Hearsay and its Limits in Extradition Proceedings: Is the Use of Supplementary Records of the Case to Rebut Allegations of Misconduct Constitutional?

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Prior to 1999, the former Extradition Act *required that evidence adduced at committal hearings conform to Canadian rules of evidence. As such, evidence generally consisted of sworn documents devoid of hearsay. Following complaints about this high evidentiary threshold and rumors that Canada was becoming a "safe haven" for criminals due to the difficulties in seeking extradition, Canada completely overhauled the* Act *and adopted the "Record of the Case" method of proof. The new evidentiary rules permit the Attorney General to adduce a summary of the foreign evidence to establish some evidence on each element of the office as particularized in the Authorization to Proceed. The summary need not be sworn and there are no restrictions on the use of hearsay. Recently, this evidentiary shortcut has been used in the context of* Charter *applications to stay extradition proceedings on the basis that the Requesting State has acted so poorly that their behaviour amounts to an abuse of process that should disentitle them from the remedy they are seeking: committal for surrender. To date, the Supreme Court of Canada has not considered whether the use of ROCs to rebut allegations of misconduct is constitutional. While the ROC method of adducing evidence withstood constitutional scrutiny in* Ferras;Latty *in the context of "ordinary" extradition proceedings, its use in rebutting allegations of misconduct on the part of the Requesting State was not one of Parliament's intended purposes and violates section 7 of the* Charter. *Using the case of* USA v Khadr *to show the problems associated with such a practice, it will be suggested that use of ROCs should be limited to establishing "some evidence" on each element of the offence as*

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originally intended. Where the Person Sought establishes an air of reality to allegations of misconduct on the part of the Requesting State, and the Extradition Judge is required to weigh conflicting evidence and make findings of fact, recourse should be made to the provisions of the Canada Evidence Act *and the* Criminal Code*, which were introduced in Bill C-40 alongside the new* Act *and govern the taking of foreign evidence by video or audio link. Such an approach gives meaning to the intent of Parliament in introducing Bill C-40 and appropriately balances the right of the Person Sought against Canada's duty to its extradition partners.*

Introduction

Prior to the overhaul of the *Extradition Act*[1] in 1999, evidence admitted into Canadian-held extradition hearings was required to conform with Canadian rules of evidence.[2] As such, evidence was received under oath and hearsay was presumptively inadmissible.[3] Given the significant differences in the rules of evidence between civil and common law jurisdictions, it was alleged[4] that many states were "so discouraged by the . . . hurdles imposed . . . that they [did] not even initiate an extradition request".[5] It was said that "[t]he primary

1. SC 1877, c 25 [*Extradition Act*, 1877].

2. See Anne Warner LaForest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 at 98.

3. See *ibid* at 98–99.

4. This proposition has not been widely accepted as proven. At the Standing Committee on Legal and Constitutional Affairs, Mr. Paul Slansky in his submissions noted that there was no real evidence that civil law jurisdictions could not meet the previous evidentiary requirements. See Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 62 (17 March 1999) (Mr. Paul Slansky) [Senate Debates].

5. "Bill C-40, an act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act* and the *Mutual Legal Assistance in Criminal Matters Act* and to amend and repeal other acts in consequence", 2nd reading, *House of Commons Debates*, 36-1, No 135 (8 October 1998) at 1610–15 (Ms. Eleni Bakopanos) [*House of Commons Debates*].

problem is that the current legislation mandates that the foreign states submit evidence in support of their request in a form which meets the complicated requirements of Canadian evidentiary rules."[6] While unsupported by any formal legal opinion, it was claimed before Parliament that, as a result of these high evidentiary requirements, Canada was unable to "fulfill its international obligation and expeditiously extradite fugitives to other countries in order to face justice".[7] As a result, the *Extradition Act*, 1877 was redrafted in its entirety and the "Record of the Case" (ROC) method of proof was adopted.[8]

Under the new *Extradition Act*,[9] a Requesting State is permitted to simply summarize the evidence available against the Person Sought in the ROC. There are no restrictions on the inclusion of hearsay nor is the ROC required to be made under oath. To the contrary, as the ROC is generally produced by the "judicial or prosecuting authority"[10] that certifies it, the ROC is full of hearsay evidence. Once the Requesting State certifies that the evidence is available for trial and is either "sufficient under the law of the extradition partner to justify prosecution"[11] or "was gathered according to the law of the extradition partner"[12] it becomes admissible and is presumptively reliable,[13] regardless of the nature of the evidence, what jurisdiction it comes from, or whether there are additional indicia of reliability.

Prior to the Supreme Court of Canada's 2011 decision in *United States of America v Cobb*,[14] it was unclear that an Extradition Judge was competent to grant remedies under the *Canadian Charter of Rights and Freedoms*.[15] As such, in 1998 when the *Extradition Act*, 1999 was being drafted, whether or not the ROC method of adducing evidence would be utilized where an allegation of

6. *Ibid* at 1610.

7. *Ibid*.

8. See Bill C-40, *An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence*, 1st Sess, 36th Parl, 1999 (assented to 17 June 1999), SC 1999, c 18 [Bill C-40, 1999].

9. SC 1999, c-18 [*Extradition Act*, 1999].

10. *Ibid*, cl 33(3)(a).

11. *Ibid*, cl 33(3)(a)(i).

12. *Ibid*, cl 33(3)(a)(ii).

13. *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33 at para 66 [*Ferras;Latty*].

14. 2001 SCC 19 [*Cobb*].

15. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

a breach of the *Charter* was alleged in the context of extradition proceedings was not considered. That is, how is an Extradition Judge supposed to weigh conflicting evidence and make findings of fact on the basis of an ROC? Do these rules permitting foreign authorities to submit evidence via an ROC that is not under oath and not subject to cross-examination, yet is presumptively reliable, withstand constitutional scrutiny when examined in the context of *Charter* litigation? These are questions that, unfortunately, were not considered by Parliament when drafting the portions of Bill C-40 that would later become the *Extradition Act*, 1999.

The thesis of this paper is that while the ROC method of adducing evidence withstood constitutional scrutiny in *Ferras;Latty*[16] in the context of "ordinary" extradition proceedings, its recent use in rebutting allegations of misconduct on the part of the Requesting State was not one of Parliament's intended purposes. Where the Person Sought raises an air of reality to allegations of misconduct, it is inconsistent with fundamental conceptions of what is fair and right in a Canadian society, and violates the principle of fundamental justice that proceedings be conducted fairly, to allow the Requesting State to deny allegations of impropriety through an unsworn document that is full of hearsay and for which cross-examination is not permitted.

To demonstrate this thesis, the case of *United States of America v Khadr*[17] will be examined to show the perils that can occur when allegations of misconduct are allowed to be addressed by the Requesting State through ROCs, Supplemental ROCs (SROCs), and even sworn affidavits. Ultimately, it will be suggested that ROCs (and SROCs) should be limited to establishing "some evidence" on each element of the offence particularized in the Authorization to Proceed (ATP) as originally intended. Where the Extradition Judge is required to weigh conflicting evidence and make findings of fact, as when allegations of impropriety are made and a stay of proceedings is sought, recourse should be made to the provisions of the *Canada Evidence Act*[18] and the *Criminal Code*,[19] which were introduced in Bill C-40, 1999 alongside the new *Extradition Act*. That is, where facts are in dispute the evidence adduced should conform with Canadian rules of evidence as much as reasonably possible. At minimum, it should be received under oath, contain as little hearsay as possible, and be subject to cross-examination.

16. See *supra* note 13.

17. 2010 ONSC 4338, aff'd 2011 ONCA 358 [*Khadr*, 2010].

18. RSC 1985, c C-5 [*CEA*].

19. RSC 1985, c C-46.

I. The Mechanics of Ordinary Extradition Proceedings

Prior to discussing any rules of evidence, a basic understanding of the Canadian extradition process is essential. In an ordinary extradition proceeding, where the Person Sought is simply putting the Requesting State to their burden of proof (i.e., showing some evidence on each element of the offence specified in the ATP, per *United States of America v Shephard*),[20] the matter proceeds in Superior Court much like "paper preliminary inquiries"[21] do in lower courts.

The process begins when the Requesting State asks the Minister of Justice and Attorney General of Canada to surrender an individual that is in Canada back to the Requesting State. The Requesting State (a.k.a. "Extradition Partner") is the jurisdiction that intends to prosecute the Person Sought for an alleged criminal offence.[22] In the Requesting State, the Person Sought would be known as the "Accused". In some cases and commentaries, the Person Sought is referred to as the "Fugitive".[23]

If the Minister of Justice determines that the alleged offence meets the preconditions set out in the *Extradition Act*, 1999,[24] and any applicable extradition treaty, the Minister of Justice issues an ATP. The ATP "authorizes the Attorney General to seek, on behalf of the extradition partner, an order of the court for the committal of the person"[25] and specifies the Canadian equivalent of the offence for which the Person Sought is alleged to have committed.

At the committal hearing, which proceeds in Superior Court, the Attorney General is no longer required to call *viva voce* evidence or produce statements free of hearsay. Rather, the Attorney General is permitted to place a summary of the evidence before the Court through the ROC. If the ROC establishes that the individual before the Court is the individual sought by the Requesting State and that there is some evidence on each element of the offence, as particularized in the ATP, a warrant of committal for surrender will be issued by the Extradition

20. [1977] 2 SCR 1067, 70 DLR (3d) 136 (SCC) [*Shephard*].

21. *Criminal Code*, *supra* note 19, s 540.

22. Extradition Partners may also seek extradition for individuals who have previously been convicted in their jurisdiction but have not yet finished serving their sentence.

23. See e.g. LaForest, *supra* note 2; *Cobb*, *supra* note 14.

24. See *supra* note 9, s 3(1)(a)–3(3).

25. *Ibid*, s 15(1).

Judge. From there, whether the Person Sought is ultimately surrendered to the Requesting State is a matter for the Minister of Justice to determine.

In other words, in an ordinary extradition hearing, like a preliminary inquiry, the Extradition Judge is only engaging in a very limited weighing of the evidence to determine whether there is some evidence upon which a properly instructed trier of fact could convict.[26] Matters of credibility and reliability are generally not considered, unless the Person Sought can establish that the presumptively reliable evidence in the ROC is "manifestly unreliable"[27] per *Ferras;Latty*, discussed in greater detail below.

II. The Rules Of Evidence Under The Old *Extradition Act* and Their Perceived Shortcomings

Prior to the *Extradition Act*, 1999 coming into force, the *Extradition Act*, 1877 required that the evidence adduced during extradition hearings conform with Canadian rules of evidence.[28] However, the law did not go so far as to require foreign witnesses to be produced either for examination in chief or cross-examination.[29] As such, extradition hearings proceeded on written forms of sworn statements from witnesses who had first-hand knowledge of the allegations. In that sense, expediency and reliability were appropriately balanced to ensure that extradition hearings proceeded quickly, yet on sworn, direct evidence.[30]

Given the significant differences in the rules of evidence between civil and common law jurisdictions, however, it was thought that it was very difficult for civilian states to request extradition from Canada.[31] This led to concerns within the government that Canada may become a "safe haven" for criminals, as many civilian states would either fail to meet the evidentiary requirements or give up entirely and not make the request at all.[32]

As noted by Professor Anne Warner LaForest, the preliminary criminal proceedings of many civilian states do not use evidence taken under oath, there

26. See *Ferras;Latty*, *supra* note 13 at para 46.

27. *Ibid* at para 40.

28. See LaForest, *supra* note 2 at 110.

29. See *ibid* at 112; Maeve W McMahon, "The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry into its Origins; and Repercussions in the Case of Hassan Diab" (2019) 42:3 Man LJ 303 at 323.

30. See LaForest, *supra* note 2 at 99; McMahon, *supra* note 29 at 323.

31. See *House of Commons Debates*, *supra* note 5 at 1610–35.

32. See *ibid* at 1610–35, 1725.

are no penalties for making a false statement, and much of the evidence collected includes second- or even third-hand hearsay.[33] As such, the evidence needed to bring a request for extradition under the *Extradition Act*, 1877 was not readily available to these states. The concern on the part of the Canadian government was that extradition requests were simply not being made by foreign states,[34] despite that state's belief that an individual who had committed a criminal offence in their jurisdiction was now located in Canada.

A review of the Parliamentary debates of Bill C-40, 1999 confirms that these concerns went beyond extradition requests by civilian jurisdictions. As Ms. Eleni Bakopanos, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, noted in the House of Commons debates, "[e]ven with countries with a similar legal tradition such as the United States, we have heard on numerous occasions how difficult it is to obtain extradition from Canada."[35] Unfortunately, and as criticized by Mr. Paul Slansky, no evidence to support these assertions was ever presented to Parliament.[36] Despite the evidentiary shortcomings to support these assertions, Bill C-40 was passed and the *Extradition Act*, 1999 came into force.

III. The New *Extradition Act* and the New Rules of Evidence

Although it is no longer very "new", in addition to specifying that evidence that would be admissible under Canadian law is also admissible in extradition proceedings, the *Extradition Act*, 1999 provides for three alternative methods of adducing evidence.

The first method, exclusively used by the Attorney General, allows for evidence to be admitted through the ROC.[37] Section 33 of the *Extradition Act*, 1999 defines the ROC as "a document summarizing the evidence available to the extradition partner for use in the prosecution".[38] A judicial or prosecuting authority of the Requesting State certifies that the evidence summarized in the ROC is available for trial and either "(i) is sufficient under the law of the extradition partner to justify prosecution, or (ii)

33. See LaForest, *supra* note 2 at 133.

34. See *ibid* at 133–34.

35. *House of Commons Debates*, *supra* note 5 at 1610–35.

36. See Senate Debates, *supra* note 4 (Mr. Paul Slansky).

37. See *Extradition Act*, 1999, *supra* note 9, s 33(1)(a).

38. *Ibid*, s 33(1)(a).

was gathered according to the law of the extradition partner".[39] Once certified, the ROC becomes admissible and is presumptively reliable.[40] Given that the ROC includes a "[summary of] the evidence available to the extradition partner for use in the prosecution"[41] that is certified by "a judicial or prosecuting authority",[42] by definition it is a document that is entirely made up of hearsay, if not double or triple hearsay at times.[43]

The second method for adducing evidence allows for evidence to be submitted in accordance with the terms of an extradition agreement.[44] However, for the purpose of this paper, this method will not be elaborated on as the Extradition Treaty between Canada and the United States[45] simply mirrors the rules of evidence found in the *Extradition Act*, 1999.

Finally, the *Extradition Act*, 1999 allows the Person Sought to admit evidence, relevant to the test for committal, if the judge considers it reliable.[46] Section 33, read in conjunction with section 32(2), which states that "[e]vidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted",[47] appears to have been included so as to make it easier for the Person Sought to adduce internationally gathered evidence. Unlike evidence produced by the Attorney General, it is not required to be certified in any way, nor produced in any special format; all that matters is that the judge considers it relevant and "reliable".

IV. The Upholding of the Record of the Case Method in *Ferras;Latty*

In *Ferras;Latty*, the appellants challenged the constitutionality of sections 32(1)(a) and 33 of the *Extradition Act*, 1999, which provide for the ROC

39. *Ibid*, s 33(3)(a).

40. See *Ferras;Latty*, *supra* note 13 at para 66.

41. *Extradition Act*, 1999, *supra* note 9, s 33(1)(a).

42. *Ibid*, s 33(3)(a).

43. If the prosecutor simply reviews a police summary of a witness statement, that would be "double hearsay". If that police report includes hearsay from the witness being interviewed, then the prosecutor's reiteration of that would be "triple hearsay".

44. See *Extradition Act*, 1999, *supra* note 9, s 32(1)(b).

45. The writer will only make reference to the United States in this paper, and not other extradition partners, as the overwhelming majority of extradition cases in Canada are with the US, given their proximity. See McMahon, *supra* note 29 at 308.

46. See *Extradition Act*, 1999, *supra* note 9, s 32(1)(c).

47. *Ibid*, s 32(2).

method of adducing evidence, on the basis that the impugned provisions allowed for the possibility that an individual could be extradited on inherently unreliable evidence. They noted that the ROCs submitted at their committal hearings consisted of unsworn summaries of other witnesses' evidence (i.e., it was unsworn hearsay).[48]

In *Ferras;Latty*, the Supreme Court of Canada recognized that there are two points where the Extradition Judge may assess the evidence before them: (i) when determining its admissibility, either under the *Extradition Act*, 1999 or the relevant treaty; and (ii) when determining whether there is evidence on each element of the offence as particularized in the ATP.[49] However, as *Shephard* previously held that an Extradition Judge had no discretion to reject evidence on the ground that it is unreliable, and must commit if there is evidence on each of the essential elements of the offence,[50] situations may arise where committal for surrender would be required where committal for trial in Canada would not.

In noting this peculiar difference between the law relating to committal for extradition and the law relating to committal for trial, McLachlin CJ in *Ferras;Latty* noted that if the Extradition Judge was not permitted to weigh and consider the sufficiency of evidence, nor could they declare it unreliable, the combined effect of the provisions could be to deprive the Person Sought of "the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition".[51]

Rather than declaring the impugned provisions unconstitutional, the Supreme Court of Canada interpreted section 29(1) to allow the Extradition Judge to engage in a limited weighing and 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".[52]

While this was certainly a welcome change to the law of extradition, at the same time, the Supreme Court of Canada made several concerning comments regarding the quality of evidence that may be admitted in extradition hearings. Specifically, they noted the following:

1. "No particular form or quality of evidence is required for extradition, which has historically proceeded flexibly and in a spirit of respect and comity for extradition partners."[53]

48. See *Ferras;Latty*, *supra* note 13 at para 67.

49. See *ibid* at para 36.

50. See *ibid* at para 39.

51. *Ibid* at para 40.

52. *Ibid* at para 50.

53. *Ibid* at para 33.

2. "The absence of particular indicia of reliability or availability of evidence in itself does not violate the principles of fundamental justice applicable to extradition hearings."[54]

3. "Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes a case sufficient to put the person on trial."[55]

In other words, once certified by the Requesting State in accordance with section 33 of the *Extradition Act*, 1999, the presumption of reliability arises regardless of the form or content simply because "[t]he Court has been presented with the good word of an extradition partner that the evidence meets the standards necessary for trial in the [Requesting State]."[56] In Mr. Ferras' case specifically, pointing out that the majority of the ROC was hearsay, some of which came from a co-conspirator with a criminal record for perjury, was insufficient to displace the presumption of reliability.[57]

While it is somewhat concerning that the Person Sought is subjected to a more stringent standard for adducing evidence, in the context of an ordinary extradition hearing it is, perhaps, an acceptable anomaly. Given the purpose of the extradition hearing itself, and the limited ability of the Extradition Judge to weigh evidence, the Person Sought would have to bring some highly reliable evidence to establish that the evidence in the ROC is "manifestly unreliable" such that committal for surrender could be successfully resisted. In that sense, the requirement that the evidence produced by the Person Sought be "reliable" is a practical reality which would exist regardless of the wording of the *Extradition Act*, 1999. However, while the low burden[58] on the Requesting State of having to certify that the evidence is available for trial and obtained in accordance with their laws might withstand constitutional scrutiny in the context of an ordinary extradition hearing, when the Person Sought raises an air of reality to the possibility that the Requesting State has committed an abuse of process, the different admissibility requirements become intolerable.

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54. *Ibid*.

55. *Ibid* at para 21.

56. *Ibid* at para 66.

57. See *ibid* at paras 67–69.

58. Even post-*Ferras;Latty*, some academics maintain that the test to be met at the "committal phase" of proceedings remains "problematically low". See e.g. McMahon, *supra* note 29. See

V. The Supreme Court's Decision in *Cobb* and Companion Cases

Prior to the Supreme Court of Canada's 2001 decision in *Cobb*, it was unclear whether an Extradition Judge had the jurisdiction to grant remedies, including a stay of proceedings, under the *Charter* in the context of an extradition hearing. In *Cobb*, the Supreme Court of Canada confirmed that the Extradition Judge must ensure that the hearing is conducted in accordance with section 7 of the *Charter*[59] and that the Extradition Judge is competent to grant *Charter* remedies, provided that the breach pertains directly to the issues relevant at the committal stage of the extradition process.[60] In the context of extradition hearings (i.e., committal for surrender hearings), the Supreme Court of Canada further noted that the Requesting State comes before the Court as a litigant who is governed by the rules of fundamental justice, including the abuse of process doctrine "that governs the conduct of all litigants before Canadian courts".[61]

As such, where it is shown that the Requesting State has committed an abuse of process in a manner that is directly relevant to the extradition proceeding in Canada, and the Person Sought establishes that their case meets the high standard of being one of the clearest of cases, the Requesting State will have disentitled itself from the remedy it was seeking and a stay of proceedings will be warranted.[62]

Since *Cobb*, several cases have arisen where the Person Sought has successfully obtained a stay of extradition proceedings on the basis that the Requesting State has acted so improperly that an abuse of process occurred. To name a few, *Cobb* and the companion cases of *United States of America v Tsioubris*[63] and *United States of America v Shulman*[64] involved abuse of process allegations against the American prosecutor and presiding American judge. Specifically, the prosecutor threatened to expose the Persons Sought to homosexual rape

also Robert J Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2021) 44:6 Man LJ 1.

59. See *supra* note 14 at para 24.

60. See *ibid* at para 26.

61. *Ibid* at para 45.

62. See *ibid* at paras 26, 52.

63. 2001 SCC 20.

64. 2001 SCC 21.

and (some interpreted [65]) the presiding American judge as threatening to impose the maximum possible sentence if the Persons Sought attempted to resist extradition in Canada, despite being legally entitled to an extradition hearing. *Khadr*, 2010 involved allegations of a fourteen-month-long illegal detention in Pakistan where he was subjected to torture and other inhumane treatment.[66] *United States of America v Tollman*[67] alleged that the American authorities failed to properly initiate extradition proceedings and instead sat on criminal charges until such a time that they could capture him outside of his home country in an attempt "to thwart the appropriate legal process in Canada in the hopes of having Mr. Tollman abandon his rights under Canadian law".[68]

VI. Use of the Record of the Case to Defend Allegations of Impropriety: The Case of Abdullah Khadr

In a number of cases,[69] instead of calling the impugned foreign witnesses in response to the allegations of impropriety, the Attorney General (on behalf of the Requesting State) has obtained one or more additional ROCs. While the legitimacy of such a practice has not yet been dealt with in the case law, the case of *Khadr*, 2010,[70] shows why it ought to be prohibited.

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65. In *Cobb*, the Supreme Court of Canada would not necessarily have interpreted the Judge's comments in that fashion but deferred to the interpretation of the Extradition Judge as a reasonable finding of fact. See *supra* note 14 at paras 17–18. The more offensive language was certainly that of the prosecutors.

66. *Khadr*, 2010, *supra* note 17 at paras 8–9.

67. (2006), 271 DLR (4th) 578, [2006] OJ No 3672 (Sup Ct) [*Tollman*].

68. *Ibid* at para 13.

69. While it is difficult to establish a "pattern" in the case law, as how the evidence is introduced is not always fully explained in the decisions, the writer has been involved in at least one unreported case where the prosecution attempted to rebut allegations of misconduct, in the context of an application for a stay of extradition proceedings, through SROCs. Additionally, the fact that this does occur can be implicitly seen in the *Khadr* case as all the witnesses cited as giving *viva voce* evidence were Canadian and references were made to the initial ROC (which usually strictly relates to the elements of the offence as it is produced prior to any allegations of misconduct), SROCs (as of late, used to rebut allegations of misconduct) and the Affidavit from the Federal Bureau of Investigation (FBI) Agent. No American authority figure testified in those proceedings despite the serious nature of the allegations.

70. *Khadr*, 2010, *supra* note 17.

Mr. Abdullah Khadr, a Canadian citizen, was sought by the United States to stand trial on terrorism-related charges for allegedly procuring "various munitions and explosive components to be used by Al Qaeda against the United States and Coalition Forces in Afghanistan".[71] On the issue of committal for surrender, "[t]he evidence forming the foundation of the terrorism-related charges consist[ed] solely of three inculpatory statements made by the applicant."[72]

At his extradition hearing, Mr. Khadr alleged that he was illegally arrested, detained, tortured and denied consular access by Pakistani officials during the nearly fourteen months while he was held in a secret detention centre.[73] Additionally, he alleged that he was threatened by American authorities while they interrogated him at the detention centre.[74] As a result of the alleged impropriety on behalf of the United States, Mr. Khadr argued that the United States had disentitled themselves to the remedy they were seeking and argued that a stay of extradition proceedings should be entered. In the alternative, he argued that his inculpatory statements, which were summarized in the ROC, should be excluded pursuant to section 24(2) of the *Charter* (the common law confessions rule) because they were "manifestly unreliable",[75] or on the basis that they were obtained through torture.[76]

In making these allegations, Mr. Khadr filed a "lengthy 226 paragraph affidavit",[77] which he was cross-examined on by the Attorney General.[78] An additional two affidavits were filed outlining the domestic law of Pakistan and their reputation for human rights violations.[79] Finally, Mr. Khadr called a psychiatrist to give evidence relevant to his mental state when he provided his final statement to the police in Canada.[80]

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71. *Ibid* at para 7.

72. *Ibid* at para 10.

73. See *ibid* at para 9.

74. See *ibid* at paras 9–10.

75. *Ibid* at para 3.

76. While Canada is also a signatory to the *Convention Against Torture*, *below* at note 109, of which Article 15 prevents the admission of evidence obtained by torture, the *Convention Against Torture* was not raised in this case and would not likely have affected the use of ROCs and SROCs to attempt to rebut the allegations of American involvement given the context of the application that it was being argued (i.e. an extradition hearing). Even if it was argued, the US could have still denied involvement in or knowledge of any torture through SROCs.

77. *Khadr*, 2010, *supra* note 17 at para 18.

78. See *ibid* at para 26.

79. See *ibid*.

80. See *ibid*.

In response, the Attorney General called as witnesses two members of the Canadian Security Intelligence Service (CSIS), two members of the Royal Canadian Mounted Police, and a Canadian psychiatrist.[81] While the two CSIS witnesses were present in Pakistan, the latter three witnesses testified about the taking of a statement from Mr. Khadr at the Toronto Pearson International Airport upon his return from Pakistan.[82] In other words, no foreign authorities were called to respond to the allegations of improper conduct. Rather, the Affidavit of "a senior official in the Counter-Terrorism Division of the Federal Bureau of Investigation ('FBI')" as well as four SROCs were filed in response to Mr. Khadr's allegations.[83]

After years of sorting out disclosure motions, ultimately, it was not seriously disputed that Mr. Khadr suffered some maltreatment while detained in Pakistan. However, the issue became to what extent the American authorities were involved, aware of, or responsible for such misconduct such that they should be disentitled to Mr. Khadr's committal for surrender. Thankfully, "voluminous disclosure in the possession of Canadian government departments or agencies was voluntarily provided to the applicant by the Attorney General, subject to a very extensive redacting of documents".[84]

Earlier in the proceedings, counsel for Mr. Khadr applied to the Extradition Judge to obtain additional disclosure from the United States.[85] At the time the Extradition Judge rendered his decision on the application for American disclosure, being July 2007, the FBI had already submitted the Affidavit in response to Mr. Khadr's allegations. As the Extradition Judge noted:

> 11 . . . the material filed by a senior official of the FBI, also in a detailed affidavit, responds to Khadr's allegations and denies any misconduct by American agents during this period.
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> 51 . . . The relationship between American and Pakistani authorities in so far as it relates to the detention and treatment of Khadr is entirely a matter of speculation. In my view, this is

81. See *ibid* at para 27.

82. See *ibid* at paras 31–32.

83. *Ibid* at para 46.

84. *Ibid* at para 5.

85. See *United States of America v Khadr*, [2007] OJ No 3140, 2007 CarswellOnt 8734 (Sup Ct) [*Khadr*, 2007].

> a fishing trip to determine what, if any, American-Pakistani relationship agreement was in place relating to the arrest of Khadr . . ..[86]

Unsurprisingly, the Extradition Judge denied the application for disclosure from the United States. Considering the lack of evidence on the issue of the United States' involvement in Mr. Khadr's arrest and subsequent detention, the only issue to be determined at the extradition hearing was whether the statements taken were inadmissible as having been improperly obtained as a result of torture.[87] In other words, it appeared as though the Extradition Judge had, based on the Affidavit provided by the FBI, accepted the American denials of any wrongdoing.

Counsel for Mr. Khadr, however, also applied to obtain unredacted copies of the disclosure provided by the Canadian agencies. As this disclosure was primarily redacted on grounds that releasing the information would "cause injury to Canada's national security and international relations",[88] it fell to be determined by a Federal Court Justice. Ultimately, some redactions were ordered to be removed by Mosley J.[89]

Meanwhile, instead of submitting further affidavits prior to the final *Charter* decision, four additional SROCs were filed on the stay application in further response to Mr. Khadr's allegations.[90] Fortunately, within the disclosure ordered to be unredacted by Mosley J and contrary to the picture painted in the SROCs and Affidavit of the FBI official, which suggested that the United States was an after-the-fact, passive participant in Mr. Khadr's arrest and detention, was evidence that the United States paid a half-a-million-dollar bounty to Pakistan for Mr. Khadr's arrest.[91] Justice Speyer, who had previously called the application for American disclosure a "fishing trip to determine what, if any, American-Pakistani relationship agreement was in place relating to the arrest of Khadr",[92] now made the following observations:

> 46 What was not contained in the ROC or the SROCs, including the affidavit, was the fact that a $500,000 bounty

86. *Ibid* at paras 11, 51.

87. See *ibid* at para 49.

88. *Khadr*, 2010, *supra* note 17 at para 19.

89. See *Khadr v Canada (Attorney General)*, 2008 FC 549 [*Khadr*, 2008].

90. See *Khadr*, 2010, *supra* note 17 at para 17.

91. See *ibid* at para 109.

92. *Khadr*, 2007, *supra* note 85 at para 51.

was paid by the Americans to the ISI[93] for Khadr's arrest. This came to light in the wake of the unredacted disclosure ordered by Justice Mosley.

. . .

109 The fact that a bounty was paid for the arrest of Khadr did not come to light until the unredacted disclosure released by Justice Mosley on April 29, 2008. There is no issue that $500,000 was paid to the ISI for Khadr's capture. This was a private bounty that received no publicity. *At the commencement of these proceedings, in the ROC and the SROCs, no mention was made of the bounty. Until the release of Justice Mosley's decision, it appeared that Pakistan was the directing mind behind the capture and arrest of Khadr*, and that the role of the United States was to participate in his interrogation for the intelligence reasons previously stated.

110 *When evidence of the bounty was disclosed, the expanded role played by the United States with respect to Khadr's detention became evident*. I agree however with the submission of the Attorney General that it would be wrong to attribute bad faith to the United States because Canada sought to protect this information on grounds of national security in the s. 38 *CEA* proceeding. Justice Mosley found, with the benefit of a full record, that Canada's claims were legitimately based.

111 Be that as it may, the disclosure of the bounty, the almost immediate access of a team of American intelligence investigators to interview Khadr following his arrest, and the subsequent actions of the United States to delay consular access and to delay Khadr's repatriation to Canada lead me ineluctably to *conclude the United States a driving force behind Khadr's capture and detention in Pakistan*. I am satisfied that while the ISI had the final say on all matters relating to Khadr's detention, the payment of the bounty heavily influenced

93. The "ISI" is Pakistan's federal intelligence service, the "Inter-Services Intelligence" Directorate.

> the ISI to act in accordance with the United States agency's wishes.[94]

It is clear from the above quotes, and from the summary of the Extradition Judge's findings at paragraph 124 of his reasons, that the presence of the bounty played a significant role in his decision to stay the proceedings. This was a major shift in viewpoint from his earlier decision on the application for American disclosure, despite his having the benefit of the ROC, the four SROCs and the FBI's Affidavit.[95]

The Extradition Judge properly noted that "it would be wrong to attribute bad faith to the United States because Canada sought to protect this information on grounds of national security in the s. 38 *CEA* proceeding".[96] However, while it may not have been appropriate for the Attorney General of Canada to reveal this highly classified information as it was not their information to disclose, the same cannot be said about the United States' failure to disclose the bounty in the Affidavit, ROC, or any of the SROCs. The existence of the bounty was information that was within the discretion of the United States to give. They knew, or ought to have known, that their involvement in Mr. Khadr's arrest was being considered by the Canadian Extradition Judge when they swore the Affidavit and produced the SROCs in response to the allegations of misconduct. They knew, or ought to have known, that it was directly relevant to the Canadian extradition proceedings. Instead of disclosing its existence or alerting the Extradition Judge that they were in possession of some potentially relevant but classified information and requesting an *in camera* hearing, they continued on with their Affidavits and SROCs as if the bounty never existed.

It is clear from the foregoing that allowing a "trusted extradition partner" to respond to allegations of misconduct through written materials, including Affidavits and SROCs, does not ensure that all relevant information will be placed before the Court. Similarly, it appears that neither the presence of an oath, nor obtaining multiple versions of the events (i.e., through four SROCs) was enough to ensure that the entirety of the truth was revealed. As a result, it is essential that when the Person Sought raises an air of reality to allegations of misconduct on the part of the Requesting State, that evidence attempting to rebut those allegations be received *viva voce*, under oath, and be subject to cross-examination. This is, of course, in addition to the disclosure rules already enunciated in *Kwok* and *Larosa* (discussed below). The concerning comments of the Supreme Court of Canada in *Ferras;Latty* referenced above, with respect to the quality of evidence required in an ordinary extradition hearing, could not

94. *Khadr*, 2010, *supra* note 17 at paras 46, 109, 110–11 [emphasis added].

95. See *ibid* at para 109.

96. *Ibid* at para 110.

have been and were not intended to apply to *Charter* proceedings where facts are in dispute.

VII. Does the Use of the ROC in the Context of *Charter* Litigation Conform to Procedural Fairness, Being A Principle of Fundamental Justice?

In *Cobb*, the Supreme Court of Canada confirmed that it is a principle of fundamental justice, guaranteed under section 7 of the *Charter*, that extradition proceedings conform with principles of procedural fairness.[97] While the issue in *Cobb* was the same at issue in the present paper (i.e., the improper conduct of the Requesting State), in *Cobb* the impugned behaviour was a matter of public record[98] and undisputed. As such, recourse to a SROC was not required so the issue of whether that would have been a proper use of those provisions was not considered.

In *Ferras;Latty*, the Supreme Court of Canada held that the ROC method of adducing evidence met the basic requirements of procedural fairness,[99] given the context.[100] These basic requirements were met through the existence of the admissibility requirements linked to the ROC, including proper certification by the extradition partner, combined with an impartial arbiter determining whether there existed some evidence upon which committal for trial would be justified in Canada.[101] As no impropriety on the part of the Requesting State was being alleged in *Ferras;Latty*, the Court did not consider whether the use of the ROC in those circumstances would meet the requirements for procedural fairness.

In *Kindler v Canada (Minister of Justice)*[102] the Person Sought argued that section 25 of the *Extradition Act*, 1877 violated section 7 of the *Charter*

97. See *supra* note 14 at para 32.

98. The prosecutor made the impugned comments on a recorded television proceeding. Similarly, the Judge made the comments "on the record". As such, both of the comments would have been easy to prove and admissible as "relevant" and "reliable" foreign evidence, pursuant to section 32(1)(c) of Bill C-40, 1999. As it does not appear that the comments alleged were disputed to have been made, there was no need to respond to the allegations through a SROC or otherwise.

99. See *Ferras;Latty*, *supra* note 13 at para 19.

100. See *ibid* at para 14.

101. See *ibid* at paras 22–26.

102. [1991] 2 SCR 779, 84 DLR (4th) 438.

because it allowed the Minister to order the extradition of an individual without assurances that the death penalty would not be applied. In determining that section 25 did not violate the *Charter*, McLachlin J, writing for the majority, held that the test for determining whether section 7 had been violated in the context of an extradition proceeding was to ask:

> 1. Is the impugned provision consistent with extradition practices, viewed historically and in the light of current conditions?
>
> 2. Does the provision serve the purposes and concerns which lie at the heart of extradition policy?[103]

She earlier clarified that "assessing whether there has been a violation of the principles of fundamental justice, a contextual approach which takes into account the nature of the decision to be made must be adopted".[104]

Building on this framework, in the context of an individual alleging improper foreign conduct on the part of the Requesting State, the question then becomes: "Is the power conferred by sections 32(1)(a) and 33 of the *Extradition Act*, 1999, to respond to allegations of misconduct through an unsworn and untested, yet presumptively reliable document, consistent with extradition practices which include the principle of fundamental justice that a person not be extradited without a fair process?" The answer to this question must, undoubtedly, be no.

In *Ferras;Latty* the Supreme Court of Canada confirmed that section 7 of the *Charter* "guarantees a fair process, having regard to the nature of the proceedings at issue".[105] Similarly, as noted by Cromwell J, writing for the four-member majority in *MM v United States of America*, "[t]he extradition process serves two important objectives: the prompt compliance with Canada's international obligations to our extradition partners, and the protection of the rights of the person sought."[106] When the Person Sought raises an air of reality to allegations of misconduct on the part of the Requesting State, the objective of meeting obligations to our extradition partners must yield to the protection of the rights of the Person Sought.

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103. See *ibid* at 848–49.

104. *Ibid* at 848.

105. *Ferras;Latty*, *supra* note 13 at para 14.

106. 2015 SCC 62 at para 1.

As explained in *United States v Burns*,[107] section 7 in the context of extradition proceedings is concerned not only with the fairness of the extradition proceeding itself but the potential consequences of the act of extradition as well.[108] While *Burns* dealt with the specific issue of extraditing Canadian citizens to potentially face the death penalty, without seeking assurances that the death penalty would not be used, the writer would argue that other collateral consequences resulting from the extradition of an individual that may engage section 7 considerations must also be considered once the air of reality threshold has been met.[109]

For example, where the Person Sought raises an air of reality to allegations of misconduct that could lead to the conclusion that he or she is at risk of being subjected to torture upon their return to the Requesting State, Canada's obligations under multilateral treaties that we have signed and ratified, such as the *Convention Against Torture*,[110] must be examined and take priority over meeting Canada's obligations under its bilateral extradition treaties[111] and customary international law.[112] For example, Article 3 of the *Convention Against Torture* states as follows:

> 1. No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[113]

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107. 2001 SCC 7 [*Burns*].

108. See *ibid* at para 60.

109. See e.g. *France v BM*, 2020 ABQB 186.

110. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention Against Torture*].

111. For a more thorough review of the interaction between the extradition process and international law and treaties, see Currie, *supra* note 58 at 7–14.

112. See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 2012 at 457.

113. *Convention Against Torture*, *supra* note 109, art 3.

Returning to the rules of evidence governing extradition proceedings, it would be an affront to societal notions of fair play and decency to allow the impugned state to continue to seek the surrender of the Person Sought and to respond to allegations of misconduct while hiding behind a veil of unsworn documents, that are presumptively reliable and not subject to cross-examination (i.e., by using SROCs). This is the case even where the allegations of misconduct fall short of reaching *jus cogens* status, such as where torture is involved, so long as the allegations raise an air of reality to allegations that may disentitle the Requesting State to the committal of the Person Sought.[114] We have seen in the case of *Khadr*, 2010 how misleading (whether accidentally, negligently, or deliberately) recourse to a SROC can be.

While the ROC method of adducing evidence may strike the appropriate balance between expediency and reliability in the context of ordinary extradition proceedings, where the Person Sought establishes an air of reality to the allegations of misconduct, recourse to SROCs is inappropriate and violates the principle of fundamental justice under section 7 of the *Charter* that proceedings be conducted in a fair manner.

VIII. Suggestions For Reform: Making Use of the *Canada Evidence Act*

If recourse to SROCs is inappropriate in the context of allegations of misconduct then how, if at all, is the Attorney General to respond to such allegations?

First, it is trite to say that a Person Sought will only be successful in obtaining a stay of extradition proceedings where they establish that the abuse of process is one of the "clearest of cases"[115] and that the prejudice "[will] be manifested, perpetuated or aggravated through the [continuation of the extradition proceedings] or by its outcome"[116] such that there is "no alternative remedy capable of redressing the prejudice".[117] Undoubtedly, this is a very high bar

114. Recall that *Tollman* did not involve allegations of torture but allegations that the American authorities improperly engaged Canada's extradition process instead of seeking it earlier through the proper channels. See *Tollman*, *supra* note 67.

115. *R v O'Connor*, [1995] 4 SCR 411 at 460–61, 130 DLR (4th) 235; see also *France v BM*, *supra* note 108 at para 48 (for its use in the extradition context).

116. *R v Regan*, 2002 SCC 12 at para 54.

117. *R v Babos*, 2014 SCC 16 at para 32.

to meet. Therefore, if the Attorney General does not feel that the Person Sought has established the alleged abuse of process to this high standard, then they are entitled to simply argue that and not bring any evidence in response. There is another option, however.

With the *Extradition Act*, 1999 came changes to several other evidentiary provisions in other statutes which can and should fill in the gap in the current *Act*. One often overlooked aspect of Bill C-40, 1999 was that it amended section 46 of the *CEA*, to allow Canadian judges to order the examination on oath of persons present in Canada but who are required by "any court or tribunal outside Canada".[118] For the purpose of facilitating this provision, section 46(2) of the *CEA* was also added to allow for the giving of testimony through the "virtual presence of the party or witness before the court or tribunal outside Canada".[119] Section 50(1.2) of the *CEA* further provides that when a witness is giving evidence, pursuant to section 46(2), that the Canadian laws relating to contempt of court apply, giving teeth to these new provisions.

Similarly, Bill C-40, 1999 amended sections 131 and 136 of the *Criminal Code* relating to the offences of perjury and giving contradictory evidence, respectfully, to apply to persons giving evidence in another jurisdiction pursuant to section 46(2) of the *CEA*. The *Criminal Code* was further amended to give Canadian judges the power to issue subpoenas in relation to section 46(2) of the *CEA*,[120] to order that a witness in Canada give evidence virtually, and to receive evidence from witnesses outside of Canada.

Interestingly, section 714.2(1) of the *Criminal Code*, as added by Bill C-40, 1999, notes that in relation to witnesses outside of Canada, "[a] court *shall* receive evidence . . . by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice."[121] In other words, there is a presumption that witnesses outside of Canada will testify virtually. Similar provisions were added to allow witnesses to testify from outside of Canada via audio link (as opposed to video link).[122] Bill C-40, 1999 also added section 714.6 of the *Criminal Code*, which deems the evidence of a witness who is outside

118. *CEA*, *supra* note 18, s 46(1).

119. *Ibid*, s 46(2).

120. See Bill C-40, 1999, *supra* note 8, cl 94 (amending the *Criminal Code* by adding section 700.1(1)).

121. *Criminal Code*, *supra* note 19, s 714.2(1).

122. See Bill C-40, 1999, *supra* note 8, cl 95 (adding sections 714.3–714.4 to the *Criminal Code*).

of Canada "to be given in Canada and given under oath or affirmation in accordance with Canadian law, for the purpose of the laws relating to evidence, procedure and contempt of court".[123]

It is important to note that section 79(2) of the *Extradition Act*, 1999 specifically holds that Part XXII of the *Criminal Code*, entitled "Procuring Attendance", and the accompanying aforementioned provisions, apply to Extradition Proceedings. In other words, in drafting Bill C-40, 1999, Parliament clearly intended that the provisions providing for virtual, international evidence, apply to extradition proceedings. However, as evidentiary limits were never placed on the use of the ROC, recourse to these provisions appear to be extremely rare even in extradition litigation where the conduct of foreign parties is placed at issue.

To conform with principles of procedural fairness, sections 32(1)(a) and 33 of the *Extradition Act*, 1999, which authorize the use of the ROC by the Attorney General on behalf of the Requesting State, should be read as authorizing their use only to establish "the case"; that is, some evidence on each element of the offences as particularized in the ATP. As that evidence is only subject to a very limited weighing, use of the ROC is appropriate and does not violate procedural fairness principles per *Ferras;Latty*.

However, where the Extradition Judge is required to weigh conflicting evidence and make findings of fact on a *Charter* motion, use of SROCs[124] should be strictly prohibited. Instead, recourse to the amended provisions of the *CEA*, *Criminal Code*, or foreign equivalent(s) should be made. As seen by the lack of disclosure of the bounty in the FBI's Affidavit in *Khadr*, 2010, the presence of an oath is not enough; *viva voce* evidence and cross-examination must occur where facts are contested, and credibility must be assessed. As, by definition, the Person Sought is already present in Canada at their extradition hearing, the default for giving their evidence is already through *viva voce* evidence, under oath, and subject to cross-examination.[125] Adopting this approach for the Attorney General simply evens the playing field. If an Extradition Partner does not have the equivalent rules of evidence available to assist with Canadian extradition proceedings, then the relevant extradition treaties ought to be renegotiated to ensure that similar provisions are available to assist.

123. *Criminal Code*, *supra* note 19, s 714.6.

124. Again, I refer to SROCs instead of ROCs as the ROC generally contains the initial summary of the allegations against the Person Sought, prior to the Person Sought's arrest on an extradition warrant and before any allegations of misconduct can be made. As such, it is typically SROCs that are (improperly) used to rebut allegations of misconduct.

125. See *Extradition Act*, 1999, *supra* note 9, s 32(2).

While insisting that Canadian rules of evidence be strictly followed over video conference is still likely impractical, the default should be for *viva voce* evidence, given by a person either directly involved or with direct knowledge of what went on under his or her supervision, that is under oath and subject to cross-examination. Even if one person in authority from the impugned state were to give *viva voce* evidence under oath, and some of that evidence received was hearsay (at the discretion of the Extradition Judge), the person giving *viva voce* evidence could still be cross-examined as to the source of the hearsay, their knowledge as to that person's ability to accurately observe and recall the hearsay being offered, whether they were under a duty to accurately record what they observed, whether they had any conflicts of interest, and any other factor the Extradition Judge deems relevant to the hearsay being offered. While the rules of evidence will have to remain flexible in the extradition context, adopting this approach as the starting point will go a long way to ensuring Persons Sought receive a fair hearing where allegations of misconduct against the Requesting State are made.

IX. Comparing This Approach to the Current Law of Extraterritorial Disclosure Orders in Extradition Proceedings

The Supreme Court of Canada in *United States of America v Kwok*[126] has already recognized the ability of an Extradition Judge to order the production of disclosure necessary to establish a *Charter* claim where an air of reality to the proposed *Charter* claim has been established by the Person Sought.[127] However, there is still some disagreement amongst lower courts as to whether or not disclosure can be ordered from a foreign state.

In *R v Larosa*, the Court of Appeal for Ontario held that:

> 76 In my view, before ordering the production of documents and compelling testimony in support of allegations of state misconduct, this court should be satisfied that the following three criteria have been met by the applicant:
>
> - the allegations must be capable of supporting the remedy sought;
> - there must be an air of reality to the allegations; and

126. 2001 SCC 18 [*Kwok*].

127. See *ibid* at paras 100, 106.

- it must be likely that the documents sought and the testimony sought would be relevant to the allegations.[128]

However, the Court was not clear on whether disclosure and testimony could be compelled from a foreign state or whether the test applied to documents in the hands of Canadian authorities. Lower courts have been divided on this issue. Prior to the Federal Court ordering that certain redacted portions of disclosure be lifted in *Khadr*, 2007, the Extradition Judge held that the request to order disclosure from the American authorities was a "fishing trip" that was "was beyond the reach of the *Charter*".[129] Conversely, in *Tollman*, Molloy J held that she did have jurisdiction to order both the disclosure of documents and the production of testimony even where the person and documents sought are outside Canada.[130] Unfortunately, however, she ruled that it was not appropriate to do so in that case.

Given the Supreme Court of Canada's comments in *Cobb* that the Requesting State is considered a litigant before the Court in an extradition proceeding and is therefore governed by the same rules of fundamental justice,[131] Molloy J's decision regarding the jurisdiction to order foreign disclosure and testimony seems logical, especially in light of the aforementioned modifications to the *CEA* which contemplate the issuance of a subpoena to assist with foreign proceedings.

While it is arguable that the Requesting State can be legally obligated to provide disclosure as a litigant in extradition proceedings, this legal obligation cannot be enforced. In other words, the Requesting State cannot be *forced* to hand over documents or to produce a person for testimony. However, if the Requesting State were to choose not to comply with an order of a Canadian Extradition Judge directing them, as a litigant before the Canadian courts, to provide disclosure, it is arguable that the Extradition Judge would have the ability to stay the extradition proceedings on procedural fairness grounds under section 7 of the *Charter*, even if an abuse of process has not been made out to the requisite standard. Such an argument would be similar to a "lost disclosure" argument in the sense that if the unwillingness of the Requesting State to produce the relevant documents prejudices the fairness of the hearing, and there is no other suitable alternative remedy, a stay of proceeding may be appropriate.[132]

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128. [2002] 163 OAC 108, 166 CCC (3d) 449 (ONCA).

129. *Khadr*, 2007, *supra* note 85 at para 51.

130. *United States of America v Tollman*, [2006] OJ No 5588 at paras 62–63, 2006 CarswellOnt 6831 (Sup Ct).

131. See *Cobb*, *supra* note 14 at para 45.

132. *R v La*, [1997] 2 SCR 680, 148 DLR (4th) 608.

X. Why Simply Adopting a Principled Approach to Hearsay Would Not Work

Over the past thirty years,[133] the law of evidence as it relates to domestic criminal trials has been moving towards a principled approach to the admission of evidence, especially with respect to the rules surrounding hearsay. The principled approach allows hearsay into evidence where the individual seeking its admission establishes that it is both necessary and reliable.[134]

The twin criteria of necessity and reliability do not bode well in the extradition context. On one view, the evidence is always necessary because the Extradition Justice has no jurisdiction to issue a subpoena for someone outside of Canada and it would be impractical to call many foreign witnesses. On another view, it is not necessary at all because of the wide availability of video conferencing. Therefore, the criterion of necessity is problematic in this context because it is highly subjective and unpredictable.

The reliability criterion is also difficult to assess in the extradition context as the principle of comity has been used to suggest that foreign evidence is presumptively reliable, regardless of what that evidence is and which jurisdiction it comes from. In his article, "That Most Canadian of Virtues: Comity in Section 7 Jurisprudence", Kevin Gray argues that the Supreme Court of Canada's use of comity as a principle of statutory interpretation is problematic and has been highly criticized by international lawyers. He argues that the use of the comity principle should be significantly restricted in *Charter* cases, noting that "there is no principled reason, other than solicitude to foreign sovereigns, for its expansive use in *Charter* jurisprudence".[135] This is particularly so where allegations of misconduct are being alleged on the part of the Requesting State. History has demonstrated that our extradition partners do not always provide us with complete and reliable evidence, particularly where allegations of misconduct have been alleged.

On a related note, it would be incredibly difficult for an Extradition Judge to assess the reliability of foreign evidence without knowing anything about that jurisdiction's legal system, police force, history of corruption, and standards for gathering and processing forensic evidence. It would also be problematic for an

133. See *R v Khan*, [1990] 2 SCR 231, 113 NR 53. The writer would consider *R v Khan* as the true start of the "principled revolution".

134. For the current leading case on the principled approach, see *R v Khelawon*, 2006 SCC 57.

135. Kevin Gray, "That Most Canadian of Virtues: Comity in Section 7 Jurisprudence" (2020) 10:1 Western J Leg Studies 1 at 28.

Extradition Judge to make such an assessment, even if the required evidence on the foreign states' legal system was called, as the Supreme Court of Canada has been reluctant to allow Canadian courts to "[interrogate] a foreign court's procedures".[136]

In contrast, if an individual representative of the Requesting State was required to give *viva voce* evidence to respond to the allegations of misconduct and testify as to how evidence was gathered and handled *in that particular case* (if relevant to the *Charter* motion), the Extradition Judge would not be required to make generalizations about the Extradition Partner's legal system. Instead, the Extradition Judge would be in a position to assess the credibility and reliability of the witness' evidence, with respect to the impugned conduct or other evidence in support of the ATP, in the context of the specific case before them.

It is important to remember that the principled approach to hearsay was crafted within a system where evidence is presumptively given *viva voce*, under oath and by witnesses with first-hand knowledge of the matter who are subject to cross-examination. That is, when hearsay is admitted, it generally only constitutes a small portion of the evidence such that its reliability and/or credibility can be assessed in light of the *viva voce* and other supporting or contradicting evidence surrounding its admission. The same sort of analysis could not be performed where the entire body of evidence adduced is written hearsay, such as through an ROC and SROCs.

As such, while the principled approach might work in domestic criminal trials for smaller pieces of evidence, should the ROC method of adducing evidence be limited to establishing some evidence on each element of the offence as suggested, the Attorney General should not be permitted to then replace the ROC method by applying to adduce Affidavits under the principled approach to the hearsay rule. Again, *Khadr*, 2010 has shown us that even sworn documents can be highly misleading.

Additionally, the principled approach to hearsay was introduced at a time when video conferencing was not widely available like it is today. Particularly in the aftermath of the COVID-19 pandemic, in Canada at least, almost every courtroom is now equipped with the ability to hear from witnesses remotely, whether they are in the same city or on another continent. As such, the justification for receiving hearsay in the context of extradition proceedings is even less compelling than in years prior.

Where the Extradition Judge is required to weigh evidence and make findings of fact, such as when the Person Sought seeks a stay of proceedings based on foreign misconduct that is disputed, the default must be

136. *Ibid* at 16. For an example, see *Argentina v Mellino*, [1987] 1 SCR 536, 40 DLR (4th) 74.

viva voce evidence by someone with direct knowledge of the circumstances and who is subject to cross-examination. While this may seem onerous at first, if the Person Sought is required to specify the allegations as much as possible, given that the allegations are against a government agency, there should be records kept that are able to identify the individuals who can best testify as to what did or did not occur with the least amount of hearsay. Additionally, if the Requesting State is highly motivated to secure the return of the Person Sought, they should be equally motivated to secure the cooperation of witnesses, whether by implementing legislation to issue subpoenas like those described above, or some other lawful means.

Conclusion

While the ROC approach has likely made extradition more accessible to Canada's extradition partners, it was never intended to be used in proceedings where credibility assessments are required, and contentious findings of fact must be made. Allowing the Requesting State to simply rebut allegations of misconduct through an unsworn and untested, yet presumptively reliable document violates procedural fairness norms in a manner that is not in accordance with section 7 of the *Charter*. Instead of striking down sections 32(1)(a) and 33 of the *Extradition Act*, 1999, which were upheld in *Ferras;Latty* in the context of ordinary extradition proceedings, it is suggested that the sections allowing for proof via the ROC be read as being limited to "the case" for which committal is being sought. In other words, the facts able to be proven via an ROC should be limited to the elements of the offence for which extradition is requested and any minor incidental facts necessary to the narrative of the case.

If the Attorney General wishes to rebut allegations of state misconduct, recourse must be made to the new provisions of the *Canada Evidence Act*, *Criminal Code*, or foreign equivalent(s) for the taking of international evidence by video conference. If the Requesting State does not have any equivalent provisions, particularly providing for the issuance of subpoenas to assist in foreign proceedings and consequences for providing false testimony in foreign proceedings, the relevant extradition treaties may need to be renegotiated. In the interim, should a Requesting State choose not to co-operate with the Canadian court's request to produce a witness, then the Extradition Judge may be entitled to stay the proceedings on procedural fairness grounds under section 7 of the *Charter*. Such an approach balances the right of the Person Sought against Canada's duty to its extradition partners, while ensuring that ordinary extradition hearings are conducted expeditiously.