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COURT OF APPEAL FOR ONTARIO

DOHERTY, GOUDGE and MACPHERSON JJ.A.

BETWEEN:	)	
	)	**Paul Slansky**
NUNZIO LAROSA	)	**for the appellant**
	)	
	)	
Appellant	)	
	)	
- and -	)	**Bradley Reitz**
	)	**for the respondents**
HER MAJESTY THE QUEEN and the UNITED STATES OF AMERICA	)	
	)	
	)	
Respondents	)	
	)	**Heard: May 30, 2002**
	)	

DOHERTY J.A.:

I

Overview of the Proceedings

[1] In July 1998, the appellant and several others were charged in Toronto with various drug related offences. A few days later, a federal grand jury in Texas indicted the appellant on drug charges arising out of the seizure of some 200 kg of cocaine near Houston, Texas.

[2] In June 1999, the United States requested the extradition of the appellant on the American charges. The Canadian charges were proceeding through the courts. The Minister of Justice authorized the Attorney General to proceed with the extradition on behalf of the United States. Under the terms of the extradition treaty between the United States and Canada, that extradition could not proceed as long as the appellant was being prosecuted on those charges in Canada.[1] In August 1999, the Crown stayed the Canadian drug charges against the appellant, clearing the way for his extradition. In February 2000, Watt J. dismissed the appellant’s motion to set aside the stay of proceedings and re-instate the Canadian criminal charges. See [2000] O.J. No. 976 (S.C.J.) (QL).

[3] In July 2000, O’Driscoll J. dismissed the motion to stay the extradition proceedings and ordered the appellant committed to await surrender to the United States. In December 2000, the Minister of Justice ordered the appellant surrendered to the United States. The appellant subsequently claimed that he was not ordered surrendered to the United States within the time limits provided for in

the *Extradition Act*, S.C. 1999, c. 18, (the "*Extradition Act*") and brought a motion for his discharge. On June 18, 2001, Wren J. dismissed that application.

[4] The proceedings outlined above have given rise to four appeals:

- ♦ The appellant appeals from the order of Watt J. refusing to re-instate the Canadian charges (C35440).

- ♦ The appellant appeals from the order of O'Driscoll J. committing the appellant for surrender (C35467).

- ♦ The appellant seeks judicial review of the Minister's decision to surrender the appellant to the American authorities (C35576).

- ♦ The appellant appeals from the order of Wren J. dismissing his application for a discharge under s. 69 of the *Extradition Act* (C36640).

[5] In addition to the four appeals, the appellant has brought a motion in all of the appeals, save the appeal from the order of Wren J. In that motion, he seeks production of documents in the possession of the respondents relating to some 17 topics identified in the notice of motion. He also seeks an order compelling a Crown prosecutor, one of the investigators and a former co-accused to give evidence before the Court of Appeal or a person designated by the Court of Appeal.

[6] In September 2001, the appellant brought a motion seeking directions with respect to the procedures to be followed on the motion. I assumed management of the appeals and the motion and directed that the appeals should be perfected before determining how the appeals and the motion should proceed.

[7] The appeals were perfected in January of 2002 and in March 2002 I gave the following direction:

Counsel have agreed that the appeal from the order of Watt J. and the order of O'Driscoll J. can proceed as "normal" appeals. If either or both are successful, counsel agree that the surrender order made by the Minister will fall and the appeal process will be over. …

Counsel agree that if the appellant is unsuccessful on these appeals, it will be necessary to consider the application for judicial review from the order of the Minister. … The Minister has declined to make certain disclosure requested by the appellant. Part of this appeal will turn on whether the Minister should have made that disclosure and whether the Court of Appeal should order that disclosure and consider that material. Counsel agree that these matters have to be settled before the actual merits of the appeal can be dealt with. They agree that in addition to hearing the appeals from the order of Watt J. and the order of O'Driscoll J., a motion can be brought at the same time requesting production of the material and/or directions concerning production of the disputed material. Once the court has made the ruling, it can then determine how to deal with the merits of the application for judicial review from the order of the Minister. …

[8] On May 30, 2002, the court heard the following:

- ♦ the appeal from the order of Watt J.;

- ♦ the appeal from the order of O'Driscoll J.; and
- ♦ the motion for the production of documents and/or the compelling of testimony from certain witnesses.

[9] The application for judicial review from the surrender order of the Minister and the appeal from the order of Wren J. remain outstanding.

II

The Canadian Charges

[10] The appellant and 11 others were arrested and charged with various drug related offences in July 1998. The charges stemmed from an extensive investigation which started in 1996 and reached into Europe, the United States, Mexico, and South America. That investigation included wide-ranging wiretapping and physical surveillance.

[11] The Crown alleged that the appellant and the other accused were part of a large-scale criminal organization that imported massive amounts of cocaine into Canada and "laundered" the proceeds of those activities. The Crown relied on various transactions to establish the conspiracy, including an aborted attempt to bring some 200 kilograms of cocaine into Canada via Texas in May 1998. That transaction gave rise to the charges in the United States on which the appellant was eventually ordered extradicted. The events relevant to those charges will be described in more detail below.

[12] The Canadian charges proceeded in Toronto in the Ontario Court of Justice (Prov. Div.).[2] Some of the accused were ordered detained in custody, and some were released on bail. The appellant remained in custody, not because he was ordered detained, but because his counsel did not proceed with a bail hearing for over six months and then repeatedly adjourned the hearing. As I read the record, the bail hearing was never completed.

[13] It was obvious from the outset that the Canadian proceedings would be lengthy and complex. The Crown's case was based largely on the contents of numerous private communications intercepted over a 17-month period. Counsel for the accused anticipated four to six weeks for pre-trial motions alone. Defence counsel wanted to begin the proceedings in the Provincial Division in March or April 1999. Crown counsel, who had to make extensive disclosure, thought August or September was a more realistic date for commencement of the proceedings. Regardless of when the proceedings began, all counsel anticipated that the proceedings would still be ongoing in August 1999.

[14] By February 1999, target dates reaching through to the end of July had been set aside in the Provincial Division. Most, if not all of the accused, were prepared to elect trial in the Provincial Division. Counsel for the accused, however, had two concerns. A co-accused, Oreste Pagano, had been physically separated from the rest of the accused, did not attend court when the other accused were in court, and received special security when he did appear in court. His counsel was not co-operating with other defence counsel. This led other counsel to believe that Pagano might have made an agreement with the Crown whereby he would become a Crown witness. Counsel wanted to know his status before making their election. Defence counsel also raised complaints about the adequacy of the disclosure provided by the Crown.

[15] Crown counsel repeatedly indicated that Pagano was not a Crown witness and that the Crown did not have a statement from him. Crown counsel would not comment on what might happen in the future. Crown counsel did not advise counsel for the accused that Pagano had contacted the police in November 1998 and indicated his willingness to co-operate with the prosecution if certain conditions were met. The police had moved Pagano to a different jail for security purposes and began the de-briefing process. In February 1999, the Crown offered to fund counsel for Pagano. The appellant did not became aware of any of these discussions or arrangements until August 1999. Further disclosure was provided in November 1999.

[16] Crown counsel took the position that it was making disclosure on the other matters raised by defence counsel as quickly as it could in the circumstances. Crown counsel also maintained that some of the disclosure demands made by the defence went beyond the Crown's disclosure obligations.

[17] In March 1999, Pagano appeared in the Provincial Division and elected to be tried by a judge and jury. All other accused were prepared to elect trial in the Provincial Division. Under s. 567 of the *Criminal Code*, if some but not all accused elect a trial by judge and jury, the judge taking the election may refuse to record the election of those who did not elect trial by judge and jury and proceed with a preliminary inquiry.

[18] Defence counsel believed that Pagano would not remain an accused but would become a Crown witness. They did not want his election to interfere with the trial of the other accused in the Provincial Division. Counsel submitted that Pagano's election was not bona fide, and that under s. 567 of the *Criminal Code*, the judge receiving the elections could allow the other accused to elect trial in the Provincial Division, despite Pagano's election for trial by judge and jury, thereby severing Pagano's trial from the trial of the other accused. Crown counsel denied any suggestion that the Crown had influenced Pagano's election. The Crown also argued that only the trial judge could decide matters relating to severance.

[19] By the end of March 1999, it was evident that a full evidentiary hearing into the allegations made by the defence in respect of Pagano's election would be needed. Various dates were set for that hearing and argument. On April 14, 1999, counsel for the accused appeared in the Provincial Division prepared to proceed with their motion to allow the accused, other than Pagano, to proceed to trial in the Provincial Division. Crown counsel announced that the Deputy Attorney General had consented to the preferment of a direct indictment against all accused pursuant to s. 577 of the *Criminal Code*. The preferring of the direct indictment effectively ended the proceedings in the Provincial Division, and Crown counsel indicated that she intended to discontinue those proceedings.

[20] Beginning in April 1999, Watt J. presided over a series of pre-trial conferences in the Superior Court. Defence counsel anticipated bringing several pre-trial motions. Eventually, all counsel indicated that their clients were prepared to re-elect trial by judge alone. Watt J. became the trial judge.

[21] In June 1999, Pagano and the Crown entered into a formal plea bargain. Pagano agreed to co-operate with the Crown and testify against his co-accused. He also agreed to consent to his extradition back to Italy where he was facing a lengthy prison sentence. In return the Crown would agree that Pagano should receive a sentence of one day in jail on the Canadian charges. He also entered into an agreement with the RCMP whereby he was to be paid up to $100,000 for his co-operation and assistance.

[22] In July 1999, the Minister of Justice authorized the Attorney General to seek an order of committal against the appellant and co-accused, Marcel Bureau, pursuant to s. 15 of the *Extradition Act*. Having decided to pursue extradition, the Crown was required to stay the proceedings on the Canadian charges. They did so in August 1999 over the objection of counsel for the appellant and Bureau. In February 2000, Watt J. refused to set aside the stay or to compel the Crown to proceed with the Canadian charges against the appellant and Bureau. Meanwhile, the Canadian charges against the other accused proceeded. Eventually, several of the accused pled guilty and received substantial penitentiary terms. Charges were withdrawn against the other accused.

The American Charges

[23] On May 16, 1998, Texas state police stopped a truck occupied by John Hill and Richard Court. The police searched the vehicle and found 200 kg of cocaine. Physical surveillance conducted in the days immediately prior to the seizure placed the appellant and Bureau in control of the vehicle in which the cocaine was discovered. Bureau was seen transferring the packages containing the cocaine from a vehicle into the truck. The appellant and Bureau were also in the immediate vicinity of the truck when it was stopped. The Canadian and American police were co-operating in the investigation and no attempt was made to arrest the appellant and Bureau, both of whom returned to Canada. Intercepted communication indicated that despite the seizure of the shipment in Texas, the appellant and others immediately began planning their next shipment.

[24] In July 1998, a federal grand jury indicted the appellant and Bureau on two drug related charges. Warrants were issued for their arrest.

[25] Hill and Court eventually entered into plea agreements with the United States authorities. In exchange for consideration on sentencing, they agreed to co-operate with the American and the Canadian authorities. They pled guilty in federal court in Texas and received sentences of 11 years and three months.

[26] In videotaped statements given under oath in late February 1999, Hill and Court indicated that they acted under the direction of the appellant and Bureau. They had flown from Canada to Texas to pick up the cocaine from the appellant and Bureau. They had received the cocaine from the appellant and Bureau and were in the process of taking it to Canada when they were stopped by the Texas police.

The Extradition Proceedings

[27] In July 1998, U.S. authorities acting under s. 11 of the *Extradition Act* asked the Minister of Justice to seek a provisional warrant for the arrest of the appellant under s. 13 of the *Extradition Act*. The appellant was already in custody on the Canadian charges and consequently the Minister did not authorize the Attorney General to apply for an arrest warrant under s. 13 of the *Extradition Act*. The appellant was unaware of the American request for a provisional arrest warrant until December 2000, when reference to that request was made in an administrative summary prepared to assist the Minister of Justice in deciding whether to order the surrender of the appellant. Regardless of whether the appellant knew of the request for a warrant, it is clear that the Canadian authorities made no secret of

the possibility, if not the likelihood, of the extradition of the appellant and Bureau. In July 2000, counsel for Bureau swore an affidavit in which he said:

> Shortly after Mr. Bureau's arrest on or about July 22, 1998, I met with Denise Dwyer, the federal prosecutor who had carriage of this matter in the hallway of Old City Hall, outside of courtroom 103, at which time she stated to me that it was likely that the United States would seek Mr. Bureau's and Mr. Larosa's extradition to the United States to face drug charges. [Emphasis added.]

[28] In February 1999, Crown counsel responsible for the prosecution of the Canadian criminal charges was asked to advise the Minister of Justice as to the appropriate forum should the American authorities seek the extradition of the appellant and Bureau. In extradition parlance, this is referred to as a "*Cotroni*" assessment. Crown counsel advised that in her opinion the United States would be the more effective forum in which to prosecute the appellant and Bureau. Based on this assessment, it was concluded that if a request for extradition was made, the Canadian charges would be withdrawn and extradition would be requested.

[29] The American authorities prepared the necessary documents in support of a request for extradition in May 1999. In June 1999, a formal request was made and in July 1999, the Minister of Justice authorized extradition proceedings and an extradition warrant was issued. The Canadian charges against the appellant and Bureau were stayed in August 1999, clearing the way for extradition proceedings.

[30] On July 24, 2000, O'Driscoll J. ordered the committal of the appellant and Bureau for the purposes of surrender. At the extradition hearing it was argued that the extradition proceedings violated s. 7 of the Charter, were an abuse of process and should be stayed. The appellant did not challenge the adequacy of the evidence offered in support of the extradition request or any other aspect of the extradition proceedings. In May 2000, Bureau consented to his extradition to the United States and was surrendered to American authorities. He subsequently pled guilty and was sentenced to 11 years and 3 months in the penitentiary.

III

The Appeal from the Order of Watt J.

[31] By August 1999 when the appellant and Bureau attempted to prevent the Crown from staying proceedings on the Canadian charges, Watt J. was the trial judge in the ongoing Canadian prosecution. The stay was entered on August 17, 1999. In February 2000, Watt J. held that he had no jurisdiction to interfere with the entry of the stay and that in any event he saw no basis upon which he could interfere. Watt J. said at paras. 87-89:

> … There is no longer a trial, a contest between the applicants and the state, at least on this indictment. The prosecution has ended. The applicants' jeopardy has been eliminated. The situation may well be different if the extradition proceedings falter and Crown counsel gives notice of recommencement of domestic proceedings or commences anew. But that is not this case, at least for the moment.

> It may well be that at the outset, during or at the conclusion of the extradition proceedings, whether at the judicial, ministerial or appellate stage a remedy may be available to the applicants. Those decisions, however, are not for me.
>
> At all events, putting the case for the applicants at its highest, I am not prepared to say that what has occurred here in the context of the entry of the stay and the commencement of extradition proceedings amounts to an abuse of process or constitutional infringement.

[32] There are two issues raised on this appeal:

- Does this court have jurisdiction to entertain the appeal?
- If jurisdiction exists, did Watt J. err in refusing to set aside the stay of proceedings and restore the Canadian charges?

[33] The resolution of the jurisdictional issue is complicated by the loss of the notice of application filed before Watt J. Counsel, who were not counsel before Watt J., could not assist as to the contents of that document. The court was left to discern the nature of the application brought by the application from the reasons of Watt J. Fortunately, those reasons are comprehensive.

[34] Having reviewed those reasons, I am inclined to the view that Watt J. was asked to exercise his jurisdiction under s. 24(1) of the *Canadian Charter of Rights and Freedoms* as a trial judge. In his reasons, Watt J. repeatedly put the issue in the terms of the power of a trial judge. For example, when summarizing the appellant's position, he said at para. 45:

> It is the position of the applicants that a trial judge has authority to review the exercise of the authority to direct the stay of proceedings under *Code* s. 579(1). It is, after all, a form of executive action, hence is subject at least to *Charter* scrutiny.

[35] If Watt J. was asked to exercise his remedial authority under s. 24(1) of the *Charter* as the trial judge in the ongoing Canadian criminal proceedings, there is no appeal to this court from his order. Similarly, if Watt J. was exercising original jurisdiction under s. 24(1) of the *Charter* as a judge of a superior court of criminal jurisdiction, no appeal lies to this court: *Criminal Code* s. 674; s. 675; *R. v. Mills* (1986), 1986 CanLII 17 (SCC), 26 C.C.C. (3d) 481 at 496 (S.C.C.); *R. v. Meltzer* (1989), 49 C.C.C. (3d) 452 at 461 (S.C.C.); and *R. v. Druken* (1998), 1998 CanLII 832 (SCC), 126 C.C.C. (3d) 1 at 7-8 (S.C.C.).

[36] Counsel for the appellant submits that the proceedings before Watt J. were in the nature of an application for a writ of prohibition under Part XXVI of the *Criminal Code* and that an appeal lies to this court under to s. 784. Counsel refers to Watt J.'s description of the initial application as one "to prohibit Crown counsel from entering a stay of proceedings on a domestic indictment". Without reference to any authority, counsel contends that prohibition can issue against the Crown's exercise of its power to stay proceedings under s. 579 of the *Criminal Code*.

[37] I am strongly inclined to the view that the application was brought before Watt J. as a trial judge under s. 24(1) of the *Charter* and is, therefore, not appealable to this court. However, I will, as Watt J. did, address the merits.

[38] I can find no merit in the application before Watt J. regardless of how it is characterized. The appellant's real complaint was not with the entry of a stay of proceedings on the Canadian criminal

charges, but with the decision to seek his extradition. Viewed in isolation, the stay operated to the benefit of the appellant in that it removed any restraint on his liberty predicated on the Canadian charges and, at least for the time being, eliminated any possible criminal jeopardy on those charges. The stay of proceedings was objectionable to the appellant only because it cleared the way for the extradition proceedings.

[39] In his factum, counsel argues that the appellant had a constitutional right to have his criminal trial proceed to completion unless "permanently terminated". Counsel relies on s. 7 of the *Charter*. This submission amounts to a claim that s. 579 of the *Criminal Code* is unconstitutional. No notice of intention to challenge the constitutionality of s. 579 has ever been given.

[40] In any event, s. 7 offers no support for counsel's submission. Section 7 is engaged when there is some interference or potential interference with the life, liberty or security of the person. The stay of proceedings had the opposite effect on the liberty interests of the appellant. No doubt, proceedings taken by the Crown after a stay is entered may well bring s. 7 into play, and the entry of the stay may form part of the factual matrix relevant to a claim that state conduct after the entry of the stay infringed s. 7 of the *Charter*. In such cases, however, it is the subsequent state action that impacts on the accused's rights under s. 7: e.g. *R. v. Scott* (1990), 1990 CanLII 27 (SCC), 61 C.C.C. (3d) 300 (S.C.C.), per Cory J. at 311-13, per McLachlin J. in dissent at 322-29.

[41] I agree with Hollinrake J.A. in *R. v. Smith* (1992), 1992 CanLII 325 (BC CA), 79 C.C.C. (3d) 70 at 80 (B.C.C.A.), leave to appeal to S.C.C. dismissed for delay, [1993] S.C.C.A. No. 7 (QL), who described the effect of a stay entered under s. 579 in this way:

> When the stay has been entered there is no contest between the individual and the state. The prosecution has come to an end. The position of the accused as against the state is the same as if he had never been charged. The individual is not put at jeopardy by the stay. On the contrary, the jeopardy he faced as an accused in an ongoing prosecution has come to an end. It may be that if in this case a new indictment is preferred, an argument could be made that the action of the Crown in staying and preferring a new indictment gives rise to *Charter* violations. However, at the moment a stay is entered, and assuming the matter stops there, I can see no possible violation of the accused's *Charter* rights. …

[42] Counsel also made various submissions in which he alleged that the conduct of the Crown during the Canadian criminal proceedings, particularly as it related to Pagano, amounted to an abuse of the judicial process. Even if these claims had any merit, they would provide no basis for interfering with the Crown's decision to enter a stay of proceedings. They would be germane had the Crown attempted to proceed with the Canadian criminal charges against the appellant.

[43] Lastly, counsel argues that the Crown's decision to proceed with extradition after first deciding to proceed with criminal charges in Canada amounted to an abuse of process. Again, assuming there is merit to this claim, it cannot taint the stay of proceedings, but may affect the propriety of the extradition proceedings.

[44] I agree with Watt J. There is no constitutional or common law basis upon which he could properly interfere with the Attorney General's decision to stay the Canadian criminal proceedings against the appellant.

IV

The Appeal from the Order of O'Driscoll J.

[45] O'Driscoll J. was the extradition judge. Under s. 29 of the *Extradition Act*, he was required to determine whether there was sufficient evidence to commit the appellant into custody for surrender to the United States. The sufficiency of the evidence was never in doubt before O'Driscoll J., but the appellant did bring a motion to stay the extradition proceedings. The notice of motion is not in the appeal record, however, from the reasons of O'Driscoll J., it would appear that the appellant advanced several grounds upon which he alleged that the extradition proceedings amounted to an abuse of the court's process and/or a violation of his rights under s. 7 of the *Charter*.

[46] The jurisdiction of O'Driscoll J. to consider *Charter* arguments is found in s. 25 of the *Extradition Act*:

> For the purposes of the *Constitution Act, 1982*, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a Superior Court judge.

[47] There has been considerable judicial debate over the scope of the Charter jurisdiction created by s. 25 and its predecessor section.[3] O'Driscoll J. held that the section did not give him jurisdiction to consider the claims made by the appellant and he quashed the motion to stay the extradition proceedings. In doing so, he relied on this court's decision in *United States of America v. Cobb* (1999), 1999 CanLII 4319 (ON CA), 139 C.C.C. (3d) 283 at 286-87 (Ont. C.A.).

[48] *Cobb*, *supra*, was reversed in the Supreme Court of Canada: *U.S.A. v. Cobb* (2001), 2001 SCC 19 (CanLII), 152 C.C.C. (3d) 270 (S.C.C.). Arbour J., for a unanimous Court, clarified the scope of the jurisdiction provided under s. 25 of the *Extradition Act*.[4] She began by referring to the limited nature of the *Charter* jurisdiction provided by s. 25:

> The extradition judge is therefore competent to grant *Charter* remedies, including a stay of proceedings, on the basis of a *Charter* violation but only in so far as the *Charter* breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process. [p. 282]

[49] Arbour J. then turned to the application of s. 7 of the *Charter* to extradition proceedings:

> The principles of fundamental justice guaranteed under s. 7 vary according to the context of the proceedings in which they are raised [citations omitted]. Where the issues before the courts involve a liberty and security interest, s. 7 is engaged and requires that the proceedings be conducted fairly. Accordingly, although the committal hearing is not a trial, it must conform with the principles of procedural fairness that govern all judicial proceedings in this country, particularly those where a liberty or security interest is at stake. [p. 284]

[50] Arbour J. concluded that conduct by the requesting state, or presumably by Canadian authorities on behalf of or in concert with the requesting state, could result in a breach of s. 7 of the *Charter* at the committal stage of the extradition process if that conduct rendered the committal

hearing unfair, or compelled the conclusion that committal for extradition would violate the principles of fundamental justice. Applying that analysis to the facts before her, which involved conduct in the nature of threats by agents of the requesting state, Arbour J. said at 288:

> The section 7 issue before the extradition judge is whether the extra judicial conduct and pronouncements of a party to the proceedings, or of those associated with that party, <u>disentitle that party from the judicial assistance that it is seeking and whether it would violate the principles of fundamental justice to commit the fugitives for surrender to the requesting state</u>. [Emphasis added.]

[51] Arbour J. went on to hold that, apart from the *Charter*, the extradition judge, like any other court, had an inherent and residual discretion to prevent abuses of the court's processes by those who were before the court. In her view, the common law abuse of process doctrine applied to the committal phase of the extradition process and empowered the extradition judge to direct a stay of proceedings if to proceed further with the extradition would offend the fundamental principles underlying the community's sense of fair play and decency.

[52] If I understand *Cobb* correctly, an extradition judge has the authority to stay proceedings under s. 25 of the *Extradition Act* or under the common law abuse of process doctrine in two related but somewhat different situations. He or she may stay the proceedings if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse of process. Unfairness is considered in the context of the purpose of the committal hearing, which is to determine whether a questioned state has established a *prima facie* case. The extradition judge may also stay committal proceedings if, in the circumstances, proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice. *Cobb* and *Shulman* are examples of situations in which proceeding with a committal hearing amounted to an abuse of process and a breach of s. 7 no matter how fairly that proceeding might be conducted.

[53] Unfortunately, O'Driscoll J. did not have the benefit of the decisions of the Supreme Court of Canada in *Cobb*, *Shulman* and *Kwok* when he held that he had no jurisdiction to consider the motion for a stay of the extradition proceedings. I am satisfied, in the light of those subsequent authorities, that he had jurisdiction. The appellant's claim amounted to an assertion that the conduct of the Canadian, and to a lesser degree the American authorities, so offended the principles of fundamental justice and the community's sense of fair play and decency as to disentitle them from pursuing the committal of the appellant for extradition.

[54] Having concluded that O'Driscoll J. erroneously held that he had no jurisdiction to consider the motion to stay, the appeal must succeed unless the Crown can show that the error occasioned no substantial wrong or miscarriage of justice. In my view, the Crown meets that burden if it demonstrates that none of the grounds on which the appellant sought a stay had any realistic possibility of success.

[55] The main argument advanced in support of the contention that the extradition proceedings violated s. 7 of the *Charter* and amounted to an abuse of process rests in the contention that the Crown initially chose criminal prosecution in Canada over extradition in July 1998 and then in July 1999 to gain a "tactical advantage" changed its position and sought the extradition of the appellant. Counsel for the appellant puts it this way in his factum:

> … The decision to prosecute the appellant when faced with the request for his provisional arrest in relation to the same conduct on the same day (July 15, 1998) constitutes a decision to prosecute rather than extradite. Absent exceptional changes in circumstances, such a decision cannot be changed.

[56] This submission bears no relation to what actually happened in this case. The Minister of Justice did not determine that extradition was inappropriate in July 1998. She was not asked to make any determination as to the appropriateness of extradition at that time. She was asked to proceed with extradition in June 1999 and in July 1999 made the determination that extradition was appropriate.

[57] A request by the American authorities that the Minister authorize someone to seek a provisional arrest warrant under s. 13 of the *Extradition Act* is not a request for extradition. It may be a precursor to such a request. The Minister did not seek a provisional warrant. Indeed, under s. 13(1)(a) of the *Extradition Act* it would appear that a judge could not have issued a provisional arrest warrant given that the appellant was in custody on the Canadian charges.

[58] The continued prosecution of the Canadian charges after the request that the Minister authorize an application for a provisional arrest warrant cannot be equated with a determination that domestic prosecution was to be preferred over extradition. The request for a provisional warrant was not acted on because the appellant was in custody and not because any decision was made on the appropriateness of extradition. The question of whether extradition was appropriate could only be addressed by the Minister of Justice after the request for extradition was made in June 1999. Nor can there be any suggestion that the Canadian authorities were hiding the possibility of extradition from the appellant. The Crown indicated that extradition was a distinct possibility shortly after the Canadian charges were laid.

[59] There is also no reason to read anything sinister into the Minister's request for a "*Cotroni*" assessment in February 1999. Obviously, the Canadian authorities were aware of a possible request for extradition. By making the "*Cotroni*" assessment before that request came, the Canadian authorities were in a position to move quickly when and if the request came. When the request came in June,[5] the Minister of Justice did move promptly and she directed that the extradition request should proceed in July 1999.

[60] Once the Minister made the decision to proceed with extradition, it was necessary to stay the Canadian criminal charges since Article 4(1)(i) of the treaty precluded extradition of a person who was "being proceeded against" for the offence for which extradition was requested. There is nothing improper in the Crown entering a stay of proceedings on the Canadian charges so as to allow the extradition to proceed. If the stay could not be used for that purpose, then the extradition treaty between the United States and Canada would effectively be amended to prohibit extradition where the target of the extradition was facing charges in Canada on the offence for which the extradition is sought. As indicated above, that is not what the treaty says. The case law provides several examples where criminal charges have been stayed to allow the authorities to pursue an extradition request. In none of those cases was it suggested that the use of the stay power was improper: see e.g. *United States of America v. Leon* (1996), 1996 CanLII 238 (SCC), 105 C.C.C. (3d) 385 (S.C.C.), aff'g (1995), 1995 CanLII 1501 (ON CA), 96 C.C.C. (3d) 568 (Ont. C.A.); and *United States of America v. Whitley* (1996), 1996 CanLII 225 (SCC), 104 C.C.C. (3d) 447 (S.C.C.), aff'g (1994), 1994 CanLII 498 (ON CA), 94 C.C.C. (3d) 99 (Ont. C.A.).

[61] The appellant also submits that by opting for extradition over the pursuit of the criminal charges, the Crown disrupted the orderly and fair administration of justice and unnecessarily wasted court resources and created the risk of inconsistent verdicts. I cannot accept this submission. No issues were relitigated and there could be no possibility of inconsistent verdicts.

[62] Counsel next submitted that the appellant was prejudiced by what he described as the Crown's "change in position" because he was in custody for a year on the Canadian criminal charges before the extradition request proceeded. In my view, this contention does not make the extradition proceedings an abuse of process absent some basis for the finding that the Canadian criminal charges were a ruse or were manipulated to effectively hold the appellant in custody pending an extradition request. There is no suggestion that there were not reasonable and probable grounds for the laying of the Canadian criminal charges against the appellant. I also see nothing in the extensive record filed on the appeal which suggests that the Crown was not pursuing those charges with due diligence up until the Minister decided that a request for extradition should be made.

[63] In assessing the prejudice flowing from detention, it must also be recalled that the appellant did not seek a bail hearing until he had been in custody for several months on the Canadian charges and even then did not pursue that hearing to its completion. Indeed, Crown counsel seemed to be more concerned than appellant's counsel about the appellant's detention without a bail hearing. The appellant's custody was clearly lawful under the Canadian charges and went effectively unchallenged by him. That detention does not affect the legitimacy of the extradition proceedings.

[64] Counsel also submitted that the Crown manipulated the Canadian criminal proceedings so as to maintain the viability of the extradition option, and in doing so abused the processes of the court, thereby disentitling itself from access to the extradition process. It is alleged that the Crown induced Pagano to elect trial by judge and jury and subsequently preferred a direct indictment to prevent the appellant from proceeding to trial in Provincial Division. Counsel for the appellant submits that in doing so the Crown:

> Deprived the appellant of his election mode of trial. Had the election been respected, there would not have been an unfettered discretion to stay or withdraw, the case would have been in the hands of the trial judge.

[65] This submission flies in the face of the clear language of s. 579, which provides that a stay may be entered "any time after any proceedings … are commenced and before judgment". The Attorney General's power to enter a stay would have been the same had the matter proceeded by way of trial in the Provincial Division as it was at the pre-trial stage before Watt J.: *R. v. Beaudry*, 1966 CanLII 537 (BC CA), [1967] 1 C.C.C. 272 (B.C.C.A.); *R. v. Smith*, *supra*; and *R. v. Scott*, *supra*. Had the matter proceeded to trial in Provincial Division, I have no doubt that the Crown would have stayed those proceedings against the appellant in July or August 1999, when it determined that extradition was appropriate. The appellant's contention that the Crown manipulated the criminal proceedings so as to maintain its unbridled power to stay a proceedings against the appellant makes no sense when the nature of that power is properly understood.

[66] Lastly, counsel submits that the Crown violated an undertaking to make Pagano available as a witness and that this misconduct necessitates a stay of the extradition proceedings. There are at least two answers to this submission. First, I can find no evidence of any undertaking to make Pagano

available as a witness. In February 1999, the Crown did undertake to facilitate service of a subpoena on Pagano if and when he ceased to be a co-accused. There is no evidence that the Crown ever breached that undertaking.[6]

[67] Second, the undertaking, whatever its substance, was given in the criminal proceedings. The alleged violation of that undertaking occurred long after the charges had been stayed against the appellant. He was no longer a party to the criminal proceedings. There is no hint of any undertaking to make Pagano available as a witness in the extradition proceedings. Consequently, even if it could be said that the Crown improperly failed to make Pagano available in the criminal proceedings, that failure occurred in the fall of 1999, long after the appellant had ceased to be a party to the criminal proceedings and had no connection to the extradition proceedings.

[68] Having reviewed the four volume record filed on the appeal and the submissions made by counsel, I am satisfied that none of the arguments advanced on behalf of the appellant in support of the application to stay the extradition proceedings could possibly have succeeded. Those submissions rest on factual misconceptions (the alleged "change" in position by the Minister), legal errors (the scope that the Attorney General's power to stay ongoing criminal proceedings), or relate exclusively to the criminal proceedings. Although O'Driscoll J. erred in holding he had no jurisdiction, I am satisfied that that error did not prejudice the appellant and I would dismiss the appeal from his order.

V

The Motions Under s. 683 of the *Criminal Code*

[69] The appellant's motion to compel the production of documents and to compel certain individuals to give evidence was brought in the appeals from the order of Watt J., the order of O'Driscoll J. and the application for judicial review of the Minister's decision. For the reasons set out above, the appropriate forums in which to consider the appellant's claim that his extradition amounted to an abuse of process or a violation of his constitutional rights are the appeal from the order of O'Driscoll J. and the application for judicial review from the Minister's decision. The motion has no relevance in the appeal from the order of Watt J.

[70] The Court of Appeal has the power to receive evidence either on the appeal from the committal order or on the judicial review of the Minister's surrender order. That power goes beyond the power generally associated with the reception of evidence on appeal. In *Shulman*, *supra*, the appellant challenged the committal order on the basis that certain conduct by agents of the requesting state so tainted the extradition process as to necessitate a stay of that process. The conduct in issue had occurred after the committal and Shulman sought to put evidence of that conduct before the Court of Appeal. In holding that this court erred in refusing to receive that evidence, Arbour J. said at 312:

> [T]he evidence is not offered as a foundation for reviewing the decision under appeal, <u>but as a basis for requesting an original remedy in the Court of Appeal. Consequently, in these circumstances, the evidence must be relevant to the remedy sought before the Court of Appeal. It must be credible and sufficient, if uncontradicted, to justify the court making the order</u>. [Emphasis added.]

[71] As I read *Shulman*, an allegation that resort to the court in aid of an extradition request amounts to an abuse of the court's process, reaches both the extradition judge and the Court of Appeal. Both courts have the power to protect against an abuse by staying proceedings, and both courts may receive credible evidence that is relevant to the alleged abuse and the appropriateness of a stay of proceedings.

[72] The Court of Appeal's power to receive evidence on judicial review from the Minister's surrender order was discussed in *Kwok*, *supra*, at 261-62:

> <u>If the proper factual basis upon which the *Charter* issues engaged in the surrender phase of the process has not yet been constructed, the court of appeal will have to receive such evidence in whatever form it deems appropriate. Since the court of appeal is the competent judicial forum of original jurisdiction under the Act to receive such evidence, its admissibility would obviously not be subject to the *Palmer* test governing the admissibility of fresh evidence on appeal</u>. …
>
> In the event that the ministerial decision were to violate the fugitive's *Charter* rights, under the current structure of the *Extradition Act*, the "court of competent jurisdiction" to address s. 6 issues is the provincial court of appeal which reviews the Minister's decision, possibly in conjunction with the appeal, if any, from the committal decision. As I have discussed above, that court is fully empowered to grant *Charter* remedies and to receive evidence to assist it in its assessment of s. 6, or any other *Charter* issues. [Emphasis added.]

[73] The reasoning in *Kwok* parallels that found in *Shulman*. If evidence is relevant to a *Charter* issue that the Minister was obliged to address at the surrender stage, this court may receive that evidence if it is necessary to establish a "proper factual basis" for a determination of any constitutional claim arising out of the surrender. In deciding whether to receive that evidence, the court will bear in mind not only the Minister's obligations with respect to the constitutional rights of the target of the extradition, but also the essentially political nature of the surrender order and the strong deference owed to the Minister's decision by the courts.

[74] This motion is one step removed from a request that this court receive evidence. The appellant is looking for evidence and he seeks the court's assistance in that search. The court's power under s. 683 of the *Criminal Code* to provide that assistance in an appropriate case is not questioned. The appellant must, however, do more than simply assert that the documents requested and the testimony sought will assist in determining issues raised on the appeal and the application for judicial review. "Fishing" expeditions are not tolerated in any judicial proceeding, particularly one which is intended to provide a simple and expeditious means of responding to Canada's international obligations. Extradition proceedings cannot be allowed to become *de facto* royal commissions. It must also be acknowledged, however, that an appellant who alleges an abuse of process or a failure by the Minister to adequately consider certain issues may find it difficult to obtain the evidence necessary to support that charge. Much of the relevant information will be in the possession of the state against whom the allegations of misconduct are made. The appellant may well not have access to that information without the assistance of the court and cannot be expected to describe with precision the contents of documents he or she has never had the opportunity to examine. Requests for production will often lack some particularity.

[75] The jurisdiction of this court to receive evidence on extradition appeals and judicial reviews from the Minister's surrender order is largely undeveloped. I think it is best to proceed cautiously in formulating the approach that this court should take when an appellant seeks production of documents and compelled testimony in aid of this court's original juridiction to receive evidence in extradition matters. The approach may vary depending on whether the appeal is from the committal order or the surrender order and it may also vary depending on the nature of the issues raised. The analysis which follows is directed at motions for production or the compelling of testimony that arise out of alleged state misconduct resulting in a breach of an appellant's s. 7 rights and/or an abuse of process. These issues may arise at either the committal or the surrender phase of the extradition process.

[76] In my view, before ordering the production of documents and compelling testimony in support of allegations of state misconduct, this court should be satisfied that the following three criteria have been met by the applicant:

- the allegations must be capable of supporting the remedy sought;
- there must be an air of reality to the allegations; and
- it must be likely that the documents sought and the testimony sought would be relevant to the allegations.

[77] The first criterion is self-evident. There is no point in engaging in a lengthy evidentiary inquiry where it cannot in law yield the result sought by the appellant. For example, one of the allegations in the notice of motion claims that the Crown misled the criminal court as to the status of Pagano. Even if this allegation were true, I fail to see how it could offer any support for a stay of the extradition proceedings.

[78] The "air of reality" requirement comes from *R. v. Kwok*, *supra*, at 267-69. An "air of reality" means some realistic possibility that the allegations can be substantiated if the orders requested are made. For example, one of the appellant's allegations relates to the alleged manipulation of the criminal process by the Crown so as to maintain its unfettered ability to stay the criminal proceedings should it decide to extradite the appellant. There is no "air of reality" to this allegation because, as explained above, the Attorney General maintained the unfettered authority to stay the criminal proceedings regardless of whether the matter was at trial or not. There is no need for the Crown to manipulate the process to maintain its power to stay at a criminal proceeding. There could only be an "air of reality" to this allegation if the Minister of Justice was under the same misapprehension as to the scope of the Crown's power to stay criminal proceedings as was counsel for the appellant. There is nothing to suggest that she did not understand the Crown's power to stay criminal proceedings.

[79] The "air of reality" standard I have attempted to describe is consistent with that prescribed by Finlayson J.A. (for the majority) in *R. v. Durette* (1992), 1992 CanLII 2779 (ON CA), 72 C.C.C. (3d) 421 at 437-38, rev'd on different grounds (1994), 1994 CanLII 123 (SCC), 88 C.C.C. (3d) 1 (S.C.C.). In *Durette*, the appellants claimed that they were denied their right to trial within a reasonable time and in the evidentiary inquiry into that claim sought to compel the testimony of certain Crown officials and police officers. The appellants wanted to inquire into the reasons for certain decisions made by the Crown which had had the effect of delaying the trial of the appellants. Finlayson J.A. said at 437-38:

> … In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney-General, the accused bears the burden of making a tenable allegation of *mala fides* on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation, the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly, and not for improper or arbitrary motives. …
>
> [T]he allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a "fishing expedition" in the hope that something of value will accrue to the defence. [Emphasis added.]

[80] The reasoning in *Durette*, has been applied recently on an application to compel the production of material in support of an abuse of process allegation at the committal phase of the extradition process: *United States of America v. Vreeland* (2002), 2002 CanLII 49652 (ON SC), 164 C.C.C. (3d) 266 at 275-77 (Ont. S.C.J.).

[81] The appellant bears the burden of demonstrating the "air of reality" and may do so by reference to the appeal record or to evidence, normally by way of affidavit, tendered in support of the motion for production and the compelling of testimony.

[82] The final requirement, that the appellant demonstrate that the documents and testimony sought are likely to yield evidence relevant to the allegations, is consistent with the conditions precedent to the issuing of a subpoena in a criminal proceeding: *Criminal Code* s. 698(1).

[83] I would add one *caveat*. Courts of appeal are not designed for the holding of evidentiary hearings and the making of credibility assessments. Where the appellant demonstrates that the documents and testimony sought to be compelled on appeal should be produced, I think the appeal court maintains the discretion to direct that the matter be remitted to the extradition judge for the conduct of the necessary inquiry. This option would be particularly attractive in cases where the appellant did not have the opportunity to present that evidence at the extradition hearing and the contemplated evidence is lengthy and will require credibility determinations. If the court decides that the evidentiary hearing is better conducted by the extradition judge, it would quash the committal order and direct a new extradition hearing at which the necessary evidentiary inquiries could be made.

[84] For the reasons set out above in support of my conclusion that the appeal from the order of O'Driscoll J. should be dismissed, I would dismiss this motion as it relates to a challenge to the committal order based on allegations of an abuse of process and a breach of s. 7. I will make brief reference to two additional allegations found in the notice of motion which are not addressed in my reasons for dismissing the appeal from the order of O'Driscoll J.

[85] The appellant suggests that the Crown's conduct somehow interfered with his "opportunity to plead guilty", which would have in turn prevented his extradition. There is nothing in the record to suggest that the appellant ever considered pleading guilty to the Canadian charges, or more to the point, that the Crown was aware of any possible guilty plea. A bald assertion in the notice of motion will not suffice to trigger the evidentiary inquiry sought by the appellant.

[86] In the notice of motion, the appellant also refers to the Crown's failure to make timely disclosure of Pagano's status as a Crown witness and statements that he provided to the authorities. The Crown certainly delayed making that disclosure in the criminal proceedings. There may well have been valid reasons for that delay. The appropriateness of any delay in making the necessary disclosure was relevant to the criminal proceedings and could have been litigated in that proceeding if any of the accused chose to do so. The possibility of improper delay in disclosure in the criminal proceedings offers no basis for the conclusion that the extradition of the appellant contravened s. 7 of the *Charter* or amounted to an abuse of process.

[87] The Minister of Justice was also required to consider whether state misconduct made the surrender of the appellant an infringement of his rights under s. 7 of the *Charter*. My analysis of the appellant's motion as it relates to the allegations of abuse of process and breach of s. 7 of the *Charter* in the context of the committal proceedings applies to the surrender phase of the extradition process as well. I would dismiss the motion in so far as it seeks production of documents and the compelling of testimony to demonstrate that the surrender of the appellant would constitute a breach of his rights under s. 7 of the *Charter*.

[88] The appellant also seeks production of documents and the compelling of testimony to support his claim that the surrender would violate his rights under s. 6(1) of the *Charter*. In addition, he seeks to adduce evidence that his medical condition should have caused the Minister to decline to order his surrender. In my direction of March 2002, I anticipated that the entire motion, including those parts referable to the s. 6(1) claim and the appellant's medical condition, could be resolved prior to the arguments of the merits of the judicial review of the Minister's decision. I am now satisfied that I was wrong in that assessment.

[89] As Arbour J. noted in *Kwok*, *supra*, on the judicial review application this court may admit evidence, and I would add, compel production and testimony, if it is satisfied that "the proper factual basis" for consideration of issues relevant to surrender does not exist. In so far as the submissions relating to the appellant's health and his s. 6(1) claim are concerned, I think this court can only decide whether it has a "proper factual basis" after it has heard the appellant's submissions on these two issues. The appellant has not had the opportunity to make those submissions.

[90] Consequently, I would adjourn those parts of the motion referable to the s. 6(1) claim and the appellant's medical health to the hearing of the judicial review application. At that time, the appellant may, if so advised, renew the motion as it relates to those two issues.

VI

[91] In summary, I would dismiss the appeals from the orders of Watt J. and O'Driscoll J. I would dismiss the motion as it relates to allegations of a breach of s. 7 and an abuse of process. I would adjourn the rest of the motion to the hearing of the judicial review application.

[92] Extradition matters should proceed expeditiously. These matters have been before the Court of Appeal for some 19 months. It is essential that the remaining matters, including the appeal from the order of Wren J., be dealt with as soon as possible. To that end, counsel should arrange a conference call with me within 14 days of the release of these reasons.

RELEASED: "DD" "AUG 22 2002"

"Doherty J.A."

"I agree S.T. Goudge J.A."

"I agree J.C. MacPherson J.A."

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[1] Treaty on Extradition between the government of Canada and the government of the United States, Can. T.S. 1976 No. 3, as amended Can. T.S. 1991 No. 37, Article 4(1)(i).

[2] As of April 19, 1999, the court is known as the Ontario Court of Justice: *Courts Improvement Act* 1996, S.O. 1996, c. 25, s. 8.

[3] The section is very similar to its predecessor, s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23, as amended, S.C. 1992, c. 13. The jurisprudence referable to s. 9(3) has application to s. 25: *United States of America v. Kwok* (2001), 2001 SCC 18 (CanLII), 152 C.C.C. (3d) 225 at 242 (S.C.C.).

[4] A similar analysis may be found in *Kwok*, *supra*; and *United States of America v. Shulman* (2001), 2001 SCC 21 (CanLII), 152 C.C.C. (3d) 294 (S.C.C.). Both were released with *Cobb*.

[5] It is clear that the American authorities relied heavily on the videotaped sworn statements obtained from the co-accused in late February 1999. The affidavits in support of the extradition request were completed in early May 1999. The formal request came about a month later.

[6] When Pagano was sentenced in December 1999, the trial judge refused to allow counsel for one of the appellant's former co-accused to serve Pagano with a subpoena within the confines of the courtroom. On my reading of the transcript, the Crown had nothing to do with this ruling by the trial judge.