Case Name:

United States of America v. Licht

IN THE MATTER OF the Extradition Act
AND IN THE MATTER OF the United States of America
and Brent Anthony (a.k.a. Dave) Licht

[2002] B.C.J. No. 1814

2002 BCSC 1151

168 C.C.C. (3d) 287

98 C.R.R. (2d) 291

55 W.C.B. (2d) 170

Vancouver Registry No. CC000801

British Columbia Supreme Court
Vancouver, British Columbia

Dillon J.

Heard: March 12, 2002.
Judgment: August 1, 2002.

(64 paras.)

Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, stay of proceedings -- Extradition -- Bars to extradition, abuse of process.

Application by Licht for an order excluding evidence against him in an extradition proceeding, or for a stay of those proceedings as an abuse of process and a breach of his rights under the Charter. Licht was accused in the United States of conspiracy to import and possess cocaine. Acting under a memorandum of understanding between the U.S. and Canada, the U.S. Drug Enforcement Agency obtained Canadian permission for Agency personnel and their informant to enter Canada to set up a

reverse sting, whereby the informants were purportedly to sell drugs to buyers resident in Canada. The RCMP agreed to this initial investigation. Although the Agency failed to obtain permission for more entries, and the RCMP actually refused one request, the Agency made further undercover forays into Canada and finally identified Licht as the principal buyer. One informant closed a deal with Licht, and the Agency arrested some of the U.S. operatives, and sought to extradite Licht. Licht requested information as to the Agency's authority to conduct the final sting, and the Agency refused further disclosure.

HELD: Application allowed. The proceedings were stayed. Given their experience with the required procedure, particularly relating to the original visit, the Agency and its informants were fully aware of the formal requirements necessary to the continuation of the sting operation. They entered Canada without lawful authority, breaching both drug and immigration laws, and compromised Licht's right to make full answer and defence by refusing disclosure. This was clearly an abuse of process so shocking, egregious, and detrimental to international cooperative agreements as to merit a stay of proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 24(1).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(1), 5(2).

Controlled Drugs and Substances Act (Police Enforcement) Regulations, SOR/97-234, s. 15.

Criminal Code, R.S.C. 1985, c. C-46, s. 465(1)(c).

Extradition Act, S.C. 1999, c. 18.

Counsel:

Richard C.C. Peck, Q.C., and David J. Martin, for Brent Licht.
Chris Greenwood, for the United States of America.

DILLON J.:--

Introduction

1 Brent Anthony Licht ("Licht") applied for an order pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms and/or the common law of abuse of process for an order for exclusion of evidence or, in the alternative, a stay of these committal proceedings under the Extradition Act, S.C.

1999, c. 18. The respondent, United States of America ("U.S.A.") opposes this application and seeks an order for committal of Licht to the U.S.A. Licht is wanted in the U.S.A. for offences corresponding to conspiracy to traffic in cocaine and conspiracy to possess cocaine contrary to sections 5(1) and (2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and sections 465(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46. The facts of this case are unusual because the U.S. Drug Enforcement Agency (the "DEA") carried on a reverse sting operation in Canada without the knowledge, approval or authorization of Canadian authorities and in the face of a refU.S.A. l of Canadian authorities to continue on with the investigation in Canada.

Facts

2 The U.S.A. seeks extradition of Licht for drug offences committed in the State of California. The charges arise from a DEA investigation that began in July 1999 relating to individuals who sought to purchase cocaine in Los Angeles for distribution in Canada. The DEA investigation was a reverse sting operation in which two confidential informants of the DEA, "CS1" and "CS2", offered to sell large amounts of cocaine to various suspects.

3 On July 8, 1999, in Valencia, California, CS1 posed as a Columbian cocaine trafficker and met with three suspects known as Jacob Stephanian, Alireza Rafi, and "Papa". Stephanian told CS1 that he wanted to purchase 100 kilograms of cocaine for delivery to Vancouver, Canada. On July 10, 1999, CS1 and CS2 met with Stephanian and Rafi at a restaurant in Glendale, California. Stephanian indicated that he wanted to purchase 75 kilograms of cocaine per month from CS1 and CS2. Stephanian wanted to introduce CS1 and CS2 to the "main guy" in Vancouver and show them the money to purchase the cocaine. There was no indication as to the identity of the "main guy".

4 On July 13, 1999, the same four met again in West Hollywood, California. Stephanian told the CSs that his "boss" would like to meet CS2 to make him more comfortable about the cocaine transaction. If the "boss" felt comfortable after meeting CS2, then the amount of cocaine purchased might increase. Stephanian suggested that he purchase 15 kilograms first and 60 kilograms later, but CS1 refused, saying that it had already been agreed that the purchase would be 75 kilograms. Stephanian made a phone call and came back to report that he would purchase 75 kilograms.

5 The next meeting occurred on July 21, 1999 in West Covina, California when CS1 and CS2 met again with Stephanian and Rafi. CS1 and CS2 showed the suspects 75 kilograms of cocaine in a pickup truck, *the cocaine "flash"*. The next day, CS2 met Rafi in Valencia, California and Rafi told CS2 that he could introduce CS2 to a number of potential buyers in three different cities in Canada. Rafi told CS2 that he would pay for CS2 to come to Canada to meet these buyers.

6 The DEA learned through recorded conversations of these meetings that the Canadian target needed to meet with either CS1 or CS2 before the transaction could take place and that the meeting had to be in Canada because the Canadian target would not cross the border to meet with them.

7 The next series of events from July 23, 1999 to August 17, 1999 and then events of August 21,

1999 are not relied upon by the U.S.A. in its record of the case. The events of August 8 and 21, 1999 were, however, included in the affidavit of Constable DaSilva of the RCMP that was used to obtain a warrant for the provisional arrest of Licht in Canada in June 2000. The information has also been included in information and reports about the investigation in support of the criminal complaint in the United States.

8 On July 23, 1999, the DEA sent an urgent country clearance and investigative request to the RCMP for arrangements to be made for a DEA CS to travel to Vancouver, B.C. on July 25, 1999 to "negotiate the arrangements concerning money and shipment of cocaine to Vancouver" and to "conduct an undercover meet with unidentified Canadian target". This request was made pursuant to a memorandum of understanding between the governments of Canada and the United States that required the RCMP's consent for investigative activities undertaken by the DEA in Canada. The RCMP was unable to provide consent immediately and replied that several major issues had to be addressed before approval would be given for a meeting between August 3-8, 1999. It was understood that the meeting was for negotiation of a reverse sting operation and that no drugs or money would change hands. The Canadian client was not identified but it was expected that this meeting would positively identify Canadian purchasers. It was planned that a DEA handler would accompany the CS, that the CS would remain in Canada only for the period set out in a Ministerial Permit and would return immediately to Los Angeles after the meeting, and that RCMP officers would provide supervision and surveillance throughout the operation. The RCMP drafted an operational plan to assist the DEA, named "E-Planet". The RCMP inspector requesting approval from Ottawa drug enforcement headquarters apologized for the urgency of the request but said that it was necessary in order to prevent an American CS from coming to Canada or taking action contrary to the memorandum of understanding with the DEA and U.S. Customs.

9 Approval for Phase I of the operation was given on July 30, 1999 by the officer in charge of drug operations at RCMP headquarters in Ottawa - the senior inspector authorized to approve a reverse sting operation within Canada according to RCMP policy adopted pursuant to the Controlled Drugs and Substances Act (Police Enforcement) Regulations, SOR/97-234. Section 15 of these regulations authorizes a member of a police force to offer to engage in the sale of illicit drugs provided that the member is an active member of the police force and is acting in the course of the member's responsibilities for the purposes of a particular investigation. The RCMP policy for reverse undercover operations allows for authorization of reverse sting operations in exceptional circumstances provided that certain conditions are met. A Ministerial Permit was required for CS2 to enter Canada and a Letter of Acknowledgment had to be signed. The approval was only for Phase I and a new operational plan was required to continue the operation after completion of Phase I.

10 CS2 and his DEA handler travelled to Canada under the supervision of the RCMP on August 7, 1999. Members of the DEB 'E' Division of the RCMP met them at the airport. CS2 signed a Minister's Permit from Immigration Canada allowing him temporary entry into Canada until August 8, 1999. CS2 had a criminal record and was then on probation for fraud. CS2 also signed a "negative Letter of Acknowledgment" with the RCMP. This letter is a condition precedent to an

agent acting in Canada. In it, CS2 stated that he understood that the investigation or his involvement in it could be discontinued at any time at the sole discretion of the RCMP and/or the DEA. Paragraph 6 states:

> I have been specifically informed and agree that pursuant to Section 4(a) of the Police Enforcement Regulations, I am exempt from the application of Section 4(1) Possession of a Narcotic, Section 5(1) Traffic in a Narcotic, Section 5(2) Possession for the purpose of Trafficking, Section 6(1) Import/ Export a Narcotic, Section 8(1) Possession of the Proceeds of Crime, and Section 9(1) Laundering the Proceeds of Crime, of the Controlled Drugs and Substance Abuse Act. I understand that these exemptions are only in effect while I am acting under the direction and control of a member of the Royal Canadian Mounted Police who I have reasonable grounds to believe is acting in the course of his/her responsibilities for the purpose of investigating Project "E - PLANET", and I am acting to assist the member(s) of the Royal Canadian Mounted Police in the course of this particular investigation.

11 CS2 also acknowledged in the letter that he was informed and understood that his assistance to the RCMP in this investigation did not exempt him at any time from criminal or civil responsibilities.

12 CS2 met with two targets known as "Jack" and "Dean" in Richmond, B.C. on August 8, 1999. This meeting was conducted under the surveillance of two DEA agents and the RCMP. Dean told CS2 that if the first transaction went well, he could introduce CS2 to other cocaine traffickers in Canada that could purchase 100 - 150 kilograms of cocaine as soon as it could be delivered. CS2 described Dean as the "main buyer". Dean told CS2 that his delay in coming to Canada had made Dean look bad because he had arranged a meeting with potential buyers and that he had lost faith in CS2 because of this. Dean wanted to complete a number of small transactions involving one kilogram of cocaine first.

13 While CS2 and the DEA agents were in Canada, they were under the continuous supervision of the RCMP. For example, when CS2 left his hotel to go to the store, a RCMP member accompanied him. Following the meeting with the targets, the RCMP escorted CS2 and the DEA agents to the airport and put them on a flight to California. The Ministerial Permit to allow CS2 into Canada expired on August 8, 1999.

14 The DEA requested continuation of the reverse sting scenario in Vancouver with the sale of one kilogram amounts. However, the RCMP had no interest in continuing negotiations for the purchase of cocaine in those amounts and so advised the DEA. Although the RCMP files indicate that this investigation was continuing and that the file was not closed, Phase I was over and no approval for further investigation in Canada was obtained by the DEA or any other agency on behalf of the United States. The RCMP were not contacted again for assistance with respect to this

investigation until after the suspects had been arrested in the United States and the arrest of Licht was sought in Canada.

15 On August 17, 1999, Stephanian advised CS2 by telephone that he was in Seattle, Washington with a Canadian buyer and wanted to meet with him to discuss the purchase of 75 kilograms of cocaine. He told CS2 that a deposit of $25,000 would be paid when CS2 arrived in Seattle. CS1, CS2, Stephanian and a male introduced as "Ali" met in Seattle on August 18, 1999. CS1 told Ali that there would be no deal unless he obtained a deposit. There was discussion about the amount of cocaine, the point of delivery, and the deposit that Ali had not brought. Ali wanted to see the merchandise before he paid the deposit and CS1 told Ali that he could see the cocaine once he had the deposit. Ali told CS1 that he could show him one million dollars in cash in Vancouver. CS1 said that he could not travel to Vancouver.

16 CS2 did, however, travel to Vancouver on the weekend of August 21, 1999. He stayed overnight at a hotel in White Rock, B.C.. Ali and Stephanian drove him to Vancouver where he met a Vietnamese man named "Steve". CS2 was shown a large bag full of cash.

17 Later that day, CS2 went with Ali and Stephanian to White Rock. Ali introduced CS2 to "Dave", whom Ali called the "main guy". CS2, Ali and Dave talked for a long time at the end of a pier (the "White Rock meeting"). Ali, CS2 and Dave discussed the cocaine transaction. They talked about Dave purchasing cocaine from CS2. As a result of this meeting, Dave agreed to meet the CSs in California on August 24, 1999 at Jerry's Deli in Studio City. Stephanian, who did not know Dave and was not included in the discussion at the end of the pier, overheard them say: "everything was set". "Dave" is Brent Licht.

18 CS2 did not obtain a Ministerial Permit to enter the country. He did not obtain the approval of the RCMP to continue the reverse sting operation in Canada. He did not inform the RCMP of his presence in Canada. From RCMP records, it appears that the RCMP were unaware of the continued investigation in Canada on August 21, 1999 because the RCMP investigation report of September 21, 1999, which includes a synopsis of the August 8, 1999 meeting, states that "...the DEA then continued the investigation inside their jurisdiction". There is also no indication in the RCMP concluding report of May 2000 that the RCMP was aware of the White Rock meeting.

19 CS2 had entered Canada two weeks earlier under strict conditions that included a Ministerial Permit for his entry and a Letter of Acknowledgment in order to conduct a reverse sting operation in Canada. This was preceded by specific information to the RCMP about the precise details of the operational plan and express approval from the RCMP to carry out the meeting of August 8, 1999. CS2 must have known that an immigration permit was required for him to enter Canada. He must have known that RCMP approval was required prior to continuation of the reverse sting operation in Canada. He must also have known that RCMP supervision of his investigative activities was required. He must have known that he was exempt from application of the provisions of the Controlled Drugs and Substances Act only while he was acting under the direction and control of

the RCMP.

20 CS2 had worked with the DEA since 1998, frequently with CS1 who was an even more experienced confidential informant. CS2 had previously assisted in the seizure of at least 9 kilograms of cocaine and 9 pounds of methamphetamine. He was an experienced confidential informant who was paid by the DEA for his services. A statement of Stephanian following his arrest contained information about the White Rock meeting. CS2 provided further information about the meeting to DEA agents in October 1999. However, CS1 must have known of the meeting at the time and the DEA relied upon this meeting in order for a meeting to occur on August 24, 1999 in California.

21 Licht met with CS1 and CS2 in California on August 24, 1999 as arranged at the White Rock meeting. Licht said that he was interested in purchasing 200 kilograms of cocaine from the CSs. He was willing to trade high grade Canadian marijuana at $3,000 per pound as part of the purchase price. CS1 told Licht that he would sell cocaine at $13,000 if delivered in Los Angeles, $14,500 if delivered in Seattle, and $16,500 if delivered to Vancouver. Licht said that he would call CS1 with a decision.

22 CS1 and CS2 met again with Licht and another individual known as Lukaniuk on August 26, 1999. Licht said that he wanted to purchase 40 kilograms of cocaine at $13,000 per kilogram before he returned to Canada on August 29, 1999. They met again on August 27, 1999 and Licht agreed to purchase 50 kilograms of cocaine at $13,000 per kilogram payable in money and marijuana. They arranged to meet later that day at a parking lot.

23 Lukanuik met CS1 in a parking lot in Sherman Oaks, California later on August 27, 1999. He told CS1 that he had $205,000 and 115 pounds of marijuana to trade for 50 kilograms of cocaine. The balance of $100,000 would be paid the next morning. CS2 arrived with a vehicle containing false cocaine and gave the keys to Lukaniuk. A man named Knowles arrived in a van with the marijuana and $203,760. Both Knowles and Lukanuik were arrested. Later that day, Stephanian, Rafi and Ali were arrested at various locations in the United States.

24 Following the arrests, the DEA sent a report to the RCMP, thanking it for its involvement and cooperation. There was no mention of the White Rock meeting in the history of the investigation.

25 A criminal complaint was filed December 17, 1999 in the United States District Court, Central District of California, charging Licht with conspiracy to possess with intent to distribute cocaine. The criminal complaint detailed the White Rock meeting. A warrant for his arrest was issued on the same day. The request for extradition was submitted on June 19, 2000. The Minister of Justice authorized the Attorney General of Canada to initiate extradition proceedings on August 1, 2000. The record of the case did not mention the White Rock meeting. However, information about the meeting was provided to the RCMP and included in the affidavit in support of the arrest of Licht in Canada.

26 On August 25, 2000, counsel for Licht asked whether the RCMP had been advised prior to August 8, 1999 that the DEA intended to introduce its civilian agent into Canada for the purpose of offering to sell cocaine and whether either the RCMP or the DEA obtained an exemption permit issued pursuant to the Controlled Drugs and Substances Act (Police Enforcement) Regulations prior to embarking on this activity. Counsel for the United States responded in October 2000 that it was not appropriate to make such inquiry and that full disclosure had been made of the material upon which the requesting state intended to rely. Counsel for Licht repeated his request on May 24, 2001. Counsel for the U.S.A. replied that this was not a case in which the RCMP obtained an exemption certificate under the police enforcement regulations. All further disclosure was opposed until disclosure was ordered by this court on February 26, 2002.

General principles of the law of extradition

27 The jurisdiction of an extradition judge at a committal hearing under the Extradition Act is modest and consists of determining whether there is sufficient evidence to establish a prima facie case (The Republic of Argentina v. Mellino (1987), 33 C.C.C. (3d) 334 at 349 (S.C.C.); United States of America v. Dynar (1997), 115 C.C.C. (3d) 481 at 521 (S.C.C.)). The judge must be aware that the proceedings must conform to Canada's international obligations (Mellino, supra at 348). The standard of proof at the extradition hearing is the same as in a preliminary inquiry (United States of America v. Sheppard (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.)).

28 In this case, an order for committal must be made if the evidence would justify committal on the offences of conspiracy to traffic in cocaine and/or conspiracy to possess cocaine. The gist of conspiracy is an agreement or meeting of minds in regards to a common design to do something unlawful. The conspiracy can be complete before any acts are undertaken that go beyond mere preparation to put the common design into effect (Dynar, supra at 512).

Application of the Charter to extradition proceedings

29 The application of the Charter to extradition proceedings must be assessed in light of the limited function of the judge under the Act. As such, the Charter issues must relate to the initial phase of the extradition process (United States of America v. Cobb (2001), 152 C.C.C. (3d) 270 at 282 (S.C.C.)). This means that the evidence sought to establish a prima facie case must be admissible pursuant to the principles of fundamental justice. However, conformation to the requirements of the Charter, including the principles of fundamental justice, can vary according to the context of the proceedings in which they are raised (Cobb, supra at 283-284). Arbour J. said in Cobb, supra at 285 that section 7 of the Charter "permeates" the proceedings so that a requesting party must appreciate that as a party to proceedings in a Canadian court, it is subject to the application of rules and remedies that serve to control the conduct of parties who turn to the courts for assistance and that litigants are protected from unfair, abusive proceedings through the doctrine of abuse of process that bars litigants from abusing the process of the courts. Conduct by a requesting state that interferes or attempts to interfere with the conduct of judicial proceedings in

Canada is a matter of direct concern to the extradition judge.

30 The fairness principle found in section 7 of the Charter incorporates the common law abuse of process doctrine as recognized by L'Heureux-Dubé J. in R. v. O'Connor, [1995] 4 S.C.R. 411 at para. 70 and applied in the extradition context by Arbour J. in Cobb, supra at 285. There is no need for the extradition judge to defer to an executive decision. Arbour J. stated the section 7 issue for the extradition judge within the doctrine of abuse of process as follows (Cobb, supra at 288):

> ...The s. 7 issue before the extradition judge is whether the extrajudicial conduct and pronouncements of a party to the proceedings, or of those associated with that party, disentitle that party from the judicial assistance that it is seeking and whether it would violate the principles of fundamental justice to commit the fugitives for surrender to the Requesting State.

31 The requesting state is governed by the rules of fundamental justice and by the doctrine of abuse of process. Conduct attributable to a litigant before the court, including a requesting state, may be sufficient to trigger the application of both section 7 and the doctrine of abuse of process (Cobb, supra at 290).

The doctrine of abuse of process

32 The history of abuse of process was described in R. v. Power, [1994] 1 S.C.R. 601 and seminally discussed in O'Connor, supra. In O'Connor, the court fused the common law and Charter principles of abuse of process. The unanimous court said at para. 63:

> [I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

33 There is also a residual category of abuse in which the individual's right to a fair trial is not implicated (R. v. Regan (2002), 161 C.C.C. (3d) 97 at para. 50 (S.C.C.)). This category was also described in O'Connor, supra at para. 73:

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

34 In this way, proceedings may be unfair to the point that they are contrary to the interests of justice (Regan, supra at para. 50).

35 The test for abuse of process comes from R. v. Jewitt, [1985] 2 S.C.R. 128 and has been affirmed repeatedly (see R. v. Shirose (1999), 133 C.C.C. (3d) 257 at 275 (S.C.C.); R. v. Keyowski, [1988] 1 S.C.R. 657 at 658-59; Power, supra at 612-615). There must be a serious violation of the community's sense of fair play and decency disproportionate to the societal interest in the effective prosecution of criminal cases (R. v. Conway, [1989] 1 S.C.R. 1659 at 1667; Shirose, supra at 276). In Power, supra at 615, L'Heureux-Dubé J. said that this must be conduct that "shocks" the conscience of the community. The threshold is high. The courts should only intervene when there is conspicuous evidence of improper motives or bad faith or of an act so wrong that it violates the conscience of the community such that it would be genuinely unfair and indecent to proceed (Power, supra at 616). Abuse of process must also have a casual element so that the abuse must have caused actual prejudice of such magnitude that the public sense of fair play and decency is affected (Regan, supra at para. 52).

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

37 Illegal police conduct may amount to abuse of process depending on the circumstances and may result in a stay of proceedings depending on the circumstances (Shirose, supra at 276 and 284). Each case must be looked at on its own. The fact of police illegality does not dictate a stay of proceedings. There should be a broad-based inquiry into the circumstances and the public interest to determine an appropriate remedy. Other information or explanations would have to be considered to determine whether the conduct shocks the community. In Shirose, supra at 286-287, the possibility that police acted not only illegally but contrary to legal advice in the sense of choosing to operate outside of the law would be an important influence upon the community view of the illegality. Binnie J. commented at 300 that police illegality planned and approved within RCMP hierarchy and implemented in defiance of legal advice would, if established, suggest a potential systemic problem concerning police accountability and control. In order to determine whether this worst scenario existed, the RCMP was to produce the legal advice that it said that it relied upon to found their illegal activity.

38 In R. v. Caster (2001), 159 C.C.C. (3d) 404 (B.C.C.A.), the use of a lawyer ruse did not contravene the community sense of fair play and decency because the conduct was then legal, the ruse was not designed to create evidence, and the conduct would never be used again because it had since been made illegal. In R. v. Mathiessen (1999), 133 C.C.C. (3d) 93 (Alta. C.A.), police targeted identified drug traffickers in a reverse sting money laundering operation that was illegal. However, the police illegality was not offensive to the basic values of the community when police had not set out to manufacture crime, when they only targeted identified drug traffickers, and when Parliament subsequently changed the law to provide for the legality of reverse sting operations.

39 In R. v. Lore (1997), 116 C.C.C. (3d) 255 (Que. C.A.), the DEA was involved in a bona fide

investigation in New York when it provided the accused with an opportunity to commit an offence in circumstances where police had a reasonable suspicion that Lore was already engaged in criminal activity. Unlike in Shirose, the undertaking to sell narcotics occurred in the United States where reverse stings were legal at the time. The police did not approach the accused for the purpose of selling narcotics but the accused initiated the agreement. In these circumstances, the police did not induce the commission of an offence and their conduct did not shock the conscience of the community. In R. v. Mack, [1988] 2 S.C.R. 903 at 976 the questions of whether the police were engaged in a *bona fide* investigation and whether police first approached with a reasonable suspicion that a suspect was engaged in criminal activity were key questions to determine whether conduct offends basic values of the community.

40 A stay of proceedings for abuse of process will only be ordered in the clearest of cases (Regan, at para. 52). A stay is only appropriate if the two criteria as set out in Regan, at para. 54 are met:

> Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> (2) no other remedy is reasonably capable of removing that prejudice. (O'Connor, at para. 75)

41 The first criterion seeks to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community. In this sense, a stay will only be appropriate if the abuse is likely to be continued or carried forward. The ongoing impact of the abuse must be considered. In this sense, a stay is a specific deterrent to prevent aggravation or perpetuation of a particular abuse (Regan, supra at para. 214 (Binnie J.'s dissent)). If a trial would not have occurred but for the abuse, then the trial itself perpetuates the abuse (ibid at para. 219). Only in rarer cases will the egregiousness of the conduct be sufficient that the mere fact of going forward is so offensive as to warrant a stay (Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391 at para. 91; Regan, supra at para. 55). If these conditions are not met, then remedies less drastic than a stay should be considered prior to continuing onto the third criterion - the balancing exercise. The judge should consider whether other less drastic remedies would cure the ongoing taint (Regan, supra at para. 105).

42 There is power to exclude evidence under section 24(2) of the Charter as a remedy for violation of constitutional rights (United States of America v. Shulman (2000), 152 C.C.C. (3d) 294 at 315 (S.C.C.)). However, this applies only to evidence gathered in Canada (R. v. Terry (1996),

106 C.C.C. (3d) 508 at 515 (S.C.C.)). A co-operative investigation between Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken (ibid at 516). Evidence gathered in Canada will be subject to Canadian law. In this way, evidence gathered in Canada in an abusive fashion may violate the principles of fundamental justice such that exclusion of evidence under section 24(2) may be warranted. Arbour, J. stated in Shulman, supra at 315:

> An extradition judge has the power to exclude evidence under s. 24(2) of the Charter as a remedy for a violation of a fugitive's constitutional rights. The Charter applies only domestically and has no effect extraterritorially, except to Canadian authorities: R. v. Cook, [1998] 2 S.C.R. 597, 128 C.C.C. (3d) 1, 164 D.L.R. (4th) 1. However, in an appropriate case, the extradition judge could exclude evidence gathered by the foreign authorities in such an abusive manner that its admission *per se* would be unfair under s. 7 of the Charter: United States of America v. Dynar, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481, 147 D.L.R. (4th) 399, R. v. Harrer, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193; 128 D.L.R. (4th) 98.

43 This statement may be taken so far as to suggest the exclusion of evidence gathered abroad in a certain case.

44 When there is uncertainty about whether this is one of the "clearest" of cases and after consideration of the first two criteria, then a third criterion is to be considered: the balance of interests served by a stay versus societal interest in having a decision on the merits (Regan, supra at para. 57). LeBel J. stated this balancing question as follows in Regan, supra at para. 105:

> In summary, to justify a stay I must ask myself: Are the alleged wrongdoings so unfair to the applicant or so offensive to society so as to render a stay the only reasonable remedy? Is this one of those "*clearest of cases*" or, on the other hand, are there societal interests compelling enough to tip the scales in favour of proceeding? [Emphasis in original.]

Application to the case at bar

(i) Illegality of DEA conduct and other circumstances

45 The activity of the DEA and CS2 on August 8, 1999 was clearly legal. The DEA had proceeded pursuant to the Controlled Drugs and Substances (Police Enforcement) Regulations and the memorandum of understanding between the two countries to obtain permission from the RCMP to carry out a specific operational plan for a reverse sting. CS2 had permission to enter Canada and acted throughout under the supervision of the RCMP. It was clear that the meeting was to negotiate the sale of drugs to Canada, luring in Canadian purchasers that were unknown to police at the time. The DEA agent's specific conversation on that day is not in evidence as the manner of reporting

these events is to describe what the suspect said. However, there was certainly discussion of the sale of drugs by CS2, the only question being the quantity. At the end of the meeting, the DEA wanted to supply one kilogram test sales to the Canadian purchasers but the RCMP would not agree to continue with this plan.

46 What is apparent after this meeting is that CS2 and the DEA were fully aware of the requirements to carry on the reverse sting operation within Canada. They had been frustrated by the slowness of the RCMP to respond to their request such that the RCMP officer apologized to headquarters that if the request was not responded to quickly, there was concern that the DEA would act without authority in Canada. This is exactly what happened on August 21, 1999.

47 CS2 entered Canada without permission and furthered the reverse sting operation without the consent of the RCMP. There can be no doubt that he did so knowing that this was in contravention of the agreements between Canada and the United States for mutual assistance in criminal matters and the memorandum of understanding between the two countries. The requesting state admitted that the memorandum of understanding, which was not in evidence before me, "required the RCMP's consent for investigative activities undertaken by the DEA in Canada". The requesting state did not argue that this consent was obtained. Rather, the United States said that there is insufficient evidence that CS2 offered to sell drugs on August 21, 1999. It is uncontroverted that the RCMP was unaware that CS2 entered the country on August 21, 1999 to carry on with the reverse sting.

48 CS2 also entered Canada without lawful immigration status. It is acknowledged that he required a Ministerial Permit to enter Canada on August 8 and that this permit expired on August 8, 1999. From this, I conclude that CS2 was illegally in Canada on August 21, 1999 or at least was here without lawful authority to carry out a reverse sting investigation.

49 The requesting state submitted that without recount of the conversation between CS2 and Licht on the pier at White Rock, it is not possible to conclude that an offer to traffic in cocaine from CS2 was made. As such, there is insufficient proof that an illegal act took place. I disagree. There is sufficient circumstantial and direct evidence to conclude that an offer to provide cocaine in California was made by CS2 to Licht.

50 CS2 had no other reason to meet with Licht than to negotiate the sale of cocaine pursuant to the reverse sting operational plan. This was CS2's opportunity to meet with the "main guy". Stephanian and Ali with whom CS2 had been negotiating for some time had set up the meeting. Each knew the purpose of the meeting. The cocaine transaction was discussed in terms of a purchase. Licht discussed purchasing cocaine from CS2. No such discussion would have occurred if CS2 had not indicated that he had cocaine to sell. At the end of the meeting, Stephanian heard: "everything was set". The parties agreed to meet in California to further the cocaine transaction. There is no other reasonable inference from these circumstances than that CS2 offered to sell cocaine and Licht agreed to buy cocaine. Events after the White Rock meeting also lead to this

conclusion.

51 Licht was not known to the DEA as a suspect before this meeting. What was known, was that the "main guy" would not carry through with a transaction unless he met with CS1 or CS2 in Canada first and that he would not travel to the United States. It was also urgent that the meeting take place right away because CS2 had been criticized before for not attending a meeting in Canada earlier. Also, Stephanian and Ali had wanted CS1 and CS2 to come to Canada on August 18, 1999 but CS1 had said that he could not come. The operation was in jeopardy if this meeting did not take place.

52 Arrangements were made at the White Rock meeting to meet at Jerry's Deli in California on August 24, 1999. This meeting occurred. There is no evidence of any conversations with either of the CSs and Licht or the others between the White Rock and Jerry's Deli meetings. The meeting on August 24, 1999 in California was the final negotiation for the cocaine.

53 The conduct of CS2 in offering to sell cocaine in a reverse sting operation on August 21, 1999 was illegal, in contravention of the Controlled Drugs and Substances Act and without the authorization of the Controlled Drugs and Substances (Police Enforcement) Regulations. This act was committed in Canada. Contrary to international law and agreements, there was no cooperation or consent of the RCMP who were unaware of this activity and who had refused to participate further in the operation after August 8, 1999.

54 The requesting state has not repudiated the conduct of CS2. Instead, it relied on this conduct to seek an arrest warrant in Canada. The evidence has been used in the United States. There is no indication that the evidence will not be used at the trial of Licht in the United States.

55 The requesting state denied disclosure of these events to Licht until ordered by this court. It is apparent, however, that this information was required to allow Licht to make full answer and defence in this committal hearing. The White Rock meeting was the catalyst to any further developments in the reverse sting operation. Without the meeting, the transaction would not have occurred because Licht would not have gone to California. It matters not that this information may not have been required for the requesting state to present a prima facie case. The respondent is entitled to the information required to present a full defence.

(ii) Abuse of process

56 This is one of those rare cases where an abuse of process is readily apparent. A United States police agent entered Canada without proper immigration status to carry out an illegal activity without the knowledge or consent of the RCMP and knowing that the RCMP had withdrawn consent to further involvement in the reverse sting operation. This conduct is clearly contrary to Canadian sovereign interests.

57 This was not a *bona fide* investigation being carried out in Canada. CS2 acted in defiance of

known Canadian requirements to make his conduct legal in Canada and to be acceptable internationally. The failure to immediately advise the RCMP of this conduct is indicative of further bad faith on the part of the requesting state. No explanation has been offered by the requesting state. The illegality of this conduct is magnified by the fact that CS2 knew that his conduct was illegal and that the RCMP would not allow further investigation in Canada. CS2 chose to act outside Canadian law. The requesting state has not repudiated this conduct.

58 The White Rock meeting was designed and resulted in inducing Licht to enter the United States to produce evidence of a drug transaction in the United States. This situation was directly manipulated by the DEA in order to fabricate the gathering of evidence in the United States. This caused actual prejudice to Licht because he would not have entered the United States without this meeting, according to DEA information. He was not known to the DEA as a drug dealer beforehand.

59 The conduct of a United States civilian police agent entering Canada without the knowledge or consent of Canadian authorities, in defiance of known Canadian requirements for legal conduct, with the express purpose to entice Canadians to the United States to commit criminal acts in that jurisdiction and acting illegally to offer to sell cocaine in Canada is shocking to the Canadian conscience. It is a serious violation of the sense of fair play and decency that has been established in cooperation agreements for mutual assistance in criminal matters. It is also a serious violation of Canadian legality in the circumstances of clear defiance of Canadian law without explanation except perhaps to pursue drug dealers through the reverse sting technique that requires specific planning and approval in Canada before it can be legal by authorized police officers.

(iii) Appropriate remedy

60 The illegal conduct of the United States DEA is so shocking here and so detrimental to international cooperative agreements to assist in criminal matters that I would be inclined to order a stay on that basis alone. The repression of crime must be done in a way that reflects our fundamental values as a society (Conway, supra at para. 8). These values are reflected in international cooperation agreements requiring the consent and authorization of the RCMP for foreign operatives to conduct police activity in Canada and in specific legislatively approved requirements for police controlled reverse sting operations within Canada. Canadians would not have confidence in their international agreements or police methods of pursuing crime if this conduct occurred. Blatant acts in disregard of Canadian sovereign values and law by this requesting state is so egregious as to warrant a stay.

61 However, the criteria set out in Regan should be considered before a stay can really be ordered. The first question, therefore, is whether the abuse would be perpetuated or manifest by ongoing proceedings. The egregiousness of the conduct here may be a complete answer to this first question. However, the transaction in California would not have occurred if the abusive conduct of August 21, 1999 had not occurred. Therefore, Licht remains prejudiced by the conduct. There is

also no indication that United States prosecutors will not rely on these events at the trial of this matter in California. The information was included in the criminal complaint to found the charges. The possibility that an American court would exclude this evidence does not alter the requirement of this court to preserve the integrity of this proceeding.

62 The alternative of exclusion of derivative evidence is a possibility. However, the United States argued that this rule would not apply to evidence obtained in the United States regardless of a Charter breach in Canada. This argument was not fully developed before me. However, there is also concern that the remedy of exclusion of evidence would not provide a complete remedy because discharge for lack of evidence at an extradition hearing is not final. New proceedings may be instituted on new or the same evidence (Mellino, supra at 348). There is no guarantee that exclusion of evidence would cure the ongoing taint. For these reasons, exclusion of evidence under section 24(2), of the Charter is not an appropriate remedy in this case.

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

Conclusion

64 The conduct of United States agents in this case is so egregious as to constitute an abuse of process to disentitle the requesting state from the assistance of this court. A stay of proceedings is ordered.

DILLON J.

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