

CANADA / JUDGMENT

United States v. Haugen

2010 BCSC 56

COURT

Supreme Court of British Columbia

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2010 BCSC 56 United States v. Haugen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Haugen,

2010 BCSC 56

Date: 20100118

Docket: 24540

Registry: Vancouver

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

Between:

The Attorney General of Canada

on behalf of the United States of America

Applicant/Requesting State

And

Dustin M. Haugen

Respondent/Person Sought

Before: The Honourable Mr. Justice S.R. Romilly

Reasons for Judgment

Counsel for the Applicant/Requesting State:

Stacey M. Repas

Mandana Namazi

Counsel for the Respondent/Person Sought:

Kenneth S. Westlake, Q.C.

Mark Jette

Place and Date of Hearing:

Vancouver, B.C.

December 15-17, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2010

A. NATURE OF THE APPLICATION

- [1] Dustin M. Haugen ("Haugen"), who is also known by the alias "Princess", is sought for prosecution by the United States of America (the "Requesting State") in relation to his involvement in trafficking and importing marihuana in 2006. The allegations are that on May 9, 2006, Haugen and Daryl Giller Desjardins ("Desjardins") transported approximately 135 kilograms (342 pounds) of marihuana from Canada to the United States of America with a red and white Bell 206B Jet Ranger helicopter bearing the Canadian registration number C-GFBN (the "Helicopter").
- [2] On January 15, 2008, the Minister of Justice (the "Minister"), through his authorized representative, issued an Authority to Proceed (the "ATP") in relation to Haugen pursuant to s. 15 of the Extradition Act, S.C. 1999, c. 18, as amended, authorizing the Attorney General of Canada (the "Applicant") to proceed before this Court to seek an order for committal in relation to conduct that corresponds to the Canadian offences of (1) trafficking in cannabis (marihuana) contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (as amended) ("CDSA"); and (2) importing cannabis (marijuana) contrary to s. 6(1) of the CDSA (collectively, the "Offences").
- [3] More particularly, the Applicant applies pursuant to s. 29(1)(a) of the Extradition Act for the committal into custody of the Respondent to await surrender to the Requesting State for prosecution for the Offences (the "Committal Application").
- [4] At the outset of this hearing, counsel for Haugen made an application for a declaration that these extradition proceedings constitute an abuse of the court's process and a breach of Haugen's right to life, liberty and security of the person as guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter"). Counsel for Haugen submitted that these proceedings be stayed pursuant to s. 24(1) of the Charter and Haugen

discharged.

- [5] With respect to the abuse of process application, for the reasons stated below, I find that this is a matter that falls within the jurisdiction of the Minister and not the extradition judge. I therefore have no jurisdiction to deal with the application.
- [6] For the reasons stated below, the committal order requested by the Requesting State is granted.

B. THE ABUSE OF PROCESS APPLICATION

i. Background

- [7] With respect to committal and the nature of the argument raised by counsel for Haugen it is necessary to set out some details of the relevant portions of the Record of the Case (the "ROC").
- [8] On May 9, 2006, law enforcement officers observed and video recorded Haugen and Desjardins flying the Helicopter from Harrison Hot Springs to a secluded location on the British Columbia side of the Canada/U.S. Border. Upon arrival at that location, several bags were loaded into the Helicopter and then flown into Washington State, near the Canadian border. Upon landing at the remote location in Washington State, several large bags were unloaded from the Helicopter by one of the two persons in the Helicopter, and then moved to a nearby truck. The Helicopter then departed and the truck was stopped shortly thereafter by U.S. law enforcement, who found in the rear of the truck, five large bags containing approximately 135 kilograms of marihuana. The Helicopter, with Haugen and Desjardins onboard, subsequently returned to Harrison Hot Springs after a brief stop at another remote location in British Columbia.
- [9] Constable Rusticus ("Rusticus") was a member of an aircraft surveillance crew - along with Jim Dotson and Mike Corcoran ("Corcoran") - that video recorded the actions of the Helicopter and its two occupants on the date in question. After following the Helicopter to its landing spot in a remote location of Washington State, Rusticus observed a waiting pickup truck at the same location. Multiple bags were seen transferred from the Helicopter to the waiting pickup truck. Rusticus relayed the description of this truck to Resident Agent John Smith ("Smith") of U.S. Immigration and Customs Enforcement. Smith observed and stopped a blue GMC truck with Washington licence plate A90865K leaving the landing zone area. Smith and other law enforcement officers took custody of two occupants of the truck and uncovered five hockey-style bags containing heat-sealed packages of a substance which tested positive as marihuana. Special Agent Nicolas Saroff ("Saroff") of U.S. Immigration and Customs Enforcement was advised of the actions of the Helicopter by Corcoran and attended the scene where he witnessed Smith taking custody of the occupants of the truck and the marihuana. Saroff took custody of a global-positioning system ("GPS") in the possession of one of the occupants of the pickup truck which pinpointed the location of the Helicopter that delivered the marihuana.

- [10] Upon their return to the hangar in Harrison Hot Springs, Desjardins and Haugen were arrested and charged in the Provincial Court of British Columbia: Chilliwack, 50349 (B.C.P.C.). Counts 1 and 2 on the information alleged that Desjardins and Haugen unlawfully exported from Canada and possessed for the purpose of trafficking a quantity of cannabis contrary to the CDSA. Count 3 in the information alleged that Desjardins had in his possession firearms and ammunition while he was prohibited from doing so by reason of a court order.
- [11] On May 17, 2006, the Crown sought Haugen's detention. Bail was denied in reasons handed down on May 18, 2006. It would appear that at the time of the alleged helicopter trip to the United States of America, Haugen was serving a 12 month conditional sentence for extortion. One of the conditions of that sentence was that he not leave the Province of British Columbia. He breached that condition when he flew to the United States of America on May 9, 2006.
- [12] Negotiations took place between counsel for Desjardins and Crown counsel about a possible disposition of the charges. It was agreed that Desjardins would plead guilty to the Offences and that a stay of proceedings would be entered on the charges against Haugen. Pursuant to that agreement, Desjardins pled guilty to the Offences and a stay of proceedings was entered on Count 3 in the information and on the charges against Haugen. There is no indication that counsel for Haugen asked that no evidence be called against his client so that the charges against him could be dismissed by a judge. At any rate, counsel for Desjardins was so concerned about his client facing prosecution in the United States of America, he had Desjardins plead guilty later that day to the firearms offence on which a stay of proceedings had already been entered.
- [13] There is no suggestion that Crown counsel entered the stay on the Offences in order to allow these extradition proceedings to be undertaken by the Requesting State.

ii. The possible unjust effect of these Extradition proceedings on Haugen

- [14] In the event that Haugen is committed in these proceedings, identifiable matters that may be considered in determining whether the proceedings by the Requesting State are unjust include the following:
- (a) According to the police, Desjardins was under investigation for a lengthy period of time before his arrest on the Offences on May 9, 2006. Although he was more culpable than Haugen, if Haugen is convicted in the Requesting State there is a strong likelihood that his sentence would be much more severe than the sentence imposed on Desjardins. In *R. v. Christie*, 2004 ABCA 287, 189 C.C.C. (3d) 274 at paras. 40-43 (quoted with approval in *R. v. Vo*, 2009 BCCA 471 at para. 18), Sullivan J., for the Alberta Court of Appeal, stated:

40 Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence.

In all probability this parity principle will not be considered by the Requesting State if Haugen is convicted of the Offences by the Requesting State.

- (b) After the stay of proceedings was entered, Haugen was finally released from custody after having spent 45 days in pre-trial custody. In British Columbia Haugen would have received two for one credit towards his sentence: *R. v. Orr*, 2008 BCCA 76, 228 C.C.C. (3d) 432; *R. v. Aubin*, 2009 BCCA 418; *R. v. Rufus*, 2009 BCCA 419; and *R. v. Evers*, 2009 BCCA 500. If convicted of the Offences by the Requesting State he would not be entitled to this credit.
- (c) If Haugen is convicted of the Offences by the Requesting State, the parole considerations would not be as flexible as those in Canada.
- (d) If Haugen is convicted of the Offences by the Requesting State, the possibility of being allowed to serve any portion of his sentence in Canada seems remote.

[15] Before I deal with the issue on the abuse of process argument, it may be prudent for me to canvass the law as it applies to my role as an extradition judge, the role of the Minister and the scope of my jurisdiction to grant Charter relief in an extradition hearing.

iii. The role of the Minister and the role of the extradition judge

[16] In *Canada (Justice) v. Fischbacher*, 2009 SCC 46, Charron J., for the majority, explained the role of the extradition judge and that of the Minister. She stated at paras. 35-40:

[35] The function of an extradition hearing is to determine whether the domestic component of double criminality is met, as required by s. 3(1)(b) of the Act. The Act clearly establishes that the province of the extradition judge is limited to consideration of only the domestic side of this issue, as the Minister has already established that the foreign component of double criminality is satisfied. Accordingly, the role of the extradition judge does not include any review of the foreign law. Section 29 delineates the judge's role as follows:

29. (1) [Order of committal] 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 that the person is the person sought by the extradition partner;

The judge must consider the evidence in light of Canadian law and determine whether it reveals conduct that would justify committal for the crime listed in the ATP if it had occurred in Canada. In *McVey*, at pp. 527-28, La Forest J. explained the role of the extradition judge as follows:

The trial judge in the United States, of course, deals with the offence under the law of that country. The identity of that offence can be determined by reference to the text of that law supplied with the requisition. The extradition judge in Canada, on the other hand, is concerned with whether the underlying facts of the charge would, *prima facie*, have constituted a crime ... if they had occurred in Canada. That is what is meant by saying that double criminality is conduct based. The courts of both countries deal with the offence under their own law, the law in which they are versed, but each must ascertain whether under that law the facts support the charge. [...]

If the extradition judge concludes that the impugned conduct would amount to a criminal offence in Canadian law, the domestic component of double criminality is satisfied and the person sought must be committed for extradition.

[36] Following committal, the matter reverts to the Minister who reviews the case in its entirety to determine whether to order the individual's surrender and, if so, on what basis. This requires the Minister to determine whether it is politically appropriate and not fundamentally unjust for Canada to extradite the person sought. Section 40(1) of the Act sets out the Minister's general power on the question of surrender:

40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.

The Minister's power to order or refuse surrender is subject to the provisions of the Treaty and the Act, and must be exercised in accordance with the Canadian Charter of Rights and Freedoms.

[37] Under the Act, the Minister's decision on surrender is contained by a series of mandatory and discretionary "Reasons for Refusal" set out in ss. 44, 46 and 47. Relevant for the purposes of the present appeal is the broad power of refusal found in s. 44(1)(a):

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
- (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances;

Given the mandatory nature of s. 44(1)(a) the "Minister must consider all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive": *United States of America v. Johnson* (2002), 62 O.R. (3d) 327 (C.A.), at para. 45. Whether the Minister is "satisfied" that surrender would be unjust or oppressive in a given set of circumstances, however, is entirely a matter of his discretion.

[38] Reaching a conclusion on surrender requires the Minister to undertake a balancing of all the relevant circumstances, weighing factors that militate in favour of surrender against those that counsel against. The circumstances that will be "relevant" to a surrender decision will vary depending on the facts and context of each case. Some of these factors may include: any representations made by the person sought on the question of surrender in

accordance with s. 43(1) of the Act, the conduct of the proceedings in the requesting country before and after the request for extradition, the potential punishment facing the individual if surrendered, humanitarian issues relating to the personal circumstances of the individual, the timeliness and manner of prosecuting the extradition proceedings in Canada, the need to respect the constitutional rights of the person sought and Canada's international obligations under the Treaty and as a responsible member of the international community: see *Bonamie, Re*, 2001 ABCA 267, 293 A.R. 201, at para. 54; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 34.

[39] In carrying out the analysis under s. 44(1)(a) of the Act, the "relevant circumstances" may also include an alleged breach of the rights of the person sought under the Charter. As La Forest J. wrote in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 522, "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender ... may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances." The Court elaborated on this test in *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, stating, at para. 68: "The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience." (Emphasis deleted.) In turn, as recognized by this Court in *Lake*, at para. 24, where surrender is found to be contrary to the principles of fundamental justice protected by s. 7 of the Charter, it will also be unjust and oppressive under s. 44(1)(a), and the Minister must refuse surrender. In this case, Mr. Fischbacher does not contend that the decision to extradite him on a charge of first degree murder violates the Charter. Thus a detailed discussion of the relationship between s. 44(1)(a) of the Act and the Charter is beyond the scope of this appeal. However, it is worth emphasizing that s. 44(1)(a) entitles the Minister to refuse surrender even where no Charter breach is alleged or where an alleged breach is not established. Where a surrender is constitutional, the Minister retains "a residual discretion to refuse surrender as being unjust or oppressive in view of the totality of the relevant circumstances, including, but not limited to, the circumstances alleged to make surrender inconsistent with the principles of the Charter": *Bonamie*, at para. 47.

[40] If the Minister decides not to surrender the person sought, he must order a discharge in accordance with s. 48(1) of the Act. If surrender is deemed appropriate in the circumstances, the contents of the Minister's surrender order must conform with s. 58 of the Act.

[Emphasis in original.]

iv. Jurisdiction of the extradition judge to grant Charter relief

[17] Section 25 of the Extradition Act provides:

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.

- [18] Pursuant to s. 25, the extradition judge is competent to grant Charter remedies, including a stay of proceedings, on the basis of Charter violations, but only insofar as the violations pertain directly to the circumscribed issues relevant at the committal stage of the extradition process: *United States of America v. Cobb*, 2001 SCC 19, 152 C.C.C. (3d) 270; and *United States of America v. Bonamie*, 2001 ABCA 267, [2002] 1 W.W.R. 247 at para. 12. The judiciary has only a limited, prescribed role in the extradition process since extradition is primarily a discretionary matter vested in the executive: *United States of America v. D'Agostino*, [1997] O.J. No. 334 at para. 32 (S.C.J.). As such, extradition judges should not pre-empt the executive with respect to those issues falling within the purview of the Minister's jurisdiction under the Extradition Act: *United States of America v. Kwok*, 2001 SCC 18, 197 D.L.R. (4th) 1 at para. 85.
- [19] In examining the extent of an extradition judge's jurisdiction, it is important to recognize that there are substantive and procedural safeguards in the extradition process that arise after the committal hearing. Until such safeguards have been exercised or exhausted, it is speculative to assume that a fugitive will be surrendered and that breaches of his Charter rights will be thereby occasioned: *United States of America v. Vreeland* (2002), 164 C.C.C. (3d) 266 (Ont. S.C.J.).
- [20] In *Kwok*, for example, Arbour J. endorsed the Supreme Court of Canada's conclusions in earlier decisions that a fugitive's s. 6 mobility rights were not engaged by the issuance of a warrant of committal but rather, by the Minister's decision to surrender. Consequently, Charter applications at the extradition hearing, other than those regarding procedural matters pertaining to the hearing itself, are, for the most part, premature since it cannot be assumed that the Minister will ignore any Charter rights arising in a given case. As a basic premise, Charter remedies must await infringement. The Minister's decision to surrender is subject to Charter compliance, and an effective remedy exists should there be any Charter violation during any part of the extradition process in the form of the joint appeal and judicial review in the provincial Court of Appeal: *Kwok*, at para. 83.
- [21] Nevertheless, an extradition judge has jurisdiction to stay proceedings under s. 25 of the Extradition Act where the conduct of the extradition proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse of process: *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.) citing *Kwok*.
- [22] The extradition judge does not, however, have "plenary and exclusive" Charter jurisdiction to rule at large on constitutional issues. In *Kwok*, Arbour J. states at para. 5:

However, s. 9(3) [now s. 25 of the Extradition Act] did not give plenary and exclusive Charter jurisdiction to the extradition judge. The Minister of Justice retains jurisdiction on matters related to surrender, and must comply with the Charter on all matters incidental to surrendering a fugitive. The Minister's decision is subject to judicial review by the court of appeal. Thus, although the extradition judge can now grant a Charter remedy, he or she can only do so on matters relevant at the committal stage.

Similarly, Arbour J. states at para. 44:

As the habeas corpus judge formerly could, the extradition judge can now grant appropriate Charter remedies on matters relevant to the committal stage, provided that he or she does not usurp the Minister's function.

[23] The Charter jurisdiction of the extradition judge is limited to the functions he or she discharges in conducting the committal hearing. These functions include conducting a hearing, ruling on the admissibility of evidence and determining whether sufficient evidence has been adduced to warrant committal pursuant to s. 29 of the Extradition Act. The Charter jurisdiction thus applies to give the judge authority to grant remedies under the Charter to ensure the procedural fairness of the hearing, and to determine whether any evidence gathered by persons to whom the Charter applies has been gathered in a manner that violates the Charter rights of the person sought.

[24] Applying the s. 25 Charter jurisdiction to these functions, the extradition judge has jurisdiction under the Extradition Act to apply the Charter with respect to two specific matters: the procedural fairness of the committal hearing and the admissibility of evidence gathered in Canada which is sought to be adduced at the hearing.

[25] In Cobb, Arbour J. said, on behalf of the Supreme Court of Canada, at para. 34:

Section 7 permeates the entire extradition process and is engaged, although for different purposes, at both stages of the proceedings. After committal, if a committal order is issued, the Minister must examine the desirability of surrendering the fugitive in light of many considerations, such as Canada's international obligations under the applicable treaty and principles of comity, but also including the need to respect the fugitive's constitutional rights. At the committal stage, the presiding judge must ensure that the committal order, if it is to issue, is the product of a fair judicial process.

v. Discussion and decision on the abuse of process application

[26] Counsel for Haugen takes the position that the current situation is sufficiently analogous to Cobb that the reasoning therein should apply. He submits that I should deal with the abuse of process argument and grant the relief requested.

[27] With the greatest respect to counsel for Haugen, I disagree that this case bears any similarity to Cobb. In fact I am in total agreement with Garton J. in *United States of America v. Chang* (2006), 205 C.C.C. (3d) 258 (Ont. S.C.J.) where it was stated at paras. 41-49:

- [41] The facts in Cobb were unique in the sense that the impugned conduct of one of the parties rendered it impossible for the fugitives in that case to have a fair extradition hearing and was such that it tainted the entire proceedings. That is not the case before this court.
- [42] In Cobb, the American trial judge assigned to hear the fugitives' case indicated, while sentencing a co-accused, that if they did not co-operate and come to the United States voluntarily, he would impose the maximum jail sentence that the law permitted. In addition, the American prosecutor, while appearing on a Canadian television program, threatened that those fugitives who contested their extradition would serve longer sentences under more stringent conditions, and would become "the boyfriend of a very bad man". The extradition judge found that these statements would "[shock] the Canadian conscience", were "simply not acceptable" and stayed the proceedings. The Ontario Court of Appeal set aside the stay and remitted the matter to the extradition judge. The Supreme Court of Canada allowed an appeal by the fugitives and restored the stay.
- [43] In upholding the extradition judge's decision, the Supreme Court of Canada noted that the issue was not whether the fugitives may face unfair proceedings in the United States, but whether their extradition hearing was fair in light of the threats made by those involved in requesting their extradition, to force them to abandon their right to such a hearing. Conduct by a requesting state or by its agents that interferes or attempts to interfere with the conduct of judicial proceedings in Canada is a matter that concerns the extradition judge.
- [44] The Court in Cobb held that both statements, or at least that of the prosecutor, were an attempt to influence the unfolding of the Canadian judicial proceedings by putting undue pressure on the fugitives not to contest the extradition request. The pressures were not only inappropriate but also amounted to an abuse of the process of the court. At p. 608, the Court stated:

We do not condone the threat of sexual violence as a means for one party before the court to persuade any opponent to abandon his or her right to a hearing. Nor should we expect litigants to overcome well-founded fears of violent reprisals in order to be participants in a judicial process. Aside from such intimidation itself, it is plain that a committal order requiring a fugitive to return to face such an ominous climate - which was created by those who would play a large, if not decisive role in determining the fugitive's ultimate fate - would not be consistent with the principles of fundamental justice.

- [45] The Court held that these concerns, and the remedies applied to them, properly belonged to the judicial phase of the extradition process as they were not dependent on the ultimate outcome of either the committal or the surrender decision. Nothing the Minister could have done would address the unfairness that would taint a committal order obtained under such circumstances. The Minister is not the guardian of the integrity of the courts. It is for the courts themselves to guard and preserve their integrity. There was therefore no need for the case to await the executive decision. The violation of the fugitive's rights occurred at the judicial stage of the process and called for redress at that stage and in that forum.

- [46] The decision in Cobb rested on the fact that the conduct of one of the parties went to the very heart of, and could not be divorced from the committal hearing itself. In such circumstances, a fair hearing was not possible and a stay of the proceedings was the only appropriate remedy. There is no comparable circumstance in the present case. There is no allegation of improper conduct by an agent of the requesting state or any other matter that would raise concerns about the fairness of the extradition hearing itself.
- [47] What the applicant is asking the court to do in this case is to consider and apply Article 4(1) - a jurisdiction that I clearly do not have - before the Minister, who does have that jurisdiction, considers it. In other words, the only way that the court can get to the point of considering whether the applicant's s. 7 Charter rights have been violated is by treading into territory that is clearly within the province of the Minister and outside this court's statutory mandate. In my view, following such a course would constitute a clear case of the court reaching out to bring within its jurisdictional ambit a matter that the Act has not assigned to it. This is exactly what the court in McVey, supra, stated that an extradition judge must not do.
- [48] In *United States of America v. Drysdale*, [2000] O.J. No. 214 (QL), 45 W.C.B. (2d) 202 (Ont. S.C.J.), (a case that pre-dates the Supreme Court of Canada's decision in Cobb), the applicants were in a situation similar to that of the applicant before the court. It appeared that the conduct that was the subject-matter of the extradition request was identical to the conduct for which they had already been tried and convicted in Canada. Dambrot J., although indicating that he was not unmoved by the substance of their claim, dismissed the application for a stay of proceedings and held that it was premature - that the issue of double jeopardy was the Minister's responsibility. With respect to the applicant's argument that the extradition proceeding would be oppressive in the circumstances, Dambrot J. stated at para. 27:
- [I]t is sufficient to say that any time persons accused of a crime are in a position to complain that it would be oppressive to place them on trial, they could equally complain that the extradition hearing or preliminary hearing that would enable them to be placed on trial is also oppressive. More than that is necessary to invoke the Charter jurisdiction of this Court. It must be established that there is something that makes the extradition proceeding unfair divorced from the alleged unfairness of the ultimate prosecution before a Charter remedy is justified.
- [49] The reasoning of Dambrot J. is applicable in this case, notwithstanding that it pre-dates the Supreme Court of Canada decision in Cobb, supra.
- [28] In my view, the reasoning of Garton J. is applicable in this case. Consequently, I hold that the abuse of process argument is one that should be dealt with by the Minister and not by me. In *United States of America v. Freimuth*, 2004 BCSC 154, 183 C.C.C. (3d) 296, at para. 67, I stated that the extradition judge had discretion to hear evidence to create a record for the Minister, but that discretion was to be exercised "very, very sparingly". The facts in the current situation are quite unique however, and, notwithstanding what I said in Freimuth, I have allowed counsel to create a partial record for the Minister by calling two witnesses. In

allowing this I have been careful not to allow counsel to call evidence in areas where there is dispute. I feared that if I did allow such evidence to be introduced, the Minister may have to decide the Charter issue on the basis of sworn testimony from one witness and unsworn testimony from another.

- [29] Having arrived at the decision that this Charter issue should be decided by the Minister and not by me, it is unnecessary for me to deal with the abuse of process application, nevertheless, in view of some of the remarks made by counsel about the prejudice suffered by Haugen, I feel compelled to refer to some of the statements of Doherty J.A. in Larosa:
- [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), 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), 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. Not. 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. ...

It is noteworthy that Mr. Westlake (counsel for Haugen) was involved in the Smith case mentioned in the above quote.

[30] With respect to the allegation of prejudice allegedly suffered by Haugen as a result of the 45 days he spent in pre-trial custody for the Offences, some statements of Doherty J.A. in Larosa are applicable:

[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.

C. THE COMMITTAL HEARING

[31] Through the Committal Application the Applicant applies pursuant to s. 29(1)(a) of the Extradition Act for the committal into custody of Haugen to await surrender to the Requesting State for prosecution for the Offences.

[32] The Applicant seeks to rely upon the following evidence in support of the Committal Application:

- (a) the ROC for Prosecution certified on February 22, 2007; and
- (b) the Admissions of Fact dated December 9, 2009 (the "Admissions").

[33] Section 24(1) of the Extradition Act authorizes this Court to conduct an extradition hearing upon the filing of an ATP.

i. Admissions of Fact

[34] At the committal hearing the following Admissions were made by Counsel for Haugen:

Dustin M. Haugen through his counsel, Kenneth S. Westlake, Q.C. and Mark Jette, admits the following facts alleged against him for the purpose of dispensing with proof thereof at the extradition hearing. It is admitted that:

1. The person before the Court, Dustin M. Haugen, is the same person who was arrested by Constable Michael Mansoor of the Royal Canadian Mounted Police in Chilliwack, British Columbia on March 17, 2008;

2. At the time of his arrest, Dustin M. Haugen identified himself to Constable Michael Mansoor by providing the name "Dustin Haugen" and the date of birth of June 10, 1982; and
3. At the time of Dustin M. Haugen's arrest, Constable Mansoor examined a British Columbia Driver's license in Haugen's possession, bearing the number 7007998. In comparing the photograph and information depicted on the Driver's license with the person who identified himself as Dustin Haugen, Constable Michael Mansoor determined that it was the same person.

ii. The issue raised by Haugen

- [35] The issue raised by Haugen on this committal hearing is very narrow. He submits that the evidence and exhibits proffered by the Requesting State at these proceedings do not meet the test for committal set out in s. 29 of the Extradition Act as that section has been explained and interpreted in *United States of America v. Ferras*, 2006 SCC 33, 268 D.L.R. (4th) 1; and *United States of America v. Graham*, 2007 BCCA 345, 222 C.C.C. (3d) 1, leave to appeal ref'd [2007] S.C.C.A. No. 467. In particular, he submits that the certified information in the record of the case fails to link the truck, its occupants and contents to the Helicopter occupied by Haugen and Desjardins.

iii. The test for committal

- [36] At an extradition hearing, the judge shall commit the person sought for prosecution if the following test in s. 29(1) of the Extradition Act is met:
- (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 that the person is the person sought by the extradition partner; ...
- [37] Section 29 of the Extradition Act requires an extradition judge to determine two matters:
- (1) what evidence is admissible under the Extradition Act; and
 - (2) whether the admissible evidence is sufficient to justify committal.

These matters appear in *Ferras* at paras. 16 and 36.

iv. The admissibility of evidence at an extradition hearing

- [38] The admissibility of evidence at an extradition hearing is governed by ss. 31-37 of the Extradition Act. The sections relevant to this proceeding include:
32. (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.
33. (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
- ...
- (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
- ...
- (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.
34. A document is admissible whether or not it is solemnly affirmed or under oath.
35. A document purporting to have been signed by a judicial, prosecuting or correctional authority, or a public officer, of the extradition partner shall be admitted without proof of the signature or official character of the person appearing to have signed it.

[Emphasis added.]

[39] As a result of s. 33(4) of the Extradition Act, there is no need for additional authentication in this case because Article 10(2) of the Treaty on Extradition Between the Government of Canada and the Government of the United States of America, Can. T.S. 1976 No. 3, as amended by the Second Protocol, Can. T.S. 2003 No. 11, speaks only of the same certification as that required by the Extradition Act:

10(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when:

...

(b) in the case of a request emanating from the United States for a person who is sought for prosecution, they are certified by a judicial authority or prosecutor who attests that the evidence is available for trial and is sufficient to justify prosecution under the laws of the prosecuting jurisdiction .[Emphasis added.]

[40] In *United States of America v. Anekwu*, 2009 SCC 41, 310 D.L.R. (4th) 1, the Supreme Court of Canada unanimously held that a summary of evidence set out in the record of the case, regardless of where the evidence is gathered, is admissible evidence in an extradition hearing if the requirements of ss. 32 and 33 of the Extradition Act are met.

v. Sufficiency of the evidence

[41] The question from s. 29 of the Extradition Act of whether "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" is known as the *prima facie* case test. To determine whether this test is met, the court is not required to determine what the facts of the case are. Rather, the court need only assess whether the admissible evidence is capable of satisfying the modern form of test originally set out in *United States of America v. Sheppard*, [1977] 2 S.C.R. 1067 at p. 1080 (sometimes referenced as *United States of America v. Sheppard*):

the duty imposed upon a "justice" is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which would, if it were believed, result in a conviction.

[Emphasis added.]

- [42] Following the decision in Ferras, an extradition judge has the discretion to not consider evidence shown to be manifestly unreliable or unavailable for trial if it would make it dangerous or unsafe to commit the person sought on the basis of such suspect evidence. The criteria for conducting the analysis to determine whether the admissible evidence is sufficient to satisfy the test for committal under s. 29(1)(a) of the Extradition Act is subject to the following significant principles:
- a) The inquiry into sufficiency of the evidence to commit for extradition under s. 29(1) involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada: whether evidence exists upon which a reasonable jury, properly instructed could return a verdict of guilty: Ferras, at paras. 38 and 48;
 - b) The extradition judge's inquiry is focused on conduct - whether the acts disclosed in the admissible evidence are criminal in Canada: Ferras, at para. 38;
 - c) The extradition judge looks at the whole of the evidence and determines whether it discloses a case on which a jury could convict: Ferras, at para. 54;
 - d) Evidence that would justify committal in Canada requires at least some evidence on every element of the parallel Canadian Crime - the double criminality requirement: Ferras, at para. 38. However, it is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot "justify committal": Ferras, at para. 46;
 - e) The extradition judge does not determine the guilt or innocence of the person sought: Ferras, at para. 68. That assessment remains for the trial court in the foreign state. However, in order to justify committal, the evidence must establish a case that could go to trial in Canada. This may require the extradition judge to engage in a limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial: Ferras, at para. 46;
 - f) The extradition judge can refuse to extradite on insufficient evidence such as where the evidence is unavailable or manifestly unreliable: Ferras, at para. 50. Manifestly unreliable evidence is evidence upon which it would be dangerous or unsafe to rest a verdict: Ferras, at paras. 40, 54 and 65;
 - g) In assessing the reliability of the evidence, the extradition judge does not make an actual determination that the evidence is in fact reliable. The issue is threshold reliability: whether the evidence tendered possesses sufficient indicia of reliability to make it worth consideration by the extradition judge: Ferras, at para. 53. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue: Ferras, at para. 54;

- h) Certification of evidence by the United States, an extradition partner of Canada, vests the evidence with a presumption of threshold reliability. Unless rebutted, this presumption will stand: Ferras, at paras. 30-32, 66 and 76;
 - i) Similarly, certification of evidence as available for trial results in a presumption of availability for trial: Ferras, at para. 58; and
 - j) That evidence takes the form of hearsay or is unsworn does not detract from the presumption of threshold reliability: Ferras, at paras. 48 and 76-77.
- [43] I will note here that there seems to be some difference of opinion between the Ontario Court of Appeal and the British Columbia Court of Appeal as to the interpretation of Ferras. I will address this concern in the next two sections.

vi. The Ontario Court of Appeal's interpretation of Ferras

- [44] In *United States of America v. Thomlison*, 2007 ONCA 42, 216 C.C.C. (3d) 97 at paras. 39-41, the Ontario Court of Appeal adopted the requesting state's argument that evidence could be removed from the requesting state's "some evidence" basket only if it was either manifestly unreliable or not realistically available for trial, and that the Ferras test does not permit an extradition judge to refuse to commit merely because the case against the accused is weak and the prospect of conviction slim. In this respect, Moldaver J.A. for the Ontario Court of Appeal stated in *Thomlison*:
- [45] In the end, when Ferras is read as a whole and against the backdrop of the s. 7 Charter issue - namely, the propriety of depriving persons of their liberty and security, by forcibly removing them to another country to stand trial on the basis of evidence that is either unavailable and/or manifestly unreliable - I am satisfied that the newly-acquired authority conferred on extradition judges is limited in the manner suggested by the respondent. Unlike the situation that existed post *Shephard*, Ferras now authorizes extradition judges to assess the availability and quality of the evidence that can legitimately be included in the "some evidence" basket for sufficiency purposes. In my view, that enables them to discard evidence that is not realistically available for trial and/or evidence that is manifestly unreliable, i.e. evidence upon which it would clearly be dangerous or unsafe to convict. It does not allow extradition judges to refuse to commit where there is "available and reliable" evidence in the "some evidence" basket upon which a reasonable jury, properly instructed, could convict.
- [46] In coming to that conclusion, I take comfort in the fact that nowhere in Ferras does the court set out, in explicit terms, the expanded role of the extradition judge suggested by the appellant. On a matter of such importance, I believe that if the court had intended to effectively create a new and more stringent test for committal, such as, "a reasonable prospect of conviction" or "a reasonable likelihood of conviction", it would have said so explicitly.

- [47] To summarize, I am satisfied that if there is some evidence, that is available for trial and not manifestly unreliable, on every essential element of the parallel Canadian crime, upon which a jury properly instructed, could convict, the test for committal will have been met. In that regard, it matters not whether the case against the person sought is "weak" or whether the prospect for conviction "unlikely". The ultimate question of guilt or innocence is for the trial court in the foreign jurisdiction.
- [45] In *United States of America v. Anderson*, 2007 ONCA 84, 218 C.C.C. (3d) 225, at para. 28, Doherty J.A. described the new approach mandated by Ferras as contemplating a "limited qualitative evaluation" of the evidence proffered by the requesting state. The court's view was that that evaluation did not require the extradition judge to evaluate the relative strength of the case put forward by the requesting state. Doherty J.A. writing for the Ontario Court of Appeal stated:
- [30] Evidence may be rendered "so defective" or "so unreliable" as to warrant disregarding it due to problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors. I would stress, however, that it is only where the concerns with respect to the reliability of the evidence, whatever the source or sources, are sufficiently powerful to justify the complete rejection of the evidence, that these concerns become germane to the s. 29(1)(a) inquiry.
- [31] In deciding whether defects in the case proffered by the requesting state are sufficiently serious to justify disregarding some part of the evidence relied on by the requesting state when conducting the s. 29(1)(a) assessment, an extradition judge must begin from the premise that the material properly certified by the requesting state pursuant to s. 33 is presumptively reliable for the purposes of the Extradition Act, including the s. 29(1)(a) assessment: see *U.S.A. v. Ferras*, supra, at paras. 52-56. The party resisting extradition may rebut the presumption of reliability flowing from certification either by reference to the requesting party's own material or by calling evidence to demonstrate fundamental inadequacies or frailties in the material relied on by the requesting state: see *U.S.A. v. Ferras*, at paras. 66-67.
- [46] In a similar vein, at para. 8 of *Thomlison*, Moldaver J.A. accepted the following as an accurate statement of the law:
- [8] [...] so long as there is some evidence, that is available for trial and not manifestly unreliable, on every element of the parallel Canadian crime, upon which a reasonable jury, properly instructed, could convict, the test for committal will have been made out, regardless of any opinion the extradition judge might have about the strength of the case or the likelihood of conviction. The ultimate question of guilt or innocence is not for the extradition judge; it is reserved for the trial court in the foreign jurisdiction.

[47] In *United States of America v. Pannell*, 2007 ONCA 786, 227 C.C.C. (3d) 336, there was an inconsistency between the supplemental record of the case and a victim impact statement. Rosenberg J.A. for the Court wrote:

[20] As this court said in the post-Ferras decision of *United States of America v. Thomlison* (2007), 216 C.C.C. (3d) 97 at para. 47, "it matters not whether the case against the person sought is 'weak' or whether the prospect for conviction 'unlikely'. The ultimate question of guilt or innocence is for the trial court in the foreign jurisdiction." See also *United States of America v. Anderson* (2007), 218 C.C.C. (3d) 225 (Ont. C.A.) at paras. 28-31. There will be ample room for cross-examination of Officer Knox and the other witnesses, but, in my view, there is evidence upon which a properly instructed jury could convict.

[Emphasis added.]

vii. The British Columbia Court of Appeal's interpretation of Ferras

[48] In *Graham*, Donald J.A. took dead aim at the interpretation of Ferras by the Ontario Court of Appeal interpreting Ferras as requiring more than some admissible evidence on each element of the offence. According to the reasoning in *Graham*, sufficiency for committal now requires that the evidence be demonstrably able to be used by a reasonable properly instructed jury to reach a verdict of guilty. In *Graham*, Donald J.A. found that the required test is analogous to reviewing a verdict for unreasonableness on appeal or the test for a directed verdict. Donald J.A. further held at para. 29 that Ferras demands a "holistic appraisal" of the evidence and at para. 31 that this appraisal must be made "through the lens of judicial experience" to determine whether the evidence is "demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty." The relevant sections of *Graham* are as follows:

[30] I find myself in respectful disagreement with the statement in *Anderson* where Doherty J.A. said for the Ontario Court of Appeal, at para. 28:

... *U.S.A. v. Ferras*, *supra*, does not envision weighing competing inferences that may arise from the evidence. It does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable. Nor does it call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.

[...]

[31] My difficulty with that way of putting the limit of discretion is that there are degrees of weakness and extradition judges should not be put off their task of assessing for sufficiency by a dictum that mere weakness is not enough. I agree that it is not enough. It may be more helpful to speak in terms of the test for reviewing verdicts for unreasonableness on appeal or for directed verdicts. The language used in paragraph 54 of Ferras, "plausible case" and "dangerous or unsafe to convict", and in paragraph 46, "[t]he evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty" suggests

the kind of analysis described in *R. v. Biniaris*, [2000] 1 S.C.R. 381 at paras. 36 and 40:

The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebe* as follows:

[C]urial review is invited whenever a jury goes beyond a reasonable standard.... [T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.

(*Yebe*, [1987] 2 S.C.R. 168] at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)

That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence.

* * *

When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

[...]

[32] In summary, *Ferras* stands for the proposition that extradition judges now have the discretion to disregard evidence shown to be unreliable or unavailable and in respect of the evidence that remains, to determine by an assessment of the evidence, including a limited weighing of the evidence, whether it is sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada.

[All emphasis in original.]

- [49] Other British Columbia Court of Appeal cases that have interpreted Ferras include: *United States of America v. Lorenz*, 2007 BCCA 342, 222 C.C.C. (3d) 16, leave to appeal ref'd [2007] S.C.C.A. No. 492, at paras. 31-41; *Italy v. Seifert* 2007 BCCA 407, 223 C.C.C. (3d) 301, leave to appeal ref'd [2007] S.C.C.A. No. 503, at para. 39; *Scarpitti v. United States of America*, 2007 BCCA 498, 228 C.C.C. (3d) 262; *United States of America v. Walker*, 2008 BCCA 55, 234 C.C.C. (3d) 564; and *Danielson v. United States of America*, 2008 BCCA 519, 243 C.C.C. (3d) 88.
- [50] In *Walker*, Donald J.A. explained how evidence introduced at an extradition hearing should be treated. In *Walker*, he stated, writing for the Court of Appeal:
- [25] Remembering that the Ferras assessment is to screen evidence so as to avoid dangerous or unsafe verdicts, extradition judges should give high risk eyewitness identification a very hard look.
- [26] Turning to the evidence in the ROC, I note the following deficiencies in the evidence:
1. While the single photo is appended to the ROC, the photo montage is not. Is the montage fair or does the appellant stand out as distinctly different from the other five subjects?
 2. The order in which the witness was shown the single photo and the montage is not disclosed. If he was shown the single photo first, then the witness may have recognized the appellant's picture in the montage not from the crime scene but from the prior viewing of the single photo.
 3. It is not said whether the montage used the same or a different photo, and if not the same photo, whether it is a good likeness.
 4. The time of day, lighting conditions, and the duration of the encounter are not disclosed.
- [27] It would have been easy for the respondent to address these matters in the ROC. The respondent cannot expect the extradition judge to assume favourable answers to the questions left unanswered because of the paucity of the evidence. If it was dark in the alley, the observation by the witness lasted only a few seconds, the police showed a single photo first, and/or the police created an unfair montage, then the sufficiency of the case is highly doubtful.
- ...
- [30] The judge in this case expressed the view that the appellant asked him "to speculate as to the frailties of the Government's case" (para. 25). With respect, I do not think that speculation is involved in evaluating this evidence. When it cannot be determined whether the eyewitness identification is dangerous or unsafe - because the summary is incomplete - then the requesting state has not met its burden. It would be speculation to assume the worst about the evidence; but by the same token, it would be speculation to assume the evidence is free of any defect that would render it insufficient for committal. Perhaps the judge, at paragraph 25 of his reasons, meant that whether the evidence is good or bad is a matter best left for trial in Washington. If so, that comes very close to the rubber stamping that prevailed under

the Shephard model. A Ferras assessment demands more than that.

- [31] Furthermore, while many of the authorities on this topic deal with jury warnings, this does not suggest that every case of dubious eyewitness identification should go to a jury. If the evidence is so weak that a guilty verdict would be unreasonable, a judge should direct a verdict to avoid an injustice. Likewise, the extradition judge should discharge on such evidence.
- [32] I have not ignored the potentially corroborative evidence that a man named "Maurice" (the appellant's middle name) lived in the neighbourhood of the shooting and was known to wear a red beanie like that worn by the shooter. But since the state of the ROC will not permit a satisfactory evaluation of the primary evidence of identification, I do not think the beanie takes the case over the line.
- [51] In *Danielson, Chiasson J.A.*, for the Court of Appeal, without specifically referring to *Walker*, stated:
- [21] On a plain reading of s. 29 of the Extradition Act, there are two issues of identification in an extradition proceeding: one, is the person named in the RoC the person who committed the alleged conduct; two, is the person named in the RoC the person before the court? As noted, the extradition judge expressed these issues at para. 3 as follows:

There [are] two aspects of the identity issue. They are:

1. that there be prima facie evidence that the person sought is the person who committed the acts alleged; and
2. that there be evidence proving on the balance of probabilities that the person before the court is the person sought by the requesting state.

[22] Wong concerned the second issue only. This Court confirmed in para. 69 that the burden of proof on the second issue is the balance of probabilities. The lower threshold of a prima facie case derives from the fact the requesting state must establish a case on which a jury reasonably instructed might convict. Although this may require the extradition judge to undertake a limited weighing of the evidence, there is no determination of the merits (*United States of America v. Ferras*, 2006 SCC 33 at paras. 46-47, [2006] 2 S.C.R. 77. [sic])

[23] It is important to distinguish between these issues - *United States of America v. Rennie* (1984), 56 A.R. 321 at para. 24, 34 Alta. L.R. (2d) 193 (Q.B.) cited in *G.V. La Forest, Extradition to and from Canada*, 2d ed. (Toronto: Canada Law Book, 1977) at 98, for the proposition: "[t]he identity of the fugitive with the person named in the warrant should not be confused with identifying him as the person who committed the crime; the latter is merely part of the prima facie case" - but, the issues are interrelated and not completely discrete.

[24] The two identification issues that arise under s. 29 concern whether a person ("the fugitive") will be committed into custody. The person identified in the RoC must be linked to the alleged criminal conduct and that person must be shown to be the person before the court. I would recast the identification issues as follows:

1. on a balance of probabilities is the person before the court the person named in the RoC;
2. is there a prima facie case that the person before the court is the person who engaged in the alleged conduct that underlies the request for extradition?

[25] Expressed in this way, it is seen that in many cases the inquiry under both identification issues will involve the same information although the onus of proof differs. For example: the evidence in the RoC contains a photograph which is used by witnesses to identify the person linked to the alleged illegal conduct and the same photograph is used by the extradition judge to identify the person in the courtroom. On other occasions the information will not be the same.

[26] Section 37 of the Extradition Act specifically addresses identification:

The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

[27] During the hearing, there was some discussion whether the word "and" between subparagraphs (a) and (b) requires both similarity of name and physical characteristics. In my view, the verb "are" clearly shows that both (a) and (b) individually can be evidence of identification.

[28] Para. 41 merely describes the person sought by the United States. Section 37 sets a low threshold for evidence of identification. It and the authorities (Gunn, for example) show that mere similarity of name can be sufficient.

[29] The United States provided particulars of the person sought. They matched the person in court. In *United States of America v. Graham*, 2005 BCSC 54 at para. 25, Bennett J. held that the requesting state was not required to state how it obtained a photograph of the person sought. The issue does not engage a consideration of the source of the description; the issue is whether the person described by the requesting state is the person in court.

- [30] In this case, the United States provided evidence that a Joshua Danielson undertook conduct that would be fraud in Canada and stated it wants a Joshua Danielson extradited. A person was brought to court and identified as Joshua Danielson. Pursuant to s. 37 and the authorities, standing alone this could be sufficient to identify Mr. Danielson as the person the United States stated it wanted, even if the particulars in para. 41 were ignored.
- [31] I would not characterize the information in para. 41 as "evidence". It merely gives the name and description of the person the United States wants. The fact the United States added descriptive particulars without identifying their source does not mean they could not be used to identify the person in court as the person the United States said it wanted.
- [32] An examination of the RoC shows it contains a great deal of information that links the alleged unlawful conduct to a Mr. Danielson. The information in para. 41 was not necessary for the judge's determination that prima facie the person named in the RoC undertook the alleged unlawful conduct and he did not rely on it for that purpose. The issue becomes whether the United States has a prima facie case against Mr. Danielson, the person before the extradition court.
- [33] As the Manitoba Court of Appeal stated in para. 28 of *Gunn*, "[t]here can be no doubt that the requesting state must prove it has 'got the right man'". It must present a case that could go to a jury that the fugitive undertook the alleged illegal conduct.
- [34] Witnesses identified Mr. Danielson from photographs, but the extradition judge stated he could not do so and the witnesses did not testify.
- [35] Relying on *Ferras*, (at para. 52) and s. 33(3)(a) of the Act, the United States submitted that because the RoC was certified properly, there is a presumption that the personal identification information of Joshua Danielson, as set out by Special Agent Collas in para. 41, is reliable and will be available for trial in the United States. The extradition judge accepted this argument, but, as noted by Mr. Danielson, the personal identification information was provided by the Special Agent who does not reveal how she came to the knowledge and she does link it to the witnesses. The RoC is silent whether the information is available from an identifying witness. I agree with Mr. Danielson that without such a link, the information does not provide evidence that the person who undertook the alleged illegal conduct is Mr. Danielson.
- [36] Neither the photographs nor the identification particulars in para. 41 can assist the United States in establishing a prima facie case Mr. Danielson undertook the alleged illegal conduct.
- [37] Section 37 of the Extradition Act provides the required link: the similarity of Mr. Danielson's name to the name of the person in the RoC is evidence he is that person; the evidence of witnesses in the RoC links the named person to the alleged illegal conduct.

[52] I mean no disrespect when I say that the procedure suggested by the Court of Appeal in Walker would seem overly trial-like. In this regard, it is perhaps helpful to review the statements of Cory and Iacobucci JJ., writing for the majority of the Supreme Court of Canada, in *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 122:

A judge hearing an application for extradition has an important role to fulfil. Yet it cannot be forgotten that the hearing is intended to be an expedited process, designed to keep expenses to a minimum and ensure prompt compliance with Canada's international obligations. As La Forest J. stated for the majority in *McVey*, supra, at p. 551, "extradition proceedings are not trials. They are intended to be expeditious procedures to determine whether a trial should be held". In fact, in some contexts, a requirement for more "trial-like" procedures at the extradition committal stage may "cripple the operation of the extradition proceedings"... [citation omitted]

[53] This reasoning seems fairly clear that the requisite threshold for committal should be the ability to hold a trial and not necessarily the ability to convict. After all, the extradition partner (in this case the United States of America) is invoking its right to perform such a trial in its own jurisdiction and not to automatically convict the person sought if committal is ordered. At any rate, in view of the reasoning in *Danielson*, Walker would now seem to be a bit of an anomaly.

viii. Ferras and the limited weighing of the circumstantial evidence

[54] In *Ferras*, at para. 39, the Supreme Court of Canada observed that the decision in *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, served to modify the Shephard test for committal where the evidence relied upon is circumstantial in permitting "a judge to engage in limited weighing of circumstantial evidence to ensure that inferences from the evidence are reasonably supportable."

[55] *Arcuri* is authority for the proposition that if direct evidence is lacking on any element of the offence charged, a reasonable jury, properly instructed, may infer from the circumstantial evidence, facts necessary to prove that element. In *Arcuri*, McLachlin C.J.C. described the limited weighing required where circumstantial evidence is involved:

23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence - that is, those elements as to which the Crown has not advanced direct evidence - may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence. The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

[Emphasis added and in original.]

The Supreme Court of Canada stated further in Arcuri:

29 where the Crown's evidence consists of, or includes, circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence (i.e. including any defence evidence) to determine whether a reasonable jury properly instructed could return a verdict of guilty.

30 In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge's task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

[Emphasis added and in original.]

Finally, the court in Arcuri reiterated at para. 33:

The preliminary inquiry justice does not herself draw inferences from the evidence, and she does not assess the credibility of witnesses. That it overstates the case to say that a preliminary inquiry justice is entitled to discharge an accused simply on the grounds that the Crown's evidence is "weak".

[56] If the circumstantial evidence is reasonably capable of supporting a number of inferences, and one of those inferences supports guilt, the person sought must be committed. In *R. v. Cinous*, 2002 SCC 29, 162 C.C.C. (3d) 129, McLachlin C.J.C. and Bastarache JJ. writing for the majority of the Supreme Court of Canada held that:

91 The expression "limited weighing", adopted by the full Court in Arcuri, was intended as a more accurate description of the judge's traditional function. The "limited weighing" description accords just as well with the approach to air of reality as originally set out in *Wu*, supra, and followed to this day. In Arcuri, McLachlin C.J. quoted at para. 24 from *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), to emphasize the consonance of the limited weighing approach with the traditional distinction between the respective tasks of the judge and jury:

The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which [the matter in issue] may be reasonably inferred; the jurors have to say whether, from those facts [the matter in issue] ought to be inferred. [...]

This distinction is crucial. The judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence.

[Emphasis in original.]

- [57] The argument that Arcuri permits the extradition judge to weigh the sufficiency of the case for committal in cases involving circumstantial evidence, including drawing inferences and choosing from amongst competing inferences, has been rejected: *Turner v. United States of America* (2002), 230 Nfld. & P.E.I.R. 152 (N.L.S.C.); and *United States of America v. Ironside*, 2005 BCSC 1587, at paras. 94-106. The limited function of the extradition judges requires the judge to order committal if the evidence as a whole "creates a web of circumstances that, if unanswered, could lead a properly instructed jury, acting reasonably" to draw an inference of guilt: *Turner*, at para. 77. If the admissible evidence gives rise to competing inferences, these are for the trier of fact to resolve and an extradition judge commits reviewable error in weighing competing inferences or in choosing from amongst them.
- [58] Subsequent to Ferras, in the decision of *Canada (Attorney General) v. Kissel*, [2006] O.J. No. 5019 (S.C.J.), L.A. Beaulieu J. noted that the limited weighing of circumstantial evidence described in Arcuri is intended to ensure that inferences from the evidence that go towards every element of the offence are reasonable. A reasonable inference does not have to be the most probable inference: *Kissel* at paras. 80-84. The whole of the evidence must be considered. Further, at para. 85, individual pieces of evidence cannot be examined in isolation devoid of their context and the other evidence.
- [59] This approach to circumstantial evidence was recently adopted in *United States of America v. Fester*, 2009 BCSC 1331, at para. 16, in which Rice J. found as follows:
- [16] In *United States of America v. Lorenz*, 2007 BCCA 342, 222 C.C.C. (3d) 16, the British Columbia Court of Appeal recognized Ferras as having extended the Arcuri reasoning to extradition cases. At paras. 33-35, Newbury J.A. emphasized the foregoing passages from Arcuri in describing the limited weighing function of an extradition judge under Ferras and the limits placed on the weighing of circumstantial evidence. This weighing of evidence was also considered in *United States of America v. Dhanda*, (unreported) February 19, 2009, Vancouver No. 24028, B.C.S.C. at page 8:

If the circumstantial evidence is reasonably capable of supporting a number of inferences, and if one of those inferences supports guilt, the person sought must be committed. The inferences need not be compelling or even easily drawn in order to be reasonable: *R. v. Katwaru* (2001), 153 C.C.C. (3d) 433 at 444 (Ont. C.A.). A reasonable inference does not have to be the most probable inference. The limited function of the extradition judge requires the judge to order committal if the evidence as a whole "creates a web of circumstances that, if unanswered, could lead a properly instructed jury, acting reasonably" to draw an inference of guilt: *United States of America v. Turner*, (2002), 230 Nfld. & P.E.I.R. 152 at para. 77, 682 A.P.R. 152.

ix. Position of Haugen

- [60] Counsel for Haugen argues that the Requesting State bears the burden of establishing a sufficient case for committal. They submit that the evidence and exhibits proffered by the Requesting State in these proceedings do not meet the test for committal set out in s. 29 of the Extradition Act, as that section has been explained and interpreted in Ferras and Graham. In particular, it is submitted that the certified information in the record of the case fails to link the truck, its occupants and contents to the Helicopter.
- [61] Counsel for Haugen submits that the ROC does not contain the information necessary to make this link. They submit that Rusticus observed the Helicopter land in a remote location near a waiting pickup truck and the transfer of bags. Smith observed a blue GMC pickup truck matching the description given to him by Rusticus leaving the landing zone area. Smith and the other officers then stopped the vehicle. Saroff responded to the scene where two men had been taken into custody from the pickup truck. Smith stopped and took possession of the GPS device.
- [62] Counsel for Haugen submit that this information fails to make a connection between the GMC pickup identified by plate number and description, and the "truck" or "pickup" that appears in the portion of the ROC containing Rusticus's evidence. Counsel submits that the "remote location" referred to by Saroff is not described by GPS and is probably information which was received from Corcoran. Corcoran's anticipated evidence is not summarized in the ROC. Counsel further submits that the assertion that the drop location was pinpointed in the GPS device lacks information necessary for the reviewing court to assess its weight and relevance. Further, Saroff, the maker of this assertion, attended only the scene where the truck was stopped and not the landing zone itself. Smith witnessed the truck leaving the landing zone area, but he never actually observed the truck and Helicopter together. Rusticus is the only officer on the record who purports to have seen the truck and Helicopter together on the ground, but no detail as to specific location or description of the truck exists in the portion of the ROC containing Rusticus's anticipated evidence.
- [63] Counsel for Haugen submit that while it is clear that the police on the ground believed that the truck they stopped had been involved in this exchange, it is for the court to determine whether, after applying the test for committal in Ferras, the materials filed by the Requesting State in fact make that connection.
- [64] Counsel for Haugen further submit that here this evidence fails to bridge the "inferential gap" discussed in Arcuri at para. 23. They submit that the court is asked to assess whether it is reasonable to infer that the GMC pickup stopped by police was the same vehicle in contact with the Helicopter on the ground.
- x. Analysis
- [65] I mean no disrespect when I say that this submission seeks the type of "trial-like" proceeding extradition judges in this Province could expect to be sought on a regular basis since the decisions in Graham and Walker. Having said that, it is clear to me that counsel for Haugen is asking me to parse the circumstantial evidence in the summary in the ROC, and evaluate

each item of evidence on a piecemeal basis without regard to the cumulative effect of the whole of the evidence. This I am precluded from doing in a trial and even more so on an extradition proceeding: *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C.(3d) 193; *R. v. Abernathy*, 2002 BCCA 8, 161 B.C.A.C. 247 at para. 41; and *R. v. Trevor*, 2006 BCCA 91, 206 C.C.C. (3d) 370 at paras. 12-13, leave ref'd [2006] S.C.C.A. No. 196.

- [66] From the summary in the ROC, on the whole of the evidence, an inference could easily be made that the GMC pickup stopped by police was the same vehicle in contact with the Helicopter on the ground.
- [67] After applying the test for committal in *Ferras*, on the materials filed by the Requesting State, I am satisfied that the Requesting State has established that Haugen should be committed to stand trial on the Offences.

D. CONCLUSION

- [68] I order that the Respondent, Dustin M. Haugen, be committed into custody with respect to Counts 1 and 2 as set out in the ATP: (1) Trafficking in cannabis (marihuana) contrary to s. 5(1) of the CDSA; and (2) Importing cannabis (marihuana) contrary to s. 6(1) of the CDSA. The Respondent, Dustin M. Haugen shall there remain until surrendered to the United States of America or discharged according to law.
- [69] This is to command the peace officers to immediately convey Dustin M. Haugen into the custody of the Keeper of the North Fraser Pretrial Centre, Port Coquitlam, British Columbia, and the Keeper, to receive and keep Dustin M. Haugen in custody until delivered pursuant to the provisions of the Extradition Act, or discharged according to law, for which this shall be the Order.
- [70] Pursuant to s. 38(2) of the Extradition Act, I have to inform you, Dustin M. Haugen, that you will not be surrendered until after the expiry of 30 days. I also have to inform you that you have a right to appeal this committal order and to apply for judicial interim release.
- [71] Pursuant to s. 38 of the Extradition Act, I direct that the following documents be transmitted to the Minister:
- (a) a copy of the committal order;
 - (b) a transcript of the evidence adduced at this hearing that has not already been transmitted to the Minister; and
 - (c) all exhibits introduced at this hearing, including all written rulings made by me on this hearing.
- [72] I do not intend to make a report to the Minister pursuant to s. 38 of the Extradition Act.

"Romilly J."

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