornography
- [2] Mr. Wong has not advanced any arguments as to whether the United States has satisfied the test to be applied at this committal hearing in accordance with s. 29 of the Extradition Act, S.C. 1999, c. 18 (the "Act").
- [3] Rather, Mr. Wong seeks a judicial stay of proceedings under the Canadian Charter of Rights and Freedoms (the "Charter"). The circumstances in which that argument is advanced are set out in my earlier reasons for judgment in *United States v. Wong*, 2015 BCSC 1203 (the "Reasons").
- [4] Mr. Wong also raises two jurisdictional arguments, one under the Charter and one under the Treaty on Extradition between Canada and the United States of America, 3 December 1971, Can. T.S. 1976 No. 3, as amended (the "Treaty"). In substance, Mr. Wong contends that if he had committed these acts in the United States, Canada would have no jurisdiction to seek his extradition. He, therefore, says that, similarly, since all his alleged actions are said to have occurred in Canada, the United States should not be allowed to now seek his extradition.

The Committal Hearing Issues

- [5] The Minister of Justice (the "Minister"), issued an Authority to Proceed dated October 20, 2014 (the "ATP"). In accordance with s. 23 of the Act, the ATP authorized the Attorney General of Canada to seek an order of committal for the corresponding Canadian offence of accessing child pornography.

The Test

- [6] The test for committal is set out in s. 29(1) of the Act:

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.

Identification

- [7] Section 29(1)(a) of the Act requires that, before an order of committal is granted, the extradition judge must first be satisfied that the person before the Court is the same person sought by the extradition partner.
- [8] As discussed in *Danielson v. United States of America*, 2008 BCCA 519, at para. 24, there are two aspects to the issue of identification:
1. on a balance of probabilities is the person before the court the person named in the [Record];
 2. is 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?
- [9] Section 37 of the Act addresses evidence on the first aspect of identity:
37. The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:
- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
 - (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.
- [10] Here, Mr. Wong has admitted that he is the person who was arrested pursuant to the warrant for arrest issued in this extradition proceeding. His photograph, upon arrest, is before the Court and easily matches his appearance as noted at this hearing. Accordingly, I am satisfied that Mr. Wong is the person sought in this extradition proceeding and who is the person referenced in the Record.
- [11] The second aspect of identification requires that I be satisfied that there is a prima facie case that Mr. Wong is the person who engaged in the alleged conduct.
- [12] The evidence against Mr. Wong primarily consists of text communications and photographs. These communications took place over Voxel accounts in the names of the minors and Mr. Wong. Voxel is a walkie-talkie application for smartphones and other devices, including the iPod Touch devices that the minor girls used.

- [13] These communications were located in a Voxer account with the username "Justin Wong". Three photographs of the adult male that the user sent to the two girls using the Voxer account are attached to the Record as Exhibits A and B. A comparison of those photographs to Mr. Wong indicates that he is probably the person they depict. In addition, geolocation data associated with those photographs indicates that they were created in the vicinity of an address in Ontario where Mr. Wong was arrested by the Ontario Provincial Police.
- [14] Mr. Wong does not dispute that both aspects of identification have been satisfied.

The Record

- [15] The evidence against Mr. Wong is set out in the certified record of the case dated October 7, 2014, issued by Steven Breslow, Assistant United States Attorney at the United States Attorney's Office for the District of Massachusetts (the "Record").
- [16] The Record references evidence that is said to establish that, from December 16-20, 2012, Mr. Wong exchanged text messages and photographs with girls aged eight and ten, who are residents of the State of Massachusetts. The text messages and photographs allegedly indicate that Mr. Wong requested that the minors provide photographs of themselves and, in particular, photographs of their bodies, including their prepubescent breasts and genitalia. The minors did as they were requested. The searches of the minors' devices also revealed photographs that Mr. Wong had sent to them of himself.
- [17] Again, the evidence indicates that the photographs of Mr. Wong, sent from a Voxer account in his name to the minors' accounts, had been taken in Ontario.
- [18] The minors' iPod Touch devices were seized in late December 2012 and taken into custody by the Massachusetts State Police and, later, the Department of Homeland Security. Homeland Security later obtained a search warrant in the United States and conducted a search of Mr. Wong's Voxer account, by which these communications were made. That account was created on December 15, 2012, just before communications with the minor girls began.
- [19] There is no issue concerning the Record satisfying the requirements of ss. 32-35 of the Act. The Record includes a certification that the evidence summarized or contained in it is available for trial and sufficient under the law of the United States to justify prosecution: s. 33(3).
- [20] The Supreme Court of Canada has stated that s. 29(1) requires a judge to determine: firstly, what evidence is admissible under the Act; and, secondly, whether the admissible evidence is sufficient to justify committal: *United States of America v. Ferras*, 2006 SCC 33, at para. 16.
- [21] The Record includes the certification that provides a "threshold indicator" of both the reliability of the evidence and its availability for trial: *Ferras* at paras 27-32.

- [22] The Minister concedes that the case against Mr. Wong is a circumstantial one given the nature of the communications. In *R. v. Arcuri*, 2001 SCC 54, at paras. 23, 29-30, the Court stated that, at a committal hearing, the judge exercises a limited weighing function in assessing whether the circumstantial evidence is reasonably capable of supporting the inferences advanced by the Crown. See also Ferras at para. 39.
- [23] Mr. Wong does not advance any evidence or argument to contest the presumption of both reliability of the evidence set out in the Record or its availability for trial. Further, Mr. Wong does not contest that the evidence set out in the Record is reasonably capable of supporting the inference that he was the person who engaged in these communications with the minor girls.

Double Criminality

- [24] Section 3(1)(b) of the Act states that a person may only be extradited from Canada if the conduct underlying the foreign offence would be a punishable offence if it had occurred in Canada. The conduct must, therefore, constitute an offence under Canadian law and fall within the category of extraditable offences set out in the Act. This is the well-known requirement of "double criminality" discussed in *Canada (Justice) v. Fischbacher*, 2009 SCC 46, at para. 4.
- [25] The ATP authorizes the Minister to seek an order for the committal of Mr. Wong for conduct that corresponds to the Canadian offence of accessing child pornography. At all relevant times, s. 163.1(4.1) and (4.2) of the Criminal Code, R.S.C. 1985, c. C-46 provided:
- (4.1) Every person who accesses any child pornography is guilty of
- (a) an indictable offence and is liable to imprisonment for a term of not more than five years and to a minimum punishment of imprisonment for a term of six months...
- (4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.
- [26] The Minister refers to the Supreme Court of Canada's decision in *R. v. Morelli*, 2010 SCC 8. In that case, the Court considered the distinction between possession of child pornography, which requires the accused to have control of the underlying data file, and accessing child pornography. The Court stated:
- [14] In my view, merely viewing in a Web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession. Possession of illegal images requires possession of the underlying data files in some way. Simply viewing images online constitutes the separate crime of accessing child pornography, created by Parliament in s. 163.1(4.1) of the Criminal Code.

[Emphasis in original]

[27] The elements of the offence of accessing child pornography were discussed in *R. v. R.D.*, 2010 BCCA 313. At para. 31, Madam Justice Bennett stated that the "elements of accessing child pornography are: knowingly causing child pornography to be viewed by, or transmitted to, oneself".

[28] "Child pornography" is defined in s. 163.1(1) of the Criminal Code:

In this section, "child pornography" means

- (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
- (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
- (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years...

[29] The Minister also refers to the Supreme Court of Canada's interpretation of these provisions in *R. v. Sharpe*, 2001 SCC 2. The Court held that an objective approach should be applied to the interpretation of the phrases "dominant characteristic" and "for a sexual purpose":

50 The objective approach should also be applied to the term "dominant characteristic" in s. 163.1(1)(a)(ii), which targets possession of visual material whose "dominant characteristic" is "the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years". The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region. The same applies to the phrase "for a sexual purpose", which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.

51 Family photos of naked children, viewed objectively, generally do not have as their "dominant characteristic" the depiction of a sexual organ or anal region "for a sexual purpose". Placing a photo in an album of sexual photos and adding a sexual caption could change its meaning such that its dominant characteristic or purpose becomes unmistakably sexual in the view of a reasonable objective observer: see *R. v. Hurtubise*, [1997] B.C.J. No. 40 (QL) (S.C.), at paras. 16-17. Absent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught. To secure a conviction the Crown must prove beyond a reasonable doubt that the "dominant characteristic" of the picture is a depiction of the sexual organ or anal region "for a sexual purpose". If there is a reasonable doubt, the accused must be acquitted.

[30] The Record indicates that the images viewed by Mr. Wong, via his Voxer account, are of the genitals and anuses of the minor girls. The text communications and photographs of the minors sent to Mr. Wong identify the girls as being of persons under the age of eighteen. The texts show that Mr. Wong was aware that the girls were under eighteen.

- [331] The texts between Mr. Wong and the minor girls indicate that he convinced them to produce and send him these images and that he viewed them. It is more than evident from the tenor of the communications that the "dominant characteristic" of the images was "for a sexual purpose".
- [32] Accordingly, the images of the girls' genitals and anuses therefore meet the definition of "child pornography" under the Criminal Code.
- [33] I am satisfied that Mr. Wong's conduct establishes a prima facie case of the offence of accessing child pornography under s. 163.1(4.1) of the Criminal Code. Again, the Record indicates a prima facie case that Mr. Wong knowingly caused these pornographic images of children to be transmitted to him and that he viewed these images.
- [34] Mr. Wong does not contend otherwise.

Conclusions

- [35] I conclude that a reasonable and properly-instructed jury could use the evidence in the Record to find that Mr. Wong accessed child pornography. In that event, and subject to Mr. Wong's arguments below, s. 29(1) of the Act mandates that Mr. Wong be committed for extradition, as requested, and in accordance with the ATP.

Stay of Proceedings

- [36] In April 2015, Mr. Wong filed an application for a judicial stay of proceedings as a result of alleged various breaches of his Charter rights, under ss. 6(1), 7, 9, 11(a)(b)(d)(f)(h) and 12.
- [37] The application previously before me was for disclosure by the Canadian Crown and the United States authorities relating to charges that were previously laid against Mr. Wong in Ontario. In February 2013, he was charged under the Criminal Code for various offences: possession of child pornography (s. 163.1(4)); making child pornography (s. 163.1(2)); using a computer to communicate with a minor for the purpose of facilitating commission of an offence (s. 172.1); transmitting sexually-explicit material to a person believed to be under 18 years of age (s. 171.1(1)(a)); and accessing child pornography (s. 163.1(4.1)).
- [38] Evidence at the earlier application included the affidavit of Stefanie Neary, sworn April 28, 2015, that principally related to the course of various court hearings held in Ontario in advance of the preliminary hearing and the transcripts of those proceedings. A communication from Mr. Wong's U.S. attorney to his Canadian counsel, and a letter responding to that communication from the U.S. Department of Justice, were also before the Court.

- [39] As I outlined in the Reasons, the Canadian charges were stayed on October 23, 2014. Mr. Wong alleges that the American authorities interfered with the Canadian prosecution, so as to lead to the stay of the Canadian charges, such that they could now proceed to extradite him to the United States where he faces much greater penalties, if convicted.
- [40] As indicated in the Reasons, at para. 100, I dismissed Mr. Wong's application for disclosure, finding no "air of reality" to his allegations of abuse of process or any Charter breaches, particularly any directly bearing on the committal hearing.
- [41] At this committal hearing, Mr. Wong renewed his application for a judicial stay of the extradition proceedings, but clarified that he only continues to assert Charter breaches under s. 6(1) and 7. He did not, however, seek to introduce any further evidence beyond what was presented at the disclosure application.
- [42] My discussion of the relevant authorities, and Mr. Wong's alleged Charter breaches, are found in the Reasons at paras. 22-39 and paras. 48-71. At para. 35, I cited authority that no s. 6 Charter rights arose in relation to the committal hearing. At paras. 28-29, I cited authority that only limited s. 7 Charter rights arise in relation to ensuring a fair judicial process at the committal hearing. Accordingly, I stated:
- [48] I have concluded that it is difficult to discern any potential Charter breach that amounts to an abuse of Mr. Wong's rights in relation to the extradition hearing that would justify a stay of proceedings. I say that having in mind the issues that arise from both the Canadian and American perspectives.
- [43] Mr. Wong does not advance any other arguments or authorities beyond those I previously addressed in the Reasons. I, therefore, do not see any basis upon which I would change my conclusion that the circumstances do not establish any Charter breach applicable to this proceeding: see Reasons at para. 100.

Jurisdictional Issues

- (1) Section 5 of the Act
- [44] Mr. Wong asserts that if his alleged conduct had occurred in the United States, and the minors were in Canada, Canada would have no jurisdiction to extradite him for the offences. He says that all of his actions occurred in Canada. Accordingly, he says that the United States has no jurisdiction to have him extradited in the reverse situation.
- [45] Section 5 of the Act is, of course, a complete answer to this argument in addressing the jurisdiction of the requesting state to prosecute the offence. That section expressly provides that it is not necessary that the conduct of the person sought occurred in the jurisdiction of the requesting state:
5. A person may be extradited

- (a) whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and
 - (b) whether or not Canada could exercise jurisdiction in similar circumstances.
- [46] Mr. Wong therefore asserted, rather late in the day (namely at this hearing), that this Court should find that s. 5 of the Act is unconstitutional as being contrary to his rights arising under the Charter, s. 6(1) and 7. The Minister did not take exception to this late notice and I heard arguments from both parties.
- [47] Mr. Wong concedes that this aspect of his argument is completely addressed by this Court's conclusions as found in *USA v. Fraser*, 2014 BCSC 1641. That case also involved an extradition to the United States where the actions of the people sought occurred entirely in Canada: para. 10. These persons similarly challenged the constitutionality of s. 5 of the Act. Just as Mr. Wong has done here, they challenged s. 5 on the basis that it was fundamentally unjust to extradite them where, if the facts were reversed, they could not be extradited to Canada.
- [48] In *Fraser*, Madam Justice Watchuk identified that the reasoning in *United States of America v. Lépine*, [1994] 1 S.C.R. 286, supported the finding that this extradition Court has no jurisdiction to consider the issue of the requesting state's jurisdiction, whether on the basis of this "mirror image" argument or otherwise: see *Lépine* at 295-297.
- [49] Watchuk J. stated:
- [48] If there is no basis to depart from the majority judgment in *Lépine*, then it follows that this court has no jurisdiction to entertain the Applicants' constitutional challenge. The majority judgment in *Lépine* explicitly concludes that the issue of a requesting state's jurisdiction - whether examined from the perspective of the foreign law, or using the "mirror image" approach effectively advocated by the Applicants - is not relevant to the committal stage. The jurisprudence is settled that the Charter jurisdiction of an extradition judge does not extend beyond issues relevant to the committal stage: *Cobb*; and *Kwok*.
- [49] On the other hand, if this court may properly revisit the majority decision in *Lépine*, then it would appear that it is able to consider the constitutionality of s. 5 of the Act. The basis of the Applicants' argument is that a requesting state's jurisdiction is directly relevant to the committal stage, and that it is unconstitutional for that issue to be left exclusively to the Minister. Absent the effect of *stare decisis*, it would be a circular answer to the Applicants' argument to say this court has no jurisdiction to entertain it because a requesting state's jurisdiction is not relevant to the committal stage.
- [50] Since *Lépine*, the Supreme Court has expressly stated that the Act establishes that the extradition judge is limited to consideration of "only the domestic side" of the double criminality issue: *Fischbacher* at para. 35. The extradition judge only assesses whether the admissible evidence establishes a *prima facie* case that would justify committal for trial in Canada on the offences set out in the ATP. If the judge concludes that the impugned conduct

would amount to a criminal offence under Canadian law, the person sought must be committed for extradition.

- [51] The decision in *Fischbacher* is also clear in that the Minister will consider the law of the requesting state at two other junctures of the extradition process: firstly, before the issuance of the ATP (para. 30); and, secondly, following any committal where the power to surrender is subject to the Treaty and the Charter (paras. 36, 38).
- [52] Returning to *Fraser*, Watchuk J. saw no basis to depart from the reasoning in *Lépine*. She concluded that the issue of the jurisdiction of the requesting state was not a relevant matter for the extradition judge. Accordingly, the court had no jurisdiction to consider any constitutional challenge to s. 5 of the Act. She stated:
- [76] I have concluded the majority decision in *Lépine* is binding on this court. The issue of a requesting state's jurisdiction - whether examined from the perspective of the foreign law, or using the "mirror image" approach effectively advocated by the Applicants - is not relevant to the committal stage.
- [77] Therefore, this court has no jurisdiction to consider the Applicants' constitutional challenge to s. 5 of the Extradition Act, because the Charter jurisdiction of the extradition judge does not extend beyond matters that are relevant to the committal stage.
- [53] I am advised that an appeal has been brought to challenge this Court's decision in *Fraser*. I see no basis upon which a different conclusion should arise in this case, and I respectfully adopt the reasoning of Watchuk J. in similarly dismissing Mr. Wong's constitutional argument. In that event, I expect that Mr. Wong may appeal and seek to have it heard at the same time as the appeal in *Fraser*.
- [54] In short, following *Lépine*, as applied in *Fraser*, the jurisdiction of the United States, in respect of Mr. Wong and these offences, is not a relevant matter at this hearing. Mr. Wong's application is therefore dismissed.

(2) The Treaty

- [55] Mr. Wong argues that even if s. 5 of the Act is constitutional, the provisions of the Treaty similarly dictate that if the facts were reversed, he could not be extradited to Canada and, therefore, he cannot now be extradited to the United States.
- [56] Mr. Wong refers to s. 3(1) of the Act which states that a person may be extradited in accordance with this Act and a "relevant extradition agreement". As for the latter, he relies on Article 3(3) of the Treaty:

When the offence for which extradition has been requested has been committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offence committed in similar circumstances.

- [57] I agree with the Minister's response that this argument adds little to the jurisdiction argument concerning s. 5 of the Act about this Court's ability to consider the jurisdiction of the requesting state. Again, the jurisprudence on this point is crystal clear; that I, as an extradition judge, have no ability to consider that matter: see *Lépine* at 295-298; *Fraser*.
- [58] Indeed, the provisions of Article 3(3) of the Treaty itself are clear that the matter of jurisdiction is for the "executive or other appropriate authority of the requested State": see discussion of this provision in *Lépine* at para. 14. If the executive should choose not to accept this argument, then I expect that judicial review proceedings may be available to Mr. Wong.

Disposition

- [59] The Record establishes some evidence upon which a reasonable jury, properly instructed, could convict Mr. Wong for conduct corresponding to the Canadian offence of accessing child pornography. This is sufficient to meet the test set out in s. 29(1) of the Act and mandates the result.
- [60] The application is granted and Mr. Wong is remanded in custody to await surrender for the conduct corresponding to the Canadian offence contained in the ATP.

"Fitzpatrick J."

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