File No. 27761
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

REQUESTING STATE/RESPONDENT

AND:

WANZHOU MENG, ALSO KNOWN AS CATHY MENG, SABRINA MENG

PERSON SOUGHT/APPLICANT

REQUESTING STATE'S RESPONDING SUBMISSIONS RE: FOURTH BRANCH OF ALLEGED ABUSE OF PROCESS

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I. OVERVIEW

1. Issues concerning the jurisdiction to prosecute have limited application in the extradition process. The extradition judge is only concerned with whether, if the relevant conduct had occurred in Canada, it would justify committal on the offence in the authority to proceed. That is the double criminality issue. Beyond that narrow issue, questions concerning a requesting state's jurisdiction to prosecute are primarily for the foreign trial court; to the limited extent that they may be raised here, they are for the Minister of Justice at the surrender phase of the proceedings.

2. There are numerous insurmountable obstacles for the Applicant in her attempt to make the Requesting State's jurisdiction to prosecute an issue for this Court. Her argument involves re-casting arguments she made in the double criminality application, which have already been determined against her. As well, courts have repeatedly held that questions of a requesting state's jurisdiction to prosecute are primarily for the courts of the foreign state. To the extent such issues may be considered within the extradition process, the Supreme Court of Canada held in *United States v. Lépine* that they are matters for the executive, not the extradition judge.[1]

3. The Applicant's attempt to frame the jurisdiction issue as a *Charter* s. 7/abuse of process issue creates its own jurisdictional hurdle: an extradition judge may only grant *Charter* remedies relating directly to the committal issues. In the absence of express statutory authority to consider this issue, neither the invocation of the doctrine of abuse of process nor the principles of customary international law are capable of conferring jurisdiction.

4. Even if this Court entertains the argument, the Applicant cannot establish an abuse, nor credibly argue that this is one of the clearest cases where a stay is required. There is no misconduct by the foreign state, nor any circumstances so offensive that the Court must intervene to preserve its integrity. The application should be dismissed.

II. FACTS

5. The Applicant is sought in the Requesting State for prosecution of offences stemming from allegations of fraudulent misrepresentations to several multinational financial institutions

[1] *United States v. Lépine*, [1994] 1 SCR 286 at pp. 296, 298-99.

("MFIs"). In support of its case on committal, the Requesting State is relying upon a summary of evidence set out in the Record of the Case ("ROC"), Supplemental Record of the Case ("SROC"), and Second Supplemental Record of the Case ("SSROC") (collectively, the "ROCs").[2]

6. The ROC discloses that, in December 2012 and January 2013, two Reuters news articles reported that Skycom, a Hong Kong corporation, had offered to sell U.S.-manufactured computer equipment to Iran's largest telecommunication's equipment maker, contrary to U.S. sanctions laws. The articles also reported that Huawei was closely associated with Skycom, noting that the Applicant, Huawei's Chief Financial Officer, had previously sat on Skycom's board of directors, among other extensive links.[3] Prompted by concerns raised in these articles, several MFI, including HSBC, sought information about the relationship between Huawei and Skycom.[4] The MFIs provided banking services to Huawei, including processing of U.S-dollar-denominated transactions through the United States, and were subject to U.S. laws and regulations.[5]

7. The ROC describes HSBC as "a MFI, which conducts business in the United States. HSBC is, and has been since at least 2007, subject to U.S. laws, including the economic sanctions provisions discussed above."[6] HSBC had extensive dealings with Huawei:

> Since at least 2007, HSBC has had a business relationship with Huawei and dozens of its subsidiaries and affiliates. According to HSBC records, as of 2015, HSBC was Huawei's most important international bank with relationships in over 40 countries. Huawei was the 17th largest customer for HSBC's Global Liquidity and Cash Management department, which was responsible for, among other services, U.S.-dollar clearing. HSBC clears dollar transactions through its U.S.-based subsidiary, HSBC US, the deposits of which are insured by the U.S. Federal Deposit Insurance Corporation ("FDIC").[7]

8. According to HSBC business records, from at least 2010 to 2014, HSBC cleared dollar transactions for various Huawei entities through its U.S.-based subsidiary, HSBC U.S.[8] The ROCs also note that, HSBC was previously under investigation by the U.S. government for violating U.S.

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[2] ROC, certified January 28, 2019; SROC, certified February 28, 2019; SSROC, certified December 14, 2020.
[3] ROC, Summary and paras. 19-20.
[4] ROC, paras. 22, 42-43, 46, 51-52.
[5] ROC, Summary and paras. 14-16, 22-24, 39-51.
[6] ROC, para. 14.
[7] ROC, para. 15.
[8] ROC, para. 16.

sanctions involving Iran. In December 2012, HSBC entered into a deferred prosecution agreement ("DPA") with the U.S. authorities to resolve that investigation, agreeing not to commit further sanctions violations and to undertake a number of remedial measures.[9]

9. Emails between HSBC employees from early 2013 disclose that HSBC sought information from Huawei regarding the relationship between Huawei and Skycom, and that Huawei responded that Skycom was a "local business partner". Huawei also confirmed and that "no Iran related transactions" had been completed using Skycom's HSBC account.[10]

10. In addition, after various inquiries from HSBC's management to Huawei regarding the Reuters articles, the Applicant requested an in-person meeting with HSBC Witness B, a senior executive. In August 2013, HSBC Witness B and the Applicant met in Hong Kong, where the Applicant allegedly made a number of misrepresentations, stating that Skycom was only Huawei's business partner in Iran and that Huawei had sold all its shares in Skycom. In a PowerPoint presentation to HSBC Witness B, the Applicant stated that Huawei operated "in strict compliance with the applicable laws, regulations and sanctions of UN, U.S. and EU sanctions."[11] Multiple pages of the presentation discussed U.S. laws, including sanctions laws, and noted that "We [Huawei] communicate with US government agencies, such as Department of Commerce (DoC) and Department of State (DoS) on an annual and day-to-day basis to obtain professional guidance and suggestions that help us to better comprehend applicable laws and regulations."[12]

11. After the meeting, HSBC Witness B made several attempts to obtain from the Applicant an English version of the PowerPoint presentation used at the meeting. It was eventually picked up from the Applicant's office and delivered to HSBC Witness B in September 2013. HSBC Witness B sent relevant portions of the presentation to other HSBC personnel.[13] This included members of HSBC's global and regional risk committees responsible for evaluating risks to HSBC posed by particular clients and determining whether to retain the client in light of the level of risk.[14]

12. Relying on the representations by Huawei that its shareholding in Skycom had been sold and that the Applicant had resigned her position on the board of Skycom, both HSBC's risk

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[9] SROC, paras. 16-21; SSROC, paras. 14-17.
[10] ROC, paras. 22.
[11] ROC, paras. 24-28.
[12] SROC, para. 27.
[13] ROC, paras. 26-27.
[14] ROC, paras. 27, 33-35, 37-38.

committee for the Asia-Pacific region and global risk committee agreed to retain Huawei as a client. At a meeting in New York, the risk committee responsible for HSBC's business in North America also considered this information and accepted Huawei's explanation and reassurances regarding Skycom. HSBC U.S. determined it would not expand business with a particular Huawei entity based on national security issues raised in a report of the U.S. House of Representatives' Permanent Select Committee on Intelligence.[15]

13. The Requesting State alleges that despite the representations of the Applicant and Huawei that Skycom was only Huawei's business partner, and that Huawei had "sold" its shareholding in Skycom in 2007, at all relevant times Huawei in fact owned and controlled Skycom.[16] The Requesting State further alleges that Skycom conducted prohibited transactions in relation to Iran that cleared through HSBC U.S. until October 2014.[17] It is alleged that by relying on the Applicant's misrepresentations, HSBC exposed itself to risks of economic prejudice, including those arising from potential civil and criminal penalties for violations of U.S. sanctions laws and reputational risk.[18] This included risk arising from the DPA. Under the DPA, it remained within the sole discretion of U.S. authorities to determine whether HSBC had violated the DPA, and whether to institute criminal or civil proceedings against HSBC for any conduct related to Huawei or for the prior criminal conduct underlying the DPA.[19] HSBC also faced a risk of civil liability from potential enforcement proceedings by the U.S. Department of the Treasury's Office of Foreign Assets Control, which administers U.S. sanctions laws and regulations.[20]

14. The Applicant and her co-defendants are charged in the Requesting State with the offences of conspiracy to commit bank fraud, conspiracy to commit wire fraud, bank fraud, and wire fraud, contrary to provisions of Title 18, United States Code.[21]

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[15] ROC, paras. 30, 33-38; SROC, para. 5.
[16] ROC, paras. 53-73; SROC, paras. 9-12; SSROC, para. 6.
[17] ROC, paras. 74-75; SROC, paras. 22-26; SSROC, para. 7.
[18] ROC, paras. 1-6; SROC, paras. 4-8, 16-21; SSROC, paras. 8-22.
[19] ROC, para 18; SROC, paras. 16-21; SSROC, paras. 14-17.
[20] ROC, para. 6; SSROC, paras. 18-19.
[21] Expert Report of Professor William S. Dodge, Exhibit A to Affidavit of Professor William S. Dodge sworn December 8, 2020, Applicant's Record – Fourth Branch Abuse of Process, Tab 2, at para. 8 ("Dodge Report").

III. ARGUMENT

A. The Requesting State's Jurisdiction to Prosecute is Not an Issue for This Court

15. The *Extradition Act*[22], the relevant extradition treaty[23], and case law all make clear that the question of the requesting state's jurisdiction to prosecute is not an issue for the extradition judge. This Court is concerned with whether, if the relevant facts occurred in Canada, they would make out a Canadian offence that corresponds to the alleged conduct. That is the double criminality exercise this Court has already undertaken.

16. Jurisdiction is primarily a matter for the foreign trial court, which can apply domestic law to the issue and, to the extent it may be relevant, customary international law. Jurisdiction may also, to a limited extent, be relevant to the executive's decision to surrender. Accordingly, this Court's limited *Charter* jurisdiction is not engaged. *Charter* jurisdiction in committal proceedings is closely tied to the judge's function. The Applicant's argument that her prosecution in the Requesting State violates customary international law has no relationship to that function.

1. The Requesting State's Jurisdiction is Not Within the Extradition Judge's Statutory Role

17. The extradition judge's role is derived from statute. The Supreme Court has made clear that "[a]ll functions within the extradition process that are not expressly assigned by statute to the extradition judge remain with the executive."[24] Accordingly, and as explained further below, an extradition judge's *Charter* jurisdiction under s. 25 of the *Act* can only be exercised in relation to her statutory functions at the committal stage. The primary function of the extradition judge is to determine whether the relevant acts, had they been committed here, would constitute a *prima facie* case of a Canadian offence.

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[22] *Extradition Act*, S.C. 1999, c. 18, as amended (the "*Act*").
[23] *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, 3 December 1971, Can TS 1976 No. 3 (entered into force 22 March 1976) as amended by an Exchange of Notes, 28 June 1974 and 9 July 1974; First Protocol, 11 January 1988, Can TS 1991 No. 37 (entered into force 26 November 1991); and Second Protocol, 12 January 2001, Can TS 2003 No. 11 (entered into force 30 April 2003) (the "*Treaty*").
[24] *United States of America v. Kwok*, [2001] 1 SCR 532, at para. 31, citing *Re McVey; McVey v. United States of America*, [1992] 3 SCR 475 at p. 519; see also *Hong Kong (Special Administrative Region) v. Chang*, 2003 BCCA 171 at paras. 8-9.

18. Courts have repeatedly directed that the question of a requesting state's jurisdiction is not within the extradition judge's domain. The Supreme Court's decision in *United States v. Lépine* remains binding authority on this issue, as affirmed recently by the Court of Appeal in *United States of America v. Romano*.[25] It makes no difference to this limit on the extradition judge's jurisdiction that the Applicant has grounded her challenge in terms of customary international law, and not under the test set out in *Libman v. the Queen*[26] or the law of the Requesting State.[27] The fact that the Applicant devotes an entire section to *Lépine* in her argument[28] is an implicit acknowledgement the decision stands firmly in the way of the argument she advances.

19. In *Lépine*, the person sought was charged in the United States with conspiracy to distribute cocaine for his role in a scheme to procure cocaine in Columbia and fly it to Nova Scotia for distribution. There was evidence that the plane used had been refurbished in Florida. During an unscheduled stop in Pennsylvania on the way to Nova Scotia, possibly to refuel the plane[29], American law enforcement seized the cocaine. The extradition judge ordered the discharge of the person sought on the basis of the threshold issue that the requesting state did not have jurisdiction to prosecute the offence charged. The extradition judge had found that there was no evidence that the conduct alleged was intended to produce detrimental effects in the United States, or that there was any substantive link between the conspiracy and the United States.[30]

20. The Supreme Court rejected the extradition judge's approach, holding that the judge "was usurping the function of the executive" and "should not have considered the issue of territoriality or jurisdiction at all."[31] La Forest J. based this conclusion on the statutory division of functions between the extradition judge and the executive, noting that the executive's role in monitoring the *Treaty* had not been assigned to the courts.[32] La Forest J. made the following observations:

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[25] *United States of America v. Romano*, 2016 BCCA 444 at paras. 11-12 ("*Romano* (Appeal)").
[26] *Libman v. The Queen*, [1985] 2 SCR 178.
[27] Applicant's Submissions – Fourth Branch, dated 14 December 2020, paras. 133-134 ("Applicant's Submissions").
[28] Applicant's Submissions, paras. 130-136.
[29] La Forest J. noted that, although the stop in Pennsylvania was described as "unscheduled", there was some evidence that it was for the purpose of refuelling: *Lépine*, at p. 292.
[30] *Lépine*, at pp. 293-94.
[31] *Ibid.* at pp. 299, 301.
[32] *Ibid.* at p. 299.

a) "The issue of the jurisdiction of the requesting state and its organs to prosecute a crime is essentially a matter governed by the law of that state." Furthermore, "whether a requesting state has a legitimate interest in prosecuting a fugitive is primarily an issue for the appropriate authorities in the foreign state."[33]

b) The extradition judge is not concerned with foreign law and "the determination of the jurisdiction of a foreign state by a judge unfamiliar with the relevant law seems to me to be an even more thorny task than a determination of the substantive law of that state."[34]

c) "[A]n extradition judge is not vested with the function of considering the jurisdiction of the requesting state to prosecute the offence." Indeed, "[t]here is nothing in the Act that requires the judge to consider where the acts charged took place, or the jurisdiction of the requesting state."[35]

d) The statutory function of assessing double criminality mandates that the extradition judge consider "whether, if the impugned acts or conduct had been committed in Canada, they would constitute a crime here." La Forest J. stated further that the question "is not whether, if some of the conduct had been committed here and some abroad, it would be a crime here."[36]

e) While the *Treaty* addresses the issue of jurisdiction, "[t]he issue of whether a state has gone beyond the terms of the treaty in exercising jurisdiction is a matter between states"; the role of monitoring compliance with the *Treaty* is not for the courts, "[i]t is one for the executive".[37]

21. There has been no relevant change to the law since *Lépine* was decided. The provisions in the current *Act* relating to jurisdiction have not been assigned to the extradition judge; jurisdiction remains a function of the executive. Section 5 of the *Act* is the relevant provision:

> 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.

22. At the surrender phase of the extradition process, pursuant to s. 47(e) of the *Act*, the Minister has the discretion to refuse surrender if satisfied that "none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has

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[33] *Ibid.* at pp. 287-88.
[34] *Ibid.* at p. 296.
[35] *Ibid.* at p. 296.
[36] *Ibid.* at p. 297.
[37] *Ibid.* at p. 298 [emphasis in original].

jurisdiction."[38] Articles 1 and 3(2) of the *Treaty*, as amended by the Protocol of 1988, also confirm that matters of jurisdiction to prosecute are a concern for the executive in monitoring compliance:

> **Article 1**
>
> Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3 (3) of this Treaty.
>
> **Article 3**
>
> [...]
>
> 2. When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.

23. As La Forest J. noted in *Lépine*, the powers set out in the *Treaty* could be assigned to appropriate authorities other than the executive, but Parliament has not done so.[39] There is simply no authority in the *Act*, the *Treaty* or the case law to support the Applicant's contention that this Court "retains jurisdiction to consider whether a person accused of an extraterritorial offence should not be extradited" under s. 5 of the *Act* or otherwise.[40]

24. To the contrary, since *Lépine*, courts have consistently concluded that the requesting state's jurisdiction to prosecute the foreign offences is not for consideration by the extradition judge, and, to the extent it is relevant, remains an executive function.[41]

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[38] *Act*, s. 47(e).
[39] *Lépine*, at p. 299. Section 7 of the *Act* assigns to the Minister responsibility for "implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them."
[40] Applicant's Submissions, para. 125.
[41] See *USA v. Fraser*, 2014 BCSC 1641, *Romano* (Appeal), at paras. 8-13, *United States of America v. Gillingham*, 2004 BCCA 226 at paras. 56-61; *United States v. Commisso et al.* (2000), 143 CCC (3d) 158 (ONCA) at paras. 2-5, 36-42, 53-58; *United States of America v. Kavaratzis* (2004), 182 CCC (3d) 176 at paras. 8-12, 17-21 ("*Kavaratzis* 2004"); *United States of America v. Sagarra* (2002), 226 Nfld & PEIR 301 at paras. 14-18; *Canada (Attorney General) (United States of America) v. Plata*, 2010 QCCS 948 at paras. 6-16; *United States v. Cail*, 2008 ABCA 282 at para. 19.

25. Recently in *United States v. Fraser*, Watchuk J. of this Court dismissed an application for a declaration that s. 5 of the *Act* infringes ss. 6(1), 7 and 12 of the *Charter* on the basis that it permits a Canadian citizen to be extradited for acts allegedly committed entirely within Canada. The applicants alternatively asked the court to "read in a requirement to s. 5 that there must be a 'real and substantial connection' to the requesting state before a person is extradited."[42] Watchuk J. dismissed the application, finding that *Lépine* remained binding authority; the issue of the requesting state's jurisdiction was irrelevant to the committal stage; and consequently, the Court had no jurisdiction to consider the challenge.[43]

26. In *Romano*, the Court of Appeal upheld Watchuk J.'s decision, and confirmed that it did not fall within the role of the extradition judge to consider the jurisdiction of the requesting state to prosecute or to consider whether s. 5 of the *Act* is constitutional.[44] In view of *Lépine* and *Romano*, the Applicant's claim that s. 5 gives this Court discretion to consider the propriety of the Requesting State's exercise of jurisdiction is untenable.

2. This Court's *Charter* Jurisdiction is Not Engaged

27. As the requesting state's jurisdiction is not a matter assigned to the extradition judge under the *Act*, this Court's *Charter* jurisdiction is not engaged by the Applicant's claims. The key jurisprudence reveals that simply framing the issue as one of abuse of process is not enough to bring it within this Court's purview.

a) Legal Principles

28. The Supreme Court's companion cases of *United States of America v. Kwok* and *United States of America v. Cobb*[45] remain the leading authorities regarding an extradition judge's *Charter* jurisdiction. *Cobb* is best understood in light of *Kwok*, where the Court detailed the history of amendments to the extradition judge's statutory *Charter* jurisdiction.[46] The Court's conclusions in

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[42] *Fraser*, at para. 3.
[43] *Fraser*, at paras. 74-77. See also *United States v. Wong*, 2015 BCSC 2276 at paras. 44-54.
[44] *Romano* (Appeal), at paras. 8-13.
[45] *United States v. Cobb*, 2001 SCC 19, [2001] 1 SCR 587.
[46] See *Kwok*, at paras. 30-58.

Kwok apply equally to s. 25 of the current *Act*, from which this Court derives its *Charter* jurisdiction.[47]

29. Prior to legislative amendments in 1992, the extradition judge did not have power to adjudicate *Charter* issues or grant *Charter* remedies.[48] Writing for the Court in *Kwok*, Arbour J. affirmed that a significant change in the 1992 *Act* was that s. 9(3) empowered the extradition judge to grant *Charter* remedies relating to "matters relevant to the committal stage, provided that he or she does not usurp the Minister's function".[49] After surveying a number of lower court decisions that diverged on whether s. 9(3) granted the extradition judge plenary jurisdiction to consider any *Charter* issue, Arbour J. concluded that it did not.[50]

30. Arbour J. expressly held that "s. 9(3) did not give plenary and exclusive *Charter* jurisdiction to the extradition judge."[51] Rather, the extradition judge can only grant remedies for *Charter* breaches relating to "circumscribed issues relevant at the committal stage" and "specific to the functions at the extradition hearing".[52] Arbour J. observed that the amendments were not intended to alter the fundamental two-tiered structure of the *Act*, with distinct functions and jurisdictions for the extradition judge and Minister.[53] The Supreme Court recently affirmed this constraint on the extradition judge's *Charter* jurisdiction in *M.M. v. United States of America.*[54]

31. The issue raised in *Kwok* was whether the extradition judge had jurisdiction to consider the person sought's allegation of a breach of his s. 6(1) mobility rights. The Court rejected the claim that s. 6(1) of the *Charter* was engaged at the committal stage and directed that, even within the context of a *Charter* application, "[e]xtradition judges should not pre-empt the executive with respect to those issues which fall under the Minister's responsibility under the Act."[55]

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[47] *Ibid.* at paras. 24, 56-57.
[48] *Ibid.* at paras. 30-31.
[49] *Ibid.* at para. 43-44.
[50] *Ibid.* at paras. 46-54.
[51] *Ibid.* at para. 5.
[52] *Ibid.* at paras. 5, 54, 57, 85.
[53] *Ibid.* at paras. 4, 54, 57.
[54] *M.M. v. United States of America*, [2015] 3 SCR 973 at paras. 40 and 55-56.
[55] *Kwok*, at paras. 67, 71, and 85.

32. In *Cobb*, the Court confirmed that an extradition judge has jurisdiction to stay proceedings for abuse of process, either as a remedy for a s. 7 *Charter* breach or at common law.[56] However, Arbour J. reiterated her conclusion in *Kwok* that the extradition judge's jurisdiction extends "only insofar as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process."[57]

b) The Applicant Has Failed to Establish That This Court May Grant Charter Remedies Relating to Jurisdiction

33. The Applicant's attempt to surmount the authority of *Lépine* and *Romano* by claiming that the "issue in *Lépine* was dual criminality; it had nothing to do with abuse of process"[58] does not stand up to scrutiny. First, making a claim of abuse of process does not by itself create plenary *Charter* jurisdiction. The Applicant must establish that any alleged breach relates to an issue on committal. It is of no moment whether the challenge to jurisdiction is framed as contrary to the domestic laws of Canada or the Requesting State, or to principles established under customary international law: the issue is irrelevant at the committal stage.

34. Indeed, *Cobb* is not authority for the proposition that any s. 7 *Charter* issue will be relevant to committal. For example, Arbour J. noted in *Cobb* that whether the person sought will face a possibly unfair trial in the requesting state is premature at the committal stage.[59] Rather, the s. 7 issue must engage the fairness of the committal hearing or the integrity of the judicial process.[60] It is notable that, in *Romano*, the Court of Appeal upheld the extradition judge's decision that *Lépine* was binding upon her and that she did not have jurisdiction to consider the challenge to s. 5 of the *Act* based on ss. 6(1), 7, and 12 of the *Charter*.[61] The appellants had argued that s. 5 violates the principle of fundamental justice that persons sought are guaranteed a "meaningful judicial process" as identified in the Supreme Court's decision in *United States v. Ferras*.[62]

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[56] *Cobb*, at paras. 36-40.
[57] *Ibid.* at para. 26.
[58] Applicant's Submissions, para. 130.
[59] *Cobb*, at paras. 33 and 42.
[60] *Ibid.* at paras. 33, 42-45; *United States v. Khadr* 2011 ONCA 358 ("*Khadr* (ONCA)"), at para. 40; Watchuk J. summarized the applicable principles in *U.S.A. v. Fraser*, 2014 BCSC 1132 at paras. 24-44.
[61] *Romano* (Appeal), at paras. 8-13.
[62] *Fraser*, at paras. 9, 59-75; *Romano* (Appeal), at paras. 12-13; *United States v. Ferras*, [2006] 2 SCR 77.

35. Rejecting this argument, Tysoe J.A. held that "*Ferras* does not empower an extradition judge to decide constitutional questions that are not necessary for the judge to decide to perform his or her function under s. 29(1) of the *Extradition Act* of deciding whether the alleged conduct, if committed in Canada, would be a crime in Canada."[63] Likewise, in *Italy v. Seifert* the Court of Appeal found the extradition judge was correct in concluding that he did not have jurisdiction to consider a s. 7 *Charter* challenge to s. 47(b) of the *Act*, which grants the Minister discretion to refuse surrender if a person convicted *in absentia* could not have the case reviewed.[64]

36. Second, *Lépine*'s application is not restricted to the issue of double criminality. As noted by La Forest J. in the opening paragraph, the case was concerned primarily with whether "the Canadian executive or the judge at an extradition hearing, has authority to consider whether the state requesting the surrender of a fugitive has jurisdiction to prosecute the fugitive for an offence for which the fugitive is charged".[65]

37. That this matter is within the domain of the executive does not shield it from *Charter* review. As Arbour J. made clear in *Kwok*, where the matter is expressly for the Minister to consider on surrender, the Court of Appeal is competent to grant any necessary *Charter* remedies in judicial review of the Minister's decision.[66]

38. As will be discussed further in the following sections, there is nothing about the Requesting State's assertion of jurisdiction to prosecute in these circumstances that is so egregious or offensive that simply "proceeding with committal proceedings would amount to an abuse of process" or s. 7 *Charter* breach.[67] *Cobb* and *Khadr* can both be distinguished. Both involved serious state misconduct that had a direct nexus to the committal process. In those cases, it was no answer that there were "potential remedies" at the executive stage; neither *Cobb* nor *Khadr* engaged issues that were expressly assigned to the Minister.[68] In contrast, and like *Kwok*, the Applicant's arguments

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[63] *Romano* (Appeal), at para. 13.
[64] *Italy v. Seifert*, 2007 BCCA 407 at paras. 74-75.
[65] *Lépine*, at para. 1
[66] *Kwok*, at paras. 5, 58, 67, 71, 80-83.
[67] *Khadr* (ONCA), at para. 47.
[68] *Cobb*, at paras. 33, 43-48, 52; *Attorney General of Canada v. Khadr*, 2010 ONSC 4338, at paras. 133, 142-49 ("*Khadr* (SCJ)"); *Khadr* (ONCA), at paras. 43-45; see also *United States v. Hulley*, 2006 BCSC 907 at paras. 56-65.

relate specifically to issues that fall under the Minister's responsibility under the *Act* and *Treaty*. This Court should not pre-empt the Minister's decision.

3. The Correct Approach is Set Out in Subsection 29(1) of the *Act*

39. The extradition judge considers whether, if the relevant facts occurred in Canada, they could make out a Canadian offence. That is the essence of the double criminality analysis, upon which this Court has already ruled. This application is effectively an attempt by the Applicant to re-argue her double criminality application.

40. Re-characterized as an issue of abuse of process and customary international law, the Applicant is resurrecting her claim that her prosecution would be unlawful because it allegedly enforces the Requesting State's sanctions against Iran.[69] In the double criminality application, the Applicant impugned the fraud allegations as artificial, effectively making the same arguments that the United States had no legitimate interest in "policing private dealings between a foreign bank and a private citizen on the other side of the world".[70] Now framed within the doctrine of abuse of process, and embroidered with expert opinion, the Applicant again argues that to extradite in these circumstances would be helping to enforce laws alleged to be offensive to Canadian values and contrary to the principles of fundamental justice.[71]

41. Neither the invocation of the abuse of process doctrine nor customary international law advance her case. To the extent that the Applicant raises issues relevant to this Court's role under s. 29(1), they have been addressed by this Court's ruling on the double criminality application.

42. Both the *Act* and case law clearly set out the approach that an extradition judge should take to the location of the alleged conduct: for the purpose of assessing double criminality, it is deemed to have taken place in Canada. Subsection 29(1) mandates that the judge order committal if there is evidence "of conduct that, had it occurred in Canada, would justify committal for trial in Canada." Courts have clarified that it is an error for the extradition judge to consider whether or

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[69] *United States v. Meng*, 2020 BCSC 785 at para. 30, summarizing Applicant's argument.
[70] *Ibid.* at paras. 30, 33.
[71] *Ibid.* at paras. 32 and 83.

not the conduct occurred in the requesting state, or to use the "mirror image" approach by notionally transposing only the conduct occurring in the requesting state to Canada.[72]

43. In the double criminality ruling, this Court has already ruled that:

a) "A domestic prosecution for fraud could properly…take place in Canada on the basis of false statements made in Canada that put a US bank at economic risk for violating US sanctions."[73]

b) "…the essence of the alleged wrongful conduct in this case is the making of intentionally false statements in the banker client relationship that put HSBC at risk. The US sanctions are part of the state of affairs necessary to explain how HSBC was at risk, but they are not themselves an intrinsic part of the conduct."[74]

c) "[The Applicant's] approach to the double criminality analysis would seriously limit Canada's ability to fulfill its international obligations in the extradition context for fraud and other economic crimes. The offence of fraud has a vast potential scope. It may encompass a very wide range of conduct, a large expanse of time, and acts, people, and consequences in multiple places or jurisdictions. Experience shows that many fraudsters benefit in particular from international dealings through which they can obscure their identity and the location of their fraudulent gains. For the double criminality principle to be applied in the manner Ms. Meng suggests would give fraud an artificially narrow scope in the extradition context. It would entirely eliminate, in many cases, consideration of the reason for the alleged false statements, and of how the false statements caused the victim(s) loss or risk of loss. By that approach, *Wilson*, described above, would, it seems, require a different result."[75]

d) "…economic sanctions laws such as were in place in the US at the time of the ATP are not part of Canadian law but they are also not fundamentally contrary to Canadian values in the way that slavery laws would be, for example."[76]

e) "That the Minister's decision concerning surrender is subject to judicial review gives yet further protection against an unjust or oppressive result flowing from the consideration of foreign law, as context for the alleged conduct, in the double criminality analysis."[77]

44. As will be discussed further below, neither the Requesting State's prosecution nor this extradition process gives "extraterritorial effect" to offences under U.S. sanctions laws, as the

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[72] See *Lépine*, at p. 288; *Commisso*, paras. 36-39; *Fraser*, at paras. 48, 76.
[73] *Meng*, at para. 61.
[74] *Ibid.* at para. 80.
[75] *Ibid.* at para. 82.
[76] *Ibid.* at para. 85.
[77] *Ibid.* at para. 87; the *Act*, s. 44.

Applicant claims.[78] The Applicant is not charged with such offences; she and her co-defendants are charged with defrauding MFIs. In any event, to the extent this issue is relevant to the Minister's decision on surrender, the decision is subject to judicial review by the Court of Appeal, which is competent to grant *Charter* remedies.[79]

45. In sum, this application raises arguments that merely re-articulate ones raised before, or are small variations on what has been argued before, and that were decided against her. Questions concerning the Requesting State's jurisdiction should be raised with the Minister or the trial court.

B. The Applicant Has Not Established an Abuse of Process

46. The Applicant has attempted to style a jurisdictional issue as an abuse of process issue. Even if we assume that it is proper to re-cast a jurisdictional issue as one of abuse of process, the argument must fail. To amount to an abuse of process, the Applicant must establish serious state misconduct or other similarly egregious circumstances. Nothing about the Requesting State's assertion of jurisdiction is capable of rendering an order of committal contrary to the principles of fundamental justice or undermining the integrity of this Court's judicial process. The test is a rigorous one and the remedy is rarely granted; the Applicant cannot meet the necessary standard.[80]

1. Legal Principles: The Applicant's Burden to Justify a Stay of Proceedings is Onerous

a) The Applicant Must Meet the Tripartite Test for a Stay

47. The test for abuse of process can be satisfied in either of two ways. On the first, or "main" branch, the Applicant must establish that there has been serious state misconduct or other circumstances that compromise the fairness of the committal hearing. On the second, or "residual" branch, the Applicant must demonstrate that continuation of the hearing will damage the integrity of the judicial process.[81] The Applicant relies exclusively on the residual branch.[82]

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[78] See discussion, below, in section B.4.
[79] *Kwok*, at para. 80-83.
[80] See *R v. Babos*, 2014 SCC 16, [2014] 1 SCR 309 at para. 30-31, 39, 44; *R v. Regan*, [2002] 1 SCR 297 at para. 55; *R v. Carosella*, [1997] 1 SCR 80 at para. 52; *R v. O'Connor*, [1995] 4 SCR 411, at paras. 68-69, 77, 81-82.
[81] *Babos*, at para. 31, see also *Henry v. British Columbia (Attorney General)*, [2015] 2 SCR 214 at para. 50.
[82] Applicant's Submissions, paras. 88ff, 108-113.

48. In *R v. Babos*, the Supreme Court clarified that the framework used to determine whether a stay of proceedings is warranted applies equally to the main and residual categories:

> 1) There must be prejudice to the accused's right to a fair trial (or, in this case, fair extradition hearing) 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."[83]

49. The Supreme Court has repeatedly emphasized that courts must determine the prospective impact of the conduct in question, calling the first criterion of the test "critically important".[84] It is only in "exceptional" and "relatively very rare" cases that past misconduct will be "so egregious that the mere fact of going forward in the light of it will be offensive".[85] Regarding the second step, *Babos* clarified that different remedies may apply depending on whether the prejudice relates to the right to a fair hearing or the integrity of the justice system. Where the concern is trial fairness, the focus is on restoring the accused's right to a fair trial.[86]

50. In residual category cases, balancing must always occur, since courts must consider whether staying the proceedings or continuing better protects the integrity of the justice system. Relevant factors include

a) the nature and seriousness of the impugned conduct;
b) whether the conduct is isolated or reflects a systemic and ongoing problem;
c) the circumstances of the accused;
d) the charges he or she faces; and

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[83] *Babos*, at para. 32, citing *Regan*, at paras. 54 and 57.
[84] *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 SCR 391 at para. 91; *Regan*, at para. 54; *Babos*, at paras. 34, 38-39; *O'Connor*, at paras. 75, 82.
[85] *Regan*, at para. 55, citing *Tobiass* at para. 91; see also *Babos*, at paras. 36 and 38.
[86] *Babos*, at para. 39.

e) the interests of society in having the charges disposed of on the merits.[87]

51. In the extradition context, courts consider whether the impugned conduct is "disproportionate to the societal interest in the effective discharge of our international obligations to those accused of serious crimes in the jurisdiction of our extradition partner."[88] A stay of extradition proceedings is no small matter: imposing one would deny a requesting state the ability to have the truth of the allegations determined, a result that is as drastic as staying a prosecution.[89] For that reason, stays will be granted only in that the "clearest of cases".[90]

b) The Extradition Context

52. The jurisdiction of an extradition judge to stay proceedings is limited to situations where "the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process."[91] Courts have only stayed extradition proceedings for abuse of process in rare circumstances.

53. When the main category is invoked, the question is whether the person sought's right to a fair hearing has been prejudiced and whether that prejudice will be carried forward through the conduct of the hearing.[92] In *Cobb*, a stay of proceedings was upheld because the fairness of the hearing was compromised by the offensive, threatening comments of a foreign prosecutor and trial judge. The extradition judge found that such comments were a direct attempt to interfere with the committal hearing.[93] In *United Kingdom v. Tarantino*, the Court found that the requesting state's conduct in repeatedly and erroneously certifying evidence as available in a careless and cavalier

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[87] *Ibid.* at para. 41.
[88] *United States v. Cavan*, 2015 ONCA 664 at para. 67; see also *United States of America v. Wilson*, 2016 BCCA 326 at para. 81.
[89] See for *e.g. India v. Badesha*, 2018 BCCA 470 at paras. 95 and 99. See also *United States v. Lane*, 2014 ONCA 506 where the Ontario Court of Appeal found that the extradition judge erred by failing to consider the improbability of the requesting state later attempting to seek the person sought's extradition once a stay had been entered.
[90] *Babos*, para. 31; *O'Connor*, at paras. 68, 70.
[91] *Cobb*, at para. 26; *Kwok*, at paras. 5, 54, 56-57.
[92] *Babos*, at para. 34.
[93] *Cobb*, at paras. 7-9, 14, 33, 43.

manner undermined the fairness of the proceedings, but also engaged the residual ground by impacting on the ability of the Court to preserve the integrity of the process.[94]

54. The Applicant relies on the residual category of abuse of process. The residual category

> does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.[95]

55. There are no cases that suggest that an assertion of prosecutorial jurisdiction can amount to a contravention of fundamental norms. Nor could it: all courts have means of providing relief from unreasonable attempts to exercise jurisdiction, but there is no basis for wrapping them up in a claim of fundamental unfairness. The extradition cases where courts have found an abuse of process in the residual category featured egregious conduct:

a) *United States of America v. Tollman*[96] and *Poland (Republic) v. Bartoszewicz*,[97] both of which involved misuse of the immigration system to effect an extradition (*i.e.* a "disguised extradition");

b) *Attorney General of Canada v. Khadr*,[98] where the court found that the person sought had been subject to numerous shocking human rights violations while detained in Pakistan at the behest of the requesting state;

c) *United States of America v. Licht*,[99] where U.S. law enforcement entered Canada illegally and conducted a reverse sting operation, unbeknownst to the Canadian authorities and despite having been made aware of the legal requirements in Canada for conducting such an operation; and

d) *U.S.A. v. Alfred-Adekeye*,[100] where the cumulative effect of a number of findings was found to justify a stay, including the improper use of the criminal process to pressure the person sought to abandon a lawsuit; failure to make full and frank disclosure before the judge issuing the provisional arrest warrant, resulting in misleading and "sinister" inferences; use of the extradition process when the person sought had repeatedly attempted to

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[94] *United Kingdom v. Tarantino*, 2003 BCSC 1134 at paras. 28-31, 46, 55-56.
[95] *O'Connor*, at para. 73 [emphasis added].
[96] *United States of America v. Tollman*, 2006 CanLII 31731.
[97] *Poland (Republic) v. Bartoszewicz*, 2012 ONSC 250.
[98] *Khadr* (SCJ), aff'd *Khadr* (ONCA).
[99] *United States of America v. Licht*, 2002 BCSC 1151.
[100] *U.S.A. v. Alfred-Adekeye* (31 May 2011), Vancouver 25413 (BCSC, unreported) at paras. 36-56, 63-64.

> obtain a visa to enter the U.S.; and numerous misleading and false allegations included in a letter from the requesting state's prosecutor filed on the bail hearing.

56. In *United States v. Wilson*, the Court of Appeal found that the certifying prosecutor's conduct was not in keeping with the good faith obligations of the requesting state relating to certification. The Court declined to order a stay of proceedings, taking into account that there was no evidence of deliberate misconduct or a systemic problem.[101] Similarly, the Court of Appeal held in *India v. Badesha*[102] that the conduct of Canadian authorities in attempting to surrender the persons sought prior to making additional submissions to the Minister of Justice was an abuse in the residual category, but found it was not the clearest of cases warranting a stay.

57. Taken together, these cases show that the conduct must be extreme to amount to an abuse – threats, involvement in human rights abuses, misuse of the justice system – and even then, the conduct may not be sufficient to justify a stay.

2. Deference to the Trial Court on this Issue Does Not Prejudice the Integrity of the Judicial Process

58. Canadian courts have repeatedly held that challenges to the jurisdiction of a requesting state to prosecute are for the trial court to consider. Deferring to the trial court is a matter of judicial comity, and causes no prejudice to the integrity of these proceedings. Rather, it is both consistent with the principles of fundamental justice in the extradition context and contemplated under customary international law.

59. The case law affirms that a contextual approach must be taken to identifying the principles of fundamental justice for extradition and determining whether a particular act or law offends those principles.[103] Extradition procedure is founded on the concepts of reciprocity, comity, and respect for differences in other jurisdictions.[104] As Rosenberg J.A. noted in *United States of America v. Yang*, "The implications of these contextual factors are profound."[105] In assessing the

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[101] *Wilson*, at paras. 68-83.
[102] *Badesha*, at paras. 92-100.
[103] See Kindler v. Canada (Minister of Justice), [1991] 2 SCR 779 at pp. 844-45; *Ferras*, at paras. 18-50; Canada v. Schmidt, [1987] 1 S.C.R. 500 at pp. 522-24; United States of America v. Yang (2001), 157 CCC (3d) 225 at paras. 41-42; Attorney General of Canada, on behalf of the Republic of Italy v. Seifert, 2003 BCSC 991 at paras. 37-43.
[104] *Kindler*, at p. 844.
[105] *Yang*, at para. 42.

constitutional implications of surrendering a person sought, courts are to proceed upon the premise that a requesting state's system of justice is sufficiently similar to Canada's:

> ...the courts must begin with the notion that the executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place, and must have recognized that it too has a duty to ensure that its actions comply with constitutional standards.[106]

60. The extradition judge's deference to the courts of the Requesting State is consonant with these principles. Moreover, the Supreme Court confirmed in *Lépine* that the question of the jurisdiction or legitimate interest of a requesting state to prosecute, is "essentially a matter governed by the law of that state."[107] Despite the Applicant's claim that she is not asking the Court to improperly determine jurisdiction under the Requesting State's laws, [108] this is plainly contradicted by her own arguments.[109] By asking the Court to determine whether the Requesting State's claim of jurisdiction to prosecute the Applicant under American law complies with customary international law, she is necessarily inviting the Court to consider the actions of foreign authorities pursuant to American law in a manner that is impermissible in the committal process.[110]

61. In the different context of judicial review of the Minister's surrender order, appellate courts have reiterated the propriety of a deferential approach in matters of jurisdiction. In *Canada (Minister of Justice and Attorney General) v. Kavaratzis*, the person sought argued that, since none of his alleged conduct in a conspiracy to distribute cocaine had occurred in the U.S., the Minister had erred in ordering his surrender. Doherty J.A. reiterated that, while in relevant circumstances the Minister might consider the issues of jurisdiction, they are first for a requesting state:

> The Minister's responsibility to monitor compliance with the Treaty and the Act cannot be equated with a freestanding duty to determine whether the requesting state's assertion of jurisdiction over the offence is well founded. *Re McVey* makes it clear that the determination of jurisdiction of the foreign court is a matter first for the foreign authorities and ultimately for the foreign court. The Minister is entitled to rely on the validity of the assertion of jurisdiction made by the requesting state. That is not to say that the jurisdiction of the foreign court can

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[106] *Schmidt*, at p. 523.
[107] *Lépine*, at pp. 287-88.
[108] Applicant's Submissions, paras. 7-8.
[109] See for e.g., Applicant's Submissions, paras. 5, 75, 80, 85, 102, 136.
[110] *McVey*, at pp. 527-28; *Canada (Justice) v. Fischbacher*, [2009] 3 SCR 170, at para. 52.

> never be challenged in the surrender phase of the extradition process. An individual whose extradition is sought could demonstrate that the assertion of jurisdiction by the requesting state is so clearly baseless under the law of the requesting state, or so clearly antithetical to Canadian notions of jurisdiction, that the Minister would be entitled to refuse to surrender the subject of the extradition request.[111]

62. Thus, jurisdiction to prosecute is primarily a matter for the foreign trial court, with the Minister having some residual capacity to consider the issue at the surrender phase.

63. Recently in *Romano*, the Court of Appeal rejected an argument that the applicants should not be surrendered to face trial for allegations that they concealed marijuana in hollowed-out logs and shipped them to California, on the basis that they did not know the destination of the logs. They claimed that without evidence of such knowledge, there was insufficient connection to the United States.[112] Rejecting this argument, the Court observed that "it is not necessary for the Minister to consider whether there is a sufficient connection to the requesting state. That is a question of jurisdiction… It would of course remain open to the applicants to challenge jurisdiction in the courts of California. Jurisdiction is ultimately a matter for determination by the court where it is sought to be exercised."[113]

64. Assessing the validity of the Requesting State's claim of jurisdiction would also be contrary to the principle of comity, which demands that Canada "maintain a limited role in the extradition process to prevent the proceeding from becoming a trial on the merits."[114] In *Canada (Justice) v. Fischbacher*, the Supreme Court noted that "it is not for the Canadian authorities, judicial or executive, to evaluate a foreign state's decision to prosecute the person sought for a given offence… To do so offends the underlying principle of comity and risks undermining the foundation of effective extradition practice."[115]

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[111] See *Canada (Minister of Justice and Attorney General) v. Kavaratzis* (2006), 208 CCC (3d) 139 at paras. 9-10 ("*Kavaratzis* (2006)") [emphasis added; citations omitted].
[112] *United States of America v. Romano*, 2016 BCCA 450, leave to appeal ref'd [2017] SCCA No. 13 at paras. 11-18 [emphasis added] ("*Romano* (JR)".
[113] *Romano* (JR), at para. 17.
[114] *Fischbacher*, at para. 52.
[115] *Fischbacher*, at para. 52; see generally at paras. 51-52.

65. Notably, American case law mandates a similar approach of deference and respect. In the U.S. extradition case of *Melia v. United States,* in response to a challenge to Canada's jurisdiction to prosecute, the United States Court of Appeals for the Second Circuit noted that it did not have to decide this issue, stating, "Melia will have the opportunity before the Canadian courts to challenge Canada's jurisdiction over him. We have the utmost confidence that the Canadian courts will decide the jurisdictional issue correctly."[116]

66. While it is true that Abella J. emphasized in *Nevsun Resources Ltd. v. Araya* that the deference accorded by comity "ends where clear violations of international law and fundamental human rights begin,"[117] the alleged breaches of the permissive principles of jurisdiction in this case are far from reaching that high threshold. The Court in *Nevsun* was considering alleged breaches of the prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity, while the other cases cited by the Court considered whether a person could be surrendered if they might face the death penalty or "systematic human rights abuses", or be deported to torture.[118]

67. Moreover, the Supreme Court held in *Kazemi Estate v. Islamic Republic of Iran* that, with the exception of *jus cogens* norms, the mere existence of an international legal obligation is not sufficient to establish a principle of fundamental justice.[119]

68. Finally, it is entirely consistent with customary international law for the trial court in the state asserting jurisdiction to determine the validity of the claim under domestic law. The principles of jurisdiction are permissive.[120] The authors of *International and Transnational Criminal Law* explain that this means, "[i]n customary international law, states are *permitted* to exercise criminal jurisdiction consistently with traditional principles, but unless a particular prohibition has *jus*

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[116] *Melia v United States*, 667 F(2d) 300 (2d Cir 1981) at 303.
[117] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 50.
[118] See *ibid.* paras. 50-54.
[119] *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 SCR 176 at paras. 150-51.
[120] Robert J. Currie and Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed. (Toronto: Irwin Law, 2020) at p. 102; see also Expert Report of Cedric Ryngaert, Exhibit A to Affidavit of Cedric Ryngaert dated December 12, 2020, Applicant's Record – Fourth Branch Abuse of Process, Tab 2, paras. 8, 10-12 ("Ryngaert Report").

cogens status, they are not *required* even to establish jurisdiction over a particular individual and his acts."[121]

69. Thus, consistent with the notion of sovereignty, states are permitted to prescribe criminal offences and then enforce, or give effect, to its criminal law. Subsequently, and as Professor Ryngaert acknowledges in his report, an assessment of jurisdiction involves considering the circumstances of each case and interpreting domestic statutes prescribing the offences.[122] Indeed, domestic court judgments provide one of the sources of state practice, which may ultimately lead to a custom, including, potentially, new bases of jurisdiction.[123] It is clear that the domestic court of the state asserting jurisdiction is the proper forum for such assessments to be conducted.

70. In short, customary international law does not provide a basis to conclude that this Court's integrity would be affected by a potential committal order merely because the Applicant challenges the lawfulness of the trial court's jurisdiction. Even on the evidence of one of the Applicant's experts, it is plain that she would be free to make these arguments before the trial court.[124]

3. No Basis in the Requesting State's Allegations to Conclude that a Committal Order Would be Tainted

71. The Applicant has failed to establish that the Requesting State's claim of jurisdiction so offends the principles of fundamental justice and the community's sense of fair play and decency that the Requesting State is disentitled from pursuing her committal. As the case law makes clear, the extradition judge does not determine whether there is "sufficient connection" to the Requesting State. Nevertheless, a cursory examination of the key allegations demonstrates several links to the Requesting State, such that an abuse of process claim cannot be sustained.

a) There are Clear Links to the United States

72. The Applicant's argument that the connection with the Requesting State is "wholly insufficient and artificial"[125] is premised on an unduly narrow characterization of the allegations

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[121] Currie and Rikhof, at p. 102 [emphasis in original]. See also *Kazemi Estate*, at para. 61.
[122] Ryngaert Report, paras. 12, 14.
[123] *Nevsun*, para. 70-72; Ryngaert Report, para. 11.
[124] Dodge Report, at paras. 17-18, 26-36.
[125] Applicant's Submissions, para. 4.

against her and ignores important context. The appropriate authorities assess jurisdiction on the basis of the prosecution's allegations, not whether those allegations could be proved.[126]

73. The Requesting State's allegations must be considered as a whole:

a) **It is alleged that the misrepresentations were intended to reassure HSBC about their risks of exposure under U.S. laws**: The key allegations are that, in a presentation to HSBC Witness B, the Applicant misrepresented the true nature of the relationship between Huawei and Skycom by not disclosing that, in reality, Huawei treated Skycom as a *de facto* subsidiary. The presentation included statements intended to assure HSBC Witness B of Huawei's purported compliance with applicable U.S. sanctions laws, going as far as to state that Huawei communicated with US government agencies "on an annual and day-to-day basis" to better understand the applicable laws.[127]

b) **The context for the meeting is important.** The Applicant gave the presentation during an August 2013 meeting with HSBC Witness B that she herself requested. It took place directly in response to HSBC's concerns arising from allegations in the Reuters articles about conduct by Skycom that potentially violated U.S. sanctions involving Iran and close ties between Skycom and Huawei. HSBC had extensive dealings with Huawei on a global basis, which included dollar-clearing through HSBC U.S.[128]

c) **It is alleged that the misrepresentations were made to ensure that HSBC and its subsidiaries would continue to provide banking services.** Knowing HSBC was concerned about its exposure to risk based on U.S. sanctions laws, it is alleged the Applicant intended for HSBC Witness B and others at HSBC to rely on the statements in order to continue the banking relationship with Huawei. This relationship provided Huawei and its many subsidiaries and affiliates access to services that included dollar clearing through HSBC U.S. The Applicant was aware HSBC Witness B wanted, and obtained, a copy of the PowerPoint presentation. It is alleged that she knew and intended that her misrepresentations would be disseminated

[126] *Kavaratzis* (2006), at para. 17.
[127] ROC, paras. 24-28; SROC, para. 27; SSROC, paras. 2-4.
[128] ROC, Summary and paras. 14-16, 19-20, 24.

throughout HSBC, including to HSBC U.S., so that they would be relied upon, and banking services for Huawei, including dollar-clearing services, would continue.[129]

d) **It is alleged that the misrepresentation carried into the United States and had consequences there.** HSBC Witness B subsequently did disseminate the relevant portions of the Applicant's PowerPoint presentation to other HSBC personnel, which members of HSBC's risk committees relied upon in deciding to continue the client relationship with Huawei. Some of the relevant statements by the Applicant were also discussed at a meeting in New York by the risk committee responsible for HSBC's business in North America. The ROCs disclose that, relying on the misrepresentations by the Applicant and others, US $2,006,027.96 in payments from Skycom's account at a Chinese bank to Networkers cleared through HSBC U.S. in violation of U.S. sanctions law.[130]

e) **The risks that arose are connected to the United States.** By relying on the Applicant's misrepresentations, it is alleged that HSBC exposed itself to a risk of economic and financial prejudice, including under U.S. laws to which HSBC was subject and as a result of reputational risk. HSBC was also at risk under its 2012 DPA. It was within the sole discretion of the U.S. government to determine whether a breach of the DPA had occurred; there was a risk of liability as U.S. authorities would have had to believe HSBC's account that it was deceived by the Applicant to avoid liability. The parties that entered into the DPA with U.S. authorities are described in the SROC as "HSBC Holdings plc (HSBC Group) – a United Kingdom corporation headquartered in London – and HSBC Bank USA N.A. (HSBC Bank USA) (together, HSBC) – a U.S. federally chartered banking corporation headquartered in McLean, Virginia".[131]

f) **Alleged misrepresentations by other Huawei representatives took place in the United States.** The ROC includes allegations of misrepresentations by other Huawei representatives to Citigroup, an MFI headquartered in the United States. Citigroup provided banking services to Huawei on a global basis, including dollar-clearing services. It is alleged that Huawei's treasurer, Evan Bai, met with Citigroup Witness A in New York City in

[129] ROC, paras. 15-16, 25-26, 28; SROC, para. 27; SSROC, paras. 2-4.
[130] ROC, paras. 27, 33-35, 37-38, 74-75; SROC, paras. 22-26; SSROC, para. 7.
[131] ROC, paras. 1-6, 14; SROC, paras. 4-8, 16-21; SSROC, paras. 8-22.

September 2012 and stated, among other things, that Huawei had no sanctions-related issues. Citigroup was similarly concerned by the allegations in the Reuters articles, and considered representations by various Huawei representatives, including the Applicant, assuring Citigroup regarding Huawei's sanctions compliance measures.[132] The ROC also states that, in July 2007, Ren Zhengfei, the founder of Huawei and father of the Applicant, made similar representations regarding Huawei's compliance with U.S. export laws during an interview at a hotel in New York City with the FBI. He allegedly stated to the FBI that Huawei had not dealt directly with any Iranian company and that he believed Huawei had sold equipment to a third party, possibly in Egypt, which in turn sold the equipment to Iran.[133]

b) The Applicant's Characterization is Unduly Narrow

74. While the nature of the fraud alleged in this case may be transnational in scope, the allegations summarized above disclose many connections to the Requesting State. This Court noted in the double criminality ruling that fraud has a vast potential scope and "may encompass a very wide range of conduct, a large expanse of time, and acts, people, and consequences in multiple places or jurisdictions."[134] This was also recognized by the Supreme Court in *Libman*, where the Supreme Court noted that a transnational fraud may be "both here and there."[135]

75. In contrast, the Applicant's narrow characterization of the allegations finds no basis in the record or the law. First, the Applicant's arguments are unduly focused on U.S. sanctions laws, which provide context to understand the alleged misrepresentation and the ways in which risk arose for HSBC, but are not the basis for the charges against her. The issue is not whether the Applicant breached sanctions laws, it is whether she engaged in fraudulent conduct. Each of the offences with which she is charged relate to fraud.

76. Furthermore, to the extent that the experts have provided opinions on the narrow premise that the Applicant's alleged conduct occurred entirely outside of the U.S., related to a non-US

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[132] ROC, paras. 39-44
[133] ROC, para. 68.
[134] *Meng*, at para. 82.
[135] *Libman*, at para. 63.

bank, and can only be linked to the U.S. based on dollar-clearing, they are of little assistance to this Court.[136]

77. This approach ignores the nature and substance of the Applicant's alleged misrepresentations, entangled as they were with implications for HSBC and its subsidiaries in the U.S. The Applicant is alleged to have wanted the banking relationship with HSBC to continue, which included dollar-clearing services, and to have known that her statements would be disseminated to others, including in the U.S, which they were. There is no justification for considering the risks that arose for HSBC narrowly on the basis that it is headquartered in the United Kingdom, since HSBC is subject to U.S. laws, and the DPA with the U.S. government clearly applied to HSBC Holdings plc and HSBC U.S.[137]

78. Finally, whether or not the Requesting State's evidence will eventually establish at trial that the Applicant "caused" HSBC U.S. to clear prohibited transactions is irrelevant to this abuse of process application, as well as to the Minister's consideration.[138] In *Kavaratzis*, Doherty J.A. clarified that it was an error to "confuse the question of proof with the question of jurisdiction":

> It may be that the American authorities will in the end fail to prove that the applicant was a party to the "general conspiracy" alleged. Jurisdiction over the offence does not, however, turn on whether the prosecution will eventually be able to prove that an individual accused was a party to that offence. Jurisdiction over the offence must be determined at the outset and must look to the allegations made by the prosecution... [139]

79. A consideration of the allegations demonstrates that the Applicant's claims are not capable of rising to an abuse of process, much less circumstances justifying the drastic remedy of a stay.

4. The Applicant's Claim that the Allegations are Extraterritorial Does Not Establish an Abuse of Process or Justify a Stay

80. The Applicant contends that the charges against her are an impermissible assertion of extraterritorial jurisdiction on the basis that her alleged conduct is "entirely extraterritorial", and

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[136] See Dodge Report, paras. 9, 25, 37-38; Ryngaert Report, paras. 3, 27, 46;
[137] ROC, paras. 14-15; SROC, para. 16.
[138] Applicant's Submissions, paras. 67-69.
[139] *Kavaratzis* (2006), at para. 17.

caused no effects in the Requesting State. She further contends that the fraud-related charges against her give "extraterritorial effect to unilaterally imposed sanctions".[140]

81. None of these arguments establish misconduct, much less circumstances that are so egregious that the Requesting States should be disentitled to seek a committal order from this Court. As already discussed, the proper forum for the Applicant to make these arguments is the trial court, and within the extradition process, at the surrender stage. However, there is nothing abusive *per se* about this Court considering the context of U.S. sanctions laws or issuing a committal order relating to conduct that did not occur within the territory of the Requesting State.

a) No Abuse from Consideration of Sanctions in Committal Process

82. This Court has already concluded on the double criminality application that the "effects of the US sanctions may properly play a role in the double criminality analysis as part of the background or context against which the alleged conduct is examined."[141] In so concluding, the Court also found that such laws are not so fundamentally contrary to Canadian values that their allegedly offensive character must be considered on committal.[142] Indeed, as the Court observed, U.S. sanctions laws could properly be considered in a Canadian prosecution to explain how a bank faced an economic risk of deprivation for violating those laws, where there was sufficient connection to Canada.[143] It follows that considering them within the committal proceeding does not threaten the integrity of this Court.

83. As already demonstrated in the previous section, the Applicant wrongly asserts that the *only* link to the U.S. is through dollar-clearing. It is also clear that the Applicant is not charged with violating U.S. sanctions laws – dollar-clearing is only one part of the allegations underlying the Requesting State's charges. The prohibited Networkers transactions provide evidence that the Applicant misled HSBC with regard to the risks presented by Skycom and relating to the risks that arose to HSBC as a result of relying on her alleged misrepresentations. The Applicant's claims that the "near instantaneous" [144] nature of a dollar-clearing banking transaction undermines the

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[140] See for *e.g.*, Applicant's Submissions, paras. 4-6, 31-35, 41-57, 62-63, 85.
[141] *Meng*, at para. 88.
[142] *Ibid.* at paras. 83-87.
[143] *Ibid.* at para. 61.
[144] Applicant's Submissions, paras. 4, 70.

link to the Requesting State is without merit. The reality of crime and ordinary commercial transactions in a digital age belies the credibility of such a characterization.

b) No Abuse Due to Alleged Conduct Outside of the Requesting State

84. Finally, the fact that the Requesting State's case relies on conduct that occurred outside of its territory does not amount to an abuse. Section 5 of the *Act* provides for extradition whether or not the conduct underlying the charges occurred in the Requesting State and whether or not Canada could exercise jurisdiction in similar circumstances. In *Romano*, the Court of Appeal affirmed that in light of s. 5 and the governing Supreme Court authorities, "the Minister may certainly surrender a person to a requesting state where, as appears to be the case here, none of the conduct that is the subject of a prosecution in that state occurred there."[145] The Court also rejected the applicants' argument that s. 5 of the *Act* is overbroad such as to offend s. 7 of the *Charter*, given that it confers upon the Minister a discretion.[146]

85. Courts have reiterated that, while a weak claim of jurisdiction may be a factor for the Minister's consideration, the discretion to extradite regardless of the location of the conduct recognizes the various legitimate interests a requesting state may have in prosecuting offences, including if harmful impacts of the offending conduct would be felt there.[147]

86. Recently in *Sriskandarajah v. United States v. America*, the Supreme Court dismissed an argument that a weak claim of jurisdiction should be a determinative factor in the Minister's analysis of a potential s. 6(1) *Charter* breach "because of recent trends in extradition and criminal justice, in particular the emergence of sweeping claims of jurisdiction by foreign states over the conduct of Canadian citizens within Canadian territory."[148]

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[145] *Romano* (JR), at para. 16.
[146] *Ibid.* at para. 19; see also *Kavaratzis* (2006), at para. 13; Sagarra v. Canada (Minister of Justice), 2004 NLCA 7 at paras. 15-21; and Di Rienzo c. Canada (Ministre de la Justice), 2007 QCCA 1712 at para. 35 (noting that the *Treaty* permits the Minster a discretion to grant extradition even if in "similar circumstances" the offence would not be subject to the jurisdiction of Canada, and concluding that in the circumstances, it would not be an abusive, capricious, or arbitrary exercise of discretion).
[147] *Romano* (JR), at para. 16; Sriskandarajah v. United States of America, [2012] 3 SCR 609 at paras. 23-34; United States of America v. Cotroni, [1989] 1 SCR 1469 at pp. 1486-88; *Kavaratzis* (2006), at para. 10.
[148] *Sriskandarajah*, at paras. 15-23.

87. In *Sriskandarajah*, the U.S. had sought the appellants' extradition for various offences related to their alleged support of the activities of the LTTE, a terrorist organization that operated in Sri Lanka. None of their conduct took place in the territory of the U.S. In particular, Sriskandarajah was alleged to have assisted the LTTE in researching and acquiring submarine and warship design software, communications equipment and other technology. He also allegedly helped smuggle items into LTTE territory, laundered money for the LTTE, and counselled individuals on how to smuggle goods to the LTTE in Sri Lanka.[149] The Supreme Court found the Minister's assessment of the links to the U.S. reasonable, noting that the evidence was "connected in one way or another" to the U.S. due to the use of email accounts, companies, and bank accounts based within the U.S.[150]

88. Even if it could be said that the Requesting State is asserting extraterritorial jurisdiction in this case, which is not a matter that comes within this Court's statutory functions, such a notion is not so contrary to Canadian legal principles that it would be an abuse of this Court to continue with the committal proceedings. In *R v. Klassen*, Cullen J. (as he then was) confirmed that, while s. 6(2) of the *Criminal Code* codifies a presumption against extraterritoriality[151], Parliament has clear authority to legislate extraterritorially.[152] Furthermore, while customary international law is incorporated automatically into Canadian law, Parliamentary sovereignty dictates that a legislature may violate international law as long as it does so expressly.[153]

89. Courts here and in other jurisdictions have recognized that the realities of transnational crime may mean that many states have jurisdiction over alleged criminal activity and require effective international cooperation.[154] In *Libman*, the Supreme Court rejected a rigid approach to

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[149] *Ibid.* at paras. 1-2; see *United States v. Nadarajah* (2009), 243 CCC (3d) 281 at paras. 78-86.
[150] *Sriskandarajah*, at paras. 34-35. See also *France v. Ouzghar*, 2009 ONCA 69, leave to appeal ref'd [2009] SCCA No. 122, where none of Ouzghar's conduct involving the forging of a passport occurred on French territory but the Ontario Court of Appeal upheld the Minister's reliance on France's assertion of jurisdiction: paras. 2-4, 15-18.
[151] Courts in the United States take a broadly similar approach: see for *e.g.*, *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016); *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020); *United States v. Zarrab*, 2016 U.S. Dist. LEXIS 153533 (S.D.N.Y. Oct. 17, 2016).
[152] *R v. Klassen*, 2008 BCSC 1762 at paras. 77-80; see also *R v. Hape*, [2007] 2 SCR 292 at paras. 66-68.
[153] *Hape*, at paras. 36, 39; see *Kazemi Estate*, at paras. 56, 58-62; *Nevsun*, at paras. 86-87, 90-91, 94.
[154] See, for *e.g.*, *Libman*, at paras. 11, 65-68, 73-77; *Cotroni*, at pp. 1485, 1488; *Sriskandarajah*, at paras. 21-23; *Liangsiriprasert v. The Government of the United States of America*, [1990] UKPC 31, (1991) Cr App R 77 at pp. 90, and pp. 88-90 generally (cited to Cr App R); *R v. Smith*, [2004] 2 Cr App R 17, [2004] EWCA Crim 631 at paras. 53-56, 64; *Lipohar v. R.* [1999] HCA 65 at paras. 37-39, 122-25, 263-274.

jurisdiction that required mechanical assessments of the location of the gist or essential element or conclusion of the offence, in favour of a flexible approach, "tak[ing] into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence."[155] It is hardly surprising that an alleged bank fraud by an employee of a telecommunications company with a global presence and dealings with a multinational financial institution involves allegations linked to several jurisdictions. Canada's interests and obligations to cooperate with our treaty partners, the reciprocal nature of those obligations, and comity all weigh in favour of deference to the trial court of the Requesting State.

C. Conclusion

90. The Applicant has failed to demonstrate any basis for examining the propriety of the Requesting State's assertion of jurisdiction, contrary to the weight of the jurisprudence that clearly directs that this issue is expressly not for the committal judge. Thus, to the extent that the Applicant raises any issues relevant to the extradition process, they are not engaged at this stage. If ordered committed, she will be able to make submissions to the Minister, whose decision is subject to judicial review. The Applicant has failed to meet her onerous burden to establish misconduct or any other circumstances that make this one of the rare occasions that justify a stay of proceedings.

IV. ORDER REQUESTED

91. The Attorney General asks that the application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 24th day of February, 2021.

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[155] *Libman*, at para. 71.

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