IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *U.S.A. v. Michell,*
2017 BCSC 2114

Date: 20170825
Docket: 27120
Registry: Vancouver

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

The Attorney General of Canada
on behalf of the United States of America

Requesting State

And

Chase William Michell

Person Sought

Before: The Honourable Mr. Justice Groves

Oral Ruling re s. 32(1)(c) Application to Admit Transcript of Facebook Conversations into Evidence

Counsel for the Attorney General of Canada on behalf of Requesting State:	J.M.L. Gibb-Carsley
Counsel for the Person Sought:	C.L. Leggett
Place and Date of Trial/Hearing:	Vancouver, B.C. August 25, 2017
Place and Date of Judgment:	Vancouver, B.C. August 25, 2017

[1] **THE COURT:** This is an extradition proceeding and, as set out in a notice of application dated the 21st of August, 2017, the applicant, Chase Michell, being the person sought in the extradition proceeding, seeks an order pursuant to s. 32(1)(c) of the *Extradition Act,* S.C. 1999, c. 18, as amended to admit into evidence at the committal hearing an entire transcript of certain Facebook conversations which are transcribed in four typed pages.

[2] What is unique about this application is the following. In the Record of the Case (ROC), the requesting state, the United States of America, summarizes as part of the ROC, in seven paragraphs of single-spaced type occupying close to a full page of type, their summary of Chase Michell's Facebook communications primarily with three people, Alison Williams, Christine Michell, and Jenn Joe. It seems clear and it is uncontroverted that the requesting state relies on this evidence as evidence of post-offence conduct supportive of guilt of the person sought. That is part of the evidence they rely on to justify the extradition at the soon-to-be-held committal hearing.

[3] The other evidence is the evidence of a child's father who says that the then two-and-a-half-year-old child identified the person sought as the person who injured her and the report of an attending doctor who points to an adult person as the source of the injuries. This case is fairly assessed, in my view, as a circumstantial case against the person sought.

[4] Getting back to the unique nature of the application, counsel did not point me to a case where the application to adduce evidence by a person sought for the purposes of the committal hearing was, in fact, the actual evidence that the requesting state relied on for their summary in the ROC. Essentially, the person sought wants to rely on the actual evidence summarized in the ROC. I note for practical purposes that the request is modest in terms of expanding the record. As noted, the summary of the Facebook posting occupies a full page of text in the ROC whereas the entirety of the Facebook postings themselves occupy about four pages of text.

[5] So I have a circumstance before me where a person sought seeks the actual evidence that the requesting state relies on and the requesting state opposes the application for the introduction of the actual evidence, but rather urges the court to consider at a committal hearing only their summary provided as the requesting state. Counsel for the person sought explains in their application, I find effectively, that the reading of the entirety of the Facebook postings of these three noted individuals' communications with the person sought that, on the day after the alleged offence for which extradition is sought occurred, there were in these Facebook postings other explanations for the person sought expressing a desire to leave the United States rather than the implication which the requesting state hopes to place by way of summary. In other words, a full reading of the documents provides greater context and challenges the reliability of the assertion by the requesting state that the comments in the Facebook posting and the subsequent act of leaving the United States is pure and simple post-offence conduct which is consistent with guilt.

[6] I will not at this stage talk at length about the difficulties associated with post-offence conduct in the criminal context and that it may, in fact, not be relevant to any consideration I have to make in the future. Suffice it to say that counsel for the person sought notes additional evidence in the actual Facebook posting which would challenge the reliability of the assertion that the person sought fled the United States for reasons of guilt.

[7] What is not mentioned in the summary in the ROC, but what is clear in the Facebook postings read in their entirety, is that the person sought had convinced his girlfriend, the mother of the alleged victim, that he was not responsible for the child's injuries. The Facebook postings note his view that he was, to use my language, being railroaded by his girlfriend's parents who would insist that she press charges against him and by his girlfriend's former boyfriend, the father of the child in question who he complains has never liked him. These assertions are clearly set out in the Facebook postings and are not mentioned at all in the summary provided by the requesting state in the ROC. There is essentially an omission of fact which would or

could potentially challenge the reliability of the assertion drawn from the summary of the Facebook postings.

[8] Section 32(1)(c) of the *Extradition Act* reads as follows:

> Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law . . .
>
> (c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

[9] As noted in *R. v. Ferras*, [2006] S.C.J. No. 33, there is a twofold test set out in that section, a test of reliability and a test of relevance. Clearly here, the test of reliability is made out as the requesting state itself relies on a summary of the document in support of its case. As for a consideration of relevance, as noted in *M.M. v. The United States of America*, 2015 SCC 62 the issue of relevance is not related to the guilt or innocence of the person sought *per se*, but is a consideration of relevance restricted to the task of the extradition judge, that being whether the test for committal under s. 29(1) of the *Act* has been met.

[10] As I understand the argument of the person sought, they wish to challenge the veracity of the ROC by pointing out the actual evidence that the ROC purports to summarize to challenge the inference they draw from the evidence by pointing to the actual evidence itself. The grounds of opposition to this application is a technical one. Essentially, and again as I understand it, counsel for the requesting state argues that the exercise the defence wishes to go through, if this evidence is admitted, is an exercise beyond the superficial weighing of evidence as an extradition judge is required to do, but is rather an attempt more appropriately dealt with at trial, if the extradition is allowed, to challenge the veracity of the evidence and provide alternate explanations for the evidence the requesting state would then rely on.

[11] For the purposes of my reasons, I accept the argument of the person sought that they intend, if this evidence is admitted, to use it to challenge the reliability of the

ROC. That is something they are entitled to do. The introduction of this evidence does not add much volume to the evidence to be referred to at the committal hearing. As noted, it is only four pages.

[12] Infused in any criminal proceeding, in my view, is the fundamental requirement of fairness to an accused person. Though the *Extradition Act* is not criminal legislation *per se*, we are dealing with a piece of legislation which could effectively impugn someone's liberty and which, if the action of committal is successful, would have an accused individual subject to the removal from the country as a result of an order made at a committal hearing. It seems to me fundamentally unfair to say that the requesting state is allowed to present evidence that they have chosen to summarize in a certain fashion, but on the other hand, the introduction of the actual evidence, which the defence argues would allow them to challenge the reliability of the summary, should be excluded or not allowed to be considered.

[13] I choose my words carefully and do not in any way intend to disrespect the position taken by the Attorney General of Canada, but this approach seems remarkably Draconian and unfair. If someone is entitled in an extradition proceeding to challenge the reliability and relevance of the evidence of the requesting state, they should be given the opportunity to actually argue based on the actual evidence as opposed to a summary which on the face of it is not complete.

[14] As noted by our Court of Appeal in the case of *United States v. Wilson*, 2011 BCCA 514, at paras. 45 and 50, the following principles, I think, are relevant to the matter before me. As noted in para. 45, the Court of Appeal says:

> . . . in the present case, counsel said the evidence at issue *would go* to the reliability of the ROC: the recording evidence, it is alleged, directly contradicts the ROC in such a way as to call its soundness into question.

That, in my view, is the exact approach taken by counsel for the person sought in this case. Turning to para. 50, the Court of Appeal notes, and I quote:

> In my respectful opinion it was an error of law to exclude the evidence which the appellant sought to tender, the thrust of which was to impeach directly the evidence of the telephone conversations summarized in the ROC.

[15] In *Wilson*, the person sought had sought to introduce other telephone conversations. In my view, the case before me is even stronger because the person sought here is seeking simply to import into evidence the actual Facebook postings summarized in the ROC. In my view, the principles noted in *Wilson* and the error noted in *Wilson* is equally applicable to a transcript of the Facebook postings actually relied on by the requesting state as it is to the telephone conversations not relied on in *Wilson*. I also repeat that, in terms of the volume of the ROC, the evidence only adds four additional pages as opposed to a considerable volume of evidence.

[16] In conclusion, I am satisfied that counsel for the person sought has met the test set out in s. 32(1)(c) of the *Act* and I will allow the transcript of the alleged Facebook conversations to be admitted at the committal hearing of the application for the reasons I have noted above.

"Groves J."