
CANADA / JUDGMENT

U.S.A. v. Rogan

2014 BCSC 1246

COURT

Supreme Court of British Columbia

DECIDED

20 June 2014

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2014 BCSC 1246 U.S.A. v. Rogan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. Rogan,

2014 BCSC 1246

Date: 20140620

Docket: 26287

Registry: Vancouver

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

Between:

In the Matter of the Attorney General of Canada on behalf of

The United States of America

Respondent/Requesting State

And

Peter George Rogan

Applicant/Person Sought

Before: The Honourable Mr. Justice Fitch

Supplementary Oral Ruling Respecting the Terms of the

Disclosure Order

Corrected Judgment: The cover page was corrected on

October 30, 2014

In Chambers

Counsel for the Attorney General of Canada on behalf of the Requesting State:

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David J. Martin

Tamara J. Duncan

Place and Date of Hearing:

Vancouver, B.C.

June 16, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 20, 2014

A. Introduction

- [1] THE COURT: Peter George Rogan is sought for extradition by the United States of America in relation to offences corresponding to the Canadian crimes of perjury and attempting to obstruct justice.
- [2] Mr. Rogan was referred to an admissibility hearing before the Immigration Division in May 2008 to determine if he was inadmissible to Canada under ss. 36(1)(c) or 36(2)(c) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ["IRPA"], after a criminal complaint was lodged against him in the United States. Proceedings before the Immigration Division have been ongoing for six years. Extradition proceedings were initiated on behalf of the requesting state in March 2013.
- [3] Mr. Rogan has filed an application to stay the extradition proceedings on abuse of process grounds. I anticipate Mr. Rogan will assert that Canadian authorities were motivated to initiate immigration proceedings in 2008 not to pursue a valid immigration objective, but to ensure that he was returned to the United States to face criminal prosecution. In short, Mr. Rogan will argue that the immigration proceedings are a sham, artifice, or device employed to achieve the ulterior objective of extradition. From here, he will argue that the extradition proceedings are so tainted by the abuse of process that manifested in the initiation of immigration proceedings that continuing the extradition proceedings undermines the integrity of the judicial process and no remedy short of a stay of proceedings is capable of

removing the taint.

- [4] By reasons for judgment delivered June 6, 2014, and indexed at 2014 BCSC 1016, I found that Mr. Rogan had met the air of reality test set out in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.). Accordingly, I made a disclosure order in relation to information potentially relevant to his pending abuse of process claim that efforts to have him removed from Canada pursuant to the IRPA are, in reality, a disguised extradition. Some of the considerations guiding the scope of the order were expressed at para. 138 of the disclosure ruling.
- [5] Following release of the disclosure ruling, I invited further submissions from counsel respecting the scope of the order, the time frame for compliance with it, and the process through which privilege claims can best be resolved.
- [6] Further submissions were made on June 16, 2014.
- [7] These supplementary reasons address the scope of the disclosure order - the agencies at which it is directed, the time frame it should encompass, and the procedure for the resolution of any privilege claims asserted over documents falling within the terms of the order.

B. Positions of the Parties

- [8] Mr. Rogan resists the notion that the court's disclosure order should be limited to documents in the possession or control of the Canada Border Services Agency ("CBSA"). In addition, Mr. Rogan submits there should be no temporal restrictions placed on the disclosure order. He seeks an order along the following lines:
 - (a) the CBSA, the RCMP, Citizenship and Immigration Canada ("CIC"), and the Department of Justice shall within 15 days of the date of this order produce to counsel for the Attorney General all documents in their possession regarding Peter George Rogan that were generated in relation to immigration and/or extradition proceedings;
 - (b) if privilege is claimed over any of these documents or portions thereof, the privilege claims should be particularized and the court should be provided with both redacted and unredacted copies of the information over which the claim is made.
- [9] Mr. Rogan takes the position that he would be able to litigate issues of privilege within two weeks of compliance with the disclosure order.
- [10] Counsel acting on behalf of the requesting state submits that the disclosure order should be limited to documents in the possession of the CBSA. In addition, he submits that the disclosure order should be temporally limited to the time at which immigration proceedings were initiated, as this corresponds with the point at which the abuse of process is said to have been hatched. Specifically, counsel acting on behalf of the requesting state submits that the disclosure order should be confined to the period between the CBSA's initial

involvement in this matter on January 12, 2007 to May 26, 2008, the date upon which Mr. Rogan was referred to an admissibility hearing under the IRPA. Counsel acting on behalf of the requesting state submits that the disclosure order should not, in any event, go beyond July 10, 2008. This date corresponds with the last of the dates upon which events occurred that were expressly relied upon by the court to conclude that the Larosa test was met: see 2014 BCSC 1016, at para. 131.

- [11] With respect to the resolution of privilege claims, counsel acting on behalf of the requesting state submits that after the disclosure order has been complied with and relevant documents produced, subject to identified privilege claims, the following procedures should be adopted.
- [12] First, and consistent with the approach endorsed in *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 33, Mr. Rogan must show some basis to conclude that the disclosure sought is not privileged or, if privileged, necessary to establish his entitlement to a stay of proceedings: see *R. v. Creswell*, 2000 BCCA 583, at paras. 52 to 57.
- [13] At the second stage, and assuming the initial threshold test is met, the court would then be provided with unredacted and redacted copies of the documents over which privilege is claimed and proceed with an ex parte hearing to decide whether the information is privileged and, if it is, whether disclosure of the information is necessary to establish entitlement to the remedy Mr. Rogan seeks. If the court concludes that disclosure is necessary, the court should only reveal as much information as is essential to the establishment of Mr. Rogan's abuse of process claim.

C. The Scope of the Order

(a) The Organization(s) Subject to the Disclosure Order

- [14] Mr. Rogan asserts that immigration proceedings initiated by CBSA officials in May 2008 that had as their object his removal from Canada were improperly motivated and a mere artifice through which his disguised extradition to the United States to face prosecution was sought to be achieved. The essence of his claim is that the immigration proceedings initiated by CBSA officials were animated by a desire to facilitate Mr. Rogan's return to the United States for prosecutorial purposes.
- [15] The only Canadian government agency with authority to initiate or maintain immigration proceedings is the CBSA. Mr. Rogan has put before me no evidence that any other Canadian agency directed the CBSA to initiate immigration proceedings against him or otherwise influenced the CBSA to seek his removal from Canada under the IRPA. As Doherty J.A. observed in *Larosa*, requests for the production of documents such as the one made in this case will often lack particularity owing to difficulties an applicant might experience in obtaining evidence necessary to support an abuse of process motion in circumstances where much of the relevant information will be in the possession of the arm of the state against whom the allegations of misconduct are made. But in this case, Mr. Rogan has

already received extensive disclosure of documents in CBSA's possession as well as disclosure of some documentation in the possession of the RCMP and CIC.

- [16] In addition, the circumstances of this case are unique in that Mr. Rogan has already had the opportunity, in the context of ongoing immigration proceedings, to cross-examine the CBSA officials whose motivations are in issue. I have been provided with transcripts of the cross-examinations of two CBSA officials that took place before Immigration Division in March 2012. It is the motivation of these two individuals that is the centerpiece of Mr. Rogan's disguised extradition claim. It is also the basis upon which the disclosure order was made. I am informed that additional cross-examination of these two (and four other) CBSA officials occurred earlier this year while the disclosure ruling was on reserve.
- [17] While I have not been provided with transcripts of the most recent cross-examinations, it was open to Mr. Rogan to put this additional material before me if it provided an evidentiary foundation for the contention that some other Canadian agency directed or influenced the decision-making authority of the CBSA officials involved in this case.
- [18] Mr. Rogan's contention that it is likely that documents relevant to the proposed abuse of process claim are in the possession of the RCMP, CIC, and/or the Department of Justice, but not contained in CBSA's file, has a distinctly speculative quality to it. It is not supported on the evidence put before me on the disclosure application, despite the opportunities Mr. Rogan has had to lay an evidentiary foundation that would support a disclosure order extending beyond the material in possession of the CBSA. In my respectful view, to craft a disclosure order that goes beyond CBSA's file would, on the state of the record before me, be sanctioning an impermissible fishing expedition. More to the point, as it is the motivation of CBSA officials that lies at the heart of Mr. Rogan's application for a stay of the extradition proceedings, documents that may be held by other Canadian agencies relevant to Mr. Rogan's case, but that are outside the knowledge of CBSA officials who are said to have been improperly motivated in their decision to refer Mr. Rogan to an admissibility hearing in May 2008, could not logically be probative of the state of mind of the CBSA officials who determined to trigger removal proceedings under the IRPA.
- [19] In these circumstances, and as I said at para. 138 of the disclosure ruling, the focus of the abuse of process allegation is and must remain on the motivation of CBSA officials in pursuing Mr. Rogan's removal from Canada; in other words, the purpose for which they acted in initiating and maintaining immigration proceedings. As it is the motivation of CBSA officials that lies at the root of Mr. Rogan's proposed abuse of process application, the disclosure order will be limited to documents in the CBSA's possession.
- [20] To be clear, the disclosure order encompasses correspondence in the CBSA's file between the CBSA and Canadian officials and the CBSA and United States officials, but, as I will explain, only extends to correspondence that is potentially relevant to the disguised extradition argument.

(b) The Order Relates to Material in CBSA's Possession Not Previously Disclosed

- [21] As noted earlier, Mr. Rogan has already received extensive and possibly complete disclosure of the contents of his CBSA file that have not been made the subject of a privilege claim.
- [22] When the disclosure application was argued, the court was made aware that Mr. Rogan had received disclosure from the CBSA of the s. 44 reports and related materials together with the affidavit of FBI Agent Te outlining the criminal allegations underlying both the immigration and extradition proceedings. The court was aware that Mr. Rogan had been able to cross-examine CBSA Officers Papp and Zuck before the Immigration Division in March 2012. Finally, the court was aware that in July 2012, the Immigration Division ordered that the CBSA file be produced and, following the procedures set out in *Canada v. Kahlon*, 2005 FC 1000, that non-privileged documents relating to the CBSA's communication with United States authorities regarding Mr. Rogan up to and including his arrest by the CBSA on May 26, 2008, be disclosed to Mr. Rogan's counsel. That order was later expanded to require disclosure from the CBSA file of documents up to June 30, 2008.
- [23] It was unclear to me at the time of the disclosure application, and remains unclear to me, whether the disclosure Mr. Rogan received related solely to the CBSA's communications with United States authorities about Mr. Rogan. It is also unclear to me whether the disclosure of this category of documents was further limited to those documents Officers Papp and Zuck relied on to refresh their memories prior to testifying before the Immigration Division. In any event, it would appear that the Kahlon procedure continued for a considerable period and that disclosure of additional portions of the CBSA's file in relation to Mr. Rogan continued in January 2014.
- [24] In March 2014, while the disclosure ruling was on reserve, Mr. Rogan's counsel, with the benefit of this additional disclosure, conducted a further cross-examination of Officers Papp and Zuck as well as four other CBSA officers who had some involvement in Mr. Rogan's file.
- [25] In addition to the disclosure Mr. Rogan has received in the course of the proceedings before the Immigration Division, disclosure has also been made to him in response to requests made on his behalf under the Access to Information Act, R.S.C. 1985, c. A-1. On June 6, 2008, Mr. Rogan sought disclosure of all information held by the CBSA in Ottawa and Vancouver relating to his case. By letter dated November 6, 2008, Mr. Rogan's counsel was supplied with the documents requested, save those determined to be exempt from disclosure under the provisions of the Act. On January 25, 2012, Mr. Rogan sought disclosure of all information held by the CBSA in Ottawa and Vancouver relating to his case that had been generated since July 1, 2008. By letter dated February 20, 2014, the requested documentation up to the date of the request was supplied, save for those documents determined to be exempt from disclosure under the Act.
- [26] I was informed by counsel acting on behalf of the requesting state that the CBSA takes the position that, to its knowledge, Mr. Rogan has received complete disclosure of its file up to June 30, 2008, with the exception of documents deemed irrelevant or redacted for privilege

by the Immigration Division in the course of the Kahlon process. I am uncertain as to how to reconcile this submission with the material before me suggesting that Mr. Rogan has received disclosure of all information held by the CBSA in Ottawa and Vancouver to the date of the second ATIP request on January 25, 2012. In any event, Mr. Rogan submits that the disclosure he has received from the CBSA to date has been disorganized and that uncertainty exists about what has and has not been disclosed. He described the Kahlon process before the Immigration Division as "chaotic" and "flawed." He says he can have no faith in the ATIP process. Having said this, it seems uncontested that Mr. Rogan has taken no appeal to the Privacy Commissioner from disclosure decisions made in connection with his ATIP requests.

- [27] Mr. Rogan submits that in order to maintain a clear record of what has been disclosed through the Kahlon process before the Immigration Division and in response to his ATIP requests, this Court should order afresh the disclosure of all non-privileged information potentially relevant to his abuse of process application. I decline to make this order.
- [28] I am not satisfied that the redisclosure of material already supplied is necessary to preserve the fairness of this proceeding. Further, such an order would be wasteful of time and resources and would be contrary to the goal of ensuring that extradition proceedings proceed to an expeditious determination of whether the test for committal has been met. In the result, this order exempts information already disclosed to Mr. Rogan in the course of the Kahlon process invoked by the Immigration Division or pursuant to the ATIP requests made on Mr. Rogan's behalf.

(c) Temporal Limitations on the Disclosure Order

- [29] Mr. Rogan's position is that the CBSA instituted and has maintained immigration proceedings against him in order to ensure his return to the United States for prosecution purposes. In my view, imposing temporal restrictions on the disclosure order would be both unwarranted and arbitrary. As I noted in my disclosure ruling at para. 138, the focus of the abuse of process allegation is and must remain on the motivation of Canadian officials in initiating and maintaining immigration proceedings.
- [30] While it is true as a practical matter that information from the CBSA file proximate to the initiation of immigration proceedings in May 2008 is more likely to be relevant to the abuse of process claim, as I said at para. 134 of the disclosure ruling, I am satisfied that Mr. Rogan should be given the opportunity to fully litigate his abuse of process/stay of proceedings application on the basis of documents and evidence likely to be relevant to the claim. I cannot be satisfied that this opportunity would be afforded in the face of a disclosure order that is restricted to a particular time band. The disclosure order must, however, be crafted to ensure that it compels the disclosure of non-privileged information potentially relevant to the abuse of process claim. It is to that issue that I now turn.

(d) The Disclosure Order Should Extend to Non-Privileged Documents Relevant to the Disguised Extradition Claim

[31] A disclosure order not tied to the purpose it serves will inevitably be overly broad and wasteful of time and resources. Mr. Rogan seeks documents relevant to the issue of whether the CBSA was motivated and willing to engage immigration proceedings to accommodate a desire on the part of the United States to have him returned to that country for prosecution purposes. The disclosure order should be restricted to documents potentially relevant to the disguised extradition claim. It is not an order for production of all documents in the possession of the CBSA relating to Mr. Rogan's case.

[32] In my view, declining to impose a temporal restriction on the disclosure order, while at the same time requiring some demonstration of potential relevance to the particular claim in issue, balances the interests of Mr. Rogan in being able to fully pursue his claim with the broader public interest in ensuring that extradition proceedings come to an expeditious conclusion. I note that the disclosure order made in *Tursunbayev v. Canada* (Minister of Public Safety and Emergency Preparedness), 2012 FC 532, at para. 114, was crafted with similar considerations in mind.

(e) Process for the Resolution of Privilege Claims

[33] I am in agreement with the approach recommended by counsel on behalf of the requesting state should issues arise about the disclosure of documents over which privilege has been claimed.

D. The Terms of the Order

[34] Consistent with these reasons, the CBSA will disclose to Mr. Rogan:

1. All documents in its possession relating to Mr. Rogan's case that:

(i) have not been previously been disclosed; and

(ii) are potentially relevant to Mr. Rogan's claim that the CBSA was motivated and willing to engage immigration proceedings to accommodate a desire on the part of the United States to have him returned to the United States for prosecution purposes;

2. Where documents falling within the scope of this order have been withheld or redacted, the basis upon which the CBSA submits that those documents should be exempted from the disclosure order;

3. The CBSA will comply with the terms of this order on or before August 29, 2014;

4. Within two weeks of receipt from CBSA of such additional disclosure as may be required to comply with the terms of this order, a further pre-hearing conference will be convened, at which time Mr. Rogan will advise the court whether he intends to contest a privilege claim or, alternatively, argue that a valid and subsisting privilege must give way because disclosure of the document in issue is necessary to establish his entitlement to a stay of proceedings;
5. The timelines for compliance with this order may be abridged or extended on further application to the court.

"FITCH J."

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