Court 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

Respondent
(Requesting State)

AND:

Meng Wanzhou, also known as "Cathy Meng" and "Sabrina Meng"

Applicant
(Person Sought)

APPLICANT'S SUPPLEMENTAL SUBMISSIONS – THIRD BRANCH OF ABUSE OF PROCESS

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I. OVERVIEW

1. These Supplemental Submissions address the additional evidence and arguments on which the Applicant relies respecting the third branch of abuse of process.

2. The Applicant's Record and Supplemental Record[1] show the Requesting State has manipulated the case for committal and the certified evidence before the Court. It has mischaracterized evidence and omitted other evidence in an effort to establish a case of fraud. Its misconduct in certifying misleading evidence, coupled with its shifting theory of the case, has corroded the fairness of these proceedings. The Requesting State has abused the judicial process, frustrated the extradition scheme, and undermined the trust and co-operation required between Canada and the Requesting State to maintain international legal order.

3. The Applicant's submission respecting the Requesting State's breach of its duty to be diligent, candid, and accurate is set out in her Submissions filed July 17, 2020, and her Reply filed March 22, 2021. In sum, the corollary of having the privilege and evidentiary shortcut of certifying untested evidence is that the Requesting State must act in good faith[2] and bears the burden of presenting the facts of its case accurately and fairly.[3]

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[1] The Supplemental Record consists of the Affidavit of Lee Vandergust, affirmed June 7, 2021, filed on the fourth s. 32(1)(c) Application, the same paper volume to be re-filed on the Third Branch Abuse Application, in accordance with the correspondence of John M.L. Gibb-Carsley to the Court dated July 23, 2021.

[2] Article 26 of the *Vienna Convention of the Law of Treaties*, Can T.S. 1980 No. 37, which is binding on the Requesting State as a matter of customary international law, requires treaties to be performed in good faith. This means that the Requesting State, in certifying evidence pursuant to Articles 9(2) and 10(2)(b) of the *Treaty*, must do so honestly, fairly, and reasonably so as not to frustrate the parties' co-operative goals of mutual assistance in transnational criminal matters. In extradition proceedings, the Court and the Applicant are at the mercy of the Requesting State's chosen evidence and the ordinary checks and balances of the adversary system to test that evidence are not operative.

[3] See Applicant's Third Branch Submission at paras. 12—22; Applicant's Third Branch Reply Submissions at paras. 1—2. This duty is analogous to an affiant's weighty duty on *ex parte* applications: *R. v. Morelli*, 2010 SCC 8, at para. 58; *R. v. Araujo*, 2000 SCC 65 [*Araujo*], at paras. 46—47; *R. v. Booth*, 2019 ONCA 970, at paras. 54—56. The Requesting State's duty to the Court has been corroborated and amplified as a fundamental tenet of extradition law by other commonwealth countries: *Zakrzewski v. Poland*, [2013] 1 W.L.R. 324 (U.K.S.C.), at paras. 12, 13; *Knowles v. U.S. Government*, [2006] UKPC 38, at para. 35; *Dotcom v. United States of America*, [2014] NZSC 24, at paras. 152, 315, see also paras. 58, 67 [per Elias C.J.], 148-151 [per McGrath and Blanchard JJ.], 228, 238 [per William Young J.], and 264-265 [per Glazebrook J.].

4. These Submissions address the Applicant's Supplemental Record, which is the same evidentiary record filed in support of her fourth Application to adduce evidence under s. 32(1)(c). In summary:

- The extradition hearing and the abuse of process application are separate and distinct.[4] This Court has ruled against the admission of the evidence in the Applicant's Supplemental Record in the extradition hearing under the strict rules imposed by s. 32(1)(c). But as the Court noted, the test for admission under the Act is "a demanding one": the evidence must be "essential to the determination" on committal.[5] In contrast, the test for admission of evidence on a *Charter of Rights and Freedoms* s. 7 abuse of process claim is mere relevance to a cognizable complaint. The Applicant easily meets that test.

- The Court found that some of the new evidence does "appear to directly contradict statements or summaries in the ROCs" and that the description of emails in para. 31 of the ROC, for example, was "potentially unreliable and perhaps manifestly so".[6] Although the Applicant's evidence was not admissible for her committal hearing, the Court's reasoning does not immunize the Requesting State's drafting choices from judicial review under the abuse of process doctrine. The new evidence shows the Requesting State's "junior/senior" construct, a central theme in paras. 22 and 31—33 of the ROC,[7] is false. As the Court noted, after the Reuters articles were published so-called junior employees in fact told an HSBC senior executive "that Skycom accounts existed, that the accounts were associated with Huawei, and that they were now to be closed" by Huawei employees.[8] This evidence supports the Applicant's claim of deliberate deception in the ROC because it shows a fake narrative was constructed by the drafter. The Requesting State repeated the false "senior/junior" construct in paras. 23—24 of the SSROC. Although the Requesting State's narrative on committal has shifted away from the "junior/senior" distinction, the attempt to abuse the Court's process remains. The Requesting State has not explained why it certified manifestly unreliable allegations or changed its theory.

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[4] *United States v. Oliynyk*, 2020 BCSC 521, at para. 105.
[5] *United States v. Meng*, 2021 BCSC 1412 [*Meng #4*], at paras. 13, 33.
[6] *Meng #4* at paras. 33—35.
[7] See e.g. *United States v. Meng*, 2020 BCSC 1607, at para. 85.
[8] *Meng #4* at paras. 34—35.

- The Requesting State's approach to its certification obligation should be viewed cumulatively. First, the ROCs contain multiple examples of omissions and mischaracterizations: the Applicant was required to bring s. 32(1)(c) applications to correct the PowerPoint summary, the "junior/senior" distinction, the description of HSBC's potential sanctions liability, and the description of HSBC's potential criminal liability. Second, the Requesting State knew that its misleading drafting of the ROCs was contrary to its duty to the Court to be diligent, candid, and accurate. Misleading a party is one thing; misleading the Court is an affront of a whole other dimension. Third, the distortion of the content of the emails on the "junior/senior" issue appears to be wilful and strategic. The Applicant's evidence shows the Requesting State had access to the same pool of emails, particularly those supporting the "summaries" in the ROC at paras. 22 and 31—33. The ROC writing was designed to make the Requesting State's case appear stronger than the true facts permitted.

II. SUPPLEMENTAL ARGUMENT

Misleading Summary of "Junior/Senior" HSBC Employees and Their Roles

5. One narrative running through the ROCs is that, while some HSBC employees knew that Huawei controlled Skycom, so-called "senior executives" did not. This was designed to leave the Court with the impression that the knowledge of such details was confined to HSBC junior employees, even after the Reuters articles were published.

6. After the Court admitted evidence that HSBC employees with titles of "Vice President" and "Senior Vice President" knew the truth, the Requesting State repeated this false narrative. Rather than correcting the ROCs in accordance with its duty of candour, the Requesting State perpetuated the misleading narrative that only some "junior" employees knew the truth. The SSROC offered evasive evidence that individuals at HSBC in the seniority band of "Vice President" and "Senior Vice President" far outnumbered the relatively few individuals with the seniority of HSBC Witnesses A and B. It suggested that those in the know where "significantly more junior" and thus irrelevant to this case.

7. What the ROCs hid was that a senior executive, Managing Director [redacted] the Deputy Head of Global Banking China, was in complete possession of the true facts concerning the relationship between Huawei, Skycom, and Canicula, and that Huawei controlled Skycom. Contrary to the ROCs, Huawei's

control over Skycom was not kept from senior HSBC executives, nor was the continuing nature of Skycom's business with Huawei in Iran.[9] [redacted] was the key figure in assessing Huawei's risk, particularly in relation to sanctions and fraud – yet she is conspicuously omitted from the ROCs.[10] HSBC's risk assessments of Huawei by [redacted] and others were made during the material period. HSBC's reputational risk was managed by the closing of Skycom's and Canicula's accounts at HSBC by Huawei employees, to the knowledge of [redacted] and others. [redacted] worked with HSBC's Global Relationship Manager for Huawei, Senior Vice President [redacted], who also knew the truth. The entire Huawei Relationship Management Team at HSBC was equally in the know.

8. The Requesting State's failure to disclose this material evidence and its selective summary of the documents to hide this evidence is shocking in a case where the prosecution is trying to convince the Court that a global bank was misled by a single PowerPoint presentation by a client eight months before a risk committee met. The Applicant, the Minister of Justice, and the Court would not have known of the omissions and misrepresentations in the Requesting State's ROCs had the Applicant not obtained access to HSBC's internal records.

9. The Requesting State tailored its evidence to fabricate a "junior/senior" division between HSBC employees that is both false and, based on the actual function of some so-called "junior" employees, misleading. Given [redacted] and [redacted] pivotal roles in assessing Huawei's potential risk and in communicating that assessment to HSBC risk committees, the Supplemental Record upends the Requesting State's initial theory of the case. It was only after this misleading conduct was brought to light that the Requesting State appeared to pivot away from its primary position that no senior executives were made aware of the true situation. It is thus no answer on an abuse of process claim to say that based on a changing prosecution theory of liability, the previous deception is no longer important to the committal. The Requesting State has many privileges in extradition proceedings, but withholding key evidence to inflate the strength of its case is not one of them. Even after evidence was admitted on the first s. 32(1)(c) application undermining the "junior/senior" distinction, the Requesting State tendered a misleading SSROC falsely implying that the HSBC employees "in the know" were no more significant than the

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[9] *Meng #4* at paras. 33—37.

[10] Under the demanding standard for introducing evidence about committal, the Court rejected the Applicant's proposed inferences on the evidence about [redacted] and [redacted] roles in HSBC risk assessment. However, the burden is different on this application.

thousands of bank employees in the same seniority band. In reality, the employees in question were the very people responsible for maintaining the client relationship with Huawei and gathering information for the risk committees.

10. The Requesting State has not explained why it certified manifestly unreliable evidence on several topics. It has not relied on negligence or carelessness, the two most forgiving explanations. The inference left is that the Requesting State's conduct was deliberate and calculated.

Misleading Summary of What HSBC Witness B Communicated to the Risk Committee

11. HSBC Witness B's summary of the Applicant's PowerPoint is the key link between the Applicant and the risk committee. The Applicant told HSBC Witness B that Skycom's relationship with Huawei was "controllable." The new evidence establishes on a balance of probabilities that Witness B never told others at HSBC that the Applicant described Skycom as "controllable". Yet the ROCs make the Applicant's alleged deception about Huawei's control of Skycom an important feature of its case for prosecution.

12. The ROC was drafted to erase evidence of the veracity of the Applicant's statements, and to conceal the disconnect between her actual, truthful representations and the summary of her presentation provided by Witness B to the risk committees. In a case where HSBC is said to be "duped" by the Applicant into thinking that Huawei in no way controlled Skycom, it is inconceivable that the Requesting State would fail to disclose precisely what the recipient of the PowerPoint presentation understood or shared. HSBC Witness B apparently did not think Huawei's control of Skycom was important, a point that is misleadingly presented by the ROC summary. Further, the ROC fails to disclose that Witness B's summary of the Applicant's PowerPoint presentation for the Global Risk Committee had little to nothing to do with Huawei's relationship with Skycom, contrary to the Requesting State's entire narrative.

13. These omissions were clearly intended to bolster the strength of the Requesting State's case. But it is now clear that the Applicant's PowerPoint presentation could not have been the cause of any risk of deprivation by HSBC.

III. CONCLUSION

14. Although the Applicant need not establish bad faith on the part of the Requesting State, it is to be inferred from the significance of the relevant omissions and the Requesting State's repeated

mischaracterizations, including in the SSROC,[11] that its conduct was deliberate and calculated to leave those considering the case with the false impression that it was stronger than the true facts merited.[12] Such deliberate deception has been recognized as an important element in evaluating whether to vitiate the underlying process initiated by the investigating or prosecuting authority.[13]

15. Unlike in *Thomlison*, the Requesting State has never "smartly and rightly" sought remedial measures to correct the misleading nature of the ROCs or otherwise limit their prejudice to the Applicant.[14]

16. The cumulative misleading allegations in the ROCs are a clear abuse of process. Misleading evidence provided to the Court undermines both the fairness of the extradition hearing and the integrity of the judicial system.[15] Two factors strongly favour finding an abuse of process. First, the Requesting State is a repeat misleader. Counsel have been unable to find a case in which a treaty partner has certified unreliable or manifestly unreliable and potential misleading evidence on five points going to the core elements and additionally the key narrative, which resulted in the Requesting State being forced to narrow and re-frame its theory of fraud. The unprecedented abuse of the certification shortcut should not be rewarded but should instead be judicially recognized as an abuse. Second, in other contexts, deliberate lies aimed at the Court have been identified as an abuse of process in the Supreme Court of Canada and by senior provincial appellate Courts.[16]

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[11] Filed at a late stage of the proceeding and thus intended to "fill the gaps" in the Requesting State's case.

[12] Such an inference was drawn in *R. (Saifi) v. Governor of Brixton Prison*, [2001] 1 W.L.R. 1134 (U.K.Q.B.), based on a failure to disclose material evidence undermining the requesting state's case.

[13] *Araujo* at paras. 53—54.

[14] *United States of America v. Thomlison*, [2005] O.J. No. 1714 (Ont. S.C.J.), at paras. 10—11.

[15] *R. v. Harrison*, 2009 SCC 34, at para. 26.

[16] *Araujo* at para. 54; *R. v. Paryniuk*, 2017 ONCA 87, at paras. 66—70, 74—75 (leave to appeal to SCC refused); *R. v. Phan*, 2020 ONCA 298, paras. 54—56; *R. v. Bacon* (also called *R. v. Cheng*, 2010 BCCA 135) (leave to appeal to SCC dismissed).

17. This Court should dissociate itself from such misconduct. The Requesting State's deliberately misleading ROCs disentitle it from the Court's assistance. A stay of proceedings is necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Vancouver, British Columbia, this 26th day of July 2021.

[redacted]

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