IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-3026
[2012] NZHC 2076

UNDER	the Judicature Act 1972
IN THE MATTER OF	an application for Judicial Review
BETWEEN	THE UNITED STATES OF AMERICA Applicant
AND	KIM DOTCOM, FINN BATATO, MATHIAS ORTMANN AND BRAM VAN DER KOLK First Respondents
AND	THE DISTRICT COURT AT NORTH SHORE Second Respondent

Hearing: 4 July 2012

Counsel: J Pike, F Sinclair for Applicant
P Davison QC, W Akel and R Woods for First Respondent Mr Dotcom
G J Foley for First Respondents Mr Batato, Mr Ortmann and Mr Van Der Kolk

Judgment: 16 August 2012

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 16 August 2012 at 1.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors: Crown Law, PO Box 2858, Wellington 6140
Simpson Grierson, Private Bag 92518, Auckland 1141
Counsel: Paul Davison QC, PO Box 105513, Auckland 1143
G J Foley, PO Box 105267, Auckland 1143

INDEX

A. Introduction

[1] The Government of the United States of America (the applicant) seeks the extradition of the first respondents on charges relating to the activities of the Megaupload business. It alleges that the first respondents were part of a conspiracy to operate websites which were intended to be used by others to illegally distribute copyrighted content, that the members of the conspiracy knew how their websites were being used, had themselves used the systems to upload, reproduce and distribute copyrighted content, and were aware that they had benefited financially from massive infringement of copyrighted material. Finally it is alleged that they conspired to "launder" the proceeds of that offending.

[2] Following the arrest of the first respondents, an extradition hearing was scheduled. In preparation for that hearing, the first respondents applied to the District Court for orders that the applicant disclose certain categories of documents. Disclosure was ordered by Judge Harvey, although the disclosure ordered was less extensive than that sought.[1]

[3] The applicant seeks to judicially review the decision to order disclosure. It says that the orders made amount to general disclosure, which is unprecedented in New Zealand or elsewhere in the context of extradition, and wrong in law.

[4] The applicant's primary submission is that disclosure in relation to extradition cases is extremely limited, consistent with the principles of international comity which inform the extradition process, and that disclosure should only be granted where the person sought for extradition establishes some evidentiary foundation for an argument relevant to this phase of the extradition process, and in respect of which disclosure is necessary.

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1 *Dotcom & Ors v United States of America* DC North Shore CRI-2012-092-1647, 29 May 2012.

B. The Background to these proceedings

1. Extradition pursuant to the Extradition Act 1999

[5] The Extradition Act 1999 governs all extradition from New Zealand. An "extraditable person" is a person accused of committing an extradition offence against the law of an extradition country.[2] It is common ground that the offences with which the first respondents are charged are extradition offences for the purposes of the Act.

[6] Extradition requests made of New Zealand are dealt with under Parts 3, 4 and 5 of the Extradition Act. Part 5 of the Act applies to extradition requests from countries with which New Zealand has no bilateral extradition treaty, or where New Zealand does have a bilateral extradition treaty but the offence is not stipulated in the treaty. In those cases the Minister of Justice must determine whether the request should be dealt with by New Zealand under Part 3 of the Act. If the Minister so determines, the Part 3 process operates in the usual way, depending on the designation of the country making the request.

[7] Part 4 of the Extradition Act relates to Australia expressly, and to the United Kingdom, Pitcairn and the Cook Islands by Order in Council. It does not apply to the United States, a fact that has some relevance to the issues on this application as I will come to. Part 4 provides the most streamlined procedure for extradition, reflecting the high relationship of comity between New Zealand and countries subject to that part. It is intended to provide a fast track, simplified extradition procedure. It establishes an endorsed warrants process. A person is eligible for surrender if a warrant for the arrest of the person complying with the requirements of s 41(1) has been produced to the court. In broad terms, if the court is satisfied that the person is an extraditable person in relation to the extradition country and the

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2 Extradition Act 1999, s 3.

offence is an extradition offence in relation to that extradition country, the person is eligible for surrender.[3]

[8] Part 3 of the Act applies in this case. This part regulates extradition proceedings between New Zealand and commonwealth countries and countries with which New Zealand has a bilateral extradition treaty such as the United States. Extradition requests made to New Zealand under Part 3 can have three phases: request for surrender and arrest following issue of warrant; the eligibility (judicial) phase and the surrender (Ministerial/Executive) phase.

[9] Section 24 in Part 3 provides that it is the court that must decide whether the person brought before it pursuant to an arrest warrant is eligible for surrender in relation to the offence or offences for which surrender is sought. In the case of a person accused of an extradition offence, s 24(2)(d)(i) provides that the court must be satisfied that the evidence produced or given at the extradition hearing would "according to the law of New Zealand, but subject to this Act," justify the person's trial if the conduct had occurred within New Zealand.

[10] The person is not eligible for surrender if the s 24 threshold is not met or if the person satisfies the court that a mandatory restriction on surrender applies. The court may also determine the person is not eligible for surrender if a discretionary restriction applies.[4]

[11] Section 25 applies to exempted countries, a subcategory of those countries to which Part 3 applies. Exempted countries are entitled to produce for the purposes of any determination under s 24(2)(d)(i), evidence in summary form, called a "record of

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3 The qualification to this statement is that the person is not eligible for surrender if the person satisfies the Court that there is a mandatory restriction on the surrender of the person, or that surrender would not be in accordance with the conditions of any treaty between New Zealand and the extradition country. Section 7 of the Extradition Act enumerates a number of mandatory restrictions on the surrender of persons, including mandatory restrictions such as the offence for which the surrender is sought is an offence of a political character. In this case, those provisions are subject to the terms of the extradition treaty.

4 Section 8 of the Act describes discretionary restrictions on surrender and the list includes matters such as the trivial nature of the case, and the amount of time that has passed since the offence is alleged to have been committed.

the case" (ROC). Section 25(2), (3) and (3A) set out the requirements for the ROC as follows:

> (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain—
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> (a) A summary of the evidence acquired to support the request for the surrender of the person; and
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> (b) Other relevant documents, including photographs and copies of documents.
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> (3) The record of the case is admissible as evidence if it is accompanied by—
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> (a) An affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person's trial; and
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> (b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.
>
> (3A) A person referred to in subsection (3)(b) is—
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> (a) the Attorney-General or principal law officer of the exempted country, or his or her deputy or delegate; or
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> (b) any other person who has, under the law of the exempted country, control over the decision to prosecute.

[12] Section 22 provides that for the purposes of the extradition hearing, the court has the same jurisdiction and powers and must conduct the proceedings in the same manner as if the proceedings were a committal hearing for an indictable offence alleged to have been committed within the jurisdiction of New Zealand.[5]

[13] If the court determines under s 24 that the person is eligible for surrender the extradition process moves to the executive phase. The court issues a warrant for the detention of a person, records in writing the extradition offence or offences in relation to which the court has determined the person is eligible for surrender and sends the Minister a copy of the warrant of detention and the record made. The Minister must then determine whether the person is to be surrendered. The Minister

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5 In that respect, s 22(1)(b) deems certain provisions of the Summary Proceedings Act 1957 to apply.

must not determine that the person is to be surrendered in a number of circumstances including if the Minister is satisfied that a mandatory restriction on the surrender of the person applies.[6]

2. Decision the subject of the review application

[14] Judge Harvey began by addressing the nature of the extradition procedure observing that the ROC procedure is merely part of a process. The ROC procedure involves the provision of information upon which the court determining the proceedings might come to a conclusion, but does not govern the entire process leading up to or associated with an extradition hearing. He said it was significant that nothing in s 25 limited the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender, and that s 25(4)(b) expressly permitted it. He summarised the position as follows:[7]

> There can be no doubt that the ROC process is an expeditious process that recognises levels of trust and comity between New Zealand and the exempted State. Behind the ROC procedure are certain presumptions about the fairness and rigour of the legal and investigative process within the requested State that justify the privilege of allowing it to adopt the ROC procedure.
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> ...
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> The function of the Court at an extradition hearing is to determine whether or not a *prima facie* case exists. It is not the function of the Court to determine whether or not the defendant is liable. Other evidence that may be adduced orally, of course, would be subject to cross examination and testing but the ROC is not, and to that extent it is evidence of a nature peculiar to extradition proceedings.

[15] As to the procedure to be followed at the extradition hearing he reviewed a number of authorities and concluded that the proceedings are of a criminal nature. He noted that s 22 of the Extradition Act incorporates the committal hearing procedure contained in the Summary Proceedings Act. He addressed the applicant's argument that the person sought could not produce oral evidence at the extradition hearing unless an oral evidence order had been obtained, and rejected it. However,

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6 Extradition Act 1999, s 30(2).
7 At [139]-[140].

he accepted that the procedure that applied to the hearing should be shaped in the light of the purpose of the hearing.

[16] The Judge extensively reviewed a line of Canadian authorities in relation to the nature of the decision to be made by the Court in extradition cases. He said that the conclusion that can be drawn from this line of authority is that extradition proceedings are not just an administrative process based solely upon the ROC. Although the scope of such proceedings may be modest or limited, their outcome must nonetheless be considered substantively, judicially and fairly. The evidence contained in the ROC and supporting documents may be accepted uncritically but only insofar as reliability and evidence gathering processes are concerned. Evaluation of the evidence remained a judicial function, and that evaluation could be informed, not only by an evaluation of the ROC, but also by any additional evidence addressed by the requesting state or by the person sought.

[17] In determining whether there was a right of disclosure, he went on to consider whether the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), and particularly ss 24 and 27, applied He reviewed a number of conflicting High Court authorities on that point and concluded that the Bill of Rights Act is applicable to extradition proceedings, including the right contained in s 24(d) of that Act to adequate time and facilities to prepare a defence, the right upon which the first respondents relied to obtain disclosure.

[18] In terms of the issues of disclosure and discovery, he said that the context of the particular proceedings and their nature must govern the approach the Court takes to ancillary or procedural applications. The right to adequate time and facilities to prepare a defence was entirely consistent with the nature of extradition proceedings. Some of the rights under s 25 of the Bill of Rights Act would not be applicable such as the right to examine witnesses for the prosecution in the context of a ROC procedure.

[19] He concluded in relation to disclosure as follows:[8]

> A denial of the provision of information that could enable a proper adversarial hearing in my view would amount to a denial of the opportunity to contest and that would effectively mean that the process is one sided and in reality becomes more of an administrative one based on the limited information provided to the Court by virtue of the ROC. Effectively by its own actions the United States is saying that there can be no other evidence than the ROC that the Court can take into account, and it can say this with some confidence, given that all or any of the evidence upon which Mr Dotcom might wish to rely is in the hands of the United States or investigative authorities acting at their behest in New Zealand.

[20] The Judge noted that the applicant's ROC currently does not comply with the provisions of s 25(2)(b) because it does not contain the relevant documents. He saw the absence of that information as lending colour to the context upon which Mr Davison relied for disclosure.

[21] The Judge said that a review of the Canadian authorities made it clear that disclosure is not prohibited. In view of the significant advantage provided to the requesting state by the ROC procedures, that should be balanced by allowing the first respondents the opportunity to have information that may assist him to contest the allegations. He said:[9]

> It is not as if the underlying reliability of the ROC is challenged by a requirement that the requesting party call evidence at the hearing. The ROC remains intact and its particular status does not change.

[22] He concluded that disclosure is available:[10]

> ... but only in so far as material relevant to the issues properly raised at the committal stage of the process is concerned. As was held in the case of *Republic of Poland v Bujak*[11] disclosure may be ordered for it is relevant to a justiciable issue and the justiciable issue in this case is the existence of a prima facie case to answer.

[23] The Judge ordered disclosure structured around elements of the various charges brought against the first respondents. The disclosure ordered by the Judge is set out in the appendix to this judgment.

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8 At [231].
9 At [236].
10 At [243].
11 *Republic of Poland v Bujak* 2006 DCR 863.

3. Grounds of review

[24] The applicant alleges that the District Court exceeded its jurisdiction in ordering disclosure beyond the evidence contained in the ROC. This result flowed from a series of errors of law concerning:

(1) The application of trial rights protected by ss 24 and 25 of the Bill of Rights Act to the extradition process; and

(2) A mischaracterisation of the role of the extradition courts, and the purpose of the extradition hearing, which would have:

(a) the District Court decide eligibility according to whether the extradition offences would be proved rather than could be proved on the basis of the ROC; and

(b) the District Court hold a hearing that is in effect as adversarial as a criminal trial of the alleged offending, in that the weight of the applicant's case is to be determined having regard to material that is neither part of the ROC nor mandated by s 25 of the Extradition Act.

[25] The applicant seeks the quashing of the disclosure order and declarations concerning the extent to which the Court may order disclosure beyond the ROC and the circumstances in which it may do so.

[26] In relation to the proper construction of the Extradition Act, the applicant says that the Judge construed s 25(2)(b) as imposing a mandatory obligation on the requesting state to include in the ROC, copies of all relevant documents held by it. It is the essence of the ROC procedure that it is deemed supported by evidence that is relevant and s 25(2)(b) cannot be read so as to imply a right to disclosure of relevant material on which the requesting state does not rely.

[27] As to the application of provisions of the Bill of Rights Act, the applicant says that ss 24 and 25 do not apply because extradition does not engage fair trial

rights as defined in those provisions. The thesis that those provisions apply in part to extradition is problematic in light of the line of cases decided by the New Zealand Court of Appeal, which hold that ss 23-25 of the Bill of Rights Act carefully define rights in a way which does not permit the application of individual subsections to contexts where other parts of the section cannot apply.

[28] The applicant submits that the disclosure obligation the Judge constructed in reliance upon ss 24 and 25 of the Bill of Rights Act is incompatible with the ROC procedure. It says that the Extradition Act does not contemplate a hearing in which the ROC evidence is weighed against exculpatory evidence adduced by the extraditable person and that s 25(4) is not properly construed as permitting defence evidence. The applicant says that the style of hearing contemplated for the purposes of s 24 of the Extradition Act is one at which the ROC will be received as evidence in support of the extradition, and the defence will only be entitled to produce evidence if it is relevant to the issue of whether any of the evidence in the ROC is "manifestly unreliable". Moreover, the defence will only be permitted to produce oral evidence when the evidence meets this admissibility threshold, and the defence has obtained an oral evidence order. This approach flows both from the provisions of the Summary Proceedings Act and from the fact that the extradition court is not to be concerned with possible defences or exculpatory material. For a court to involve itself in this would be to trespass on the trial phase in the requesting country and infringe the principle of comity on which the extradition relationship is founded (the applicant says this analysis is supported by a body of Canadian case law). The applicant contends that the only question for the New Zealand Court is:

> Does the request disclose "extradition offences" (as defined by the Treaty) and would the evidence summarised in the request be sufficient to justify committal for trial here?

[29] The applicant says that when the function of the extradition court is thus correctly stated, it is apparent that the District Court's order is premised on an error as to the use to which the disclosed material could be put. The applicant argues that although the Judge considered relevant Canadian authorities, he reached conclusions that are not supported by the Canadian principles. There was error of law and principle in treating the existence of a prima facie case as a "justiciable issue", warranting additional "limited" disclosure. By this expansion of terms, practically

the entire subject matter of the United States investigation became subject to disclosure. "Limited disclosure" has meant, in effect, the kind of general disclosure that the authorities determine to be unsupportable.

[30] It is said that such reasoning is entirely absent from the Canadian decisions. There is no authority for the imposition of disclosure obligations on the scale ordered, or on the grounds identified, by the Judge.

[31] Finally, it is argued that the Judge erred in failing to take into account evidence that the disclosure ordered would significantly trespass on the trial requirements of the requesting state. He made an order purporting to bind the United States, which was beyond the District Court's jurisdiction. In both these respects the Court failed to observe the principle of comity that controls extradition proceedings.

C. Analysis

[32] The critical issues raised by this proceeding are whether and in what circumstances disclosure may be ordered in extradition proceedings, and the proper extent of any disclosure ordered. Before addressing these questions it is necessary to consider, as the Judge did, a number of prior issues. It is convenient to address those issues in the following order:

(i) The approach to construction of the Extradition Act and application of the Bill of Rights Act. The applicant argues for a particular construction of provisions of the Act, and it is therefore necessary to address the proper approach to construction of those sections.

(ii) The issue for extradition court under s 24(2)(d)(i) of the Extradition Act. The nature and scope of this issue is critical to determining whether disclosure is necessary for a fair hearing

(iii) The right to disclosure and extent of any disclosure.

1. Approach to construction of the Extradition Act and application of the Bill of Rights Act 1990

Nature of the extradition process

[33] The extradition hearing is provided for in the Extradition Act, and the construction to be placed upon some provisions of the Act is at issue in this proceeding. In ascertaining the meaning of that Act, I am required to consider its text, in the light of its purpose.[12] As Tipping J observed for the Court in *Commerce Commission v Fonterra Co-operative Group Ltd*, those two considerations are the "key drivers of statutory interpretation".[13] He continued:

> Even if the meaning of the text may appear plain in isolation of the purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[34] Section 12 of the Act relevantly describes the Act's object as providing for the surrender of an accused person to an extradition country to enable New Zealand to carry out its obligations under extradition treaties. It is also clear from the provisions of the Act, however, that the Act has as its purpose the creation of procedures that allow for the just and expeditious disposition of requests for extradition.

[35] The nature of the extradition process is an issue that has been traversed on many occasions by the Supreme Court of Canada within the context of similar governing legislation. In *United States of America v Anekwu*[14] Charron J discussed the nature of the extradition process as follows:

> [27] ... as a starting point, it is wrong to equate extradition proceedings with the criminal trial process. As stated by McLachlin J., as she then was, in *Kindler v Canada (Minister of Justice)*, [1991] 2 S.C.R. 799, at pp 844-45:

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12 Interpretation Act 1999, s 5(1).

13 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

14 *United States of America v Anekwu* 2009 SCC 41, [2009] 3 SCR 3.

> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.
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> This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.
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> ...
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> Thus this Court, per La Forest J., recognized in *Canada v Schmidt* [1987] 1 S.C.R. 500, at pp. 522-23, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without, for example, the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.

[36] Also useful on this point is the judgment of the Canadian Supreme Court in *United States of America v Ferras* in which McLachlin CJ said of the purposes of the extradition hearing:[15]

> The first purpose is to foster efficient extradition where such a case is made out, in accordance with [the requested state's] international obligations. This requires a flexible, non-technical approach. The second purpose is to protect an individual in Canada from deportation in the absence of at least a *prima facie* case that he or she committed the offence alleged which must also be an offence in [the requested state] ...

[37] As the Crown submitted in this case, the extradition process is founded on the acceptance that the requesting country will afford a fair trial process.[16] That cannot be questioned, and the extradition court must not usurp the trial process procedures of the requesting country, or allow the extradition proceedings to take on the character of a trial. The role of the extradition court has been described as modest.[17] It is intended to be an expeditious, summary process.[18]

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15 *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77.
16 *Argentina v Mellino* [1987] 1 SCR 536 at [32].
17 *United States of America v Dynar* [1997] 2 SCR 462 at [120].
18 *Republic of France v Diab* 2011 ONSC 337 at [14].

[38] Extradition proceedings are proceedings of a criminal nature. The consequences that can flow from them include forced removal from New Zealand and detention pending the extradition hearing and perhaps, pending removal.[19] Nevertheless, the proceedings, although criminal in nature, are proceedings of a special kind having regard to the limited nature of the role for the court as defined by the Extradition Act.[20]

[39] In interpreting the provisions of the Extradition Act it may also be necessary to take into account the provisions of any extradition treaties between the requesting state and New Zealand. Section 11 addresses the significance of extradition treaties to the interpretation of the Act:

> (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.
>
> (2) Despite subsection (1), no treaty may be construed to override—
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> (a) Section 7; or
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> (b) Section 24(2)(d) or section 45(5); or
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> (c) Subsection (2)(b) or subsection (3)(a) of section 30 (including where those provisions are applied under section 49); or
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> (d) Any provision conferring a particular function or power on the Minister or a court.
>
> (3) This section is subject to section 105.

[40] In *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China*, Keith J described the meaning and effect of s 11 as follows:[21]

> Section 11(1) is a very strong direction. The "construction" it directs is more than the mere interpretation of the Act. It uses much stronger wording than the interpretation directions in the Interpretation Act 1999 s 4 and the New Zealand Bill of Rights Act 1990 s 6 which is also to be read with ss 4

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19 *Schlaks v Gordon* HC Auckland M636/98, 15 May 1998; *United States of America v Cullinane* [2003] 2 NZLR 1 (CA).

20 *R v The Senior District Court Judge, Bow Street Magistrate's Court & Ors* [2006] EWHC 2256 (Admin) at [76].

21 *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 at [15]-[18].

> and 5. To use the wording of subs (2), the Act is "overridden" by inconsistent treaty provisions or, as the equivalent provision in s 3(4) of the Extradition Act 1965 put it, the Act must be read "subject to" the terms of the treaty and construed to give effect to it.
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> ...
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> The process which s 11 of the New Zealand Act requires can perhaps be better thought of as reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent. The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its internal law to justify its failure to perform a treaty (articles 26 and 27 of the Vienna Convention on the Law of Treaties). In the specific context of extradition, the Act also recognises those principles in its objective stated in s 12: the Act, among other things, is an Act:
>
> > (a) To enable New Zealand to carry out its obligations under extradition treaties.
>
> ...
>
> The direction in s 11(1) is not unqualified. Subsection (2) (like s 3(3) of the 1965 Act) qualifies the basic proposition in subs (1) by excepting basic protections in the Act from the override. It accordingly contemplates the prospect that the Act may override a particular treaty. That apparent exception to the principle that treaties must be complied with may be explained in three ways. First, the basic protections in paras (a) – (c) are routinely included in bilateral extradition treaties or in one case (the torture exception) in a very widely accepted multilateral treaty (para [28] below); and, so far as para (d) is concerned, it is not in general the practice for extradition treaties to dictate whether the executive or the judiciary is to exercise a particular function. Secondly, subs (2) is in effect a direction to the executive that in negotiating extradition treaties it is to ensure that the listed protections are incorporated; such directions are expressly given by ss 100 and 101 of the Extradition Act 1999 and were given in a different way in the original Imperial Extradition Act 1870, s 4 which provided that an Order in Council applying the Act to a foreign state was not to be made unless it contained certain provisions. Thirdly, the protections stated in subs (2) essentially look to treaties concluded in the future. That arises from subs (3) which makes s 11 subject to s 105, a provision concerned with treaties in force when the 1999 Act came into force.

[41] The extradition treaty between the United States and New Zealand contains nothing that bears upon the issue of disclosure. The treaty was concluded in 1970, and therefore pre-dates the 1999 Extradition Act. Accordingly some provisions of the 1965 Extradition Act continue to apply, but it is not suggested that this is significant in this case.

Application of the Bill of Rights Act

[42] The next issue is the application of the Bill of Rights Act to the extradition hearing. It cannot be disputed that the Bill of Rights Act applies to extradition proceedings as s 3 provides that it applies to acts done by the judicial branch of the government of New Zealand. The significance of this to the interpretation of the Extradition Act appears in s 6 of the Bill of Rights Act which provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[43] Balancing this direction is s 5 of the Bill of Rights Act:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[44] Section 4 of the Bill of Rights Act provides:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[45] The interpretation of those sections was considered by the Supreme Court in *Hansen v R*.[22] There McGrath J observed that:

> [252] Section 6 accordingly adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach

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22 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

> to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the courts must prefer it to any inconsistent meaning.
>
> (Footnotes omitted)

[46] The applicant puts at issue whether s 24 (rights of persons charged) and s 25 (minimum standards of criminal procedure) apply to the extradition proceeding and to the first respondents. However, in the course of oral argument the applicant accepted that s 27 of the Bill of Rights Act applies to the first respondents in relation to the conduct of the extradition hearing. In relevant part s 27 provides:

> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[47] As the District Court Judge observed, there are a number of conflicting High Court authorities on the point. *Callahan v The Superintendent of Mount Eden Prison & Another*,[23] was a case decided shortly after the coming into force of the Bill of Rights Act. The request for extradition in that case was supported by an affidavit from the requesting country. It was argued that extradition on the basis of an affidavit would be in breach of s 25(f) of the Bill of Rights Act because the person sought would not have the right to examine the witnesses for the prosecution. Temm J referred to the Canadian case *Schmidt v R*[24] in which the issue was whether a person could resist extradition by relying upon the protection against double jeopardy contained in the Canadian Charter of Rights and Freedoms (the Charter). Section 11(h) of the Charter provides that any person charged with an offence has the right, if finally acquitted, not to be tried for that offence again. The Supreme Court of Canada said that s 11(h) of the Charter had no application to charges in a foreign jurisdiction because it was intended to govern trials conducted by the governments of Canada. The fugitive could not rely upon the Charter because the fugitive was not a "person charged with an offence".

[48] Adopting this analysis, Temm J concluded that Mr Callahan was not charged with an offence in New Zealand; he was detained under a warrant issued pursuant to

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[23] *Callahan v The Superintendent of Mount Eden Prison & Anor* HC Auckland M648/91, 22 July 1991.

[24] *Schmidt v R* [1987] 1 SCR 500.

the Extradition Act and the question for examination was whether he should or should not be extradited. The Bill of Rights Act and in particular s 25, did not apply to extradition proceedings because he was not charged with an offence in New Zealand. The decision in *Callahan* was subsequently followed by Potter J in *Schlaks v Superintendent of Mount Eden Prison.*[25]

[49] On the other side of the divide are three decisions, the first an earlier decision in respect of Mr Schlaks but involving a different issue and a different Judge.[26] Mr Schlaks brought an urgent application for determination of pre-trial matters before the extradition hearing. One of these was whether ss 24 and 27 of the Bill of Rights Act obliged the requesting country to provide further particulars of charge to detail which acts or omissions referred to in the counts contained in the extradition requests would be offences against the laws of New Zealand. In discussing this Giles J said:[27]

> The extradition procedure is, of course, being conducted in a New Zealand Court and the provisions of the New Zealand Bill of Rights Act 1990 apply. Section 27 preserves the right to the principles of natural justice. Natural justice requires that a person accused of an offence be given adequate information to understand precisely what is alleged so that a defence can be prepared. Section 24 of the New Zealand Bill of Rights Act 1990 requires that that information be provided promptly.
>
> I accept that the New Zealand Bill of Rights Act 1990 is addressing criminal prosecution in New Zealand. An extradition request is not a prosecution but those principles, in my view, apply by way of analogy.

[50] The second of these decisions is *Poon v Commissioner of Police.*[28] In *Poon* the issue was the availability of bail in the context of extradition proceedings, and in particular whether s 24(b) of the NZBORA applies in extradition cases.[29] Baragwanath J said that whilst some provisions in s 24 plainly cannot apply to extradition hearings, to the extent the language of the Act can reasonably be applied to public sector conduct, it should be applied. He found that the right under s 25(c) to be presumed innocent until proven guilty according to law, and under s 25(b) to be tried without undue delay, applied to extradition cases.

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25 *Schlaks v Superintendent of Mount Eden Prison* HC Auckland, M1839/98, 18 December 1998.
26 *Schlaks v Gordon and Ors*, HC Auckland M636/98, 15 May 1998.
27 At p 24.
28 *Poon v Commissioner of Police* [2000] NZAR 70.
29 Section 24(b) provides that everyone who is charged with an offence (b) shall be released on reasonable terms and conditions unless there is just cause for continued detention.

[51] He also noted the provisions of s 22 of the Extradition Act which require the District Court to conduct extradition proceedings as if they were a preliminary hearing. He concluded that there was nothing in the language of s 24 of the Bill of Rights Act, to render it inapplicable to persons arrested for the purposes of extradition. He said:[30]

> ... the Bill of Rights Act states fundamental values, most of them already recognised by the common law, and is not to be construed narrowly.

[52] In 2006, the issue of the application of Bill of Rights Act provisions to those subject to extradition proceedings again came before Baragwanath J. In *X v Refugee Status Appeal Authority*[31] the issue was whether X was entitled to a declaration that the particulars of his refugee claim be made absolutely confidential so that they could not be disclosed to the government of Rwanda or to New Zealand officials involved in extradition or prosecution proceedings. In obiter comments, Baragwanath J responded to criticism in academic publications of his earlier decision in *Poon*:

> [58] Both standard texts on the New Zealand Bill of Rights, *Rishworth*[32] at 608 and 742 and *Butler and Butler*[33] at 719, have challenged my decision in *Poon v Commissioner of Police* ... that s 24(b) is apt to refer to a foreign charge as well as a New Zealand charge. They prefer the views expressed in majority judgments of the Supreme Court of Canada in *Schmidt v The Queen* and *Republic of Argentina v Mellino* and in two unreported judgments of this Court, *Callahan v Superintendent of Mt Eden Prison* which I had declined to follow and *Schlaks v Superintendent of Mt Eden Prison* which had not been cited in *Poon*. Their reasoning is that, as stated in *Schlaks* at pp 31-33, a person imprisoned on an extradition warrant is not "charged with an offence" for the purposes of s 24. Similar arguments can be advanced in relation to s 25.
>
> [59] But such argument begs the essential question of what *is* the purpose of ss 24 and 25. Mr Poon had been "charged with an offence", albeit in Hong Kong rather than New Zealand. As a human being in detention in New Zealand I could see no reason for him to be disentitled to the right to bail unless cause were shown to the contrary. In the absence of clear language to the contrary there is no obvious policy reason why the New Zealand Parliament should apply a differential approach in such a vital matter of human rights as unnecessary detention. Where there is just cause for continued detention the Court will decline bail.

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30 At [36].

31 *X v Refugee Status Appeal Authority* [2006] NZAR 533.

32 Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

33 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (LexisNexis, Wellington, 2005).

> [60] No doubt the proper treatment on suspects [sic] facing charges upon New Zealand offences and criminal proceedings in New Zealand are obvious targets of ss 24–25; not all of their provisions will apply to an extradition where the case is not to be tried in New Zealand. But it by no means follows that the effects upon suspects of charges upon foreign offences and criminal proceedings overseas do not fall within the sections in so far as their language *can* fairly apply.
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> (Footnotes and citations omitted. All original emphasis).

He then continued:

> [63] The Bill of Rights is focused on the protection of persons subjected to public sector conduct. The rights are not confined to New Zealand citizens and residents. They are enforceable against the judiciary as well as the executive. I have recognised that certain of the provisions of ss 24 and 25 can have no application to extradition cases. But the s 25(a) right to a "fair hearing" in relation to "the determination of the charge", whether that hearing is in New Zealand or in Rwanda, could be adversely affected by how the New Zealand Courts (including both the Authority and this Court) deal with relevant issues.
>
> [64] It must follow that this Court is bound to ensure that such right at ultimate trial is not imperilled by events in New Zealand. To ensure such fair hearing, if there were real risk of leakage of information and corrupt advantage being taken to damage the defence case, it could well be necessary to hear the extradition application before the refugee claim.
>
> [65] As New Zealand's role in world affairs has constantly shown, we see ourselves as members of a global community. There can be no room for a crabbed construction of a statute expressed in such generous terms as the Bill of Rights. There is no reason to read down its language to exclude consequences at trial beyond our borders …

[53] For the applicant, Mr Pike argues that in adopting the reasoning of Baragwanath J, Judge Harvey gave a strained meaning to ss 24 and 25. He relies on judgments of Richardson J in *R v Goodwin*[34] and *R v Barlow*[35] in which a distinction was made between open textured rights in the Bill of Rights Act (for example ss 18-22) and provisions that are more specifically focused. In *Barlow* Richardson J said that provisions such as s 23 (rights of persons arrested or detained) must be read as a whole. If that approach is adopted "arrest" in s 23 cannot mean "detention" whether by intentional acts or inducing a (reasonable) belief that the person was not free to leave. That was because provisions such as s 23(1)(a) – the right to be informed of the reason for the arrest – could not have any application to a case where the Police

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34 *R v Goodwin* [1993] 2 NZLR 153 at 186.
35 *R v Barlow* (1995) 14 CRNZ 9, 27-30.

were unaware that a situation of "arrest" had arisen. Provisions such as s 23, and also ss 24 and 25, are dealing with different phases in the criminal process, and it would be wrong to transpose rights applying in one phase to another.

[54] Mr Pike submits that proceeding from this point, and applying the necessary textual and contextual analysis (an extradition hearing is not "the determination of a charge" and there is no charge before the Court in the sense used in Bill of Rights Act), the ss 24 and 25 guarantees have no application to extradition proceedings.

[55] Both analyses reflected in the conflicting authorities have their attractions, but I accept Mr Pike's argument that when regard is had to the language of ss 24 and 25 it seems that the expression "charged with an offence" is there used in the sense of charged with an offence under New Zealand laws. Similarly, Butler and Butler say:[36]

> We reject the view expressed by Rishworth et al that a "policy" orientated approach to ss 24 and 25 of BORA should be adopted such that some proceedings might involve the determination of an offence for some subsections but not for others. A "pick and mix" approach to the single word "offence" defies the normal approach to interpretation of a term in a statute.

[56] Although I think this a persuasive point, it is equally plain that some of the rights preserved to an accused person in ss 24 and 25 should be applied in extradition cases. For example, I doubt the applicant would challenge that the first respondents have the right to a fair and public hearing by an independent and impartial Court, that they have the right to have their extradition proceeding dealt with without undue delay, and that they have a right to be present at that hearing and present some form of case relevant to the scope of the extradition hearing.

[57] These propositions are reconcilable. The starting point is that the rights recorded in ss 24 and 25 did not spring up with the Bill of Rights Act, but rather found formal expression there. Moreover, the Bill of Rights Act does not purport to codify all of the human rights and fundamental freedoms in New Zealand, and the rights of those involved in extradition proceedings were not therefore reduced by its enactment. Section 28 provides:

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[36] At 21.5.34.

> An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

[58] Further, s 27 (which the applicant accepts applies in this case) preserves to the first respondents the right to the observance of principles of natural justice in respect of the extradition hearing. In *Furnell v Whangarei High Schools Board* the Privy Council said of natural justice that it is "but fairness writ large and judicially."[37] Extradition proceedings are, as the District Court Judge correctly observed, essentially criminal in character. At issue are fundamental rights such as the freedom of movement.[38] In the context of such proceedings the minimal standards of criminal procedure appropriate to the extradition context should be applied through the vehicle of s 27 to ensure a fair hearing. Sections 24 and 25 can be seen to provide content to what natural justice requires. I caveat that observation as follows: what procedures are required in a particular case to achieve fairness will depend upon the nature of the issue before the Court. The content of what natural justice requires will vary depending upon the context;[39] the more significant the rights affected, the more stringent the procedural rules designed to maintain the fairness of the process are likely to be.

2. The issue for the extradition court under s 24(2)(d)(i) of the Extradition Act

The same as the issue on committal?

[59] The applicant argues that the District Court Judge mischaracterised the threshold as being whether the ROC *would* establish the first respondent's guilt, rather than whether the ROC *could* prove guilt, because he contemplated the possibility of defence evidence, and it follows, contemplated the possibility of the weighing of evidence.

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37 *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718. The two principles of natural justice are that parties must be given adequate notice and opportunity to be heard and that the Tribunal must be disinterested and unbiased. See: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 954.

38 New Zealand Bill of Rights Act 1990, s 18.

39 *Fraser v State Services Commission* [1984] 1 NZLR 116 at 122.

[60] In considering the nature of the s 24(2)(d)(i) threshold it is best to start with the statute. The issue framed for the court by s 24(2)(d)(i) is whether the Court is satisfied that the evidence produced or given at the extradition hearing would, according to the law of New Zealand, but subject to the Act:

> In the case of a person accused of an extradition offence, justify the person's trial of the conduct constituting the offence had occurred within the jurisdiction of New Zealand.

[61] Section 22(1)(a) of the Act reinforces that the question is framed so as to mirror the issue for the Court in committal proceedings. That section relevantly provides:

> (1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—
>
> (a) The court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and
>
> ...

[62] In New Zealand, the test for committal following a committal hearing is whether the Court is of the opinion that the evidence adduced by the prosecutor is sufficient to put the defendant on trial for an indictable offence.[40] The evidence will be sufficient where it is evidence upon which a reasonable jury, properly instructed, could convict.[41] For this reason, defence evidence is seldom offered at the committal stage, and where it is offered a Court will seldom embark very far upon a weighing of conflicting evidence, as issues as to credibility and weight to be attached to evidence are properly for the jury. There are some occasions, however, where a committal court will weigh both prosecution and defence evidence in determining the sufficiency of evidence for committal. Such occasions will include where the Court must test the safety of inferences to be drawn from circumstantial evidence, where the defence produces evidence which, by providing context to prosecution evidence, negates it,[42] or where the defence presents evidence that so far undermines

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40 Summary Proceedings Act 1957, s 184G.
41 *Auckland City Council v Jenkins* [1981] 2 NZLR 363.
42 See *W v Attorney-General* [1993] 1 NZLR (CA).

the reliability of the prosecution evidence that the Court considers it no longer passes the threshold for admissibility, or means that no jury could reasonably convict if properly directed.

[63] In *Downey v The District Court,*[43] the Serious Fraud Office sought to review a decision of Justices of the Peace ordering disclosure of documents in the prosecution's possession for the purposes of whether the defendant should be committed for trial. Critical to the Judge's decision to decline the application for review was the nature of the Court's function in committal proceedings. The Judge said:[44]

> Whether the evidence is sufficient to put the defendant on trial would seem to have much in common with the question whether an accused should be discharged under s 347 of the Crimes Act (*R v ETE* (1990) 6 CRNZ 176, 180) and, in at least the first two out of the following three categories, whether there is a case to answer in a summary prosecution (*Auckland City Council v Jenkins* [1981] 2 NZLR 363, 365). In evaluating the evidence the Justices can refuse to commit for trial if (i) the prosecution has failed to adduce any evidence to support some element essential to the Crown case (this being self-evident from s 168(1) itself), (ii) if the "creditableness" of critical witnesses is such that no jury could reasonably believe their evidence (for recent discussion of the distinction between creditability and credibility see *G v Attorney-General* CA 203/94, 31 October 1994) or (iii) if on an overall view of the evidence the likelihood of a guilty verdict is so slight that a trial would be unjustified, this being said to arise only in an "extreme case" (*W v Attorney-General* [1993] 1 NZLR 1, 8 (CA)).

[64] There are issues that might be traversed in a domestic committal proceeding that would not be traversed in an extradition hearing. For example, on occasion committal hearings are used as opportunities to explore whether there are grounds to challenge the admissibility of evidence at trial on the grounds it was improperly obtained. In the extradition context, issues such as those are properly for the trial court and not for the extradition court. However, even in the domestic context this typically occurs because it is efficient to allow this, not because the nature of the issue for the court is essentially different.

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43 *Downey v The District Court & Ors* HC Auckland M271/95, 29 June 1995.
44 At 3.

Does the use of the Record of Case procedure affect the nature of the issue?

[65] The applicant makes an additional argument to support its contention that the extradition hearing is more narrow in its focus than the hearing contemplated by the District Court Judge. The applicant contends that the Judge was wrong in finding that the Act contemplates an adversarial hearing at which oral evidence can be called for the person sought. The applicant says that because the ROC is admitted without the need to prove its contents through first hand witnesses, it is presumptively reliable, and it is necessarily assumed to be supported by the evidence it summarises, and consistent with the certificate contained in the ROC, which continues to be held by the requesting state.

[66] Mr Pike takes this submission further. He says that when the s 24(2)(d)(i) test is combined with the provisions of s 25 in relation to the ROC procedure, it becomes plain that the extradition hearing is concerned only with the question, could (not would) the ROC evidence be accepted as satisfying the component element of those offences? If the fact finder could accept that evidence as proving the elements of the offence, the test of justification in s 24(2)(d)(i) will be met. Any other evidence will only be admitted if it could go to show that any aspect of the ROC is manifestly unreliable and before defence evidence will be admitted for this purpose, there must be an "air of reality" about the challenge to the ROC. Before oral defence evidence is admitted there must also be an oral evidence order. Mr Pike thereby strives to parlay the procedural privilege granted to exempted countries through the ROC procedure into a hearing with a far narrower focus than that of a traditional committal hearing at which the court can consider all of the evidence before it, prosecution and defence, when evaluating whether the committal threshold is met.

[67] It is appropriate, as the applicant contends, to consider the particular provision (s 24) in context. Indeed, s 24 qualifies the test articulated by the words "but subject to the Act". In assessing whether there is anything in the applicant's argument that the nature of the ROC procedure requires a reading down of the Court's role beyond the plain words of s 24(2)(d)(i), it is instructive to understand the reasons for the adoption of the ROC process.

[68] The origins of the ROC were summarised by the Ontario Court of Appeal in *United States of America v Yang.*[45] The Court referred to the difficulties that non common law countries had, prior to the adoption of the ROC process, in presenting the evidence in support of an application for extradition in a way which complied with the particular evidentiary rules applying in Canada. Those rules required that affidavits based upon first hand information from all of the various witnesses and victims be gathered in support of the application. The Court said:[46]

> In the result, there was evidence, admittedly mostly anecdotal, that civilian states had stopped making requests of Canada for extradition. Even the United States, with whom Canada transacts most of its extradition business, found the Canadian rules cumbersome, especially in very complex drug and fraud investigations.

[69] At the same time the Court said the growth in trans-national crime had sparked worldwide initiatives to modernise extradition. States were complaining about the need for proof of a prime facie case, through the use of affidavits containing first hand accounts (not inadmissible hearsay), and in some cases, the requirements that the documentary evidence be produced under oath or affirmation. The Court summarised the background as follows:[47]

> The scheme in the new *Extradition Act* originates in negotiations between law ministers of the Commonwealth. In 1986, the Government of Australia proposed the abolition of the *prima facie* test within the Commonwealth scheme for rendition. Canada, in particular, was opposed to this suggestion, which would have abolished any judicial assessment of the sufficiency of the request. Accordingly, in 1989 at a meeting in New Zealand, Canada proposed that the *prima facie* test be retained but that the requesting state could rely upon a record of the case. The record of the case would contain a recital of the evidence. Thus, there would be no requirement for affidavits containing first-hand accounts. Further, the recital of evidence could be based upon evidence admissible in the requesting state and not necessarily admissible in the requested state. This proposal would bring the Commonwealth more in line with there scheme for extradition as set out in the *European Convention on Extradition* and the United Nations *Model Treaty on Extradition.* The law officers of the Commonwealth adopted Canada's proposal.

[70] It is clear that the ROC procedure was intended to smooth the evidentiary path for the requesting state. There is no indication, however, that it was intended to create an entirely new procedural scheme for extradition hearings which would

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45 *United States of America v Yang* [2001] 203 DLR 4th 337.
46 At [24].
47 At [28].

exclude the possibility of a defendant calling evidence where it was relevant to the extradition issue, unless relevant to show the "manifest unreliability" of the ROC. The applicant's argument proceeds on the basis that s 25 confers on the ROC a presumption of reliability in the sense that the ROC is to be treated as equivalent to proof of the matters covered, or in other words, that it will ultimately (at trial) be accepted as reliable. However, all that s 25 confers is "threshold" reliability. In *Ferras* the Supreme Court of Canada described the notion of threshold reliability for the ROC as conferring on evidence "sufficient indicia of reliability to make it worthy of consideration" by the extradition Judge.[48]

[71] The applicant calls in aid of its argument, discussion in various Canadian cases as to the nature of the extradition where the ROC procedure is used. Section 29(1)(a) of the Canadian Extradition Act bears a significant similarity to s 24(2)(d)(i). It provides:[49]

> A Judge shall order the committal of the person into custody to await surrender if
>
> (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied the person is the person sought by the extradition partner;
>
> ...

[72] Section 33 of the Canadian Act contains the ROC provisions which are as follows:

> (1) The record of the case must include:
>
> (a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and
>
> (b) in the case of a person sought for the imposition or enforcement of a sentence,
>
> (i) a copy of the document that records the conviction of the person, and

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48 *United States v Ferras* [2006] 2 SCR 77 at 102.

49 Extradition Act 1999 (Can), s 29(1)(a).

(ii) a document describing the conduct for which the person was convicted.

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(3) A record of the case may not be admitted unless

(a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) For the purposes of this section, a record of the case includes any supplement added to it.

Section 32 provides:

(1) 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:

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);

(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(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

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

[73] These provisions were considered by the Canadian Supreme Court in *Ferras*. Prior to that case, extradition Judges had interpreted their role very narrowly. The

extradition Judge had no discretion to refuse to extradite if there was any evidence supporting each of the elements of the offence alleged, even if that evidence was so dubious as to be dangerous. The only exception to this rule was to allow some limited weighing of circumstantial evidence to ensure that inferences from the evidence were reasonably supportable.

[74] In *Ferras* the Supreme Court revisited this approach in light of the Charter, particularly s 7, and the amendments to the Extradition Act 1999 that brought in the ROC procedure. The Court decided that in order to bring the Extradition Act as amended into conformity with s 7 of the Charter, a different role for the extradition Judge had to be defined. Section 7 of the Charter guarantees the "life liberty and security of the person, of every individual", and the right not to be deprived of those rights "except in accordance with the principles of fundamental justice".

[75] The Court recognised that extradition constitutes a serious denial of liberty and security of the person. The person sought is forcibly removed from Canada to another country to stand trial according to that country's rules. It followed that the principles of fundamental justice must be respected. The Court said that s 7 of the Charter does not guarantee a particular type of process, but does nevertheless guarantee a fair process having regard to the nature of proceedings at issue. In my view the same can be said of s 27 of the Bill of Rights Act. It guarantees, to those subject to Court proceedings, a fair process.

[76] The Court referred to its own earlier decision *United States of America v Shephard*,[50] which had formulated the narrow test for extradition, saying that such an approach amounted to a rubber stamp, and not a judicial process. It said:[51]

> Here we find the basic requirements of justice in the extradition context. A person cannot be sent from the country on mere demand or surmise. The case for extradition need not be presented in a particular technical form. But it must be shown that there are reasonable grounds to send the person to trial. A *prima facie* case for conviction must be established through a meaningful judicial process. It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to law, which must involve a meaningful judicial process. The idea is as old as the *Magna Carta* (1215), Clause 39 of which provided: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or

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50 *United States of America v Shephard* [1977] 2 SCR 1067.
51 *Ferras* at [19].

deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals, or by the law of the land."

[77] The Court said of the critical issue:[52]

> Challenging the justification for committal may involve adducing evidence or making arguments on which the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition Judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt or innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

[78] In considering the background to the *Shephard* case the Court observed that:[53]

> Canadian Courts in recent decades have adopted the practice of leaving a case or defence to the jury where there is any evidence to support it, and have discouraged trial judges from weighing the evidence and refusing to put a matter to the jury on the basis that the evidence is not sufficiently reliable or persuasive .... This may explain the conclusion in *Shephard* that the extradition judge has no discretion to refuse to extradite if there is any evidence, however scant or suspect, supporting each of the elements of the offence alleged. This narrow approach to judicial discretion should not be applied in extradition matters, in my opinion. The decision to remove a trial judge's discretion reflects confidence that, given the strict rules of admissibility of evidence on criminal trials, a properly instructed jury is capable of performing the task of assessing the reliability of the evidence and weighing its sufficiency without the assistance of the judge. The accused is not denied the protection of the trier of fact reviewing and weighing the evidence. The effect of applying this test in extradition proceedings, by contrast, is to deprive the subject of any review of the reliability or sufficiency of the evidence. Put another way, the limited judicial discretion to keep evidence from a Canadian jury does not have the same negative constitutional implications as the removal of an extradition judge's discretion to decline to commit for extradition. In the latter case, removal of the discretion may deprive the subject of his or her constitutional right to a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty.
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> (Original emphasis)

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52 At [54].
53 At [47].

[79] In considering the Canadian line of authorities it is therefore important to bear in mind that the pre *Ferras* jurisprudence, and even the controversy in *Ferras* was informed by the very narrow ("rubber stamp") approach previously taken to the threshold for committal by that country's lower courts. *Ferras* was a reassertion of the need to apply in the extradition context a test more akin to the test for committal that applies in New Zealand to committal hearings.

[80] The applicant contends that *Ferras* is authority for the proposition that in an ROC case the Court can only refuse extradition where the person sought establishes that the ROC contains no evidence on a necessary element of the charged offence or where the ROC contains manifestly unreliable evidence. The applicant contends that the weighing of defence evidence against the ROC is not contemplated. However, as appears from those portions of the judgment set out above the role the Supreme Court defines for the extradition Court in *Ferras* is broader than that.

[81] A further obstacle in the way of the applicant's argument is s 25(4) which states:

> Nothing in this section –
>
> (a) Prevents an exempted country from satisfying the test in s 24(2)(d)(i) in accordance with the provisions of this Act that are applicable to countries that are not exempted; or
>
> (b) Limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender.

[82] Mr Pike argues that s 25(4)(b) is not properly construed as enabling a defendant to file evidence. He says s 25(4) contains two rules, both of which apply to the exempted country, which are to be read as reserving to the exempted country the maximum amount of flexibility as to how it goes about proving its case. On this analysis para (a) provides that an exempted country is not to be restricted to a ROC procedure, and can elect not to use it, and (b) is to be read as applying where a ROC procedure has been used and the exempted country wishes to supplement it with additional evidence.

[83] That is not an obvious reading of the provision. The plain reading of it is that the ROC procedure does not limit the evidence which is relevant to the extradition issue which can filed by either party. I also do not consider that such a reading is

required to enable the ROC procedure to have its intended effect - enabling a simplified and efficient method of placing evidence supporting extradition before the Court. Moreover, a procedure which allows one party freedom to file evidence in a variety of forms but severely restricts the ability of the other to file relevant evidence would not easily be characterised as 'fair'. If the intention had been to so severely limit the extent of defence evidence as suggested by Mr Pike, clear legislative language was required. That was the approach adopted in relation to Part 4 proceedings, which applies to countries with whom New Zealand has the greatest level of comity in extradition matters.[54] Section 45(5)(a) relevantly provides:

> The person to whom the proceedings relate is not entitled to adduce, and the court is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which the surrender is sought.

Do the oral evidence provisions of the Summary Proceedings Act affect the nature of the issue?

[84] The applicant also refers to Part 5 of the Summary Proceedings Act and the use of oral evidence orders at committal hearings,[55] arguing that defence evidence can only be admitted where such an order is obtained.[56]

[85] A committal hearing only takes place when an oral evidence order has been made. Once such an order has been made (allowing one or more witnesses to be orally examined) a committal hearing must take place.[57] The making of such an order fundamentally changes the nature of the committal process. Section 184G provides that:

> When all the evidence has been given at a committal hearing, if the Court is of the opinion that the evidence adduced by the prosecutor is sufficient to put the defendant on trial for an indictable offence, the Court must proceed [to commit the defendant for trial].

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54 Australia and any designated country.

55 Part 5 of the Summary Proceedings Act incorporated into the extradition process by s 22 of the Extradition Act, regulates committal proceedings for indictable offences and s 178 provides for oral evidence orders. (Part 5A has no application in this instance as it deals with the committal process in cases of a sexual nature. Sections 203, 204 and 206 are also not relevant for the purposes of this application).

56 Part 5 provides that a standard committal will occur on the papers and without a hearing. At a standard committal the Court must, without considering any evidence that has been filed by the prosecution, commit the defendant for trial: Summary Proceedings Act 1957, s 177.

57 Summary Proceedings Act 1957, s 183.

[86] The Extradition Act requires that an extradition hearing proceed as if it were a committal hearing, while the Summary Proceedings Act provides that a committal hearing will only take place when an oral evidence order has been made. In those circumstances, the District Court Judge determined that the necessity to make an oral evidence order did not exist since the only purpose of an oral evidence order is to engage the committal process, and that had already been engaged by the Extradition Act.

[87] I differ from the Judge's analysis in this respect. Oral evidence orders not only engage the committal hearing process, they also define the scope of the oral evidence to be received at the committal hearing. Section 184B provides that the Court must not hear oral evidence at a committal hearing, unless an oral evidence order has been made in relation to the person giving that evidence. This last provision seems to support the applicant's proposition that an oral evidence order is required in respect of each witness to give evidence at an extradition hearing.[58]

[88] I do not think much turns on this point as this procedural requirement cannot alter the nature of the issue for the extradition court. Moreover, s 180 of the Summary Proceedings Act sets out the circumstances in which an application for oral evidence order will be granted. In terms of that provision, the essential test in the extradition context will be whether it is in the interests of justice to hear the witness. If the Court is satisfied that the evidence is relevant to the issue that it has to determine, I can see no reason why it would not allow the evidence to be called. If the evidence is not relevant to that issue the Court will not, consistent with its obligation in the extradition context to conduct focused and expeditious proceedings, make an oral evidence order.

[89] To conclude on this part, there is nothing in the Extradition Act which suggests that where the ROC procedure is adopted the person sought is limited to filing evidence relevant only to the issue of "manifest unreliability' of the ROC. The Act has preserved to persons sought the right to a hearing on the s 24(2)(d)(i) issue, and they may file evidence relevant to it, narrow issue that it is. The applicant's suggested interpretation of the provisions requires a strained reading unsupported by

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[58] Although I have not heard argument on the issue it seems that this requirement would also apply to the applicant.

the purpose of the legislation. I also consider such a reading to be inconsistent with s 27 of the Bill of Rights Act as the extraditable person would not receive a fair hearing on the central issue. To read the Act as the applicant suggests would be to create a lopsided hearing. The applicant would retain flexibility and freedom as to how it presents its case on the s 24(2)(d)(i) issue, including the advantage of the ROC procedure and the ability to call supplementary evidence, whereas the person sought would be limited to attacking the reliability of the ROC or identifying inadequacies in the ROC in response. There seems no principled basis on which the person sought should be so constrained.

[90] I do not therefore consider that the Judge erred in his characterisation of the process surrounding the extradition hearing. Both the issue for determination and the procedure to be followed at the extradition hearing resemble those at a committal hearing. The hearing is adversarial, although the focus of the permitted contest between the parties is the narrow issue framed by s 24(2)(d)(i). In keeping with the principles of comity reflected in the statutory extradition process there is a need to ensure that the issues traversed, and as a consequence, the evidence admitted at the hearing is relevant to the extradition issue. However, if defence evidence is relevant to that issue it may be admitted.

3. Disclosure rights

[91] This brings me to the final, but critical issue for determination, whether the person sought is entitled to disclosure as part of the procedural rights attaching to the extradition hearing.

[92] The applicant challenges Judge Harvey's approach to ordering disclosure. It says that when the nature of both the extradition hearing and the issues for the extradition Judge are properly understood, then the scope for disclosure narrows considerably. Disclosure cannot be ordered of that which is not relevant. If the only way the person sought can resist extradition is to point to an absence of evidence on the critical issue, or to some part of the ROC which should be disregarded as manifestly unreliable, then the only disclosure that can be relevant relates to the reliability of the ROC. The applicant refers to English authority which supports its contention that disclosure in the extradition context is the exception and the

threshold for it is high. The applicant relies upon Canadian authorities which say that, before such disclosure will be ordered, a contention that an aspect of the ROC is "manifestly unreliable" must have an "air of reality", which means the applicant argues, an evidential foundation, and that the threshold applied by the Canadian Courts in this regard is high. Finally, the applicant submits that it is significant that in no New Zealand decision has disclosure yet been ordered.

Overseas authorities

[93] The applicant refers to *Wellington v The Governor of Her Majesty's Prison Belmarsh & Another*[59] to support the contention that disclosure is rarely required in extradition proceedings. There, six propositions were stated as applicable to an application for disclosure in the extradition context of which the first five are relevant to the present issue under consideration. Justice Mitting said:[60]

> 1. It is for the requesting state alone to determine the evidence upon which it relies to seek a committal.
>
> 2. The requesting state is not under any general duty of disclosure similar to that imposed on the prosecution at any stage in domestic criminal proceedings.
>
> 3. The magistrates' court has the right to protect its process from abuse and the requesting state has a duty not to abuse that process. That is no different from saying that the requesting state must fulfil the duty which it has always had of candour in making applications for extradition.
>
> 4. In fulfilment of that duty, the requesting state must disclose any evidence which would render worthless the evidence on which it relies to seek committal.
>
> 5. It is for the person subject to the extradition process to establish that the requesting state is abusing the process of court.
>
> ...

[94] In approving of those comments, the Privy Council said in *Knowles v Government of the United States of America*:[61]

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59 *Wellington v The Governor of Her Majesty's Prison Belmarsh & Another* [2004] EWHC 418 (Admin).

60 At [26]. The sixth proposition related to the ability in the UK context of the requested state to request further evidence pursuant to Orders in Council. It is not relevant for these purposes.

61 *Knowles v United States of America & Anor* (2006) UKPC 38 at [35].

> There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith. While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or very severely undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state.

[95] The applicant also places particular reliance upon the following statements in *United States v Dynar*:[62]

> Even though the extradition hearing must be conducted in accordance with the principles of fundamental justice, this does not automatically entitle the fugitive to the highest possible level of disclosure. The principles of fundamental justice guaranteed under s. 7 of the *Charter* vary according to the context of the proceedings in which they are raised. It is clear that there is no entitlement to the most favourable procedures imaginable ...
>
> The context and purpose of the extradition hearing will shape the level of procedural protection that is available to a fugitive. In *Kindler v. Canada* ... the position was put by the majority in this way:
>
> > While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.
>
> ...
>
> It follows that it is neither necessary nor appropriate to simply transplant into the extradition process all the disclosure requirements referred to in *Stinchcombe* [et al] ... Those concepts apply to domestic criminal proceedings, where onerous duties are properly imposed on the Crown to disclose to the defence all relevant material in its possession or control. This is a function of an accused's right to full answer and defence in a Canadian trial. However, the extradition proceeding is governed by treaty and by statute. The role of the extradition judge is limited and the level of procedural safeguards required, including disclosure, must be considered within this framework.
>
> Procedures at the extradition hearing are of necessity less complex and extensive than those in domestic preliminary inquiries or trials. Earlier decisions have wisely avoided imposing procedural requirements on the committal hearing that would render it very difficult for Canada to honour its international obligations. .....

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62 *United States of America v Dynar* (1997) 2 SCR 462 at [128]-[135].

> ..... The obligation on the Requesting State is simply to establish a *prima facie* case for the surrender of the fugitive and it is not required to go further than this. The committal hearing is neither intended nor designed to provide the discovery function of a domestic preliminary inquiry ...
>
> ...
>
> The Requesting State concedes that the fugitive is entitled to know the case against him ... In light of the purpose of the hearing, however, this would simply entitle him to disclosure of materials on which the Requesting State is relying to establish its *prima facie* case.
>
> Mr. Dynar does not argue that he did not receive adequate disclosure of the materials that were being relied upon to establish the *prima facie* case against him. It follows that, in light of the limited nature of extradition hearing, no additional disclosure was required ...

[96] Reference is also made by the applicant to the following statements by the Canadian Supreme Court in *United States v Kwok*:[63]

> The extradition judge may only order the production of materials relevant to the issues properly raised at the committal stage of the process, subject to his or her discretion to expand the scope of that hearing to allow the parties to establish the factual basis for a subsequent *Charter* challenge, when it is expedient to do so, including, obviously, when there is at least an air of reality to the *Charter* claims (*Dynar, supra, per* Cory and Iacobucci JJ., at para. 141). Requests for disclosure of materials related to issues which properly belong to the executive phase of extradition, and to the judicial review thereof, have no independent relevance before the extradition judge and are subsumed in his or her discretion to hear evidence related to such issues.
>
> In this case the appellant was entitled to know the case against him, including materials upon which the United States relied upon to establish a *prima facie* case. Since the Requesting State was not relying on materials in the possession of Canadian authorities, and in the absence of any indication of bad faith or improper motives on the part of prosecuting authorities, there was no obligation to provide further disclosure of materials requested.

[97] It is significant that both *Dynar* and *Kwok* were decided before *Ferras*, a decision in which the scope of the extradition hearing was reshaped. It is also significant that what was at issue in both cases was the obligation to make disclosure of material the Canadian authorities had gathered at the request of the United States authorities. In *Dynar* it was argued that the lack of disclosure by those authorities was in breach of the Charter. Alternatively it was submitted that Mr Dynar would argue at a new hearing that there had been a violation of his right to be free from

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63 *United States of America v Kwok* 2001 SCC 18, [2001] 1 SCR 532 at [100]-[101].

unreasonable search and seizure under s 8 of the Charter because of how the Canadian authorities had gone about collecting evidence. Complete disclosure of the product of the Canadian investigation undertaken at the request of the United States authorities was sought. In *Kwok* disclosure was sought to ground an argument that the Canadian authorities were breaching Mr Kwok's s 6 Charter rights to remain in Canada by declining to prosecute him for the extradition offending in Canada. His challenge was that it was irrational to decline to prosecute him in Canada, rather than surrender him to the United States.

[98] The issues for which disclosure was sought in both *Dynar* and *Kwok* were therefore clearly collateral to the extradition issue. I also note that in *Kwok* it was recognised that the extradition Judge had jurisdiction to order production of materials relevant to issues properly raised at the committal stage of the proceeding. Nevertheless it is the case that since *Dynar* and *Kwok,* the approach to disclosure outlined there has been applied in Canada in cases where the disclosure sought was not collateral to the extradition issue. Some of those decisions also post date *Ferras,*[64] a case which might be thought likely to have caused a re-think of the issue of disclosure.

[99] I do not find this line of authority particularly persuasive in so far as it relates to disclosure in extradition proceedings on core extradition issues. The comments in *Dynar* and *Kwok,* which arose in relation to truly collateral issues, have been applied in these later decisions as statements of principle with broader application without weight being given to this important distinguishing feature. And reference in *Kwok* to an "air of reality" seems to have been given a significance I doubt was originally intended. In *Kwok* the expression was used in connection with circumstances in which an extradition hearing could be used (for expediency) to explore collateral issues. But it has been applied in at least a few of the cases in the post-*Ferras* line of authorities both as a threshold for the admissibility of defence evidence, and for disclosure in relation to core extradition issues.

[100] Moreover, underpinning the decisions of Courts of the United Kingdom and Canada in relation to disclosure is a concern that to allow disclosure within the

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[64] *Scarpitti v United States of America* 2007 BCCA 498, 228 CCC (3d) 262; *United States of America v Walker* [2008] BCSC 1404; *United States of America v Hulley* [2007] BCSC 240.

context of the committal proceedings will be to convert what is meant to be an expeditious process for the recognition of extradition treaty rights into a prolonged hearing, possibly akin to the occasionally lengthy committal hearings that occurred in New Zealand prior to the recent reforms to the committal process. In my view that risk can be averted by controlling the evidence that is allowed to be called at the hearing. To attempt to control it by severely constraining the information available to the person sought is to use a very blunt instrument and risks an unfair hearing. In some of the cases concern is also expressed that any order for disclosure by a requesting state would purport to give extra-territorial effect to those orders. But since the applicant is a party to the extradition proceedings it is subject to the jurisdiction of the Court, and considerations of extra-territoriality do not arise.

The New Zealand context

[101] The proper starting point for any analysis of the first respondents' rights to disclosure in New Zealand is again the Extradition Act. As I have noted, s 22 of the Act incorporates the committal procedures for indictable offences[65] and applies provisions of the Summary Proceedings Act to extradition proceedings.[66] Neither these provisions, nor the Act more generally, indicate an intention to exclude a right to disclosure. To the contrary, there are indications in the Act that disclosure is contemplated, at least in some extradition proceedings. Section 102 is the provision that empowers the making of regulations for the purposes of the Act. Section 102(1)(e) creates a regulation power in respect of the following:

> (e) Prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including (without limitation),—
>
> (i) The pre-hearing disclosure of information:
>
> (ii) The powers of the court when information required to be disclosed by the regulations is not disclosed or not disclosed in accordance with the requirements specified in the regulations or by the court:
>
> (iii) Requiring the person whose surrender is sought to give notice of his or her intention to put a restriction on surrender in issue in the proceedings:

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65 Extradition Act 1999, s 22(1)(a).
66 Extradition Act 1999, s 22(1)(b).

(iv) The circumstances in which the court may appoint an expert witness, the procedure to be followed after the expert witness is appointed, the rights of the parties in relation to the evidence given by the expert witness, and the manner in which the expert witness is to be remunerated:

[102] Of some significance also is the provision in s 102(2) that:

> Regulations made under subsection (1)(e) may provide for different practice and procedure in relation to proceedings under Part 3 than in relation to proceedings under Part 4.

[103] Those provisions give the Executive the ability to adapt, to the particular circumstances of the extradition context, the committal hearing procedures applied by s 22 of the Extradition Act. In the absence of such regulation, however, the implication is that the matters in s 102(1)(e) continue to be treated as they would at a committal hearing. Consequently, it is also relevant that in committal hearings conducted in New Zealand in respect of indictable offences, defendants have the right to disclosure. That right is provided for by the Criminal Disclosure Act 2008. One interpretation of s 22(1)(a) would import into the extradition process provisions of the Criminal Disclosure Act since that Act confers on the District Court power to order disclosure of information in criminal proceedings.[67] However, I am rather cautious in reaching the conclusion that the Criminal Disclosure Act applies. This was not an argument advanced before Judge Harvey, was not the subject of argument before me, and the issue is not entirely clear cut. It could be argued that the listing of statutory provisions under s 22(1)(b) suggests an intention that only those statutory provisions which are listed form part of the jurisdiction and powers of the Court, and that statutory provisions which are not listed do not. Against that it can be noted that the provisions listed create, to some extent at least, substantive as well as procedural rights. It could also be argued that the regulation making power in relation to disclosure tells against the incorporation of the jurisdiction and powers conferred by the Criminal Disclosure Act. On the other hand, the Criminal Disclosure Act provides that it does not affect or limit other enactments which authorise information

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[67] In the case of proceedings laid indictably, full disclosure is required to be provided, by a prosecutor as soon as reasonably practicable after the defendant has made his or her first appearance in court: Criminal Disclosure Act 2008, s 13. "Prosecutor" is defined to mean the person who is "in charge of the file or files relating to a criminal proceeding": Criminal Disclosure Act 2008, s 6. If a prosecutor fails to provide the disclosure the court may order that disclosure: Criminal Disclosure Act 2008, s 30.

to be made available.[68] Regulations, once made, would thus displace the provisions of the Criminal Disclosure Act.[69]

[104] In any case, it is not necessary to decide this issue as the District Court has an inherent power to order disclosure as part of the powers it has to enable it to regulate its own proceedings, and prior to the coming into force of the Criminal Disclosure Act, disclosure was ordered in respect of committal hearings. This much was recognised by Fisher J in *Downey v The District Court*[70] who said, of the District Court's power to order disclosure for the purposes of committal hearings:[71]

> [it] is well established that an inferior tribunal has all such powers as may be necessarily incidental to the discharge of those primary functions expressly conferred on it by legislation.

[105] The applicant also relies upon the one New Zealand extradition authority in which the right to disclosure has been addressed. In *Flickinger v Crown Colony of Hong Kong*[72] Williamson J was asked to review a decision by a District Court Judge refusing disclosure in extradition proceedings. Williamson J noted that none of the authorities on disclosure related to extradition proceedings, and concluded there was no jurisdiction to order disclosure. It seems that counsel in that case did not argue that the District Court's inherent powers created such jurisdiction.

[106] The applicant says that the provision of disclosure would completely undermine the ROC procedure, so that the direction in s 22 to conduct the proceedings in the same manner as a committal hearing must give way to the purposes of the Extradition Act. However, it follows from the view I have taken to the nature of the issue to be determined at the extradition hearing, and the role of the ROC in that hearing, that there is nothing inconsistent between that procedure and the provision of disclosure.

[107] Mr Davison argued that the applicant's concern in relation to disclosure is overblown as there are, in any event, extensive disclosure obligations placed upon

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68 Criminal Disclosure Act 2008, s 42.

69 It is relevant for these purposes that "enactment" as used in s 42 of the Criminal Disclosure Act is defined in s 29 of the Interpretation Act 1999 to mean "the whole or a portion of an Act or regulations".

70 See above at n 42.

71 At 2.

72 *Flickinger v Crown Colony of Hong Kong* [1990] 3 NZLR 372 (HC)

the applicant by virtue of s 25(2)(b) which requires that the ROC must contain "other relevant documents, including photographs and copies of documents". This means that the ROC must contain not only those documents which the requesting country relies upon, but also any other relevant documents.

[108] There are issues of definition that arise in relation to s 25(2). The first is what constitutes evidence "acquired to support the request for the surrender of the person?" Is it only evidence which tends to support the prosecution case, so that the requesting country may include in the ROC only the information it relies upon to support extradition. Or rather, does s 25(2)(a) require a fair summation of all evidence gathered during the course of the investigation? Although the language used is somewhat ambiguous I consider that it means the former. This follows from the rationale for the ROC procedure and from the language of the provision. It was intended to provide a simplified method for the requesting country to meet the evidentiary threshold set by s 24(2)(d)(i). It was not developed as a mechanism for disclosure.

[109] The next issue of definition that arises is what is meant by "other relevant documents" in s 25(2)(b). In construing the meaning of this provision it is significant that the paragraph commences with the word "other", which assumes that there is some other document referred to in the section. The logical reading is that the summary of evidence described in s 25(2)(a) is the "other document". When s 25(2)(a) is read in this way, it tends to link (a) and (b), supporting a reading that "other relevant documents" is to be read as "other relevant documents" acquired to support "the request for the surrender of the person."

[110] Section 25(2) therefore was not intended to create a disclosure regime. But I would qualify that statement as follows: the country seeking extradition must have an obligation of candour which requires it to disclose to the extradition Court in the ROC any evidence gathered which could materially affect the extradition Court's assessment of whether the threshold has been met. This obligation flows from the

fact that to conceal such evidence could amount to an abuse of the processes of the Court.[73]

[111] A copy of the ROC was provided to the Judge and was handed to me during the course of the hearing. It is apparent that the ROC as presently comprised does not comply with the requirements of s 25(2), as it does not addend the documents referred to directly or indirectly in the ROC in support of the request for surrender. Mr Pike for the applicant argued that the ROC did comply with s 25. He said that s 25(2)(b) was to be read as to only require the inclusion in the ROC of critical documents such as photographs supporting identification. It is hard to see on what basis s 25(2)(b) can be so read. By its language s 25(2) imposes upon the requesting state an obligation to include within the ROC both a document summarising the evidence acquired to support the request for surrender of the person and also other relevant documents that support that request. This suggests a ROC will typically be comprised of an overview of the case for extradition, a summary of the evidence of witnesses of fact. It will also addend documents which provide the basis for the summary or are referred to in it, those documents thereby becoming admissible without the requirement that their authenticity be proved in accordance with the usual rules of evidence.

[112] This can be contrasted with the Canadian provisions, which provide a discretion in the requesting state to incorporate relevant documents. A decision to make it mandatory for the requesting state to include relevant documents, rather than adopting the Canadian model, reflects a conscious decision on the part of Parliament to impose upon the requesting state an obligation to disclose documents relied upon.

[113] Finally on this point, the applicant argues that to order disclosure impinges upon the criminal trial processes of the requesting country, and says that the Judge erred in failing to refer to the affidavit of Mr Prabhu filed in the proceeding.[74] Mr Prabhu deposes as to the circumstances in which disclosure will be ordered in the United States. The principal point he makes is that disclosure is not provided until

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[73] See the observations of Justice Mitting in *Wellington v The Governor of Her Majesty's Prison Belmarsh & Anor* [2004] EWHC 418 (Admin) at [91] above.

[74] Mr Prabhu is an Assistant United States Attorney with the United States Attorney's office for the Eastern District of Virginia. He is Chief of the Cybercrime Unit.

the defendant has appeared before the Court, or before the defendant's attorney has entered an appearance. He says:

> Once a defendant is brought before the Court, the Court can exercise its power and enforce the rules that are designed to ensure a fair trial. Courts in the United States, as they do in New Zealand and elsewhere, rely on comity of Courts overseas not to begin pre-trial proceedings which may have an impact on a case before it comes before the jurisdiction of the Court that is going to try the case.

[114] Moreover he says:

> Government attorneys also do not provide disclosure before an attorney enters their appearance in the US because of the ethical obligations of the attorney to protect the confidentiality of its client, the United States.

Finally:

> In addition, we would be precluded from disclosing portions of the investigative file without the permission of our Court, pursuant to rules governing the procedure of grand jury materials.

[115] I suspect the Judge did not refer to this affidavit as he did not consider it relevant. I am inclined to the same view. Although disclosure may not have "kicked in" for the criminal proceedings of the requesting state, what is at issue here is the process around the extradition hearing. This is not a pre-trial proceeding on a matter properly for the trial Court but is a hearing required by statute. There is nothing incompatible between disclosure for the purposes of extradition and the requesting state's trial processes. Counsel in New Zealand are also constrained by ethical obligations. To the extent there are particular legal constraints on the release of documents or information, that can be worked through in the disclosure process.

[116] Mr Prabhu also points to the fact that disclosure obligations in the United States are reciprocal. The issue of whether the first respondents would also have disclosure obligations was not addressed in argument before me. Section 176 of the Summary Proceedings Act is in Part 5 of that Act, and therefore applies to extradition proceedings. It obliges the first respondents to disclose any evidence they intend to provide to the court at the extradition hearing. It therefore seems that the first respondents do have disclosure obligations, at least to that extent.

[117] In my view disclosure should be provided by the requesting state. The Act provides the person sought with a right to challenge whether the threshold for extradition has been met before he will be extradited. Consistent with the requirements of s 27 of the Bill of Rights Act to a fair hearing, the person sought should be given access to sufficient information to enable him or her to fully participate in that hearing on an equally informed basis. Without access to materials relevant to the extradition hearing phase, the person sought will be significantly constrained in his or her ability to participate in the hearing and the requesting state will have a significant advantage in terms of access to information. There is an issue as to whether an evidentiary threshold must be met before disclosure will be ordered. Should the requested person be required to show some sort of basis for a challenge to extradition that engages the need for disclosure, before being entitled to it? To require that would be to set a threshold that would rarely be met, a fact which emerges from the Canadian authorities. The person sought will be caught in the catch 22 position that without disclosure any threshold is unlikely to be met. The applicant would argue that that is the intended effect of the statutory scheme for extradition, but I see no reason to construe the Act in that way.

[118] That takes me to the final point, the proper extent of disclosure. This received little attention in the course of the hearing,[75] but it follows from the reasoning I have set out above that the proper extent of disclosure is that which is relevant to the extradition hearing. It seems to me that by structuring the orders around the elements of the offence, the Judge appropriately limited the scope of the disclosure to that which is relevant to the s 24(2)(d)(i) question. The applicant points to the size of the burden thereby imposed. But on the evidence much of the material is already in electronic format. The size of the task also reflects, as the Judge observed, the complexity of the case. The size of the task in a particular case cannot be permitted to shape the general principle to be applied.

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[75] The applicant's primary submission in this regard was inevitably linked to its primary arguments about the availability of disclosure more generally. It argued that the disclosure ordered, which the District Court Judge described as limited, was in fact general in nature and therefore inappropriate.

D Conclusion

[119] To conclude:

1. The Extradition Act is to be construed in the light of its purpose, the extradition treaty between the United States and New Zealand, and also in the light of the provisions of Bill of Rights Act.

2. The person sought is entitled to the procedural rights protected by s 27 of the Bill of Rights Act to ensure that he or she has a fair hearing. The purpose of the extradition hearing is to decide whether the threshold established for extradition in s 24(2)(d)(i) is met. Therefore, those procedural rights are not of a scale that would be afforded in a full hearing (trial) to determine whether a charge is proved. There is nothing in the ROC provisions procedure which alters the s 24(2)(d)(i) threshold, or which further constrains the procedural rights of the person sought in relation to that hearing beyond any constraints which are explicit in the Extradition Act.

3. The person sought is entitled to adduce evidence which is relevant to that narrow issue. Consistent with the need to ensure that the extradition process is expeditious, the extradition Judge will ensure that only evidence relevant to that issue is produced. The oral evidence application in the Summary Proceedings Act provides a useful procedure for this purpose.

4. Without disclosure the person sought will be significantly constrained in his or her ability to participate in the hearing, and the requesting state will have a significant advantage in terms of access to information.

5. The extradition court does have jurisdiction to order disclosure to ensure a fair hearing because it has all the powers and jurisdiction of a court conducting a committal hearing. Because the applicant is a

party to the proceeding, orders for disclosure does not involve the District Court making orders with extraterritorial affect.

6. The provision of disclosure does not undermine the ROC procedure. Nor is it inconsistent with the conduct of an expeditious and focused extradition hearing. The hearing can be kept within its proper bounds by controlling the evidence that is allowed to be called. To attempt to control it by severely constraining the information available to the person sought is to use a very blunt instrument and risks an unfair hearing.

7. The person sought does not have to establish that any potential challenge to the application for extradition has an "air of reality" before he or she will be entitled to disclosure.

8. Disclosure should be of documents relevant to the extradition phase. The Judge structured the disclosure ordered around the elements of the offences alleged against the first respondents. He did not therefore exceed the proper scope of disclosure for the extradition hearing.

Result

[120] The application for review is dismissed.

Winkelmann J

Appendix – Disclosure ordered by the District Court

1. Criminal breach of copyright

(a) A copyright ownership element

(i) All documents either connected to, related to or evidencing legal ownership of the copyright interest allegedly infringed.

(b) Infringement element

(i) All documents either connected to, related to or evidencing alleged infringement of the copyright interests, including but not limited to:

- all records obtained or created in connection with the covert operations undertaken by agents involved in the investigations related to these proceedings in transacting and uploading/downloading data and files on the Megaupload site;
- all records or information and/or material provided to or obtained by the investigating and/or prosecuting agencies in this case from holders and/or owners of copyright interests evidencing alleged infringement of their copyright and/or complaining of such alleged infringement;
- all records and materials related to communications between relevant copyright holders and Megaupload and/or its employees regarding their copyright interest, the direct delete access provided by Megaupload to any such copyright owners, and any communications between the copyright owners and Megaupload and/or its staff regarding take-down notices;

(c) Commercial element

(i) All/any records or materials or information relating to the operation of the Megaupload rewards scheme for premium users, including but not limited to:

- all documents containing communications between Megaupload Ltd and/or its employees and the said premium users, including communications regarding the payment of, entitlement to or qualification for rewards; and

- all documents relating to the payment of all/any rewards to "premium" users.

(d) Knowledge/wilfulness element

(i) All and any documents materials and/or records containing evidence relied upon by the respondent as evidencing or supporting the allegation that the applicant acted wilfully in relation to the infringement of copyright material;

(ii) All documents evidencing communications between the applicant and all/any of the alleged co-conspirators demonstrating either knowledge or wilfulness on the part of the applicant, or the absence thereof in relation to the deliberate and unlawful infringement of copyright including but not limited to:

- all emails passing between, exchanged, forwarded, copied (either directly or indirectly) between the applicant and all or any of the alleged co-conspirators; and

- all telephone and other forms of electronic communication (including Skype) intercepted in the course of the investigation, including both transcripts and electronic recordings of such communications.

2. Money laundering

(a) All documents allegedly evidencing the transfer and/or handling of funds for the purpose of money laundering.

(b) All documents containing descriptions of transactions or recording financial transactions undertaken by the applicant (either directly or indirectly) for the purpose of money laundering.

3. Racketeering

(a) All documents said to evidence the formation and/or existence of an enterprise involved in "racketeering activity".

(b) All documents said to evidence participation by the applicant in such an enterprise.

(c) All documents said to evidence the engagement in "racketeering activity" by the applicant and/or the said enterprise.

4. Wire fraud

(a) All documents said to evidence that the applicant, by means of any of the specified mechanisms of transmission (see 18 U.S.C. § 1343) by which it is alleged that the applicant received a benefit or caused a loss as a result of false or fraudulent pretences.

(b) All documents said to evidence the fraudulence and/or falsity of the basis upon which the applicant is alleged to have received a benefit or caused a loss.