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: THIRD BRANCH OF ALLEGED ABUSE OF PROCESS

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I. OVERVIEW

1. Comity and the presumed good faith of Canada's extradition partners in preparing an extradition request are foundational principles of extradition law that underlie every proceeding. An allegation that the Requesting State has, by design, fashioned a summary of the evidence to mislead this Court is grave and should not be given credence in the absence of compelling evidence of serious misconduct. Under the veneer of abuse of process, the Applicant makes what are in substance arguments about the sufficiency and reliability of the Record of the Case ("ROC") and Supplemental Record of the Case ("SROC")[1] – routine matters for the committal judge. Courts have been clear that such issues are effectively and fairly addressed under the *Extradition Act*[2] (the "*Act*") and that ultimate reliability is for the trial court. To establish that the Requesting State's conduct in preparing the ROCs amounts to an abuse requires satisfaction of a rigorous test. The Applicant has failed to meet that test.

2. While the Applicant attempts to bolster her allegations of omissions and misrepresentations in the ROCs by framing them as a breach of duties that she asserts result from certification, her submissions reflect a misunderstanding of the applicable legal principles. The Requesting State must conduct itself with candour and diligence. However, its obligations with respect to certification, summarizing the available evidence, and disclosure must be understood not in the abstract, but in light of the extensive jurisprudence on these subjects. A summary, by its nature, is a selection. It is designed to meet a requesting state's limited burden on committal. The mere absence of certain evidence from the summary does not establish misconduct.

3. There is no evidence that the Requesting State omitted evidence to mislead the Court, or that the ROCs were prepared in such a careless and cavalier manner as to be offensive to societal notions of fair play and decency. This Court has already concluded that most of the evidence the Applicant sought to adduce on this branch is irrelevant to the issue of committal. Omission of irrelevant evidence cannot establish misconduct, much less justify a stay of proceedings.

4. Moreover, the evidence that has been admitted under s. 32(1)(c) of the *Act* does not establish an abuse of process. There is simply no evidence to support the Applicant's allegation that the Requesting State improperly tailored the ROCs to mislead this Court. The Applicant's

[1] ROC, certified January 28, 2019; SROC, certified on February 28, 2019 (collectively, the "ROCs").
[2] *Extradition Act*, S.C. 1999, c. 18, as amended (the "*Act*").

complete PowerPoint presentation to HSBC was readily available to her and filed at her bail hearing prior to the ROC being certified. In addition, the Second Supplemental Record of the Case ("Second SROC")[3] provides context for ROC's summary of the PowerPoint and HSBC's corporate structure, undermining any allegation of misrepresentation. Nor does the absence of particular details about American sanctions law in the ROC support an inference of misconduct. The appropriate role of this foreign law on committal was unclear at the time of certification and required detailed submissions and a considered ruling by this Court. It is not reasonable to infer that any omission reflected a failure of due diligence or improper motive.

5. The summary of the evidence in the ROCs has not caused any prejudice to the Applicant's right to a fair extradition hearing. This Court admitted the limited evidence it determined to be relevant, thus remedying any potential unfairness. The *Act* empowers the Court to consider at the committal hearing whether the Applicant has rebutted the presumptive threshold reliability of any evidence in the ROCs and whether the Requesting State has established a *prima facie* case. The Supreme Court of Canada made plain in *United States of America v. Ferras* that allegations of error and falsification are evidentiary concerns that extradition judges are well-equipped to remedy without resort to s. 24(1) of the *Charter*.[4]

6. In short, there is no evidence of any misconduct by the Requesting State, much less misconduct that "falls so far below an expected reasonable standard to amount to a complete failure of due diligence."[5] The application should be dismissed.

II. ARGUMENT

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

1. The Applicant Must Meet the Tripartite Test for a Stay

7. In *R v. Babos*, the Supreme Court clarified the test for when an abuse of process may warrant a stay of proceeding. The test is a rigorous one, requiring evidence that satisfies a high

[3] Second SROC, certified on December 14, 2020.
[4] *United States of America v. Ferras; United States v. Latty*, [2006] 2 SCR 77 at paras. 32, 49-54, 59.
[5] *United Kingdom v. Tarantino*, 2003 BCSC 1134 at para. 46.

standard. The need for a high standard is justified by the fact that a stay "is the most drastic remedy a criminal court can order," and only warranted on rare occasions.[6]

8. The test 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.[7]

9. The *Babos* framework 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."[8]

10. 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".[9] 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".[10]

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[6] See *R v. Babos*, 2014 SCC 16, [2014] 1 SCR 309 at para. 30-31, 39; *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.
[7] *Babos*, at para. 31, see also *Henry v. British Columbia (Attorney General)*, [2015] 2 SCR 214 at para. 50.
[8] *Babos*, at para. 32, citing *Regan*, at paras. 54 and 57.
[9] *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.
[10] *Regan*, at para. 55, citing *Tobiass* at para. 91; see also *Babos*, at paras. 36 and 38.

11. 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.[11]

12. Finally, *Babos* affirmed that in residual category cases, balancing must always occur, since courts must consider which of two options better protects the integrity of the justice system: staying the proceedings or proceeding despite the impugned conduct. Relevant factors include

- the nature and seriousness of the impugned conduct;
- whether the conduct is isolated or reflects a systemic and ongoing problem;
- the circumstances of the accused;
- the charges he or she faces; and
- the interests of society in having the charges disposed of on the merits.[12]

13. Moldaver J. observed in *Babos* that the burden to justify a stay in the residual category is onerous and such cases will be "exceptional" and "very rare".[13]

14. The balancing test has been further refined in the extradition context to take into account factors of particular importance to that context. The test has been described as whether the impugned conduct amounting to an abuse 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."[14] 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 no less drastic than staying a prosecution.[15]

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[11] *Babos*, at para. 39.
[12] *Ibid.* at para. 41.
[13] *Ibid.* at para. 44.
[14] *United States v. Cavan*, 2015 ONCA 664 at para. 67; see also *United States of America v. Wilson*, 2016 BCCA 326 at para. 81.
[15] 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.

15. Although the doctrine of abuse of process has been largely subsumed under s. 7 of the *Charter*, the Supreme Court confirmed in *O'Connor* that the "clearest of cases" standard continues to apply when considering whether a stay would be "appropriate and just" under s. 24(1) of the *Charter*.[16]

2. The Extradition Context

16. The jurisdiction of an extradition judge to stay proceedings is limited. In *United States v. Cobb*, the Supreme Court confirmed that an extradition judge has the jurisdiction to stay proceedings either as a s. 7 *Charter* remedy or as part of the judge's common law power to prevent an abuse of process.[17] However, the extradition judge's *Charter* jurisdiction, which arises from s. 25 of the *Extradition Act*, extends "only insofar as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process."[18]

17. Courts have only stayed extradition proceedings for abuse of process in rare circumstances. 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.[19]

18. 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 designed to encourage the persons sought to abandon their rights to an extradition hearing.[20] Although the fairness of the hearing itself was not affected, the requesting state's conduct was found to be a direct attempt to interfere with the committal hearing:

> The issue at this stage is not whether the appellants will have a fair trial if extradited, but whether they are having a fair extradition hearing in light of

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[16] *O'Connor*, at paras. 68, 70.
[17] *United States v. Cobb*, 2001 SCC 19, [2001] 1 SCR 587 at paras. 36-40.
[18] *Ibid.* at para. 26; see also *United States of America v. Kwok*, [2001] 1 SCR 532 at paras. 5, 54, 56-57. Although in *Cobb*, the Supreme Court considered the extradition judge's *Charter* jurisdiction under s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23 [am. 1992, c. 13], in the companion case of *Kwok*, the Court made clear that s. 25 of the current *Act* is effectively identical to s. 9(3) under the previous *Act*. The Court concluded that the resolution of the issue of *Charter* jurisdiction was the same under both provisions: see *Kwok*, at paras. 24, 56-57.
[19] *Babos*, at para. 34.
[20] *Cobb*, at paras. 7-9, 14, 33, 43.

> the threats and inducements imposed upon them, by those involved in requesting their extradition, to force them to abandon their right to such a hearing. The focus of the fairness issue is thus the hearing in Canada, to which the *Charter* applies, and not the eventual trial in the U.S., which it may be premature to consider pending the Minister's decision on surrender. Conduct by the Requesting State, or by its representatives, agents or officials, which interferes or attempts to interfere with the conduct of judicial proceedings in Canada is a matter that directly concerns the extradition judge.[21]

19. The fairness of the proceedings was also at issue in *United States v. Fafalios*.[22] The Crown's appeal was considered an abuse of process as it was precipitated by the Crown's invitation to stay the proceedings after declining to comply with a disclosure order. 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 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.[23]

20. The residual category of conduct caught by s. 7 of the *Charter*

> 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.[24]

21. Other extradition cases where courts have found an abuse of process in the residual category include

- *United States of America v. Tollman*[25] and *Poland (Republic) v. Bartoszewicz*,[26] both of which involved misuse of the immigration system to effect an extradition (*i.e.* a "disguised extradition");

[21] *Cobb*, at para. 33 [emphasis added].
[22] *United States v. Fafalios*, 2012 ONCA 365.
[23] *Tarantino*, at paras. 28-31, 46, 55-56.
[24] *O'Connor*, at para. 73 [emphasis added].
[25] *United States of America v. Tollman*, 2006 CanLII 31731 (*Tollman* Stay Ruling).
[26] *Poland (Republic) v. Bartoszewicz*, 2012 ONSC 250.

- *Attorney General of Canada v. Khadr*,[27] 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;

- *United States of America v. Licht*,[28] 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

- *U.S.A. v. Alfred-Adekeye*,[29] 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 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.

22. In *United States v. Wilson*, the Court of Appeal found that the failure of the certifying prosecutor to make enquiries about the availability of the victim witnesses, upon learning that two witnesses had died, 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, however, taking into account that there was no evidence of a deliberate intent to mislead or withhold information, or that the requesting state condoned or acquiesced in the prosecutor's conduct, or of a systemic problem.[30] Similarly, the Court of Appeal held in *India v. Badesha*[31] 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.

23. 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.

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[27] *Attorney General of Canada v. Khadr*, 2010 ONSC 4338 ("*Khadr* SCJ") aff'd *United States v. Khadr* 2011 ONCA 358.
[28] *United States of America v. Licht*, 2002 BCSC 1151.
[29] *U.S.A. v. Alfred-Adekeye* (31 May 2011), Vancouver 25413 (BCSC, unreported) at paras. 36-56, 63-64.
[30] *Wilson*, at paras. 68-83.
[31] *Badesha*, at paras. 92-100.

B. The Applicant Has Not Established an Abuse of Process in Either Category

24. The Applicant has not established serious state misconduct or other circumstances rising to the level of an abuse of process. There is no evidence that the Requesting State withheld or suppressed evidence to mislead this Court. Nor is there any evidence of improper motive by the authorities, as in other cases. While evidence of bad faith or an improper motive on the part of the foreign authorities is not required to establish an abuse of process,[32] the absence of such evidence is nevertheless relevant to whether conduct constitutes an abuse in the circumstances.[33]

25. The Applicant's allegations of material misrepresentations and omissions are in effect arguments about whether the ROCs establish a *prima facie* case of fraud and their threshold reliability. To the extent the allegations are about the ultimate reliability, they are matters for the trial court in the Requesting State.[34] The Applicant has failed to demonstrate any misconduct, and certainly none capable of causing irreparable prejudice to her right to a fair hearing.

1. No Conduct or Circumstances Causing Prejudice to the Integrity of the Justice System

26. The Applicant has led no evidence that would substantiate a claim of residual ground abuse – that is, serious state misconduct or circumstances connoting unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and undermines the integrity of the judicial process.[35] The Applicant's claims reflect a misunderstanding of the case law, which clearly describes the Requesting State's circumscribed obligations under the *Act*. A review of the complete record, including the Second SROC, reveals that the Applicant's allegations that the Requesting State failed to meet its obligations do not stand up to scrutiny.

a) This Court Should Not Give Credence to Claims of "Improper-Tailoring" Without Clear Proof of Wrongdoing

27. The Applicant's claim that the Requesting State has "improperly tailored" [36] the ROCs to mislead the Court is, in essence, an allegation of bad faith, improper motive, and prosecutorial misconduct. Courts have made clear in a series of judgments that such grave and serious allegations

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[32] *Canada (Attorney General) v. Barnaby*, [2015] 2 SCR 563 at para. 10.
[33] See for *e.g. R v. Nixon*, [2011] 2 SCR 566 at paras. 66 and 68; *O'Connor*, at para. 79.
[34] *Ferras*, at para. 57.
[35] *O'Connor*, at para. 73; *Babos*, at para. 35.
[36] Notice of Application re Third Branch dated July 17, 2020 at paras. 7-9.

demand clear evidence. In the present case, there is no direct proof, and the ROCs themselves do not support an inference of misconduct.

28. In *United States v. Turenne*, Steel J. of the Manitoba Queen's Bench refused to give credence to the suggestion that the requesting state had cherry-picked evidence based on an ulterior motive.[37] Steel J. relied in part upon *In re Arton*, a decision of the English High Court of Justice, where the fugitive had alleged bad faith. Lord Russell C.J. underscored the implications of such allegations:

> I come now to the third, and last, ground upon which this rule has been moved – that the demand for extradition is not made in good faith and in the interests of justice. It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the gravest possible kind, not only upon the motive and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring and friendly Power.[38]

29. In *United States v. Freimuth*, Romilly J. of this Court cited *Turenne* and *Arton* in rejecting an invitation to "look behind" the certification.[39] The Court of Appeal cited Romilly J.'s reasoning with approval in *Scarpitti v. United States of America*, where the person sought applied for further disclosure, claiming that his alleged co-conspirators had falsely implicated him in order to obtain plea agreements. The Court dismissed the application, finding there was no evidence of improper communication between the requesting state and co-conspirators.[40] Similarly, in *United States v. Akrami*, this Court declined to order disclosure to test allegations of improper motive and "cherry-picking" by the requesting state on the same basis.[41]

30. *Rogan* and *Tollman* confirm that there is an equally high bar in the context of allegations of misconduct in preparation and certification of the ROC due to material misstatement or omission. Fitch J. (as he then was) noted in *Rogan* that a stay could only be granted

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[37] *United States of America v. Turenne*, [1998] MJ No 541 (QL), 1998 CanLII 14095 (MBQB) at pp. 9, 11-13.
[38] *In re Arton* (1895), [1896] 1 QB 108 (QBD) at pp. 114-115 [emphasis added].
[39] *U.S.A. v. Freimuth*, 2004 BCSC 154 at paras. 2, 55-56.
[40] *Scarpitti v. United States of America*, 2007 BCCA 498 at paras. 27-28.
[41] *U.S.A. v. Akrami et al.*, 2000 BCSC 1438 at paras. 19-21.

> …in the face of conspicuous evidence of misconduct on the part of the Requesting State - whether advertent and intentional or inadvertent but rooted in gross negligence or dereliction of duty - that risks undermining the integrity of the judicial process.[42]

31. Likewise, in *Tollman* Molloy J. refused to order additional disclosure to further an abuse allegation, observing that there was considerable overlap between the evidence relied on at committal and allegations of abuse in deliberately misrepresenting evidence in the ROC. She held that to establish an abuse in such circumstances "the allegations must go further than attacking the truth or reliability of the evidence; it will be necessary to show additional evidence of wrongdoing by the foreign authority, over and above an attack on the accuracy of the evidence in the ROC", such as evidence that the prosecutor knew evidence was untrue.[43] Courts have also held that allegations of the certifying authority's knowledge, or repeated lack of diligence in confirming, that a witness had died and was unavailable for trial when certifying the ROC are capable of establishing an abuse.[44]

b) Principles Applicable to the Preparation of the ROCs

32. The Requesting State's conduct in preparing the summary of the evidence must be assessed in the context of well-established principles of extradition law. An omission of evidence *per se* does not establish misconduct, as the Requesting State is obliged to summarize evidence in the ROC, not produce all the evidence in its possession.

33. The fact that a requesting state may proceed on a summary of the evidence reflects the need for a flexible, non-technical approach to extradition proceedings.[45] The requesting state is not obliged under the *Act* to submit its entire case. Paragraph 32(1)(a) makes a certified ROC admissible, while s. 33(1) requires that the ROC include a summary of the available evidence. The constitutionality of those provisions was confirmed in *Ferras*.[46] Paragraph 32(1)(c) provides a vehicle for the person sought to adduce additional evidence that is relevant and reliable.

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[42] *U.S.A. v. Rogan*, 2014 BCSC 2370 at paras. 7 and 10.
[43] *United States v. Tollman*, [2006] OJ No 5588 (SCJ) at para. 65 [emphasis added] ("*Tollman* Disclosure Ruling").
[44] See for *e.g. Tarantino*; see also *Wilson*, at para. 77.
[45] *Ferras*, at para. 21.
[46] *Ibid.* at para. 50.

34. The effect of these provisions is that the requesting state has no obligation "to canvass all the evidentiary nooks and crannies of the case to come up with the summary."[47] As courts have repeatedly held, most recently by the Court of Appeal in *United States of America v. Finn*, "[t]he requesting state is not required to summarize in the ROC all the evidence it intends to lead at trial. The obligation is simply to establish a *prima facie* case for the surrender of the fugitive."[48]

35. Furthermore, this Court recognized in *United States v. Cheema* that a requesting state controls what evidence it relies on to meet this burden.[49] Indeed, if the Supreme Court's frequent assertion that an extradition hearing is "intended to be an expeditious process" [50] is to be realized, the Requesting State must be given considerable latitude to choose the evidence to be summarized.

36. If a requesting state's summary fails to establish a *prima facie* case, it runs the risk of a discharge.[51] The requesting state's burden on committal informs its disclosure obligations. In *United States v. Dynar*, the Supreme Court confirmed that the Crown's duty in domestic criminal proceedings to provide disclosure of all relevant material arises as a function of the defendant's right to full answer and defence, which is not applicable in the extradition context. In light of the limited nature of the extradition hearing, a requesting state must provide disclosure of materials on which it is relying to establish its *prima facie* case.[52]

37. The *Tollman* disclosure decision illustrates these principles. The Court rejected the claim that the prosecuting authority deliberately misrepresented evidence by including one witness's earlier statement but not including subsequent statements more helpful to the defence. Molloy J. noted that there is no obligation on a requesting state to include a summary of evidence that may be of assistance to the defence or frailties of the evidence tendered, nor is it a misrepresentation to refer only to statements that support the prosecution's case.[53]

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[47] *Germany v. Schreiber* (2001), 152 CCC (3d) 499 (Ont SCJ) at p. 522.
[48] *United States of America v. Finn*, 2017 BCCA 443 at para. 37. See also *U.S.A. v. Pannell*, 2007 ONCA 786 at para. 23; *United States of America v. Martin*, 2014 BCSC 1112 at para. 41; *U.S.A. v. Welch*, 2007 BCSC 1890 at para. 34; *Rogan*, at paras. 101-102; *Schreiber*, at pp. 520-21, 522; *Turenne* at p. 11.
[49] *United States v. Cheema*, 1999 CanLII 6966 (BCSC) at para. 31.
[50] *United States of America v. Dynar*, [1997] 2 SCR 462 at para. 122; *M.M. v. United States of America*, [2015] 3 SCR 973 at para. 38.
[51] See *Turenne*, at p. 13; see also *Cheema*, at para. 31.
[52] *Dynar*, at paras. 127-134.
[53] *Tollman* Disclosure Ruling, at paras. 71-72.

38. Finally, for allegations of misrepresentation by omission of evidence to amount to an abuse of process, the omission must have a serious impact on the fairness of the hearing. This is true even in the different context of domestic prosecutions. Although cases where the Crown has failed to disclose relevant evidence normally fall into the residual category of abuse, the impact of the non-disclosure on the fairness of the trial is nevertheless a central consideration when assessing the seriousness of the infringement. The Supreme Court has made clear that non-disclosure will generally amount to an abuse of process only where the defendant's right to full answer and defence has been impaired. Furthermore, a stay is only appropriate where the defendant demonstrates irreparable prejudice to that right and all other acceptable avenues of protecting it are exhausted.[54]

39. Extradition proceedings are not concerned with guilt or innocence. The person sought must demonstrate that evidence not disclosed in the ROC has caused irreparable prejudice to the right to a fair hearing, and that no other remedy will protect the fairness of the extradition hearing.

c) No Basis to Infer Bad Faith, Improper Motive, or Lack of Diligence and Care

40. The only evidence from which this Court may draw inferences about the Requesting State's conduct, motive, and intent in preparing the summaries of the evidence is the ROCs themselves and the documentary evidence adduced by the Applicant. However, this record contains no evidence to rebut the presumption that the ROCs were prepared in good faith, nor does it support the Applicant's grave claims that the Requesting State tailored its evidence to mislead the Court.

41. This Court may consider the Second SROC, since, as the Applicant acknowledges, the third branch abuse allegations concern the "heart of the Requesting State's theory of criminal liability."[55] Further submissions on the admissibility and relevance of the Second SROC are found below. Review of the record, including the Second SROC, confirms that there is no merit to the claim that the evidence admitted under s. 32(1)(c) demonstrates an abuse of process.

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[54] *O'Connor*, at paras. 74-77; *R. v. Dixon*, [1998] 1 SCR 244 at para. 35.
[55] Applicant's Submissions re Third Branch dated July 17, 2020 ("Applicant's Submissions"), para. 69(1).

i) The PowerPoint Presentation

42. This Court has admitted two statements from the translation of the PowerPoint presentation that the Applicant allegedly delivered to HSBC Witness B in August 2013:[56]

- "Huawei'e [*sic*] engagement with Skycom is normal and controllable business cooperation, and this will not change in the future", from slide 16, along with the full content of the slide for context;
- "As a business partner of Huawei, Skycom works with Huawei in sales and services in Iran", from slide 6.[57]

43. This Court concluded that these statements ought to be admitted on committal as they were realistically capable of demonstrating that the ROC's summary of the Applicant's statements to HSBC were potentially misleading.[58] Evidence framed in a potentially misleading manner is not, on its own, sufficient to establish an abuse of process.[59] Moreover, an examination of the ROCs clarifies that the omissions are not in fact misleading and do not render the summary of the PowerPoint presentations manifestly unreliable. They do not demonstrate abusive conduct.

44. First, while the ROC's summary does not include the word "controllable" in respect of the relationship between Huawei and Skycom, the ROC shows that the Applicant communicated to HSBC that Huawei exerted a certain amount of influence over Skycom. This is apparent from several of the representations included in the ROC's summary of the presentation, such as the statement that "Huawei requires Skycom to make commitments on observing applicable laws…" and that the Applicant's board membership and holding shares was meant to "better manage our partner". The ROC also included the Applicant's statement that these measures were no longer necessary "to monitor Skycom's compliance".[60] Indeed, it is a reasonable inference that the Applicant intended to assure HSBC of Huawei's ability to ensure Skycom's compliance with

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[56] ROC, para. 25.
[57] *United States v. Meng*, 2020 BCSC 1607 at paras. 38-40, 46-49 ("*Meng* (s. 32(1)(c) Ruling)"); Applicant's Record re Third Branch ("*Record*"), Vol. I, Tab 1A, Affidavit of Du Fei sworn December 4, 2018, pp. 6 and 16.
[58] *Meng* (s. 32(1)(c) Ruling), at paras. 38-40, 43-49.
[59] See *United States of America v. Boyachek*, 2013 BCSC 1636 at paras. 51-68 ("*Boyachek* SC"). See further discussion of *Boyachek* below at para. 87.
[60] See ROC, paras. 28 (b)-(e); see also SROC, para. 27.

sanctions laws in order to convince the bank that there were no risks associated with its "business partner" and secure its relationship with Huawei.[61]

45. Any meaning to be derived from the ambiguous word "controllable" must arise from the context of the whole presentation. The Applicant did not in fact disclose in the presentation the true nature of the relationship and that Skycom's shares were sold to another *de facto* subsidiary of Huawei. Rather, the presentation focused on Huawei's trade compliance efforts. The trade compliance theme is accurately reflected in the ROC's summary of Huawei's purported reasons for holding shares and the Applicant's membership on Skycom's Board.[62] There is thus no basis to conclude that the ROC misleadingly summarized the presentation; the Requesting State fairly summarized the Applicant's representations to HSBC that Huawei had the ability to influence Skycom's trade compliance.

46. The Second SROC also provides context for why the Requesting State's summary focused on the PowerPoint representations that attempted to distance Huawei from Skycom. The representations included in the ROC are consistent with the way Huawei portrayed its relationship with Skycom in a statement to Reuters, which is included in full in the Second SROC:

> The relationship between Huawei and Skycom is a normal business partnership. Huawei has established a trade compliance system which is in line with industry best practices and our business in Iran is in full compliance with all applicable laws and regulations including those of the UN. We require our partners, such as Skycom, to make the same commitments."[63]

47. Similarly, HSBC Witness B is expected to testify that the Applicant called Skycom a third-party business partner in her oral presentation on August 22, 2013.[64] The Second SROC also reveals that, after the August 2013 meeting, HSBC required proof that Huawei had sold Skycom to a third party as a condition of retaining their relationship.[65]

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[61] ROC, paras. 22(a), 24-25, 28(a),(b),(d),(e).
[62] ROC, paras. 28 (a)-(f); see also SROC, para. 27.
[63] Second SROC, at para. 1. See also *Record*, Vol. 1, Tab 6B, "Exclusive: Huawei CFO linked to firm that offered HP gear to Iran" (January 31, 2013), Reuters, Exhibit B to Affidavit of Diane Kaiser sworn July 13, 2020, 3rd page.
[64] Second SROC, at para. 2.
[65] Second SROC, at para. 5, 5(a)-(b).

48. To the extent the ROC stated that Huawei denied control over Skycom, this must be considered against the evidence in the ROCs as a whole. To establish a *prima facie* case, the Requesting State set out evidence to demonstrate that Huawei and the Applicant did not disclose that Skycom was, and continued to be, part of Huawei.[66]

49. Second, though the ROC did not expressly attribute the statement that "Skycom is a business partner of Huawei and works with Huawei in sales and services in Iran" to the Applicant,[67] the summary of her representations included reference to "normal business cooperation" between the two companies.[68] That HSBC Witness B knew this cooperation occurred in Iran is clear from the ROC: the main objective of the Applicant's meeting with HSBC was to provide information about potential sanctions risks arising from Huawei's work with Skycom in Iran, as initially identified in the Reuters articles.[69] There is no basis to conclude that the Requesting State was deliberately misleading about Huawei and Skycom working together in Iran.

50. Finally, the previous filing of the complete PowerPoint presentation in these proceedings undermines the Applicant's allegation that the certifying authority intentionally omitted specific statements to mislead the Court. The Affidavit of Du Fei dated December 4, 2018, filed on this application and attaching the PowerPoint presentation, was previously filed by the Applicant on her application for bail.[70] The ROC was prepared and subsequently certified on January 28, 2019. The notion that the Requesting State would have deliberately attempted to hide portions of a document that it was aware was filed in its entirety with the Court defies logic.

51. Additionally, as it was the Applicant's own PowerPoint presentation, it makes no sense that the Requesting State would attempt to mislead this Court about evidence that would be readily available to her. In two previous decisions, this Court has dismissed claims that a "strategic" omission of information known to be in the possession of the person sought could support an

[66] ROC, paras. 53-73; SROC, paras. 9-12; see also Second SROC, paras. 2-3, 5-6.
[67] At para. 34 of the ROC, the statement from p. 6 of the PowerPoint presentation is attributed to Huawei and not the Applicant specifically.
[68] ROC, para. 28(b).
[69] ROC, paras. 19-24; see also Second SROC at para. 2.
[70] The Affidavit of Du Fei was filed by the Applicant as an exhibit on her bail hearing: Exhibit 3, "Book of Evidence in Support of Notice of Application", Tab 8 (Exhibit Card No. 436371).

inference of an intention to mislead the Court. [71] As Fitch J. held in *Rogan*, it is not reasonable to infer an intention to suppress or mislead in such circumstances.[72] The Ontario Court of Appeal in *United States v. Pannell* also rejected an allegation that non-disclosure of evidence available to the person sought could undermine the presumed reliability of the ROC.[73]

52. There is no evidentiary foundation for a finding of misconduct or other abusive circumstances in relation to the Requesting State's summary of the PowerPoint presentation.

ii) Evidence Regarding U.S. Sanctions Law

53. This Court has admitted two passages from paragraphs 13 and 50 of the Report of John Bellinger relating to U.S. sanctions laws, concluding that the ROC has the potential to be misleading concerning the operation and effects of those laws.[74] The two passages were admitted in relation to the issue of causation and are repeated here for ease of reference:

> It is important to note that it would be a violation under the ITSR for "causing" another violation of the regulations whether the parties to any Iran-related payment are affiliates, partners, unrelated third parties, or the same entity transferring funds among its own accounts. It has no bearing on the U.S. government's theory of liability whether the payors or payees have any relationship at all, or whether the same party is on both sides of the payment. The only relevant facts for such a violation to be found are that the relevant payment results in the export of financial services in the form of dollar clearing from the United States to Iran by a U.S. bank (or other U.S. person).
>
> Whether Skycom was an affiliate, distant relative, or stranger of Huawei was at all times irrelevant.[75]

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[71] *Rogan*, at paras. 79, 90, 94, 103; *U.S.A. v. Welch*, 2007 BCSC 1890 at para. 35.
[72] *Rogan*, at paras. 79, 103.
[73] *Pannell*, at para. 23.
[74] *Meng* (s. 32(1)(c) Ruling), at para. 69; *Record*, Vol. 1, Tab 2B, Report of John Bellinger, III, Exhibit A to Affidavit of John Bellinger sworn May 13, 2020 ("Bellinger Report – Third Branch").
[75] Bellinger Report – Third Branch at paras. 13 and 50. The Applicant has filed two expert reports from Mr. Bellinger – one on the s. 32(1)(c) application, and the other on the third branch abuse application – that are identical up to para. 19. After para. 19, there are variations in the evidence, though many paragraphs appear in both versions. In the s. 32(1)(c) ruling, the evidence admitted from para. 50 of the Bellinger Report – Third Branch appears at para. 20 in the s. 32(1)(c) application record.

54. This evidence does not provide a foundation for concluding that the ROC's summary of U.S. sanctions laws misleads by omission. While Mr. Bellinger's evidence may provide further background or context about the effect of U.S. sanctions, it is incapable of establishing an abuse.

55. The level of detail about U.S. sanctions laws provided in the ROC does not provide grounds to conclude that the Requesting State behaved in a careless or cavalier manner, or deliberately attempted to mislead this Court. The extent to which American sanctions law could or should be relevant to the assessment of a *prima facie* case was the subject of vigorous debate on the double criminality application. While the argument was ultimately rejected, the Requesting State's primary position had been that a *prima face* case of fraud could be established without reference to the U.S. sanctions regime, and that sanctions laws only explained the motivation for the Applicant's alleged misrepresentations to HSBC.[76] This Court also observed that "no case authority to date directly answer[ed] the question of whether the 'essence' of conduct alleged to amount to fraud includes the legal context in which the impugned statements were made."[77]

56. These circumstances do not amount to an abuse of process. To the contrary, in response to the Court's concerns that the detail provided in the ROC was broad and general, the Requesting State has provided additional details regarding potential for liability under U.S. sanctions laws.[78]

57. Furthermore, Mr. Bellinger's evidence does not establish an omission or lack of diligence so egregious that it amounts to an abuse. In particular, his analysis does not address a matter central to the Requesting State's theory of liability: the risks to HSBC that arose from maintaining a relationship with Huawei itself. Mr. Bellinger's evidence diverts attention to the question of whether HSBC had enough information from the Applicant to avoid risk from Skycom's activities. However, the Requesting State's evidence suggests that if HSBC knew that the risk of maintaining Huawei as a client in fact included the risk of maintaining Skycom as a client – since they were effectively the same entity – then it would have assessed the risk in relation to Huawei differently. The ROC reveals that the focus of HSBC employees was Huawei's exposure.[79]

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[76] Requesting State's Written Submissions Re: Application for a Determination of a Question of Law Regarding Double Criminality dated January 8, 2020, paras. 49-56.
[77] *United States v Meng*, 2020 BCSC 785 at para. 64.
[78] Second SROC, paras. 18-22.
[79] See for *e.g.* ROC, paras. 22(a), 30, 38; Second SROC, para. 2.

58. Had HSBC the ability to assess risk accurately, it is reasonable to infer from the evidence that HSBC may not have maintained Huawei as a client and stopped clearing U.S. dollar payments for Huawei since Huawei's activities would have been of equal concern to HSBC. Huawei did indeed pose a risk to HSBC by virtue of the activities of its *de facto* subsidiary. The Networkers transactions, which violated US sanctions laws and were not disclosed by the Applicant, both pre- and post-dated the Applicant's meeting with HSBC Witness B, and provide some evidence of HSBC's exposure to risk from Huawei.[80]

iii) Evidence Regarding the Junior HSBC Employees

59. The Affidavit of Hou Jianguang was admitted under s. 32(1)(c) of the *Act* in relation to the reliability of statements in the ROC describing HSBC personnel with knowledge of the Huawei-Skycom relationship as "junior employees".[81] The admitted evidence demonstrates that these employees, [redacted] and [redacted] held the titles of "Vice President, Global Banking" and "Senior Vice President, Global Payment." The Applicant claims, based on these titles, that the ROC inaccurately described the employees as junior to mislead the Court about the relative seniority of personnel who were aware of the internal connections between Skycom's HSBC bank account and Huawei.

60. The Second SROC provides details about HSBC's corporate structure, demonstrating that the ROC's characterization of these employees as junior[82] was fair, and that the Applicant's claim is groundless. Special Agent Klein is expected to testify based on his experience investigating financial institutions that titles such as "vice president" and "senior vice president" do not connote positions second only to the "president" of the entire institution, or that individuals holding these roles could reasonably be viewed as senior. The Second SROC states, "To the contrary, individuals holding these roles generally serve the functions of securing new clients and managing existing client relationships." Nor are they considered "executives" of the bank, "who generally report to the Chairman/CEO and the Board of Directors."[83]

[80] ROC, paras. 74-75; SROC, paras. 23-24; Second SROC, para. 7.
[81] *Meng* (s. 32(1)(c) Ruling), at paras. 81-88.
[82] ROC, paras. 31-32.
[83] Second SROC, para. 23.

61. Employment information from HSBC reveals that, in 2011, there were approximately 20,000 HSBC employees in the same seniority band as [redacted] and [redacted], and approximately the same number in 2013 and 2014. The ROC states, "In contrast, during the same time period, there were approximately 200 employees with the seniority of either HSBC Witness A or HSBC Witness B."[84] Both HSBC Witness A and HSBC Witness B were described in the ROC as senior executives.[85]

62. Accordingly, there is nothing misleading or unreliable about the ROC's evidence that certain junior employees were aware that the Skycom account was internally connected to Huawei, but did not report this to more senior executives. The ROC explains that risk assessment and decision-making about retaining the relationship with Huawei were the responsibility of senior executives, including HSBC Witness A.[86] In any event, the evidence of what senior executives ought to have known is an issue for trial.

iv) The Remaining Evidence and Allegations

63. The Applicant's remaining allegations may be addressed summarily, as this Court has concluded in its ruling on the s. 32(1)(c) application that the bulk of the Applicant's evidence adduced on the third branch is irrelevant to committal. Specifically, this Court did not admit the following evidence under s. 32(1)(c), which has also been adduced on this branch of abuse:

a) The majority of the Mr. Bellinger's report, save for the two passages noted at para. 53, above. This Court found that a significant part of the report amounted to arguments that the Applicant may raise at the committal hearing. Other portions were found to be irrelevant to the issues in the extradition hearing, namely (i) whether or not the issues in the extradition are unprecedented in nature, (ii) that HSBC could have avoided clearing the U.S. dollar transactions through the U.S.; and (iii) that denominating payments in U.S. dollars is not prohibited by U.S. sanctions.[87]

[84] Second SROC, para. 24.
[85] ROC, para. 14, 23.
[86] See for *e.g.* ROC, paras. 30, 33-36.
[87] *Meng* (s. 32(1)(c) Ruling), at paras. 53-64. As noted above, it appears the Court was considering the Bellinger Report – Third Branch. As noted by the Court at para. 58, pp. 7-12 of the Bellinger Report – Third Branch deals

b) The Affidavit of Eric Wong, adduced in support of the Applicant's argument that the ROC is misleading by suggesting that HSBC could only have processed U.S. dollar transactions through the U.S., and describing the possibility of dollar-clearing through Hong Kong. This Court concluded that the evidence was not relevant since the ROC did not suggest any inevitability in HSBC processing the transactions through the U.S. and, in addition, the Requesting State is not arguing that the bank had no other options.[88]

c) The Affidavit of Zhang Fan, adduced in support of the Applicant's allegations that the Requesting State improperly implied that economic risk could arise from a proposed credit facility, and that a second credit facility was ultimately cancelled. This Court concluded that this proposed evidence could have no relevance to committal since the second credit facility would have remained open to Huawei, whether or not Huawei ultimately drew on it.[89]

64. The above evidence and related arguments on this branch of abuse are nearly identical to the Applicant's unsuccessful s. 32(1)(c) allegations regarding the unreliability of the ROCs.[90] As no breach of s. 7 can result from the omission of evidence that is not material to the proceedings, it cannot provide a basis for a finding of abuse or a stay of proceedings.[91]

65. The Application Record includes two additional affidavits that were not adduced on the s. 32(1)(c) application, neither of which provide any basis for a finding of abusive conduct:

a) The Affidavit of Julie Copeland, an American lawyer, attaches an expert report based on her experience in anti-money laundering and sanctions compliance. While the Applicant has not adduced HSBC's Deferred Prosecution Agreement on the third

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with the allegedly unprecedented nature of the Applicant's prosecution (though some of the same content appears in different places in the s. 32(1)(c) application record).

[88] *Meng* (s. 32(1)(c) Ruling), at paras. 74-80; *Record*, Vol. 1, Tab 3, Affidavit of Eric Wong sworn July 10, 2020, (the same affidavit appears in at Tab 2 of the s. 32(1)(c) application record).

[89] *Meng* (s. 32(1)(c) Ruling), at paras. 106-111; *Record*, Vol. 2, Tab 7, Affidavit of Zhang Fan sworn July 16, 2020 (the same affidavit appears at Tab 7 of the s. 32(1)(c) application record).

[90] See Notice of Application to Adduce Evidence pursuant to Section 32(1)(c) of the *Extradition Act* dated August 10, 2020, at paras. 2-3; see also Applicant's Submissions re Application to Adduce Evidence pursuant to Section 32(1)(c) of the *Extradition Act* dated August 10, 2020, at paras. 47-48, 51, 70.

[91] See *O'Connor*, at para.74; *Rogan*, at para. 91.

branch, she relies on Ms. Copeland's evidence to make effectively the same arguments rejected by this Court in the s. 32(1)(c) ruling. The Applicant relies on Ms. Copeland's evidence that the DPA required HSBC to "know its client" and screen all transactions using an automated monitoring system. However, as this Court has held, evidence of "HSBC's failure to protect itself from the economic consequences of a deceit, if established, will be of no relevance" since "[a] duped victim is no less a victim because they could or should have protected themselves against the fraud."[92]

Additionally, the Applicant's argument that Ms. Copeland's evidence demonstrates that it is "inconceivable an HSBC risk committee…would overlook the Bank's relationship with Skycom and Huawei" is speculative and irrelevant to the issue of committal.[93] The actual evidence in this case is that the senior executives, charged with making decisions regarding risk exposure from retaining a relationship with Huawei, relied on statements from Huawei, including the Applicant, not knowing about the links between Huawei and Skycom's accounts. The credibility or ultimate reliability of this evidence is for the trial court. On committal, the test is "whether there is any admissible evidence that could, <u>if believed</u>, result in a conviction."[94] Being irrelevant to committal, the Applicant's arguments cannot ground any finding of abusive conduct by the Requesting State.

b) The Affidavit of Diane Kaiser attaches the two Reuters articles referenced in the ROC.[95] While the Applicant's submissions refer in passing to the Reuters articles a number of times, they do not rely on this affidavit or allege any omissions or material misrepresentations in the summaries of the Reuters articles set out in the ROCs. Accordingly, this evidence is irrelevant to the Applicant's third branch allegations. To the extent the Applicant claims that issues of trade compliance were at the "heart of the Reuters articles said to have prompted the restaurant meeting", this could only bear

[92] *Meng* (s. 32(1)(c) Ruling), at para. 93, citing *R. v. Hansen*, [1983] 4 WWR 52 (Alta CA) at 54; *Record*, Vol. 1, Tab 4, Exhibit A to Affidavit of Julie Copeland sworn July 13, 2020, paras. 26-28 ("Copeland Report").
[93] Applicant's Submissions, para. 52; Copeland Report, at paras. 24-30.
[94] *M.M.*, at para. 45 [emphasis added].
[95] See for *e.g.* ROC, at Summary and paras. 19-24; *Record*, Vol. 1, Tabs 6A and 6B, Affidavit of Diane Kaiser sworn July 13, 2020.

> on her argument that the ROCs misrepresent the nature of her presentation as focussing on Huawei's control of Skycom, rather than on trade compliance. This Court has already rejected this argument, finding that trade compliance is a strong theme in the ROC's summary.[96]

66. Finally, the Applicant's claims that the Requesting State misleads this Court about (i) the timing of the Networkers transactions; and (ii) through its characterization of the proposed credit facility in its written *Larosa* submissions are frivolous.[97] The ROC fairly sets out that the Networkers transactions occurred both before and after the Applicant's alleged misrepresentations, and explicitly distinguishes transactions that post-date the Applicant's meeting in August 2013.[98] It also states clearly that the $900 million credit facility was proposed via signed letter.[99] The responding written submissions in the *Larosa* disclosure application reflected this evidence. On the issue of committal, it is open to this Court to accept or reject the argument that extending the loan gave rise to a risk to HSBC.

d) The Jurisprudence Does Not Support the Applicant's Claims

67. Neither *Tarantino* nor *Thomlison* assist the Applicant in demonstrating prejudice, much less prejudice warranting a stay. Unlike the present case, the courts in *Tarantino* and *Thomlison* had before them clear and cogent evidence that the requesting state had acted in a careless and cavalier manner, or with improper motive, resulting in manifestly erroneous certifications and a misleading ROC, respectively. In contrast, the Applicant's alleged omissions consist of evidence the Requesting State is under no obligation to include in the ROC.

68. The facts of this case bear no resemblance to *Tarantino*, where the extradition proceedings were stayed on the basis that the requesting state relied on a series of demonstrably unreliable certifications. The bulk of the evidence against Mr. Tarantino summarized in two successive ROCs came from two witnesses that had absconded or died. In each instance, the United Kingdom ("U.K.") authorities were aware for several months that the witness testimony had become

[96] *Meng* (s. 32(1)(c) Ruling), at paras. 34-36.
[97] Applicant's Submissions, paras. 53-57, 61-66.
[98] ROC, paras. 74-75; SROC, paras. 23-24.
[99] SROC, para. 6.

unavailable but did not advise Canadian authorities or correct the ROC. With respect to the second witness, the person sought discovered through a private investigator that he had been dead for four months at the time of the first ROC's certification, and 21 months at the time of the second ROC's certification.[100]

69. A third ROC was eventually certified and relied upon at the extradition hearing in *Tarantino*. As the third ROC excised the evidence of both witnesses, the Court concluded that their evidence was not available or admissible through other means. There was also evidence that the certifying authority in the U.K. had failed to make inquiries related to a third witness and did not realize he had moved to a different country.[101] Stromberg-Stein J., as she then was, found that the conduct of the U.K. authorities amounted to a complete failure of due diligence that impacted on the fairness of the extradition process and the ability of the court to preserve the integrity of the process.[102] Stromberg-Stein J. concluded that a stay of proceedings was justified in light of Her Ladyship's findings of a progression of inaccurate certifications:

> In this case, there is demonstrated proof that the relevant certifying official has not been diligent. There are two examples of serious misinformation on critical assertions in records of the case and evidence of a failure to act diligently to correct the situation once aware the certified evidence was not available. Even the most recent assurance by the same certifying official renders doubt about the certification process.[103]

70. The facts in *Tarantino* have been described by the Court of Appeal as "exceptional"[104] and "extreme".[105] No other extradition proceedings since have been stayed on the basis of allegations regarding the preparation of the ROC or reliability of the certification.[106]

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[100] *Tarantino*, at paras. 18-24.
[101] *Ibid.* at paras, 26, 28-29.
[102] *Ibid.* at paras. 46, 56.
[103] *Ibid.* at paras. 55-57.
[104] *Pannell*, at para. 22.
[105] *U.S.A. v. Pal*, 2010 BCCA 480 at para. 22.
[106] See for *e.g. Rogan*, at paras. 10, 61-62, 75-81, 89-95, 99-106; *Wilson*, at paras. 68-83; *United States of America v. Chandler*, 2019 BCCA 92 at paras. 71-76; *U.S.A. v. Boyachek*, 2014 BCCA 437 at paras. 43-44, 69-75; *Republic of Korea v. Lee*, 2012 ONSC 815 at paras. 36, 40, 45-49, 60-61; *Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337 at paras. 74-78. In *United States of America v. Toren*, 2012 BCSC 1655, the Court did not stay the proceedings. However, at the committal hearing, the extradition judge discharged the persons sought, having determined the certification was not reliable on the basis of evidence that additional individuals had died since a previous ruling where the Court had found there was no air of reality to an abuse of process.

71. In *Thomlison*, the Ontario Superior Court of Justice found that an intentional omission by U.S. authorities resulted in a misleading ROC. The requesting state had failed to disclose in the ROC that the anticipated evidence of a witness residing in Ontario had been gathered in an interview in Canada. The governing law at the time would have made such evidence inadmissible as part of the ROC and the Court found that the omission was "a transparent attempt on the part of the requesting state" to avoid cross-examination of the witness. Nevertheless, the Court determined that the appropriate remedy was to excise the misleading evidence, a decision that was upheld on appeal.[107]

2. No Conduct or Circumstances Causing Prejudice to the Applicant's Right to a Fair Hearing

72. The Applicant asserts that by "certifying misleading records", the Requesting State has engaged in misconduct. However, it does not follow that omissions and misrepresentations, even if established, necessarily make it unsafe to rely on the evidence in a ROC, undermine the certification, or require a constitutional remedy. The Applicant cannot point to any actual prejudice to her right to a fair hearing resulting from her alleged concerns about the evidence, as she is required to do.[108]

73. The *Act* empowers this Court to effectively address any concerns relating to threshold reliability or whether the evidence establishes a *prima facie* case. In *Ferras*, the Supreme Court concluded that two key protections under the *Act* assure the person sought a fair process: first, the admissibility provisions, including certification of a ROC under s. 33(3), aimed at establishing threshold reliability of the evidence; and, second, a meaningful judicial determination of whether it establishes a *prima facie* case, under s. 29(1).[109] The Court recognized that the judicial aspect of the extradition process protects both the integrity of the process and the interests of the person sought for extradition.[110]

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[107] *United States v. Thomlison*, [2005] OJ 1714 (Ont SCJ) at para. 14 ("*Thomlison* SCJ"); *United States of America v. Thomlison*, 2007 ONCA 42, at paras. 31-32 (*"Thomlison* CA").
[108] *Regan*, at para. 52.
[109] *Ferras*, at paras. 16-17 and 29, 43-47, 50.
[110] *Ibid*. at para. 23.

74. *Ferras* clarified that certification under s. 33(3)(a) means that evidence in a ROC is presumed reliable and available, because the principle of comity presumes the requesting state's good faith and diligence.[111] But the court recognized that a fair process consistent with s. 7 of the *Charter* must leave room to account for error or falsification. The person sought may attempt to rebut the presumptions of reliability and availability as part of a challenge to the sufficiency of the case.[112] Under s. 29(1), the extradition judge has the discretion to refuse extradition on the basis of insufficient evidence, including where the reliability of the evidence certified is successfully impeached or where there is no evidence that the evidence was available.[113]

75. The *Act*'s protections have been engaged by the Applicant in these proceedings, following the process set out in *M.M. v. United States of America*.[114] As part of her challenge to the sufficiency of the evidence, the Applicant applied under s. 32(1)(c) of the *Act* to adduce almost all the same evidence she has adduced on this branch of her abuse claims. This Court admitted the portions of the evidence it determined relevant, to be considered as part of the evaluation of the sufficiency of the case. Availability of the evidence is not in issue.

76. If this Court concludes, in light of the whole record, that admitted evidence renders evidence essential to committal unreliable or defective, it has a discretion under s. 29(1) to give it no weight. A constitutional remedy under s. 24 of the *Charter* is unnecessary where no issues of fairness other than reliability and availability have been raised.[115]

77. The Applicant's summary of the case law regarding certification under s. 33 of the *Act* contains no discussion of *Ferras* and relies almost entirely on *Tarantino*.[116] However, the comments of Stromberg-Stein J., as she then was, in *Tarantino* regarding the accuracy expected of the requesting state in the certification process must be read in light of the facts of that case. As discussed above, in *Tarantino* the certifications of a series of ROCs were demonstrably inaccurate and called into question the conduct of the certifying prosecutor who had carelessly neglected to advise Canadian authorities or correct the ROC about evidence that had become unavailable. In

[111] *Ibid.* at paras. 31-33, 51-53, 58.
[112] *Ibid.* at paras. 32-34, 49-54, 58.
[113] *Ibid.* at para. 50.
[114] *M.M.*, at paras. 73-85.
[115] *Ferras*, at paras. 59-60.
[116] Applicant's Submissions, paras. 15-20.

this case, the Applicant's concerns relate solely to the sufficiency and reliability of the evidence. The accuracy of the representations in the certification itself has not been impugned.

78. *Tarantino* must also be read in light of the subsequent decision in *Ferras*, which contemplates a fair process for assessing circumstances that fall short of the exceptional circumstances in *Tarantino*. In particular, in its detailed discussion of certification, the *Ferras* court made no mention of any "presumption of accuracy" conferred by certification, as asserted by the Applicant.[117] *Ferras* confirmed that the extradition judge does not consider whether the evidence summarized in the ROC is actually true.[118]

C. The Applicant Has Not Demonstrated That a Stay Is Justified

79. The Applicant has failed to establish any misconduct or circumstances that could amount to an abuse of process – a precondition for this Court to enter a stay of proceedings. Even if this Court were to find that such circumstances exist, the Applicant faces a second formidable burden: to establish that this is the "clearest of cases" that requires a stay. Any potential unfairness has been remedied by the admission of evidence under s. 32(1)(c). The Applicant cannot meet the tripartite test for a stay of proceedings.

1. The Applicant Has Failed to Establish Ongoing Prejudice or the Absence of an Alternative Remedy

80. The Applicant must demonstrate that proceeding on the ROCs as framed by the Requesting State would result in ongoing prejudice – that is prejudice that will be "manifested, perpetuated, or aggravated" through the conduct of the extradition hearing, or by its outcome.[119] She has failed to do so.

81. Simply put, this case does not feature the type of conduct by the Requesting State that is so intolerable that the Court must distance itself from it, so as not to "leave the impression that the justice system condones conduct that offends society's sense of fair play and decency."[120] The record does not evince the type of misconduct required in the context of allegations about

[117] Applicant's Submissions, paras. 1, 13-14.
[118] *Ferras*, at para. 68.
[119] *Babos*, at para. 32.
[120] *Ibid.* at para. 35.

misrepresentations in the ROC – that is, "conspicuous evidence of misconduct on the part of the Requesting State - whether advertent and intentional or inadvertent but rooted in gross negligence or dereliction of duty - that risks undermining the integrity of the judicial process."[121]

82. Even if the evidence admitted under s. 32(1)(c) demonstrates some "omissions" in the ROCs, it plainly does not justify the drastic remedy of a stay of proceedings.

83. There is no evidence of bad faith or improper motive, either direct or to be inferred from the ROCs. Regardless of whether any of the evidence admitted under s. 32(1)(c) impacts committal, it does not impugn the good faith and fairness of the Requesting State. This is particularly so, given that the law regarding the extradition judge's ability to consider foreign law as context for the allegedly criminal conduct was not entirely clear.

84. Nor will the circumstances of this case cause any ongoing prejudice to the Applicant's right to a fair committal hearing. The absence of such prejudice reinforces the lack of any harm to the integrity of the judicial process.

85. Further, the Applicant cannot satisfy the second step of the test because there is an alternative remedy capable of redressing the prejudice. The Applicant's claims about alleged omissions and the reliability of the evidence – the same concerns raised on this branch of abuse – have already been remedied through the admission under s. 32(1)(c) of the evidence allegedly omitted, where relevant to the committal hearing. To the extent that evidence in a ROC is demonstrated to be so misleading as to be manifestly unreliable, *Ferras* made plain that it is part of the extradition judge's central task on committal to consider whether there are compelling concerns about threshold reliability that justify disregarding any evidence on committal.[122] Resort to s. 24(1) of the *Charter* is unnecessary.

86. The jurisprudence illustrates the *Act*'s utility in addressing such concerns. Recently, in *United States v. Chandler*, the Court of Appeal upheld the extradition judge's continued reliance on the ROC even after the person sought challenged the reliability of a particular statement by adducing evidence that appeared to be contradictory. For the Court, Griffin, J.A. noted that the

[121] *Rogan*, at para. 10; see also *Tollman* Disclosure Ruling, at para. 65.
[122] *Ferras*, at para. 54.

> …authorities make clear that…the judge is not required to accept or rely on all of the evidence contained in the record of the case. Even if some of it is shown to be unreliable, that does not necessarily mean that the committal will be refused if there is sufficient remaining evidence to justify committal…"[123]

87. Likewise, in *United States of America v. Boyachek*, Griffin J., as she then was, did not rely on portions of the ROC that had the potential to be misleading, finding that the certifying prosecutor "was less careful than he should have been in the way in which he wrote the summary of evidence in the ROC."[124] Despite the issue not being raised before the Court, Griffin J. found that the conduct did not establish an abuse. She noted that the fairness of the hearing was not affected due to concessions by the Requesting State and clarification evidence provided in a supplemental ROC. The Court proceeded to rely on the remaining evidence that had not been affected by the misleading portions.[125] The Court of Appeal dismissed the person sought's argument, raised for the first time on appeal, that these circumstances amounted to an abuse.[126]

88. Even considering the Applicant's allegations on this branch under the rubric of abuse of process, they do not individually or cumulatively amount to the type of misconduct that would result in a stay of proceedings. In the circumstances of this case, where the evidence is "inextricably interwoven with the merits of the charges"[127], an alternative to a stay, such as admitting the allegedly omitted evidence, or excising any misleading evidence, would "adequately dissociate the justice system from the impugned state conduct going forward".[128]

89. For example, in *Thomlison*, the Court found that an omission of relevant evidence in the ROC was for the improper purpose of avoiding cross-examination of a witness and therefore excised the evidence of that witness in all respects. The Court nevertheless declined to find that the omission was for the purpose of misleading the Court and rejected the person sought's request for a stay of proceedings.[129] The extradition judge's decision to excise the evidence in *Thomlison* was upheld by the Ontario Court of Appeal. Moldaver J.A., as he then was, noted: "I should not

[123] *Chandler*, at para. 69.
[124] *Boyachek* SC, at paras. 51-52.
[125] *Ibid*. at paras. 55-68.
[126] *Boyachek* CA, at paras. 69-75.
[127] *Tollman*, at para. 73.
[128] *Babos*, at para. 39.
[129] *Thomlison* SCJ, at paras. 3, 14.

be taken as holding that the remedy of excision will be warranted in all cases where disclosure is found to be incomplete and misleading. To state the obvious, the appropriate remedy, if any, will depend on the facts and circumstances of the particular case."[130]

90. Where the Applicant cannot demonstrate ongoing prejudice to the fairness of her extradition hearing or the integrity of this judicial process or the justice system – that is, where there is no conduct that reaches into the jurisdiction of the extradition judge – "it is not open to [the extradition] judge to assume responsibility over the actions of foreign officials in preparing evidence or to assume that foreign courts will not give the fugitive a fair trial or cannot properly weigh evidence."[131] Any such allegations are more appropriately raised before the Minister of Justice to consider on surrender under his broad jurisdiction under s. 7 of the *Charter* and s. 44 of the *Act*.[132]

2. The Final Balancing

91. Given that any potential unfairness has already been remedied by the admission of any relevant evidence allegedly omitted, a final balancing may not be necessary. However, a balancing of relevant factors and interests takes on additional importance where a court is considering a stay based on the residual category.[133] In this case, the following factors weigh against a stay:

- Society's interest in the extradition of persons alleged to have committed serious offences outside of Canada[134] – a stay hinders Canada's ability to fulfill its international obligations and is thus only appropriate in circumstances where there is irreparable prejudice to the Applicant's fair hearing rights or conduct that is so offensive to society's sense of fair play and decency that to proceed with the hearing would perpetuate the abuse;

- The allegations are serious – the Applicant is alleged to have deceived a multilateral financial institution, giving rise to a risk of financial prejudice and potential liability, including under U.S. sanctions laws. The Requesting State has a legitimate interest in such matters being adjudicated on their merits; and

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[130] *Thomlison* CA, at paras. 31-32.
[131] *United States of America v. Shulman*, [2001] 1 SCR 616 at para. 59.
[132] See *Freimuth*, at para. 57; see also *Argentina v. Mellino*, [1987] 1 SCR 536 at para. 31.
[133] *Babos*, at para. 41.
[134] *Wilson*, at para. 81.

- There is no evidence of a systematic pattern of misconduct or any link between the allegations on the different branches of abuse.

92. While this Court may take into account the cumulative effect of any findings of misconduct, the present case lends itself to an individualistic approach. The Supreme Court adopted such an approach in *Babos*, where there were three alleged instances of misconduct that were separate and distinct, committed by different players: the first prosecutor on the case who made threats while plea bargaining, a different prosecutor's conduct in obtaining medical records of one of the defendants, and alleged collusion by police to mislead the court.[135] In a similar way, Fitch J. in *Rogan* summarily dismissed the allegations regarding misrepresentations in the ROC, finding there was no air of reality. Fitch J. found that CBSA's motivation to initiate and maintain immigration proceedings was not demonstrated to be linked to the requesting state's alleged misconduct in preparing the ROCs.[136]

93. Likewise, in this case, the Applicant's allegations regarding the preparation of the ROCs are separate and distinct from those relating to the other branches, involving different actors.

94. In any event, the "clearest of cases" standard remains, regardless of the approach taken to the separate types of alleged misconduct. Unlike a criminal trial, where doubt on a number of matters may add up to establish reasonable doubt, a stay cannot be established merely on the basis of several concerns if they nevertheless do not meet the test. There must be clear misconduct or circumstances amounting to an abuse of process that is irremediable without a stay, a conclusion that is not supported by the evidence in this case. The integrity of the justice system is better protected by proceeding with the extradition hearing.

D. Other Issues: This Court May Consider the Second SROC in Relation to the Third Branch Allegations

95. This Court may consider the Second SROC in relation to the third branch abuse allegations, since, as the Applicant acknowledges, they concern the "heart of the Requesting State's theory of criminal liability."[137] In *United States v. Wilson*, the Court of Appeal questioned in *obiter dicta*

[135] *Babos*, at para. 73.
[136] *Rogan*, at para. 62.
[137] Applicant's Submissions, para. 69(1).

whether it was open to the Requesting State to use the ROC provisions of the *Act* to respond to an allegation of abuse when the evidence in the ROC had "nothing to do with the merits of the case for committal."[138] Conversely, the evidence in the Second SROC relates directly to the Requesting State's case for committal and the reliability of the evidence, as do the Applicant's third branch allegations.

96. The Court in *Wilson* cited *Tollman*, where Molloy J. considered the admissibility of a Second SROC filed in response to abuse of process allegations.[139] In the decision, Molloy J. distinguished "extra-judicial phase" and "judicial phase" abuse allegations. While the former concerned claims of disguised extradition, the latter related to the certification of the ROC and SROC, which were alleged to contain information known to be untrue.[140] Molloy J. concluded that a ROC or SROC was inadmissible to rebut allegations of misconduct or abuse of process that have "nothing to do with the merits of the case against the person sought" as it was not a summary of "evidence for use in the prosecution" permitted by ss. 32 and 33 of the *Act*.[141]

97. Accordingly, she reviewed the SROC and struck those paragraphs which set out evidence relevant only to the extra-judicial phase abuse allegations and not to the charges against the person sought.[142] Molloy J. held that the issue of the admissibility of a ROC on an abuse of process hearing "involving the factual matters at issue in the extradition itself" did not arise before her.[143] It bears noting, however, that Molloy J. took the Second SROC into account in her reasons for dismissing the disclosure application relating to the judicial phase allegations, concluding there was no evidence to support allegations that the certifying prosecutor had misrepresented evidence before the court.[144]

98. *United States v. Oliynyk*, where Crossin J. found that a third SROC was inadmissible on an abuse application,[145] is distinguishable on the facts. In *Oliynyk*, the person sought's allegations of

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[138] *Wilson*, at para. 101.
[139] *Ibid*. citing *Tollman Disclosure Ruling* at para. 35.
[140] *Tollman* Disclosure Ruling, at para. 1.
[141] *Ibid*. at paras. 34-35
[142] *Ibid.* at paras. 36-43.
[143] *Ibid.* at para. 34.
[144] *Ibid.* at paras. 67-70, 72.
[145] *United States v Oliynyk*, 2020 BCSC 521 at paras. 95-110.

abuse had nothing to do with the requesting state's preparation of the ROCs. Rather, he alleged entrapment by U.S. authorities and unlawful conduct by a confidential witness on Canadian soil that precipitated the events underlying the charges.[146] The third SROC was adduced solely to respond to these allegations of abuse.[147] Since the allegations did not take issue with the manner in which the requesting state had summarized the evidence on committal in the ROCs, the Court did not consider the potential relevance of additional evidence on committal in an SROC to such allegations.

99. In contrast, in this case the Second SROC summarizes evidence relating to committal, including the evidence admitted under s. 32(1)(c) regarding the reliability of the ROCs. The Applicant concedes that her allegations of omissions and misrepresentations in the ROCs are "not only relevant to the sufficiency of evidence at the committal hearing or the Applicant's defence at her trial, but to the abuse of process", arguing that they relate to "every element of the alleged fraud".[148] In other words, the abuse allegations stem directly from the Requesting State's summary of the evidence in the ROCs relating to the underlying charges. There is therefore no basis for rejecting consideration of a summary of evidence in a supplemental ROC as part of the record in determining whether the abuse allegations withstand scrutiny, especially where that evidence also underlies the charges.

100. Where allegations of misconduct are intimately connected to the merits of the case on committal and the manner in which the Requesting State summarized the evidence, it is fair and in the interests of justice that evidence in an SROC also relating to the merits be considered as part of the record. There is no unfairness occasioned by relying on the Second SROC. Notably, SROCs containing evidence responding to abuse of process allegations have been considered in other cases where the issue of admissibility was not adjudicated.[149]

101. The Second SROC undermines several claims of unreliability in the ROC and SROC and dispels the related allegations of impropriety in their preparation. As demonstrated by the review

[146] *Ibid*. at paras. 22, 86, 129, 139-145.
[147] *Ibid.* at paras. 95-96.
[148] Applicant's Submissions, para. 68.
[149] See *Khadr* SCJ, at para. 103; *Attorney General of Canada v. Iusein*, 2016 ONSC 6758, at paras. 3, 26-27, 51.

of the record above, including the Second SROC, there is no merit to the claims that the evidence admitted under s. 32(1)(c) of the *Act* demonstrates an abuse of process.

E. Conclusion

102. As the Applicant has failed to establish any misconduct by the Requesting State in preparing or certifying the ROCs or other circumstances that could amount to an abuse of process, she cannot meet the first step of the rigorous test for a stay of proceedings. The bulk of the Applicant's evidence adduced on this branch is irrelevant to committal and therefore cannot constitute the basis of s. 7 *Charter* breach. Nor does the limited evidence that this Court admitted under s. 32(1)(c) give rise to an inference of the type of wrongdoing that would justify the extraordinary remedy of a stay. To the contrary, the Applicant has been, and continues to be, afforded the robust protections of the *Act*, resulting in a fair committal process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 25th day of January, 2021.

Robert J. Frater, Q.C. Counsel for the Attorney General of Canada on behalf of the United States of America	Monika Rahman Counsel for the Attorney General of Canada on behalf of the United States of America	Kerry L. Swift Counsel for the Attorney General of Canada on behalf of the United States of America

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