NOTE: THE SUPPRESSION ORDER MADE IN THE DISTRICT COURT IN RELATION TO THE CONTENTS OF THE UNITED STATES' RECORD OF THE CASE REMAINS IN EFFECT

IN THE COURT OF APPEAL OF NEW ZEALAND

CA526/2012
[2013] NZCA 38

BETWEEN	THE UNITED STATES OF AMERICA Appellant
AND	KIM DOTCOM, FINN BATATO, MATHIAS ORTMANN AND BRAM VAN DER KOLK First Respondents
AND	THE DISTRICT COURT AT NORTH SHORE Second Respondent

Hearing: 20 September 2012

Court: Arnold, Ellen France and French JJ

Counsel: J C Pike and F Sinclair for Appellant
P J Davison QC, W Akel and R C Woods for Mr Dotcom
G J Foley for Messrs Batato, Ortmann and Van der Kolk

Judgment: 1 March 2013 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed. The order for disclosure made by Judge Harvey in the District Court is quashed.

B The cross-appeal is dismissed.

C Costs are reserved. The parties have leave to file further memoranda if necessary.

REASONS OF THE COURT

(Given by Arnold J)

Table of Contents

	Para No
Introduction	[1]
Allegations against Megaupload and Mr Dotcom	[6]
Extradition	
Background	[12]
Extradition Act 1999	[16]
(a) The relationship between the Act and a relevant extradition treaty	[19]
(b) Protection of human rights	[22]
(c) Different extradition processes	[27]
(i) Endorsed warrant process: Part 4	[28]
(ii) Commonwealth and treaty countries: Part 3	[30]
(iii) Non-Commonwealth, non-treaty countries: Part 5	[36]
Background to record of the case procedure	[37]
Nature of extradition proceedings	[40]
The judgments below	[46]
(a) District Court	[46]
(b) High Court	[48]
Evaluation	[49]
The NZ/US Treaty	[50]
The Act	[65]
(a) Section 25	[82]
(b) Section 24	[97]
Drawing the threads together	[104]
Relief	[110]
Decision	[114]

Introduction

[1] This case raises an important point concerning the extent of disclosure that a court may order a requesting state to provide in advance of a particular form of extradition hearing. The background is that the appellant, the United States of America, seeks to extradite Mr Dotcom and the remaining first respondents (whom we will refer to simply as Mr Dotcom for ease of reference) to face charges arising out of their involvement in a group of companies known as the Megaupload companies (Megaupload). The essential allegation is that Megaupload, for the purpose of commercial advantage or private financial gain, provided internet-based storage facilities to users and allowed them to use those facilities to share files in

breach of copyright. Megaupload and Mr Dotcom are alleged to have committed criminal breaches of copyright in respect of films, television shows, music, electronic books, video games and other computer software. They are also alleged to have been involved in money laundering, racketeering and wire fraud, although these offences flow from the copyright charges.

[2] Prior to the extradition hearing, which is yet to be held, Mr Dotcom sought disclosure of various categories of documents from the United States prosecuting authorities. Judge Harvey ordered disclosure.[1] (For ease of reference, the orders are set out in Appendix A to this judgment.) As can be seen, the orders are structured in terms of the ingredients of the offences alleged and are widely drawn. For example, order 1(b)(i) refers to documents "connected to, related to or evidencing alleged infringement of the copyright interests".

[3] The United States brought an application for judicial review of Judge Harvey's decision, which Winkelmann J dismissed.[2] The United States now appeals from Winkelmann J's decision. Although Mr Dotcom generally supports Winkelmann J's reasoning, he has filed a cross-appeal in relation to her finding that an oral evidence order is required before a witness may be called at an extradition hearing and seeks to support her judgment on other grounds.

[4] The Extradition Act 1999 (the Act) recognises different categories of jurisdiction, each with different requirements for extradition. The United States is a jurisdiction to which pt 3 of the Act applies. It is an exempted country, which enables it to follow an extradition process that is simpler than that which must be followed by non-exempted jurisdictions. Where it brings an extradition application, the United States is entitled to present a record of the case to the court hearing the application (the extradition court). In essence, the record of the case is a summary of the evidence against the person sought to be extradited.

[5] We have concluded, contrary to the views of the Courts below, that the exempted country regime under the Act does not contemplate disclosure on the basis

---

1 *Dotcom v United States of America* [2012] DCR 661.
2 *United States of America v Dotcom* [2012] NZHC 2076.

ordered. Accordingly, the appeal will be allowed. The cross-appeal will be dismissed.

Allegations against Megaupload and Mr Dotcom

[6] The United States' record of the case (including the supplementary record) is 109 pages in length and summarises the significant evidence that the United States intends to lead at the trial of Megaupload and Mr Dotcom. The detail of the record of the case is subject to a suppression order made by Judge Harvey, which continues in force. The following account of the factual background is accordingly brief.

[7] Megaupload offered internet-based storage facilities for electronic files, which users of the service could share. It operated through servers located in a number of different countries. According to the record of the case, Megaupload presented itself as a "cyberlocker", that is, a private data storage provider. Megaupload allowed access for three broad categories of users: unregistered, non-paying, anonymous users; registered, non-paying users; and registered, paying, premium users. It is alleged that Megaupload offered financial incentives to premium subscribers to upload popular files, so that a premium subscriber who uploaded such material would receive payments based on the number of downloads of the stored material. Specific examples are referred to in support of this allegation.

[8] From an analysis of databases found on Megaupload's servers, the United States alleges that a small proportion (slightly over one per cent) of Megaupload's subscribers were premium subscribers; the remainder, it says, did not have significant capability to store content long-term. Further, it says that less than nine per cent of Megaupload's subscribers had ever uploaded material. It argues that this data indicates that most users accessed Megaupload in order to view and download content. It says that most of the uploaded files were infringing copies of copyrighted works and alleges that Megaupload "purposefully made their rapid and repeated distribution a primary focus of their infrastructure".

[9] The Digital Millennium Copyright Act was enacted in 1998 to provide internet service providers with a "safe harbour" from civil copyright suits (but not

criminal proceedings) in the United States if they meet certain criteria.[3] The United States says that Megaupload provided an "abuse tool" to major copyright holders, which was supposed to enable copyright holders to remove infringing material from Megaupload's servers but which did not work as copyright holders understood it would work. In particular, it did not disable access to the infringing material other than to a limited, and therefore ineffectual, extent.

[10] This is a much abbreviated summary. It will be clear, however, that the United States' case against Megaupload and Mr Dotcom is largely circumstantial. Moreover, it is strongly contested. For Mr Dotcom, Mr Davison QC noted that the United States' case is based on its interpretation of Megaupload's business model: the reward programme, the abuse tool and so on. He said that Mr Dotcom wished to challenge the United States' interpretation of the business model at the extradition hearing in order to demonstrate that the inferences that the United States seeks to draw are unfounded. In relation to the abuse tool for example, Mr Davison acknowledged that it was correctly described in the record of the case but said that when the reasons behind it were explained, Mr Dotcom could show that it was not part of an unlawful conspiracy. Presumably an extradition hearing of some weeks is anticipated.

[11] There are two further features that we should note by way of background:

(a) An Assistant United States Attorney, Mr Jay V Prabhu, filed an affidavit in the High Court outlining the law applicable to disclosure in criminal proceedings in the United States. He deposed that disclosure generally occurs after the defendant's first appearance in court. Disclosure will not be ordered until the defendant has submitted to the jurisdiction of the United States' courts. Further, disclosure will not be made to a lawyer who has not entered an appearance in the judicial district where the case is to be tried. This is to enforce ethical obligations. In addition, disclosure obligations are

---

[3] 17 USC § 512. For a helpful discussion, see Raphael Gutierrez "Save the Slip for the Service Providers: Courts Should Not Give Short Shrift to the Safe Harbors of the Digital Millennium Copyright Act" (2002) 36 USFL Rev 907.

reciprocal. Mr Prabhu said that Mr Dotcom already has access to a significant amount of discovery material. He deposed:

> For example, the defendants have already obtained a copy of the databases supporting the Mega Sites, which includes a full index of the files uploaded onto the Mega Sites' servers around the world, including the name, type, and number of views or downloads, in addition to information about users of the Mega Sites. Furthermore, the defendants have access to their own financial and banking records, as well as their own electronic mail ("e-mail") accounts, which contain millions of relevant emails. Many of these materials are available online at no cost to either party.

(b) There is no affidavit material before us explaining what particular difficulty Mr Dotcom says he will face if extensive disclosure is not provided.[4] Rather, the case has been argued at the level of principle.

Extradition

Background

[12] Extradition processes are recognised to be an important aspect of the comity of nations. Nations have an interest in ensuring that persons within their jurisdiction who are accused of criminal offences in another state are surrendered in order to answer those allegations in that state. Equally, however, states committed to the rule of law have an interest in ensuring that persons they surrender will not face injustice or oppression in the requesting state.[5] Extradition processes must take proper account of both of these important values.

[13] The following extract from the explanatory note to the Extradition Bill 1998 accurately stated the position:[6]

> The modern law of extradition is founded on a number of principles:
>
> - It is in the interests of all states that crimes acknowledged to be such do not go unpunished.

---

4 We understand that some affidavits were filed by or on behalf of Mr Dotcom in the High Court, but none were contained in the Case on Appeal.

5 *Knowles v Government of the United States* [2006] UKPC 38, [2007] 1 WLR 47 at [12].

6 Extradition Bill 1998 (146-1) (explanatory note) at ii.

- It is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

- It is also necessary to ensure that the basic human rights of the person sought are adequately protected. There is considerable hardship if an innocent person is sent to stand trial in another state, particularly when the requesting state is not that person's usual state of residence.

> Extradition law therefore attempts to strike an appropriate balance between the aspirations of the international community in wanting to limit havens for lawbreakers and the legitimate expectations of persons accused or convicted of crimes that they will be dealt with humanely and in accordance with law.

[14] The explanatory note went on to say that there had been pressure on states to change domestic laws to reflect the realities of the late 20th century and to adopt more uniform laws and practices.[7] It noted that extradition was increasingly seen as an important law enforcement tool and that there was likely to be an increase in the number of extradition requests as transnational crime became more common.[8]

[15] At an international level, extradition is dealt with in multi- or bi-lateral guidelines, conventions or treaties.[9] In particular, there is an extradition treaty between the United States and New Zealand.[10] At a national level, extradition is generally subject to specific legislation, as in New Zealand.

Extradition Act 1999

[16] Prior to the passing of the Act, extradition law in New Zealand was found in the Fugitive Offenders Act 1881 (UK), which dealt with extradition to Commonwealth countries, and the Extradition Act 1965, which dealt with extradition to non-Commonwealth countries. When the Foreign Affairs, Defence and Trade Committee reported back on the Extradition Bill 1998, it said:[11]

---

7 At ii.

8 At iii.

9 For example, European Convention on Extradition 1957, Convention relating to Extradition between Member States of the European Union 1996 and *Model Treaty on Extradition* GA Res 45/116, A/Res/45/116 (1990).

10 Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970) (NZ/US Treaty). The text of the Treaty is also set out in sch 1 of the Extradition (United States of America) Order 1970.

11 Extradition Bill 1998 (146-2) (select committee report) at i.

> The primary aim of the new legislation is to modernise New Zealand extradition law by rationalising the existing extradition regimes and by incorporating various changes in extradition practice that have gained international acceptance in recent years.

[17] Various features of the Act provide a background to the analysis of the central issue in this case. Before addressing them, however, we note that it is agreed that Mr Dotcom is an "extraditable person" in terms of s 3 of the Act. That is, he is a person who has been accused of having committed an "extradition offence"[12] against the law of an "extradition country",[13] namely the United States.

[18] We also make a further preliminary point. In the course of our judgment we will refer to authorities from other jurisdictions, in particular Canada and the United Kingdom. Considerable care must be taken with the use of such authorities, however, as the relevant legislative schemes differ in significant respects from the New Zealand scheme. For example, in the United Kingdom the Extradition Act 2003 (the 2003 UK Act) effected radical changes to the law of extradition, in part to give effect to arrangements between members of the European Union. Apart from countries falling within those arrangements, the Act recognises two classes of country – those that are not required to demonstrate that there is a prima facie case against the person sought and those that are required to demonstrate such a case.[14] As a consequence, statements from overseas authorities must be seen in their proper context. Obviously, our ultimate responsibility is to interpret the Act, albeit that we must do so in its international setting.

(a) The relationship between the Act and a relevant extradition treaty

[19] There is a well-established presumption of statutory interpretation that legislation should be read in a way that is consistent with New Zealand's international obligations, at least to the extent that its wording permits.[15] The Act goes further than this, however. Section 11 provides:

---

12 As defined in s 4. It is accepted that the offences of which Mr Dotcom is accused are extradition offences.

13 Section 2.

14 See *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157 at [64] and following for a summary of the 2003 Act.

15 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

> If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.

Delivering the judgment of this Court in *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China*, Keith J described s 11(1) as giving "a very strong direction".[16] He later described the process that s 11 requires as "reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent."[17] This feature distinguishes the Act from other legislation to which the usual presumption applies and demonstrates the importance which Parliament attached to New Zealand's international obligations in the extradition context.

[20] There are limits, however. Section 11(2) goes on to qualify s 11(1) by providing that no treaty may be construed to override specified provisions in the Act or "[a]ny provision conferring a particular function or power on the Minister or a court".

[21] Section 12 identifies the object of the Act, which includes enabling New Zealand to carry out its obligations under extradition treaties.[18] As we have said, there is an extradition treaty between the United States and New Zealand.[19] There are three articles in it which may bear upon the issue before us – arts 4, 9 and 12. We set out the text of these articles at [50] below.

(b) Protection of human rights

[22] In accordance with the need to protect important human rights and similar values, the Act provides for mandatory and discretionary restrictions on surrender:

(a) Mandatory restrictions on surrender are found in s 7. Surrender is prohibited where, for example, the offence for which a person is

---

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

17 At [16].

18 Section 12(a).

19 See NZ/US Treaty, above n 10.

sought is "of a political character",[20] or a person's surrender is sought so that he or she may be prosecuted or punished on account of "race, ethnic origin, religion, nationality, sex, or other status, or political opinions".[21]

(b) Discretionary restrictions on surrender are found in s 8. They include matters such as the trivial nature of the case against the person sought,[22] the fact that the allegations against the person are not made in good faith in the interests of justice and the length of time since the alleged offence was committed.[23]

[23] In this context we should also mention two other features of extradition law which may provide a measure of protection for those who are sought for extradition.

[24] The first is what is generally referred to as the double criminality requirement. That requirement is that the offence for which the requesting country seeks to extradite the person must be such as to constitute an offence in New Zealand had the relevant conduct occurred in New Zealand. That is, the conduct at issue must constitute an offence under the law of both the requesting and requested states.[24] The double criminality requirement rests partly on the concept of reciprocity, which underlies the law of extradition, and partly on the principle of legality, which protects people from punishment where their conduct does not breach the law.[25] The definition of "extradition offence" in s 4 of the Act contains the double criminality principle.[26] However, s 4 is subject to any relevant extradition treaty. As this Court discussed in *United States of America v Cullinane*, the

---

20 Section 7(a).
21 Section 7(b) and (c).
22 Section 8(1)(a).
23 Section 8(1)(b) and (c).
24 As s 5 makes clear, "it is the nature of the acts or omissions that is important, rather than how they are categorised or named or how the constituent elements of the offence are expressed in the law of the extradition country": *Kim v Prison Manager, Mount Eden Corrections Facility* [2012] NZSC 121 at [14] per McGrath J (giving the judgment of Elias CJ, himself and Glazebrook J).
25 I A Shearer *Extradition in International Law* (Manchester University Press, 1971) at 137.
26 See s 4(2).

extradition treaty between New Zealand and the United States lists the offences to which it applies and does not contain a double criminality requirement.[27]

[25] The second element is what is known as the principle of specialty (or speciality).[28] This is the requirement that a person who is to be extradited may only be tried for the crime for which he is extradited. This is provided for in s 30(5) of the Act, albeit in significantly modified form.

[26] Besides these protections, there are procedural protections, which we will discuss when we come to the central issue in the case.

(c) Different extradition processes

[27] In terms of the way in which extradition requests may be made and considered, the Act recognises three broad categories of country: (a) Australia and several other countries that have been designated by Order-in-Council, which are entitled to utilise the endorsed warrant process under pt 4; (b) Commonwealth countries and countries with which New Zealand has an applicable extradition treaty,[29] which fall within the processes set out in pt 3; and (c) other countries, which fall under pt 5.

(i) Endorsed warrant process: Part 4

[28] The process that places the least demands on the requesting state is the endorsed warrant process set out in pt 4 of the Act. It is a fast, simplified process applying to extradition requests from Australia and other jurisdictions designated by Order-in-Council (presently, the United Kingdom, Pitcairn and the Cook Islands). Where a warrant for the arrest of a person has been issued by a person having authority to do so in the requesting country, it can be endorsed by a District Court

---

27 *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) at [49]–[67]. See art 2 of the NZ/US Treaty.

28 Clive Nicholls, Clare Montgomery and Julian Knowles *The Law of Extradition and Mutual Assistance* (2nd ed, Oxford University Press, 2007) at [5.77].

29 In relation to non-Commonwealth countries the offence at issue must be one covered by the extradition treaty. If it is not, Part 5 will apply: see s 60(1)(a)(ii). Section 16 allows for non-Commonwealth, non-treaty countries to be brought within Part 3 (other than through Part 5), but this provision does not appear to have been utilised to date.

Judge in New Zealand.[30] Once endorsed, the warrant provides authority for the Police to execute it.

[29] When arrested, the person must be brought before a court, which must determine his or her eligibility for surrender.[31] Essentially, the court must order extradition if the endorsed warrant is produced and the court is satisfied that the person is an extraditable person, and the offence is an extraditable offence, in relation to an extradition country. The court may, however, find that the person is not eligible for surrender where that person satisfies the court that (a) a mandatory restriction applies; (b) extradition would not be in accordance with an extradition treaty between New Zealand and the requesting country; or (c) a discretionary restriction applies. Importantly, inquiry into the evidence against the person is specifically precluded.[32] Where the court is satisfied that the person is eligible for surrender, it must order the person's detention, preparatory to surrender.[33] The court may, however, refer a case to the Minister for final decision in certain limited circumstances.[34]

(ii) Commonwealth and treaty countries: Part 3

[30] The more usual process, contained in pt 3 of the Act, involves substantive decision-making by both the executive and the courts. Under s 18(1), a country such as the United States seeking extradition must transmit its request to the Minister of Justice. The request must be accompanied by "duly authenticated supporting documents".[35] In relation to a person sought for trial, this simply means an arrest warrant issued by a person having authority to issue it in the requesting country and a written disposition setting out a description of the offence, the penalty applicable to it and the conduct constituting the offence.[36] The Minister may (not must) then request a District Court judge to issue a warrant for the arrest of the person sought to be extradited. The District Court judge may issue the warrant if satisfied that: (a) the

---

30 Section 41.
31 Section 45.
32 Section 45(5).
33 Sections 46 and 47.
34 Sections 48 and 49.
35 Section 18(3).
36 Section 18(4).

person is, or is suspected of being, in or on his or her way to New Zealand; and (b) there are reasonable grounds to believe that the person is an extraditable person in relation to the requesting country and the offence is an extradition offence.[37] Following arrest, the person must be brought before a court as soon as possible.[38]

[31] There are three provisions that are particularly important to the arguments in this case: s 22, which sets out the powers of the court; s 24, which deals with the court's determination of whether a person is eligible for surrender; and s 25, which deals with the record of the case procedure. For ease of reference, we have set these provisions out in Appendix B to this judgment.

[32] We will leave detailed discussion of these sections until our discussion of the substantive issues. For present purposes it is sufficient to note three things. First, the United States has been designated as a country entitled to use the record of the case procedure.[39] Second, s 25(2) sets out what the record of the case must contain. It provides:

> A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain–
>
> (a) a summary of the evidence acquired to support the request for the surrender of the person; and
>
> (b) other relevant documents, including photographs and copies of documents.

[33] In the judgment under appeal, Winkelmann J held that s 25(2)(b) meant that the record of the case had to include not simply a summary of the evidence relied upon but also the documents which provided the basis for the summary or which were referred to in the summary, whether directly or indirectly.[40] The United States challenges that interpretation.

[34] Third, s 24(2)(d) requires that, before a court may determine that a person is eligible for surrender, it must be satisfied that the evidence given or produced at the extradition hearing would, under New Zealand law, justify the suspect's trial if the

---

37 Section 19.
38 Section 23(1).
39 Extradition (Exempted Country: United States of America) Order 1999.
40 At [111].

relevant conduct had occurred in New Zealand. In other words, the court must be satisfied that there is a prima facie case against the suspect.

[35] If the court determines that a person is eligible for extradition under pt 3, it must issue a warrant for detention.[41] The Minister must then determine whether the person is to be surrendered.[42] The Minister *must* refuse surrender if, for example, one of the mandatory restrictions on surrender applies or the Minister considers that there are substantial grounds for believing that the person may be subject to torture in the requesting country and *may* refuse surrender on other grounds.[43] If the Minister determines that the person should be surrendered, he or she then makes a surrender order.[44] If the determination is that the person should not be surrendered, the person must be discharged from custody forthwith.[45]

(iii) Non-Commonwealth, non-treaty countries: Part 5

[36] Section 60 of the Act provides for the extension of the Act to individual extradition requests from countries which are not members of the Commonwealth and with which New Zealand does not have an applicable extradition treaty. China is an example of such a country. The decision whether a request is to be dealt with under the Act is made by the Minister. If the Minister decides that the Act should be extended, the procedures set out in pt 3 will become applicable.[46]

Background to record of the case procedure

[37] The record of the case procedure was introduced when the Act came into force in 1999. In adopting this procedure, New Zealand accepted a proposal that had been developed in Canada and adopted in its extradition legislation of the same year (the 1999 Canadian Act).[47]

---

41 Section 26(1).
42 Section 30(1).
43 Section 30(2) and (3).
44 Section 31.
45 Section 35.
46 This form or extradition process was at issue in *Kim*, above n 24.
47 Extradition Act SC 1999 c 18, ss 32 and 33.

[38] Both the Canadian and New Zealand Acts followed discussions between law Ministers of various Commonwealth countries in the 1980s. It appears that throughout the 1980s, efforts were being made at an international level to modernise extradition laws to accommodate the global nature of crime and changes in offending. A particular problem was that civilian states found it difficult to prepare a prima facie case based upon affidavits that met the requirements of common law countries. In *United States v Yang* Rosenberg JA described the genesis of the 1999 Canadian Act as follows:[48]

> [28] The scheme in the new *Extradition Act* originates in negotiations between law ministers of the Commonwealth. In 1986, the Government of Australia proposed the abolition of the *prima facie* test within the Commonwealth scheme for rendition. Canada, in particular, was opposed to this suggestion, which would have abolished any judicial assessment of the sufficiency of the request. Accordingly, in 1989 at a meeting in New Zealand, Canada proposed that the *prima facie* test be retained but that the requesting state could rely upon a record of the case. The record of the case would contain a recital of the evidence. Thus, there would be no requirement for affidavits containing first-hand accounts. Further, the recital of evidence could be based upon evidence admissible in the requesting state and not necessarily admissible in the requested state. This proposal would bring the Commonwealth more in line with the scheme for extradition as set out in the *European Convention on Extradition* and the United Nations *Model Treaty on Extradition*. The law officers of the Commonwealth adopted Canada's proposal.
>
> [29] Another important consideration for Canada was its obligation to cooperate with the United Nations Tribunals, which oversee trials of war crimes and crimes against humanity in the former Yugoslavia and in Rwanda. These tribunals designed their own evidentiary and procedural rules that borrowed from both the common law and civilian systems. In particular, hearsay evidence is admissible at the trials in these tribunals.

[39] Mr Davison submitted that the essential reason for the record of the case procedure was to deal with the difficulties faced by civilian countries in preparing cases in a way that conformed to the requirements of common law jurisdictions, particularly as to affidavits. Certainly, that seems to have been an important consideration. But as Anne Warner La Forest explains, there were other considerations, including the need to facilitate extradition by international tribunals and a desire to modernise and harmonise extradition law so as to make it more workable generally.[49]

---

48 *United States v Yang* (2001) 203 DLR (4th) 337 (ONCA).

49 Anne Warner La Forest "The Balance Between Liberty and Comity in the Evidentiary requirements Applicable to Extradition Hearings" (2002) QLJ 95 at 132–140.

Nature of extradition proceedings

[40] Finally, we should say something about the nature of extradition proceedings, in particular, the extent to which the protections in the New Zealand Bill of Rights Act 1990 (NZBORA) apply to them.

[41] Although the extradition process is an important element of the system of criminal justice, it is wrong to equate it with the criminal trial process. McLachlin J (speaking for the majority of the Supreme Court of Canada) made this point in *Kindler v Canada (Minister of Justice)*,[50] a decision under the pre-1999 Canadian extradition legislation. It was repeated by the Supreme Court in *United States v Dynar*[51] and, more importantly (because the 1999 Canadian Act applied), in *United States of America v Anekwu*.[52] Because extradition proceedings are not concerned with issues of guilt or innocence, all the NZBORA protections that would apply in a criminal trial are not automatically applicable in an extradition hearing. However, as the parties agreed, NZBORA clearly does have some application in respect of extradition proceedings. In particular, it was not disputed that s 27 (the right to justice) applies.

[42] Similarly in the United Kingdom. Lord Phillips of Worth Matravers CJ, delivering the judgment of the Court in *R (Government of United States of America) v Bow Street Magistrates' Court*,[53] said that extradition proceedings are criminal proceedings "albeit of a very special kind" and that the extradition judge "should apply the normal rules of criminal evidence and procedure *to the extent that these are appropriate having regard to the specifics of the statutory schemes* …".[54] The qualification was particularly important in that case as the requesting country, the United States of America, was not required to show a prima facie case in order to justify extradition.[55]

---

50 *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at 844–845.
51 *United States v Dynar* [1997] 2 SCR 462 at [129].
52 *United States of America v Anekwu* 2009 SCC 41, [2009] 3 SCR 3 at [27].
53 *Bow Street Magistrates' Court*, above n 14.
54 At [76] (emphasis added).
55 See Nicholls, Montgomery and Knowles, above n 28, at [6.36]–[6.38].

[43] In *Pomiechowski v District Court in Legnica, Poland* the Supreme Court said that an extradition application "does not involve the determination of a criminal charge, and [the suspect] is not entitled to any full process of examination of his guilt or innocence, or to the procedural guarantees which would attend that".[56] However, the Court went on to say (in respect of a UK citizen whose extradition was sought by the United States) that the suspect was entitled "to a fair determination as to his common law right to remain within the jurisdiction".[57]

[44] In *United States of America v Ferras*, a decision we discuss in more detail below, the Supreme Court of Canada made it clear that under the 1999 Canadian Act a judge considering an extradition application had a substantive role to play – he or she was not simply a "rubber stamp".[58] Judicial evaluation was a critical element of the fair process to which the person whose extradition was sought was entitled. This raises a question to which we shall return, namely, what material is sufficient for this purpose.

[45] Ultimately, the nature of the extradition process and the extent to which it engages NZBORA protections depends upon the interpretation of the Act in its international context. Mr Davison argued that ss 24 and 25 of the NZBORA apply to individuals charged in another jurisdiction whose extradition is sought. However, as Winkelmann J accepted, ss 24 and 25 do not, on their wording, apply in the extradition context.[59] They are focussed on persons facing charges in New Zealand. But it is indisputable that the Act seeks to protect the rights of persons whose extradition is sought in a variety of ways.

---

56 *Pomiechowski v District Court in Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604 at [32].
57 Ibid.
58 *United States of America v Ferras* [2006] 2 SCR 77 at [25].
59 At [55].

The judgments below

(a) District Court

[46] We will not attempt to provide a detailed summary of Judge Harvey's lengthy decision. We simply note two points. First, the Judge considered that, in order to have a fair hearing, Mr Dotcom was entitled to disclosure. He said:

> [230] … As I understand it all of his information and records were contained on computers or on servers which were removed from his premises or his control as the result of the actions of the New Zealand Police and the United States Authorities in other countries in January 2012. He simply does not have access to information that may assist him in preparation for trial. As I have said, this information is in the hands of prosecuting authorities and at the moment is denied him.
>
> [231] A denial of the provision of information that could enable a proper adversarial hearing in my view would amount to a denial of the opportunity to contest and that would effectively mean that the process is one sided and in reality becomes more of an administrative one based on limited information provided the Court by virtue of the [record of the case]. Effectively by its own actions the United States is saying that there can be no other evidence than the [record of the case] that the Court can take into account, and it can say this with some confidence, given that all or any of the evidence upon which Mr Dotcom might wish to rely is in the hands of the United States or investigative authorities acting at their behest in New Zealand.

The Judge went on to say that the failure to provide the relevant documents meant that the record of the case did not meet the requirements of s 25(2)(b) and this supported the case for disclosure.[60]

[47] Second, Judge Harvey noted that the record of the case procedure gave the requesting state a significant advantage in the extradition process and said this should be balanced by allowing Mr Dotcom the opportunity to access information that might assist him to contest the allegations.[61]

---

60 At [232].
61 At [235].

(b) High Court

[48] In her judgment on the judicial review application, Winkelmann J identified three issues, namely the approach to the construction of the Act and the application of NZBORA, the issue for an extradition judge under s 25(2)(d)(i) of the Act and the right to, and extent of, disclosure.[62] The Judge summarised her conclusions as follows:

> [119] To conclude:
>
> 1. The Extradition Act is to be construed in the light of its purpose, the extradition treaty between the United States and New Zealand, and also in the light of the provisions of [the] Bill of Rights Act.
>
> 2. The person sought is entitled to the procedural rights protected by s 27 of the Bill of Rights Act to ensure that he or she has a fair hearing. The purpose of the extradition hearing is to decide whether the threshold established for extradition in s 24(2)(d)(i) is met. Therefore, those procedural rights are not of a scale that would be afforded in a full hearing (trial) to determine whether a charge is proved. There is nothing in the [record of the case] provisions procedure which alters the s 24(2)(d)(i) threshold, or which further constrains the procedural rights of the person sought in relation to that hearing beyond any constraints which are explicit in the Extradition Act.
>
> 3. The person sought is entitled to adduce evidence which is relevant to that narrow issue. Consistent with the need to ensure that the extradition process is expeditious, the extradition Judge will ensure that only evidence relevant to that issue is produced. The oral evidence application in the Summary Proceedings Act provides a useful procedure for this purpose.
>
> 4. Without disclosure the person sought will be significantly constrained in his or her ability to participate in the hearing, and the requesting state will have a significant advantage in terms of access to information.
>
> 5. The extradition court does have jurisdiction to order disclosure to ensure a fair hearing because it has all the powers and jurisdiction of a court conducting a committal hearing. Because the applicant is a party to the proceeding, orders for disclosure does not involve the District Court making orders with extraterritorial affect.

---

62 At [32].

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

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

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

Evaluation

[49] We will begin our evaluation with the extradition treaty between the United States and New Zealand, given the paramountcy accorded to it by the Act. We will then turn to the terms of the Act.

The NZ/US Treaty

[50] As we have said, there are three provisions in the treaty which may bear upon the issue before us, namely arts 4, 9 and 12. Article 4 provides:

> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offence of which he is accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

Article 9 provides:

> The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

Article 12 provides:

> If the requested Party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that Party shall require.
>
> …

[51] Article 4 contemplates that the requesting state will have to establish a prima facie case against the suspect, sufficient to justify his or her committal for trial for the alleged offence in the requested state. This is consistent with s 24(2)(d) of the Act (which, by virtue of s 11(2), cannot be overridden by a treaty). There is a question, to which we will return, as to what constitutes "evidence" for these purposes.

[52] Mr Davison argued that the treaty did not prohibit disclosure. He pointed to the fact that arts 4 and 9 provide that the law of the requested state applies to the extradition determination. Disclosure was, he submitted, part of the relevant law. We also note that Winkelmann J said in the judgment under appeal that there was nothing in the treaty that bears upon the issue of disclosure.[63] These points raise the question of the effect of art 12.

[53] Clearly, art 12 recognises the possibility of requests for further information. It may be, as Mr Pike argued, that it tends to indicate that there was no expectation that the requesting country would ordinarily submit all the evidence or information that it has about a suspect and the alleged offending when it makes its request. Rather, the focus will be on showing, by the appropriate process, that there is a proper basis for the suspect to be tried.

[54] Be that as it may, Mr Pike accepted that New Zealand could seek additional information from the United States under art 12 but submitted that the United States was under no obligation to give disclosure as ordered by Judge Harvey. He referred in particular to *Jenkins v United States of America*, where Sedley LJ delivering the judgment of the Administrative Court rejected an argument that a District Judge

---

63 At [41].

could order disclosure in an extradition context against the United States.[64] The Court said that the correct approach was for the District Judge to ask the Home Secretary to consider exercising the power under art 9 of the UK/USA extradition treaty (which is identical to art 12) to request further information from the United States.[65] The Court gave two examples of situations which might justify such a request – where reference is made to a statement in a document without which the statement is not intelligible and where there is sufficient evidence before the extradition court of an abuse of its process to justify it calling for more information before it reaches a decision.[66]

[55] The same view was taken in the *Bow Street Magistrates' Court* case. Although it acknowledged the criminal character of extradition proceedings, the Court held that an extradition judge could not make an order for disclosure against a requesting state. In part this was because of the nature of an extradition hearing (in particular, its non-adversarial character) and in part because the order would be against a foreign state which was seeking to enforce treaty rights.[67] Giving the judgment of the Court, Lord Phillips said:

> [85] Both our civil and our criminal procedures have complex rules in relation to disclosure of documents. In each of the cases before us the persons whose extradition is being sought have persuaded the judge that he should make an order for disclosure. We do not consider that this was the appropriate course to take. Neither the rules governing disclosure in a civil action, nor those governing disclosure in a criminal trial can be applied to an extradition hearing. Furthermore, those rules form part of an adversarial process which differs from extradition proceedings. Where an order for disclosure is made, it requires one party to disclose documents to the other, not to the court. But where extradition is sought, the court is under a duty to satisfy itself that all the requirements for making the order are satisfied and that none of the bars to making the order exists.
>
> [86] There is a further objection to ordering disclosure. The order will be made either against a judicial authority within the European Union or against a foreign sovereign state that is requesting the Secretary of State to comply with treaty obligations. In neither case would it be appropriate to order discovery. Were it appropriate to make such an order, the only sanction for a failure to comply with it would be to reject the request for extradition. That

---

64 *Jenkins v United States of America* [2005] EWHC 1051 (Admin) at [25].

65 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Island and the Government of the United States of America [2003] UKTS 13_2007 (2003).

66 At [26].

67 *Bow Street Magistrates' Court,* above n 14, at [85]–[86].

> fact points the way to the appropriate course that the court should take where there are grounds for believing that an abuse of process has occurred.

Having cited art 9 of the UK/USA extradition treaty, the Court said:

> [89] The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the state seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not.

[56] We accept Mr Davison's submission that these cases must be approached with caution as, under the 2003 UK Act, the United States was not required to establish a prima facie case to obtain an order for extradition. The observations about disclosure made in the cases were in the context of situations where an abuse of process was alleged.

[57] However, the Privy Council in *Knowles v Government of the United States of America* did address the situation where the requesting state was required to show a prima facie case against the suspect.[68] The Privy Council held that a requesting state is not under any general duty of disclosure similar to that imposed on prosecutors in English criminal proceedings even where it is required to establish a prima facie case to justify extradition.[69] The Privy Council went on to note that a requesting state "does, however, owe the court of the requested state a duty of candour and good faith".[70] The Privy Council said:[71]

> While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of [the duty of candour and good faith] disclose evidence which destroys or very severely undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state.

[58] Nicholls, Montgomery and Knowles give the following summary of the principles applicable in the United Kingdom where the requesting state is obliged to adduce evidence in support of its application for extradition:[72]

---

68 *Knowles*, above n 5.

69 At [35]. The Privy Council approved the decision of Mitting J in *Wellington v Governor of Her Majesty's Prison Belmarsh* [2004] EWHC 418 (Admin).

70 Ibid.

71 Ibid.

72 Nicholls, Montgomery and Knowles, above n 28, at [6.52] (footnote omitted).

> It is for the requesting state alone to determine the evidence upon which it relies to seek an extradition order. The requesting state is not under any general duty of disclosure similar to that imposed on the prosecution at any stage in domestic criminal proceedings. The court conducting the extradition hearing has the right to protect its process from abuse and the requesting state has a duty not to abuse that process. That is no different from saying that the requesting state must fulfil the duty of candour which it has always had in making applications for extradition. In fulfilment of that duty, the requesting state must disclose any evidence which would render worthless the evidence on which it relies to seek committal. It is for the person subject to the extradition process to establish that the requesting state is abusing the process of the court. The requested state may be given power to request further evidence under the relevant extradition treaty but, in the absence of evidence of abuse, the court is entitled to, and should generally, refuse to request the UK authorities to exercise that power or to adjourn to permit it to be exercised.

[59] Similarly, in Canada it has been held that there is no general right to disclosure in extradition proceedings. In *United States v Dynar* Mr Dynar argued that he was entitled to a high level of disclosure in the extradition proceedings against him so that he could make full answer and defence in accordance with his rights under s 7 of the Canadian Charter of Rights and Freedoms. Although the Supreme Court did not definitively resolve the issue, it commented that the requirement that an extradition hearing be conducted in accordance with the principles of fundamental justice did not automatically entitle the subject of the application to the highest possible level of disclosure.[73] The Court said that "[t]he context and purpose of the extradition hearing will shape the level of procedural protection that is available to a fugitive".[74] It noted that the role of an extradition judge is limited and that the level of procedural safeguards, including disclosure, had to be considered in that context.[75] Further, the Court noted that an extradition judge lacked the jurisdictional ability to obtain further information from a requesting state.[76]

[60] In *United States of America v Kwok* the Supreme Court also addressed the question of disclosure in an extradition context.[77] The appellant was a Canadian citizen whose extradition was sought by the United States so that he could face drug and fraud charges. He sought disclosure of material in order to establish unjustified

---

73 *Dynar*, above n 51, at [128].
74 At [129].
75 At [130].
76 At [133].
77 *United States of America v Kwok* 2001 SCC 18, [2001] 1 SCR 532.

invasion of his Charter rights by Canadian officials. The Court reiterated what it had said in *Dynar*, to the effect that the committal hearing was not intended or designed to provide the discovery function of a domestic preliminary inquiry.[78] The Court then said:

> [101] In this case, the appellant was entitled to know the case against him, including the materials upon which the United States relied … to establish a *prima facie* case. Since the Requesting State was not relying on material in the possession of Canadian authorities, and in the absence of any indication of bad faith or improper motives on the part of prosecuting authorities, there was no obligation to provide further disclosure of materials requested.

[61] We should note that both *Dynar* and *Kwok* were decided under the pre-1999 Canadian legislation and prior to *Ferras*. Both dealt with disclosure of material generated by Canadian authorities, which the suspects sought in an effort to establish that their Charter rights had been infringed. As a consequence, Winkelmann J concluded that both decisions should be given little weight in the present context.[79] We return to this aspect below.

[62] As noted earlier, Winkelmann J said that there is nothing in the NZ/US treaty which bears upon disclosure. We doubt the correctness of that conclusion. Article 12 deals with the provision of further information by the requesting state. An order for disclosure purports to require the requesting state to provide further information – it is not directed at information that is in the hands of the New Zealand authorities. It is not at all obvious why art 12 does not apply.

[63] Winkelmann J also said that there was no question of the District Court making an order with extraterritorial effect as the United States was a party to the proceedings. Mr Pike challenged this conclusion. The United States is nominally a party to the extradition proceedings, but its dealings are with the executive, in particular the Minister of Justice. Mr Pike pointed out that under the Act an extradition request by a country such as the United States is made to the Minister of Justice.[80] The Minister may then notify a District Court judge of the application and

---

78 At [99].
79 Ibid.
80 Section 18.

request that the judge issue an arrest warrant for the suspect.[81] Once arrested, the suspect must be brought before the court as soon as possible for a determination as to whether or not he or she should be granted bail.[82] The court must then make a determination as to the suspect's eligibility for surrender (assuming that the suspect does not surrender by consent).[83] At the hearing, a record of the case "may be submitted *by or on behalf of* the exempted country".[84] If the court determines that the person is eligible for surrender, it must among other things make a report to the Minister.[85] The Minister must then determine whether the suspect should be surrendered.[86] If the decision is that the suspect will be surrendered, the Minister makes a surrender order.[87]

[64] This indicates that, even though courts play a vital part in the process, extradition is very much a government to government process – the request is directed to the executive, not the courts. This feature also suggests that art 12 provides the appropriate mechanism for further disclosure. We return to this issue below.

The Act

[65] In light of the close affinity between the Act and the Canadian legislation, we will discuss the decision of the Supreme Court of Canada in *Ferras* before discussing the relevant provisions of the Act. This is against the background that s 29(1)(a) of the 1999 Canadian Act is in similar terms to s 24(2)(d)(i) of the New Zealand Act and provides:

> 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 the 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;

---

81 Section 19.
82 Sections 23 and 28.
83 Section 24.
84 Section 25(1) (emphasis added).
85 Section 26.
86 Section 30.
87 Section 31.

Section 33 of the Canadian Act deals with the record of the case. Section 33(1)(a) provides:

> (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 s 33(2):

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

[66] In *Ferras*, extradition orders had been made against the appellants following hearings at which the record of the case procedure was used.[88] The appellants claimed that the admission of evidence by that process violated the guarantee in s 7 of the Canadian Charter of Rights and Freedoms that no one may be deprived of liberty except in accordance with the principles of fundamental justice because there was no guarantee that the evidence in the record of the case was reliable.

[67] The case was argued against the background that the majority of the Supreme Court had held in an earlier decision, *United States of America v Shephard*, that an extradition judge was obliged to accept evidence adduced by the requesting state even though it was manifestly unreliable.[89] The consequence of that decision was that extradition judges had felt compelled to grant extradition orders even where it was clear that the evidence put forward by the requesting state was unreliable in critical respects; they felt constrained to accept what the requesting country said at face value despite well-founded doubts or concerns.

[68] Delivering the judgment of the Court in *Ferras*, McLachlin CJ posed the issue as being:[90]

> ... whether the [record of the case procedure rendered] the extradition process unfair when considered together with the other provisions of the Act

---

88 The decision also dealt with a related appeal where a different process was utilised. We will ignore that for present purposes.

89 *United States of America v Shephard* [1977] 2 SCR 1067.

90 *Ferras*, above n 58, at [15].

> and the nature of extradition proceedings. In other words, do these provisions raise a real risk that a person may be committed for extradition where the evidence does not establish conduct which, had it occurred in Canada, would justify committal for trial ...

[69] The Chief Justice then noted the distinction between the admissibility and the evaluation of evidence.[91] Fair process in the extradition context meant that the requesting state had to establish that there were reasonable grounds to believe that the suspect may have committed the offence.[92] In considering the factual and legal background to an extradition application, the judge had to act judicially and not simply as a rubber stamp.[93] McLachlin CJ then noted the legislative requirements for certification of the record of the case and concluded that, if the record was appropriately certified, it was admissible. She said that the inquiry into the sufficiency of the evidence involved an evaluation of whether the conduct described in the admissible evidence would justify committal for trial in Canada.[94] Under the 1999 Canadian Act, a judge at an extradition hearing had the same powers as the judge on a preliminary inquiry in a criminal case, although he or she was obliged to exercise them in an extradition context. Necessarily, the judge had to make some assessment of the evidence.[95] In this respect, the Court departed from its earlier decision in *Shephard*.

[70] Against this background, the Chief Justice concluded that the record of the case procedure did not violate the s 7 right because the extradition judge had a discretion "to refuse to extradite on insufficient evidence such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial".[96]

[71] McLachlin CJ then turned to the question of how the judge should discharge his or her role when there is a record certified by the requesting state. Certification raised a presumption that the evidence in the record was reliable.[97] A suspect was, however, entitled to challenge its reliability. The Chief Justice said:

---

91 At [16].
92 At [19].
93 At [25] and [34].
94 At [38].
95 At [46]–[49].
96 At [50].
97 At [52].

> [54] Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left to the trial where guilt or innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

[72] Subsequent appellate decisions have indicated that the role of the extradition judge in terms of evaluating the evidence is, although expanded, still a limited one. For example, in *United States of America v Thomlinson* Moldaver JA, giving the judgment of the Ontario Court of Appeal, said:[98]

> [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.

[73] In other words, the requesting state did not have to show that there was a reasonable likelihood of conviction. The Supreme Court of Canada refused leave to appeal.[99] The approach articulated in *Thomlinson* has been adopted in a number of other decisions of the Ontario Court of Appeal.[100]

[74] The Court of Appeal of British Columbia has also concluded that, while *Ferras* expanded the role of the extradition judge beyond that previously articulated in *Shephard*, that role is still limited. In *United States of America v Wilson* the Court, in a judgment delivered by Finch CJBC, quoted from *Ferras* and said:[101]

---

98 *United States of America v Thomlinson* 2007 ONCA 42, (2007) 216 CCC (3d) 97.

99 (2007) 218 CCC (3d) vi (SCC).

100 See, for example, *United States of America v Anderson* 2007 ONCA 84, (2007) 218 CCC (3d) 225, leave to appeal refused, (2007) 220 CCC (3d) vi (SCC); *United States of America v Nadarajah* 2010 ONCA 859, (2010) 266 CCC (3d) 447, leave to appeal granted, but on another point. The Supreme Court dismissed the appeal: see *Sriskandarajah v United States of America* 2012 SCC 70.

101 *United States of America v Wilson* 2011 BCCA 514, (2011) 281 CCC (3d) 15. See also *United States v Costanzo* 2009 BCCA 120, (2009) 243 CCC (3d) 242, leave to appeal refused, (2009) 244 CCC (3d) vi (SCC); *United States of America v Rosenau* 2010 BCCA 461, (2010) 262 CCC (3d) 515, leave to appeal refused, (2011) 264 CCC (3d) iv (SCC); *United States of*

> [36] These passages demonstrate that the function of an extradition judge is to determine the threshold reliability of the evidence set out in the [record of the case]. Although there is a presumption of reliability supporting that evidence, it is a presumption that can be rebutted. The judge is not to accept the [record of the case] at face value.
>
> [37] Where evidence is tendered that would tend to impeach the reliability of the [record of the case], the judge must consider that evidence and engage in a limited weighing of it to determine the sufficiency of the evidence for committal to trial. That function is at the heart of a fair and meaningful judicial process.

[75] The Court of Appeal of Manitoba has also adopted a similar view as to the effect of *Ferras*.[102] Moreover, the Court said that *Ferras* had made it clear that the nature of extradition proceedings severely restricted the extent of disclosure that would be required from requesting states. "Extradition hearings continue to be part of an expedited process to comply with Canada's international obligations".[103]

[76] In *United States v Michaelov* the Ontario Court of Appeal considered the question of disclosure in an extradition context after *Ferras*.[104] The United States alleged that Mr Michaelov, a Canadian resident, had failed to remit sales tax collected from customers of two car dealerships that he owned in New York and sought his extradition to face trial. The record of the case included a summary of the trial evidence that an auditor was expected to give. The auditor had reviewed a large number of forms that had been submitted by the dealerships to state authorities indicating that state and local taxes had been collected from purchasers. The auditor said that most of the forms carried Mr Michaelov's signature. Mr Michaelov denied that he had signed the forms (or, at least, most of them) and sought an order that they be disclosed for the purpose of his extradition hearing. He argued that he needed to consider the forms to see whether he could impeach the presumptively reliable contents of the record of the case and that disclosure was necessary to enable him to have a fair hearing. The extradition judge refused his application.

[77] The Ontario Court of Appeal summarised the submissions of his counsel, Mr Gold, as follows:

America v Edwards 2011 BCCA 100, (2011) 271 CCC (3d) 471.

102 *United States of America v Gunn* 2007 MBCA 21, [2007] 4 WWR 707, leave to appeal refused, 2007 SCC 31901.

103 At [43].

104 *United States of America v Michaelov* 2010 ONCA 819, (2010) 264 CCC (3d) 480.

> [33] Mr Gold submits that the decision of the Supreme Court of Canada in [*Ferras*] altered the extradition landscape, permitting an extradition hearing judge to consider and reject the case for committal on the ground that its evidentiary underpinnings are manifestly unreliable. It follows from *Ferras*, Mr Gold says, that the person sought may attack the reliability of the prosecutor's case, in other words, may impeach or rebut the presumed reliability of the certified [record of the case].
>
> [34] Mr Gold points out that the decision of the Supreme Court of Canada in [*Kwok*] authorizes an extradition hearing judge to order disclosure of materials relevant to issues properly raised at the committal hearing. Since the reliability of the evidentiary foundation of the prosecutor's case is in issue at the hearing, according to *Ferras*, it follows, Mr Gold urges, that the presiding judge should have ordered disclosure of materials that could have assisted the appellant in that pursuit.

[78] Having stated the relevant principles concerning the test for committal in terms of *Ferras* and *Thomlinson*, and concerning disclosure in terms of *Dynar* and *Kwok*, the Court upheld the extradition judge's decision not to order disclosure. The Court said that Mr Michaelov's argument confused threshold reliability with ultimate reliability, the extradition hearing being concerned with the former and the trial with the latter. The Court also noted that under United States' law, the prosecution would not provide disclosure until 30 days after arraignment, so ordering disclosure on the basis sought would provide Mr Michaelov with earlier disclosure than he would be entitled to under the law of the United States.

[79] The Supreme Court of Canada refused leave to appeal in this case.[105]

[80] As we noted above, Winkelmann J discounted the significance of *Dynar* and *Kwok* on the basis that the disclosure sought in those cases, which related to material gathered by the Canadian authorities at the request of the United States authorities, was sought to support arguments that the suspects' Charter rights had been breached. Winkelmann J said that these issues were "clearly collateral to the extradition issue".[106] The Judge acknowledged that some cases after *Ferras* had applied the approach articulated in *Dynar* and *Kwok* where disclosure was sought on the core extradition issue but said that she did not find these authorities particularly persuasive.[107] However, *Michaelov* (which may not have been drawn to the Judge's

---

105 See (2011) 264 CCC (3d) iv (SCC).
106 At [98].
107 At [98]–[99].

attention) dealt directly with the issue of disclosure on the core extradition issue. The fact that the Supreme Court did not grant leave suggests the Court did not regard the decision as wrong or as raising any issue of principle. Accordingly, we consider that *Dynar* and *Kwok* remain authoritative on the question of disclosure.

[81] Against this background we turn to the Act. We will begin with s 25, then discuss s 24 (including s 22). In considering these provisions, we are mindful of what the majority of the Supreme Court said in *Kim*:[108]

> The overall purpose of the Extradition Act includes facilitation of the bringing to justice of those in New Zealand accused of serious crimes committed outside of New Zealand. It is well-recognised that this purpose calls for a contextual construction of extradition statutes that accommodates the different legal systems to which they apply, rather than one premised on the meanings reflecting the context of criminal procedure under New Zealand domestic law.[109]

(a) Section 25

[82] As we have said, s 25(2) addresses the content of the record of the case. For ease of reference, we set it out again. Section 25(2) provides:

> A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain–
>
> (a) a summary of the evidence acquired to support the request for the surrender of the person; and
>
> (b) other relevant documents, including photographs and copies of documents.

There is a potentially significant difference between this and the equivalent Canadian provision (see [65] above). Section 25(2) says that the record *must* contain other relevant documents whereas the Canadian provision (s 33(2)) says that the record *may* include other relevant documents.

[83] Section 25(3) requires that a record of the case be accompanied by:[110]

---

108 *Kim*, above n 24, at [42].
109 *Re Ismail* [1998] UKHL 32, [1999] 1 AC 320 at 329.
110 Section 25(3)–(4).

(a) an affidavit from a prosecutor, or an officer of the investigating authority, stating that the record of the case was prepared under his or her supervision and that the evidence has been preserved for use at the suspect's trial; and

(b) a certificate from a law officer or his or her delegate, or other person who has control over the decision to prosecute, that in his or her opinion the record of the case discloses the existence of evidence that is sufficient under (in this case) United States' law to justify prosecution in the United States.

It was not suggested to us that there had been any failure to meet these requirements.

[84] Section 25(4)(a) allows an exempted state to satisfy the test in s 24(2)(d)(i) other than by way of the record of the case procedure. Section 25(4)(b) makes it clear that nothing in s 25 "limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender". We discuss this provision further at [90] below.

[85] As we understood Mr Davison's argument, the summary referred to in s 25(2)(a) is a summary of the evidence that witnesses will give at trial. Accordingly, witness statements need not be produced. However, copies of all other relevant documents must be produced as part of the record. For his part, Mr Pike says that is contrary to the purpose for which the record of the case procedure was introduced and would significantly undermine its effectiveness, particularly in document-intensive cases such as commercial fraud cases.

[86] Section 25(2)(a) refers to "a summary of the evidence acquired to support the request for surrender". There seem to us to be three significant features of this provision:

(a) The word "evidence" is apt to cover both evidence that witnesses will give and documentary evidence. In this context, it is relevant that the accompanying affidavit referred to in s 25(3)(a) must state that the

evidence has been "preserved" for use at the person's trial, a term that covers more than simply oral evidence. We consider that the words "other relevant documents" in s 25(2)(b) must be interpreted against this background.

(b) What is required is a "summary" of the evidence.

(c) The evidence to be summarised relates to the request for surrender, not to the trial. While the evidence referred to in the record of the case must be available for trial, the record will not necessarily contain all the evidence that it is proposed to lead at trial although it must, of course, be sufficient to establish a prime facie case against the suspect.

[87] The words "other relevant documents" in s 25(2)(b) are not, in our view, a roundabout way of requiring a requesting state to give disclosure of all relevant documents it holds as would occur prior to a criminal trial. As originally drafted, s 25(2)(b) did appear to impose such a requirement. As introduced, cl 25 of the Extradition Bill provided:

> (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain–
>
> (a) A recital of the evidence acquired to support the request for the surrender of the person; and
>
> (b) A certified copy, reproduction, or photograph of all exhibits, documentary evidence, and depositions of witnesses; and
>
> (c) Any other matter required by regulations made under this Act.

Had s 25(2) been enacted in that form, it is difficult to see that the record of the case procedure would have served any useful purpose from the perspective of a requesting state such as the United States.

[88] However, when enacted, the word "recital" in paragraph (a) was replaced by "summary", paragraph (b) was significantly amended and paragraph (c) was omitted.

Although the material available to us does not explain the changes, we think the following conclusions can fairly be drawn:

(a) The word "recital" suggests a greater degree of detail than "summary", so that the replacement of the former by the latter suggests that what is required is that the important features of the evidence be identified. Ultimately, however, what is provided must be sufficient to show that there is a prima facie case against the suspect.

(b) The replacement of "all exhibits, documentary evidence, and depositions of witnesses" by "other relevant documents" supports the view that "evidence" in paragraph (a) includes documentary evidence.

(c) The word "other" before "relevant documents" suggests that the documents being referred to in paragraph (b) are documents that are not covered in the summary provided under paragraph (a). There will be some obvious examples. One of the important issues for an extradition court is identity. The court must ensure that the person before the court is the person to whom the application relates. Photographs are one means of establishing identity and are likely to be provided as part of the record of the case as they cannot readily be summarised.

[89] Given the language of s 25(2)(b), we do not consider that the United States was obliged to include in the record of the case all relevant documents whether or not they were summarised or referred to in the summary of evidence prepared under s 25(2)(a). We do not agree with Winkelmann J that the effect of s 25(2)(b) is to require the United States to addend to its summary "the documents referred to directly or indirectly in the [record of the case] in support of the request for surrender".[111] Rather, we consider that s 25(2)(b) requires the United States to include documents essential to justifying the extradition request but which could not be, or were not, summarised or referred to in the summary.

---

[111] At [111].

[90] We return to s 25(4)(b), which provides that nothing in s 25 "[l]imits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender". Mr Pike had argued in the High Court, as he did in this Court, that s 25(4)(b) was, like s 25(4)(a), intended to apply only to the requesting state, not to the suspect. Winkelmann J rejected that contention. She indicated that had that been Parliament's intention, clear language would have been required, such as is found in s 45(5)(a).[112] That section applies to pt 4 extradition proceedings (the endorsed warrant process) and provides that a suspect being dealt with under that part "is not entitled to adduce, and the court is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which surrender is sought".

[91] We consider that the argument about the effect of s 25(4)(b) is something of a distraction. Mr Pike did not dispute that a suspect is entitled to lead evidence to, among other things, challenge the reliability of the evidence summarised in the record of the case, although he argued that the suspect's ability in this respect was circumscribed. That the suspect is entitled to lead evidence is clear from *Ferras* and the nature of the task an extradition court is required to perform. But that does not mean that a suspect is entitled to full or extensive disclosure from the requesting state before doing so.

[92] We should at this juncture refer to s 102 of the Act and to the Criminal Disclosure Act 2008 as both featured in the argument. Section 102 of the Act deals with the power of the Governor-General to make regulations. Under s 102(1)(e)(i) the Governor-General has the power to make regulations:

> Prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including (without limitation),–
>
> (i) the pre-hearing disclosure of information:

Section 102(2) provides:

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

---

[112] At [83].

[93] It was argued that these provisions indicated that Parliament contemplated that pre-hearing disclosure of information would be available.

[94] The regulation-making power in relation to pre-hearing disclosure was introduced into the Bill when the Select Committee reported back to the House, albeit without comment. The inclusion of the power reflected the recommendation of officials. Officials noted that in *Flickinger v Crown Colony of Hong Kong* the High Court had held that there was no ability to obtain general disclosure in extradition proceedings, given that they were not criminal trials,[113] but that in *Franic v Wilson* the High Court had ordered that further particulars be provided to the suspect.[114] Officials considered that the executive should have the power to make regulations to specify which aspects of domestic criminal procedure should apply in particular extradition contexts. Although the Select Committee included the regulation-making power in the Bill when reporting back, it made no comment about it.

[95] The existence of the regulation-making power suggests it was not intended that the ordinary rules relating to disclosure in domestic criminal proceedings would apply to extradition proceedings. Apart from that, the regulation-making power is generally worded and provides little assistance with the resolution of the particular issue before us. In any event, the fact that an extradition court may be able to require further disclosure in some contexts does not mean that it may do so in all: potentially, an extradition court has a range of matters to consider, including whether a mandatory or discretionary restriction on extradition applies. Apart from that, these provisions cannot override a relevant treaty provision, such as art 12.

[96] In relation to the Criminal Disclosure Act, Winkelmann J noted that there are several difficulties with the argument that it applies in the extradition context.[115] In particular, it is not listed in s 22(1)(b) as one of the statutory provisions which applies to extradition hearings. Further, its application is inconsistent with the regulation-making power in s 102 and with the approach that has been taken in Canada and the United Kingdom.

---

113 *Flickinger v Crown Colony of Hong Kong* [1990] 3 NZLR 372 (HC).
114 *Franic v Wilson* [1993] 1 NZLR 318 (HC).
115 At [103].

(b) Section 24

[97] To recapitulate, under s 24 an extradition judge must determine whether the suspect is eligible for surrender. Section 24(2)(d) requires that the court be satisfied that the evidence before it would be sufficient to justify the suspect's trial if the conduct constituting the offence had occurred in New Zealand. In other words, the court must be satisfied that there is a prima facie case against the suspect. By virtue of s 22(1)(a), except as expressly provided in the Act the court "has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand". Section 22(1)(b) then provides that, among other things, pt 5 of the Summary Proceedings Act 1957 applies to extradition proceedings "so far as applicable and with the necessary modifications".

[98] The use of the phrase "committal hearing" in s 22(1)(a) is significant. Part 5 of the Summary Proceedings Act provides for standard committals and committal hearings. Standard committals occur on the papers, without committal hearings, and involve no consideration of the evidence; by contrast, committal hearings occur only after oral evidence orders have been made and are the consequence of such orders.[116] At a committal hearing, the court must be satisfied that the evidence adduced by the prosecutor is sufficient to put the defendant on trial, otherwise it must discharge the defendant.[117]

[99] Section 22(1)(a) directs that there be a hearing of the nature of a committal hearing. An extradition court must, therefore, consider the evidence. It might be thought that this direction renders oral evidence orders redundant in the extradition context given that they are the trigger for committal hearings in domestic criminal proceedings. Moreover, extradition hearings where the record of the case procedure is used are essentially "on the papers" processes at least as far as the requesting state is concerned.

---

116 Summary Proceedings Act 1957, s 145(1).
117 Section 184G.

[100] However, the procedure at committal hearings is dealt with in s 184 and following of the Summary Proceedings Act. Section 184A(1)(b) requires that at a committal hearing the prosecution call "each prosecution witness who is to give oral evidence under an oral evidence order" and s 184A(2)(b) contains a similar provision in relation to the defence. Section 184B provides that the court must not hear oral evidence from the defendant or a witness unless an oral evidence order has been made in respect of him or her. There does not appear to be any reason why this procedure should not apply in the extradition context. Ultimately, it provides a mechanism for the extradition court to control the extent of any oral evidence, so as to ensure relevance and the like. In this respect, we agree with Winkelmann J.[118]

[101] While the test to be applied at an extradition hearing is the same as that applicable to a committal hearing, the process to be followed must be modified in some respects to take account of the record of the case procedure. This is consistent with *Ferras*.

[102] To explain, the record of the case does not contain evidence in the traditional sense but rather a summary of the evidence available to the requesting state for trial. The record is admissible as evidence in the extradition hearing only by virtue of s 25. As previously noted, it will be admissible only if it is accompanied by an affidavit from an investigating officer or prosecutor stating that he or she prepared, or oversaw the preparation of, the record and that the evidence (that is, the evidence summarised) has been preserved for use in the person's trial. A law officer or head prosecutor must depose that the record discloses evidence sufficient under the law of the requesting state to justify a prosecution in that state. These are important requirements, designed to protect the integrity of the process. They inevitably impact on the nature of the extradition hearing. If a suspect was entitled to demand disclosure of all relevant documents on the basis that he or she wished to challenge not the reliability of the summarised evidence but rather the inferences that the requesting state seeks to draw from it, the record of the case procedure would lose much if not most of its efficacy. We do not accept that Parliament intended such an outcome.

---

[118] At [87].

[103] In addition, it must not be forgotten in this context that the requesting state owes a duty of candour and good faith, as earlier explained. An extradition court is entitled to expect that a requesting state will have met its obligations in that respect, at least in the absence of any evidence that it may not have. It may be in a particular case that a suspect will be able to lead evidence which indicates that the extradition request involves an abuse of process. If that occurs, the court will, of course, have to be satisfied that there is no such abuse.

Drawing the threads together

[104] We return to the point that extradition is a process which must be seen in its international context. It simply provides a mechanism to enable the return of a suspect to the requesting state to stand trial for alleged criminal offending. There are, as we have described, important protections for the suspect in the process, particularly in the mandatory and discretionary restrictions on surrender in ss 7 and 8 of the Act. Further, in relation to extraditions under pts 3 and 5 of the Act where substantive extradition hearings must be held, the District Court must be satisfied that the evidence establishes a prima facie case against the suspect. The question in this case is what that requires of a country utilising the record of the case procedure in terms of disclosure.

[105] It is useful to return to the distinction made by the Supreme Court of Canada in *Ferras* between the admissibility of evidence and the sufficiency of evidence. The Court described the admissibility provisions in the 1999 Canadian Act as being "aimed at establishing threshold reliability" while sufficiency goes to the question whether the evidence establishes a prima facie case against the suspect.[119] The Court accepted that an extradition judge has a discretion to refuse to extradite on insufficient evidence "such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial".[120] It said that there is a presumption of reliability in respect of the evidence in the record but the suspect is entitled to

---

119 At [17].
120 At [50].

challenge that by evidence or argument.[121] We consider that the same position applies under the New Zealand Act.

[106] Like other states making extradition requests, a requesting state utilising the record of the case procedure has a duty of candour and good faith. Subject to that, it is for the requesting state to decide what information it wishes to put before the requested state in support of its request. The record must, of course, be accompanied by an affidavit from the investigating authorities and a certificate from a law officer or prosecuting official, which are also important both as constraints on the requesting state and protections for the suspect. The suspect is entitled to challenge the reliability of the record, whether by argument or leading evidence. Where that occurs, the extradition court must undertake a limited weighing of the evidence.

[107] Article 12 of the NZ/US extradition treaty contemplates that New Zealand may seek further information from the United States. In general, where an extradition court considers that it needs further information to determine whether or not it is satisfied that there is a prima facie case against a suspect, it should convey that request to the Minster of Justice, who must then consider whether to convey it to the United States. The position may arguably be different where the extradition court considers, on the basis of cogent evidence, that its processes may be being abused by the requesting state. In such circumstances, it may be that the court itself should be entitled to order disclosure so as to protect the integrity of its processes, as appears to be envisaged in Canada if there is an "air of reality" to the allegations,[122] although not in the United Kingdom.[123]

[108] Finally, as we noted earlier, the record of the case procedure is an "on the papers" process as far as the requesting state is concerned. There can be no sensible expectation that a requesting state such as the United States will have potential trial witnesses available in New Zealand for an extradition hearing. This affects the extent of the evaluation that the extradition court can conduct and the nature of the evidence that the suspect can reasonably expect to present. The role of the extradition court is, as the Canadian and United Kingdom courts have repeatedly

---

121 At [52]–[53].

122 See, for example, the discussion in *United States v Rosenau*, above n 101, at [36]–[64].

123 *Bow Street Magistrates' Court*, above n 14, at [89]. (Quoted at [55] above).

said, a limited one. In this context, it is to ensure that the requesting state has presented sufficient evidence to indicate that there is a prima facie case against the suspect. A suspect may well be able to point to gaps or flaws in the material summarised or analysed in the record of the case, or may be able to point to documentary or other evidence which causes the extradition court to doubt the reliability of the material proffered by the requesting state. This may cause the extradition court to conclude that the requesting state has not established a prima facie case. But a challenge which does not go to the reliability of the material in the record but to its interpretation – that is, to the inferences that should be taken from it – is more appropriate to a trial than to an extradition hearing.

[109] It follows from the foregoing analysis that, in our view, the disclosure orders in this case were wrongly made.

Relief

[110] In the judicial review application, the United States sought by way of relief that Judge Harvey's disclosure orders be set aside. It also sought orders:

> Declaring that the District Court in determining a request for extradition to which section 25 of the Extradition Act applies does not have jurisdiction to make any order in the nature of general criminal disclosure beyond the Record of the Case.
>
> Declaring that any disclosure may be made only if:
>
> (a) The respondents satisfy the Court that there are specified items of inherently cogent evidence to which they do not have access, and
>
> (b) Those items of evidence will (despite the presumption of the reliability of the Record of the Case) establish that the evidence summarised in the record of the Case is manifestly unreliable and cannot support any particular charge or charges to which the extradition request relates.

Finally, the United States sought costs.

[111] We consider that the appeal should be allowed and the disclosure orders made by the District Court should be quashed. We are not prepared to make the declarations sought, however. Although we agree that in general further information should be sought from a requesting state such as the United States through the art 12

mechanism rather than by ordering disclosure, there may be situations where a disclosure order would be justified (for example, where there is cogent evidence that the court's processes are being abused). Certainly, we are unwilling to rule out that possibility especially as it has some support in the Canadian authorities although not in those from the United Kingdom. Given the difficulty of anticipating all possible situations, we think it unwise to go beyond what is required to determine the present case.

[112] In relation to the cross-appeal, as we say at [100] above, we agree with Winkelmann J's analysis in relation to oral evidence orders, and accordingly consider it must fail.

[113] On the question of costs, we are not sure what occurred in the High Court in relation to costs. As to costs in this Court, they will be reserved. The parties may apply for further orders if that is thought necessary.

Decision

[114] We allow the appeal and quash the disclosure orders made by the District Court.

[115] We dismiss the cross-appeal.

[116] The question of costs is reserved. The parties may file further memoranda if necessary.

Solicitors:
Crown Law Office, Wellington for Appellant and Second Respondent
Simpson Grierson, Auckland for First Respondents

APPENDIX A

Disclosure ordered by the District Court

1. Criminal breach of copyright

(a) A copyright ownership element

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

(b) Infringement element

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

- all records obtained or created in connection with the covert operations undertaken by agents involved in the investigations related to these proceedings in transacting and uploading/downloading data and files on the Megaupload site;

- all records or information and/or material provided to or obtained by the investigating and/or prosecuting agencies in this case from holders and/or owners of copyright interests evidencing alleged infringement of their copyright and/or complaining of such alleged infringement;

- all records and materials related to communications between relevant copyright holders and Megaupload and/or its employees regarding their copyright interest, the direct delete access provided by Megaupload to any such copyright owners, and any communications between the copyright owners and Megaupload and/or its staff regarding take-down notices.

(c) Commercial element

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

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

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

(d) Knowledge/wilfulness element

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

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

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

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

2. Money laundering

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

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

3. Racketeering

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

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

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

4. Wire fraud

(a) All documents said to evidence that the applicant, by means of any of the specified mechanisms of transmission (see 18 USC § 1343) by

which it is alleged that the applicant received a benefit or caused a loss as a result of false or fraudulent pretences.

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

APPENDIX B

22 Powers of court

(1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—

(a) the court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a preliminary hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and

(b) the following provisions apply to the proceedings, so far as applicable and with the necessary modifications:

(i) Parts 5 and 5A and sections 203, 204, and 206 of the Summary Proceedings Act 1957:

(ii) Parts 1 (except sections 9 to12), 2, and 4 of the Bail Act 2000:

(iii) the Criminal Procedure (Mentally Impaired Persons) Act 2003.

(2) Despite section 5 of the Summary Proceedings Act 1957, a District Court presided over by Justices or 1 or more Community Magistrates does not have jurisdiction to conduct proceedings under this Part.

(3) Despite section 46(1) and (2) of the Summary Proceedings Act 1957 (as applied by section 153 of that Act) and section 28(2) of the Bail Act 2000, a decision under this Part to remand a person in custody or on bail may be made only by a Judge.

…

24 Determination of eligibility for surrender

(1) Subject to section 23(4), if a person is brought before a court under this Part, the court must determine whether the person is eligible for surrender in relation to the offence or offences for which surrender is sought.

(2) Subject to subsections (3) and (4), the person is eligible for surrender in relation to an extradition offence for which surrender is sought if—

(a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and

(b) if—

(i) this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions, or qualifications that require the production to the court of any other documents; or

(ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents—

those documents have been produced to the court; and

(c) the court is satisfied that the offence is an extradition offence in relation to the extradition country; and

(d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—

(i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or

(ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.

(3) The person is not eligible for surrender if the person satisfies the court—

(a) that a mandatory restriction on the surrender of the person applies under section 7; or

(b) except in relation to a matter referred to in section 30(2)(ab), that the person's surrender would not be in accordance with the provisions of the treaty (if any) between New Zealand and the extradition country.

(4) The court may determine that the person is not eligible for surrender if the person satisfies the court that a discretionary restriction on the surrender of the person applies under section 8.

(5) Subsections (3) and (4) are subject to section 105.

(6) Without limiting the circumstances in which the court may adjourn a hearing, if—

(a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings are produced; and

(b) The court considers the deficiency or deficiencies to be minor in nature,—

the court may adjourn the hearing for such period as it considers reasonable to allow the deficiency or deficiencies to be remedied.

25 Record of case may be submitted by exempted country at hearing

(1) For the purposes of any determination under section 24(2)(d)(i), a record of the case may be submitted by or on behalf of an exempted country.

(2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain—

(a) A summary of the evidence acquired to support the request for the surrender of the person; and

(b) Other relevant documents, including photographs and copies of documents.

(3) The record of the case is admissible as evidence if it is accompanied by—

(a) An affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person's trial; and

(b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.

(3A) A person referred to in subsection (3)(b) is—

(a) the Attorney-General or principal law officer of the exempted country, or his or her deputy or delegate; or

(b) any other person who has, under the law of the exempted country, control over the decision to prosecute.

(4) Nothing in this section—

(a) Prevents an exempted country from satisfying the test in section 24(2)(d)(i) in accordance with the provisions of this Act that are applicable to countries that are not exempted; or

(b) Limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender.

(5) A court to which a certificate under subsection (3)(b) is produced must take judicial notice of the signature on it of a person described in subsection (3A).