Case Name:

United States of America v. Tollman

Between
The United States of America, Requesting State (Respondent), and
Gavin Tollman, Person Sought (Applicant)

[2006] O.J. No. 3672

271 D.L.R. (4th) 578

212 C.C.C. (3d) 511

144 C.R.R. (2d) 1

70 W.C.B. (2d) 839

Court File No. E-1/05

Ontario Superior Court of Justice

A.M. Molloy J.

Heard: June 5-9 and 12, 2006.
Judgment: September 14, 2006.

(149 paras.)

International law and conflict of laws -- Criminal law -- Extradition -- Bars to extradition -- Abuse of process -- Application by Tollman for stay of US extradition proceedings granted -- US wanted Tollman on charges of tax evasion -- US authorities had attempted to bypass the extradition process and pressure Tollman to give up his rights while he was visiting Canada from the UK -- Canadian immigration and law enforcement officials were complicit in this attempt -- The tactics used amounted to an abuse of process.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Principles of fundamental justice -- Application by Tollman for stay of US extradition proceedings granted -- US wanted Tollman on charges of tax evasion -- US authorities

had attempted to bypass the extradition process and pressure Tollman to give up his rights while he was visiting Canada from the UK -- Canadian immigration and law enforcement officials were complicit in this attempt -- The tactics used amounted to an abuse of process.

Applicant Tollman sought to have extradition proceedings against him stayed. In November of 2004 charges were laid against Tollman, the global CEO of a travel agency, alleging tax evasion in the US. The warrant for his arrest was sealed and Tollman, a permanent resident of the UK, remained unaware of the warrant. US prosecutors were notified that Tollman was traveling to Canada in January of 2005 and communicated with Canadian law enforcement about his detention in Canada and transfer to the US. On his arrival in Canada on January 18 he was detained and held in custody in the Metro West Detention Centre under s. 36(1)(c) of the Immigration and Refugee Protection Act. His release was negotiated and ordered on January 21, but Canadian immigration officials refused to honour the order. Late that evening, in an "urgent" hearing without notice to Tollman, an arrest warrant under the Extradition Act was obtained. Tollman remained in custody until January 28 and, under the conditions of his second release, had to remain in Canada, away from his family, for one and a half years. Tollman alleged that the tactics used by the US in this case were designed to force him to give up his lawful rights in Canada and amounted to an abuse of process.

HELD: Application allowed; extradition proceedings stayed. The court found this to be one of the rare circumstances under which the test for proving an abuse of process had been met. The US authorities could have instituted extradition proceedings at any time, but hoped rather to avoid the process entirely. The procedural tactics employed were calculated to isolate Tollman in a country not his own in such a way as to pressure him to give up his rights and surrender to the US. The fact that a proper extradition hearing was eventually held was immaterial. As a result of its attempt to circumvent the lawful process of extradition, the offending state was disentitled to any relief from the court.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, s. 7

Extradition Act, S.C. 1999, c. 18, s. 11

Immigration and Refugee Protection Act, S.C. 2001 c. 27, s. 36(1)(c)

Treaty on Extradition Between the Government of Canada and the Government of the United States of America, Article 8, Article 9

Counsel:

Thomas Lemon and Nancy Dennison, for the Respondent

Michael Code and David Martin, for the Applicant

REASONS FOR JUDGMENT
ABUSE OF PROCESS

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A.M. MOLLOY J.:--

A. INTRODUCTION AND OVERVIEW

1 It is only in an exceptional case that an extradition proceeding will be stayed as an abuse of process. This is such a case. On June 12, 2006, I granted Gavin Tollman's application to stay these proceedings, finding they constituted an abuse of the process of this court. My reasons for that decision are set out below. Before getting into those detailed reasons, it is useful to provide an overview, so that the reasons which follow can be seen in context.

2 In November 2004, charges were laid against Gavin Tollman in the United States, essentially alleging income tax evasion for a period of years prior to 2001. The charges relate to a time when Mr. Tollman was the president of a tour company in the United States known as Trafalgar Tours USA. That company was part of a larger international conglomerate of companies ("the Tollman-Hundley Group"), which owned and operated a hotel chain and tour companies in various parts of the world, with its head office in the United Kingdom. Mr. Tollman's father, uncle and other family members were also either active or former principals in these companies.

3 The complaint setting out the charges against Gavin Tollman was sealed by court order as soon as it was issued. Mr. Tollman had no idea there were charges against him. The senior prosecuting attorney in the United States was Assistant U.S. Attorney, Stanley Okula. Mr. Okula was also the prosecutor in a number of other cases involving similar charges against other principals of the Tollman-Hundley Group, including members of Mr. Tollman's family.

4 In November 2004 when the complaint against Gavin Tollman was issued, Mr. Tollman was still an American citizen, but was a permanent resident of the United Kingdom, having moved to London, England, in January 2004. The US authorities were fully aware that Mr. Tollman lived in London. In November 2004, the United States was embroiled in ongoing litigation in the United Kingdom in which the United States sought the extradition of Mr. Tollman's aunt and uncle, Stanley and Beatrice Tollman, to face charges similar to those against Gavin Tollman and in which he was alleged to be a co-conspirator. Stanley and Beatrice Tollman had been granted immediate bail in those proceedings and spent no time in custody. They are alleging abuse of process against the United States and the litigation has been ongoing, in one form or another, since March 2003.

5 Mr. Okula does not appear to have taken any steps in relation to the complaint against Gavin Tollman until January 2005. At that time, he received information that Mr. Tollman would be travelling on business to Bermuda and stopping in Toronto for business meetings before returning to his home in London, England. Mr. Okula took no steps to bring extradition proceedings against Mr. Tollman in the United Kingdom or in Canada. Instead, he contacted Canadian immigration authorities and asked them to detain Mr. Tollman as soon as he entered Canada and to deliver him to the United States border where US authorities would be waiting to take him into custody to face the charges against him. The sole basis for this request was the outstanding charges against Mr. Tollman in the United States.

6 Both Canada and the United States are bound by a treaty with respect to the appropriate process for seeking the return of persons in Canada to face charges in the United States. The process for effecting those treaty obligations is governed by the *Extradition Act*, S.C. 1999, c. 18. The US authorities sought to avoid the extradition process altogether, thereby circumventing the international treaty, the extradition legislation and their own policy guidelines for dealing with cases of this nature. Initially, Canadian immigration authorities agreed to assist the United States as requested. The discussions between the two began by at least January 13, 2005. With the assistance of the RCMP, Mr. Okula discovered the exact flight upon which Mr. Tollman would be travelling from Bermuda to Canada and Canadian immigration authorities confirmed they would arrest Mr. Tollman in Toronto and escort him into US custody. All of this occurred before Mr. Tollman had even left his home in London.

7 On January 18, shortly before Mr. Tollman was scheduled to arrive in Toronto, one Canadian immigration official told Mr. Okula that Canadian immigration authorities would merely place an immigration hold on Mr. Tollman, and that the US would need to bring formal extradition proceedings before Mr. Tollman could be turned over to them. Nevertheless, Mr. Okula took no steps to initiate those extradition proceedings. Mr. Tollman arrived in Toronto on the afternoon of Tuesday, January 18, 2005. He was immediately detained by Canadian immigration authorities and held in custody at the Metro West Detention Centre that night pending his admissibility hearing.

8 Mr. Tollman's legal counsel in the United States, Elliott Sagor, learned that Mr. Tollman had been detained at about 4:00 pm on January 18, 2005. Mr. Sagor then had discussions with Mr.

Okula, with whom he had extensive previous dealings in connection with the charges against others in the Tollman-Hundley Group. Mr. Sagor assumed Mr. Tollman was being held under an extradition warrant and had discussions with Mr. Sagor about waiving extradition and having Mr. Tollman attend voluntarily in the United States to address the charges. Mr. Okula said nothing to disabuse Mr. Sagor of this misapprehension.

9 The Immigration Review Board (IRB) hearing to review Mr. Tollman's detention took place on the morning of Thursday, January 21. Based on information provided by the United States, Canadian immigration authorities attempted to have Mr. Tollman held without bail pending a later admissibility hearing. They were unsuccessful. An order was made by the Immigration Review Board that morning ordering Mr. Tollman's release, pending the hearing, on strict terms which included a cash deposit and named sureties. Later that same afternoon, Mr. Tollman's immigration counsel (Mr. Waldman) attended at the appropriate office, with the sureties, and tendered all of the required documents. However, the immigration official on duty took the position the IRB order was made without jurisdiction and refused to release Mr. Tollman. Mr. Waldman contacted a more senior immigration officer who agreed that Mr. Tollman ought to have been released pursuant to the IRB order and advised that if Mr. Waldman attended the next morning, this would be done.

10 At around the same time, Mr. Okula took his first steps to commence these extradition proceedings. Acting on the US request for a provisional arrest warrant, the Canadian Department of Justice, alleging urgency, attended *ex parte* before a judge of this court at 10:00 pm that Friday night and obtained a provisional arrest warrant for Mr. Tollman's arrest under the *Extradition Act*. Although the material filed in support of that application may not have been overtly false, it was misleading in many respects and many material facts were either not disclosed or were buried in attachments and not referred to in the main affidavit.

11 In the middle of the night, RCMP officers attended at the Metro West Detention Centre, removed Mr. Tollman from his cell and took him to the police station, where he was arrested under the *Extradition Act*. When Mr. Waldman attended Saturday morning as arranged to effect his client's release under the IRB order, he was advised that Mr. Tollman was now being held under the *Extradition Act* and he would have to apply for bail in this court.

12 Again, bail was opposed, unsuccessfully. Nordheimer J. granted bail in the extradition proceedings on January 27, 2005. Canadian immigration authorities continued to quibble about the propriety of the IRB Order and did not release Mr. Tollman until January 28, 2005, on the immigration bail. In total, Mr. Tollman was in custody at the Toronto West Detention Centre for 10 days in very difficult circumstances. Although he has been on bail since that date, and although some of the more restrictive provisions of that bail were varied as time progressed, Mr. Tollman has spent the last year and a half of his life in Toronto, under strict conditions that included the surrender of his passports and a requirement that he not leave the jurisdiction. This has resulted in substantial hardship for him given that he has young children who live in London, England, and his business is there. His wife has joined him in Canada, but at considerable cost to her, both personally

and in her career.

13 In my view, the evidence supports Mr. Tollman's contention that the United States deliberately set out to thwart the Canadian extradition process and to deny him the protections afforded to him under our legislation. US authorities initially sought to use the Canadian immigration system to effect Mr. Tollman's removal to the United States, completely and improperly ignoring the extradition process. When that attempt was unsuccessful, they continued to press for his detention, only bringing these extradition proceedings when all else had failed. Further, even in the extradition proceedings, they were less than forthright in the application for the arrest warrant that resulted in Mr. Tollman's further detention. It would appear that the intention behind all of this was to bring maximum pressure to bear upon Mr. Tollman in the hopes that he would simply agree to deportation and give up his rights under the *Extradition Act.* The fact that none of these efforts was successful is irrelevant. The conduct of the United States constitutes an affront to the processes of this court that cannot be condoned. This case falls squarely within the principles enunciated by the Supreme Court of Canada in *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 152 C.C.C. (3d) 270, 2001 SCC 19. By attempting to thwart the appropriate legal process in Canada in the hopes of having Mr. Tollman abandon his rights under Canadian law, the foreign state has disentitled itself to any relief from this court. This is conduct that offends this community's sense of fair play and decency and constitutes an abuse of process. The only suitable remedy in these circumstances is a stay of proceedings, which I have ordered.

B. ABUSE OF PROCESS: GENERAL LEGAL PRINCIPLES

14 Our courts will intervene to prevent abuse of process based on the common law power to do so and to protect rights guaranteed by the *Charter of Rights and Freedoms.* Traditionally, the common law power was directed towards abuse that undermined the integrity of the judicial system, whereas the abuse of process power under the *Charter* tended to address abuse that affected individual rights. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, the Supreme Court of Canada recognized and endorsed both streams of the abuse of process power and noted that the evolution of the power has resulted in the merger of the two. L'Heureux-Dubé J. held, at para. 71:

> The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the Charter has traditionally been more on the protection of rights, I believe that there is no utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

15 In *O'Connor*, the Supreme Court confirmed the formulation of the test for abuse of process as established in *R. v. Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128. The Court adopted Lord Devlin's rationale for staying proceedings to control

prosecutorial behaviour prejudicial to the accused as articulated in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 at 1354 (H.L.) as follows:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves the inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer: <u>The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of the law is not abused.</u>
>
> [Emphasis added]

16 The Court in *O'Connor* (at para. 59), stated the test for abuse of process as follows, quoting from its decision in *Jewitt*:

> ... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive and vexatious proceedings.

17 Finally, the Court in *O'Connor* emphasized the importance of flexibility in applying the abuse of process remedy. The remedy should be used in only the clearest of cases: *O'Connor* at para. 59. However, it may be applicable in situations that go beyond conduct touching on the integrity of the judicial system and the fairness of the accused's trial. As L'Heureux-Dubé J. stated at para. 73:

> ... In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

18 An extradition judge has the power to stay proceedings for abuse of process both at common law and under the *Charter* on the same principles established in *O'Connor*: *Cobb* at paras. 39 and 49. The extent of that power must be analyzed within the context in which it arises: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481; *United States of America v. Yang* (2001), 56 O.R. (3d) 52, 157 C.C.C. (3d) 225 (C.A.). It does not expand the limited role of the extradition judge under the *Extradition Act*, but neither is the power so circumscribed that it applies only where the abuse relates directly to the sufficiency of the evidence issue to be determined by the extradition judge. The focus must be on the Canadian judicial process. The abuse power cannot be

used to remedy the actions of foreign states outside our borders, nor can it be invoked in respect of any perceived unfairness of the ultimate trial to be held in the foreign state. However, the power applies to any conduct that reaches into this jurisdiction and undermines the integrity of the judicial system here: *Cobb* at paras. 21-40, and cases referred to therein.

19 The power to stay extradition proceedings may be exercised where an abuse of process affects the fairness of the extradition hearing itself or is an attempt to interfere with that process: *Cobb.* In *Cobb*, the United States sought to extradite a number of Canadian residents who had been charged with conspiracy to commit fraud through a telemarketing scheme in the United States. A number of the co-conspirators voluntarily surrendered to the United States to stand trial; others did not. In the course of sentencing one of the offenders who had pleaded guilty, the American trial judge cited his voluntary surrender as a mitigating factor and said that others who resisted extradition from Canada would ultimately receive the maximum jail sentence possible. Later, and while the extradition proceedings against Mr. Cobb and others were still ongoing in Canada, the US prosecutor gave an interview to a Canadian television program in which he said those who resisted extradition would end up serving longer sentences with "much more stringent conditions", such as being "the boyfriend of a very bad man". The Supreme Court of Canada treated these remarks as an attempt by the American authorities to intimidate Canadian residents into abandoning their rights under our *Extradition Act.* This went beyond a situation where one might have concerns about the fairness of the trial the persons sought might ultimately receive. As noted by Arbour J. (at para. 33), "The issue is not whether the appellants will have a fair trial if extradited, but whether they are having a fair extradition hearing in light of the threats and inducements imposed upon them, by those involved in their extradition, to force them to abandon their right to such a hearing." She held further, at para. 35:

> The Requesting State is a party to judicial proceedings before a Canadian court and is subject to the application of rules and remedies that serve to control the conduct of the parties who turn to the courts for assistance. Even aside from any claim of *Charter* protection, litigants are protected from unfair, abusive proceedings through the doctrine of abuse of process, which bars litigants - and not only the State - from pursuing frivolous or vexatious proceedings, or otherwise abusing the process of the courts.

20 In *Cobb* the threats from the American authorities did not in fact induce the persons sought to abandon their right to resist extradition. The Supreme Court of Canada found this to be immaterial. It was the attempt to interfere with the due process of the court that mattered, not the success or failure of that attempt: *Cobb* at para. 50. In upholding the extradition judge's stay of proceedings, Arbour J. held at para. 52:

> By placing undue pressure on Canadian citizens to forego due process in Canada, the foreign State has disentitled itself from pursuing recourse before the courts and attempting to show why extradition should legally proceed.

21 In *Larosa v. Her Majesty the Queen and the United States of America*, [2002] O.J. No. 3219, 166 C.C.C.(3d) 449 at para. 52 (C.A.) the Ontario Court of Appeal interpreted *Cobb* as recognizing jurisdiction to stay proceedings in two "related but somewhat different situations": 1. where the actual conduct of the hearing produces unfairness; and 2. where proceeding with the committal hearing would amount to an abuse of process or breach principles of fundamental justice. Doherty J.A. noted that *Cobb* was an example of the latter situation since proceeding with the committal hearing in the circumstances would be a breach of fundamental justice, no matter how fairly that proceeding might be conducted.

22 The onus is on Mr. Tollman to establish his allegations of abuse. The applicable standard is the balance of probabilities, but abuse will only be found in the "clearest of cases" and the case law has repeatedly described this as a "heavy onus", particularly where prosecutorial misconduct is alleged. That said, it is virtually impossible for one person to prove by direct evidence the motive or intent behind the acts of another. In the absence of some direct evidence from the person whose conduct is challenged, the motivation behind that conduct must typically be inferred from the surrounding circumstances. The onus, however, remains on the person alleging the misconduct to prove the improper motivation. Lord Denning recognized the difficulty of this task in *R. v. Brixton Prison (Governor)*, [1962] 3 All E.R. 641 (C.A.), stating at p. 664:

> ... The task of the subject who seeks to establish such an allegation as this is indeed heavy. On the face of it, the [deportation] order which he wished the court to quash will look perfectly valid on its face, and to get behind it and to demonstrate its alleged true character he will need to have revealed to him the communications, oral and written, which have passed between the home and the foreign authorities. But if the appropriate minister here certifies, as he has done in this case, that such disclosure will be contrary to the public interest, then, as a rule, the subject will not obtain it. He will be left to do his best without such assistance, and in the nature of things, therefore, he will seldom be able to raise a prima facie case, or alternatively to sow such substantial and disquieting doubts in the minds of the court as to the bona fides of the order he is challenging that the court will consider that some answer is called for. If that answer is withheld, or being furnished is found unsatisfactory, then in my view, the order challenged ought not to be upheld, for otherwise there would be virtually no protection for the subject against the illegal order which had been clothed with the garments of legality simply for the sake of appearances and where discovery was resisted on the ground of privilege.
>
> [Emphasis added]

C. DISGUISED EXTRADITION: GENERAL LEGAL PRINCIPLES

23 When Mr. Tollman arrived in Toronto on January 18, 2004, he was found to be inadmissible under s. 36(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 ("IRPA"), which provides:

> 36(1) A permanent resident of a foreign national is inadmissible on grounds of serious criminality for
>
> (c) committing an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

24 For present purposes, the issue is not whether Mr. Tollman might technically be said to fall within this provision by virtue of the fact that tax evasion charges had been filed against him in the United States. Assuming there was jurisdiction to deny entry to Mr. Tollman under the IRPA, the question is whether that jurisdiction was validly exercised. It is an abuse of process to exercise a statutory power for a reason that is unrelated to the purpose for which that power was granted: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, 243 D.L.R. (4th) 513. More specifically, it is an improper use of the IRPA power to remove a foreign national to another country for the purpose of enabling that foreign state to prosecute him or her for offences allegedly committed there.

25 The power under the IRPA to refuse a foreign national entry to Canada on the grounds of serious criminality is a discretionary one. This is to be contrasted with the scheme under the *Extradition Act.* Both that Act and the international treaties which it implements contemplate that a foreign state wishing to have a person returned to it from Canada to face charges must proceed under the *Extradition Act.* It sets out the exclusive and mandatory process for extradition. For example:

* Section 11 of the Act states that a request by an extradition partner for the provisional arrest or extradition of a person "shall" be made to the Minister.
* Article 8 of the treaty between Canada and the United States provides that extradition "shall" be made in accordance with the laws of the requested state and that the person sought "shall" have the right to use all remedies available under the law.
* Article 9 of the treaty states, "The request for extradition shall be made through diplomatic channels."

26 The mere fact that a person seeking to enter Canada is wanted for an offence in the United States is not a barrier to the immigration authorities' refusing him entry here, provided that the decision to deny entry is made for a legitimate Canadian immigration law purpose. However, if a foreign state seeks the assistance of Canada to have a fugitive returned there for prosecution, that

foreign state must bring the appropriate extradition application through diplomatic channels pursuant to the treaty and the *Extradition Act.* It would be improper for Canadian immigration authorities to apprehend a person and return him to the United States solely because they were requested to do so by the United States, for to do so would be to completely circumvent the *Extradition Act* and the safeguards built into that legislative scheme.

27 The underlying principles were well stated by Lord Denning in the *Brixton Prison* case as follows at p. 661:

> So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorized purpose, it was lawful. If it was done professedly for an authorized purpose, but in fact for a different purpose with an ulterior object, it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his home country because he considered his presence here to be not conducive to the public good, then his action is lawful.
>
> [Emphasis added]

28 The Supreme Court of Canada endorsed these principles established in the *Brixton Prison* case in *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839, 69 D.L.R. (2d) 273, although the Court held on the facts of that case that the applicant had failed to discharge his onus of showing that the deportation proceedings taken were in fact a sham designed to effect the applicant's extradition to Panama rather than for a legitimate purpose under the *Immigration Act.* In that case, Mr. Moore had previously been deported from Canada, was illegally in this country, and had been travelling under a false passport.

29 Subsequently, Rouleau J. applied the *Brixton Prison* reasoning in *Kindler v. Minister of Employment and Immigration* (1985), 47 C.R. (3d) 225 (Fed.Ct.). Mr. Kindler had been convicted of first-degree murder in Pennsylvania and the jury had recommended the death penalty. He escaped the jurisdiction before sentencing and had been living and working illegally in Quebec. Rouleau J. concluded that on the facts of that case there was insufficient evidence to prove that the

Minister did not genuinely consider it in the public interest to order the deportation. Having made that determination, however, he noted the following (at p. 234):

> However, I should add that, if the petitioner had been able to show that the real purpose of the deportation proceedings was to surrender him to a foreign state because he is a fugitive criminal sought by such foreign state, this would have been an abuse of the power to deport and as such would have been restrained by the court. Parliament has set up, in the Extradition Act, a special procedure for the surrender of foreign criminals and the general discretionary power to deport cannot be utilized to replace this special procedure. Generalia specialibus non derogant.
>
> [Emphasis added]

30 More recently, the same principles were again applied by the Federal Court in *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (T.D.). In that case, the applicant had been convicted in the United States of various serious offences involving the sexual assault of minors, had jumped bail prior to sentencing, and upon entry to Canada had lied to immigration authorities about his criminal record. Rothstein J. (as he then was) held in that case that the mere fact that American authorities wanted Mr. Halm back and cooperated with Canadian authorities to assist in that regard was not sufficient to support a conclusion that the deportation proceedings were a sham. However, he also endorsed (at para. 21) the general principle that it is open to the courts to inquire as to whether the government's purpose for deportation was a lawful one and that "if the purpose is to surrender the person as a fugitive criminal to a state because it asked for him, that is not a legitimate exercise of the power of deportation."

31 Finally, in considering general principles underlying the importance of requiring adherence to extradition laws, the words of Lord Bridge of Harwich in *R. v. Horseferry Road Magistrates Court ex parte Bennett*, [1993] All E.R. 138 (H.L.) are particularly apt. The conduct complained of in that case was somewhat more extreme than is at issue in the case before me. The accused was a citizen of New Zealand who was alleged to have committed criminal offences in England. He was traced to South Africa by the English police. No attempt was made to extradite him. Rather, the English police persuaded South African police to arrest the accused in South Africa and forcibly deport him to New Zealand, via Heathrow airport in London, with the understanding that English police would intercept him in London and arrest him there. When he arrived at Heathrow, he was met by English police, arrested and charged. The English House of Lords stayed the criminal charges based on abuse of process. Lord Bridge of Harwich stated at p. 130:

> ... There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by

> participating in violations of international law and the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of the circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having taken cognisance of the lawlessness, it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident of another country is properly extradited here, the time when the prosecution commences is the time when the authorities set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests ... To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but it is, in my view, a wholly proper and necessary one.
>
> [Emphasis added]

D. DETAILED FACTUAL FINDINGS

32 The theory of the applicant is that United States authorities attempted to engineer a situation in which Mr. Tollman would either be delivered directly to the United States for prosecution or detained in custody away from his home, work and family where he would be under considerable pressure to abandon his rights and surrender to the jurisdiction of the United States to face trial. There is substantial, indeed overwhelming, evidence to support that theory.

33 The applicant submits that the conduct of the United States constitutes an abuse of process that caused personal harm to Mr. Tollman and undermined the integrity of the Canadian judicial system. It is convenient to analyze the facts within the four categories of abuse alleged by the applicant: (i) engineered fugitive status; (ii) disguised extradition; (iii) failure to comply with IRB release order; and (iv) improperly obtained extradition arrest warrant. I do not see these as water-tight compartments, standing alone. They cannot be analyzed piecemeal as if each were unrelated to the others. Rather, they should be seen as a continuum of conduct in which the intention of the authorities at one stage may be gleaned from what was done, or not done, at another stage.

(i) Engineered Fugitive Status

34 The United States issued a warrant for Mr. Tollman's arrest on November 8, 2004. It was immediately sealed by court order, along with the complaint setting out the charges against Mr. Tollman. The applicant alleges that this was the first step in the scheme to lie in wait for Mr. Tollman, taking no steps against him while he was in the security of his home jurisdiction, and then springing into action to have him taken into custody in a foreign country where his quick surrender to the United States authorities could more easily be achieved.

35 There is, of course, nothing unusual about sealing an arrest warrant or complaint. There is no particular need to broadcast the issuance of arrest warrants, especially to persons against whom they are issued and who may have no desire to be arrested. There was likewise no need for the United States authorities to advise Mr. Tollman or his New York lawyer that the warrant had been issued. However, having taken the precaution of sealing these documents and not disclosing their existence, it was no longer open to the United States to allege that Mr. Tollman was in fact a "fugitive" from justice. Mr. Tollman testified, and I accept, that he had absolutely no idea that charges had been laid against him or a warrant issued until he was advised of it by a Canadian immigration official at the Toronto airport after his detention on January 18, 2005. Further, he believed that the investigation that had been ongoing in the United States for several years was winding down and he had no reason to believe he was being targeted for prosecution. The charges against him were a complete surprise.

36 The United States has presented no evidence to explain why the arrest warrant and complaint in this case had been sealed. At an earlier stage in this proceeding, the United States had filed some explanatory material in the unsworn form of a Record of the Case ("ROC"). I ruled on May 30, 2006 that this was an improper use of the ROC and struck from the record any allegations not related to the actual charges against Mr. Tollman. I held that material to be relied upon by the United States in specific response to the factual allegations underlying the abuse of process application (as opposed to the merits of the charges against Mr. Tollman) should be in the form of sworn evidence and would be subject to cross-examination. I also ruled that the applicant had met his initial onus of establishing an air of reality to his allegations, including the allegation of engineered fugitive status, and that the motivation of the United States was legitimately called into question. Notwithstanding this, the United States stands mute in the face of Mr. Tollman's allegations. There is, however, evidence from Elliot Sagor, a New York lawyer who represented Mr. Tollman and his companies, that it is customary in the United States to seal arrest warrants where there is a risk of flight, although he queried the appropriateness of that step for Gavin Tollman. The United States also filed as evidence a number of US court documents including other arrest warrants against various members of the Tollman family which had been sealed by court order when initially issued.

37 To characterize this "lying in wait" conduct as part of the overall scheme alleged, it is not enough to look at the conduct with the benefit of hindsight and determine that, since it was of

considerable assistance to the United States in supporting an argument that Mr. Tollman was a fugitive and in having him arrested by immigration authorities in Canada, it was likely undertaken with that purpose in mind. On the face of it, sealing the warrant and complaint is not nefarious, nor is the failure to take steps towards extradition from the United Kingdom necessarily an indication of anything untoward. In this case, however, Mr. Tollman has presented considerable evidence to suggest that these steps taken by the United States authorities are indeed odd and were part of the overall scheme to get Mr. Tollman into US custody without having to use extradition proceedings.

38 Mr. Tollman and his companies had been represented by a New York lawyer named Elliott Sagor. The US prosecutor, Mr. Okula, was well aware of this fact and had met with and spoken with Mr. Sagor about the overall investigation on numerous occasions. Mr. Tollman had cooperated throughout, responding to subpoenas and producing requested documentation from himself and the corporations. He and Mr. Sagor had expected that if further charges were being considered they would be advised first and be given the opportunity to have their forensic accountants review the situation, as had been the course of conduct in respect of potential charges against the corporation.

39 The requesting state in these proceedings required Mr. Tollman to prove all aspects of the alleged abuse of process, including that his whereabouts and principal residence were known to the US authorities at all relevant times. The material filed on this application amply demonstrates that fact.

40 Gavin Tollman was promoted to the position of global C.E.O. of Trafalgar Tours in October 2003. The head office is in London. His promotion was widely publicized. For the year prior to this Mr. Tollman had been required to spend substantial time in London for business, and estimated his time was divided about 50/50 between the United States and the United Kingdom. In January 2004 he officially moved to London, joining his wife Toni who had proceeded ahead of him and purchased a home.

41 Mr. Tollman has two young children from his previous marriage. His ex-wife has custody and lives with the children in London. Mr. Tollman's present wife (Toni Tollman) was also married previously and her two children from that marriage live in the United Kingdom. Mr. Tollman's office at Trafalgar Tours head office is located in prestigious premises in London, near Buckingham Palace. Mr. Tollman's home address was openly disclosed on numerous accessible documents, such as banking records and the electoral rolls. He applied for and obtained a work permit under his own name, setting out his actual residence and work addresses in London. He has two motorcycles registered in his own name, showing his home address. He travelled openly and extensively for work, using his US passport except for visits to the country of his birth (South Africa), where he used his South African passport. Much of this information was readily available from simple internet searches. In short, Gavin Tollman was easy to find. A ten-year-old with internet access could find him. There is no question that he could have been easily located using the resources of the United States justice system.

42 The initial factum filed in December 2005 on behalf of the United States on the disclosure application in this proceeding mentions a number of times that neither Mr. Tollman nor his New York lawyer ever advised the US authorities that he had moved to London or provided his new address to them. This is disingenuous. There was obviously no need to provide such information since it had never been requested and there was no reason to believe the American authorities were even interested in Gavin Tollman. However, that factum was filed prior to later developments in the hearing that led the Canadian Border Security Agency (CBSA) to disclose substantial relevant documentation it had earlier objected to producing. That material included a document which Mr. Okula first sent to Naydene Baca at the American Homeland Security office in Ottawa and which Ms Baca then forwarded to Canadian immigration officials in Toronto on January 14, 2005. The stated purpose of sending the document was to provide background information to Canadian authorities as to the charges against Mr. Tollman. The document is a provisional arrest warrant directed to the authorities in Australia. The existence of a draft application for a provisional arrest warrant in Australia was never explained. However, interestingly, Mr. Tollman confirmed in his evidence that he had been scheduled to travel to Australia for business but that the trip had been cancelled.

43 The Australian provisional arrest warrant is undated, but states Gavin Tollman's current location as the United Kingdom. In other material filed in the extradition proceedings, the US authorities referred to the fact that Mr. Tollman owned homes in New York and London valued in the millions. It is also apparent from various e-mails between Mr. Okula, Naydene Baca and Canadian immigration authorities between January 13 and January 18, 2005 that American authorities not only were aware that Mr. Tollman was in the United Kingdom, but knew when he was leaving there for a business trip to Bermuda and that he would be stopping in Toronto on his return trip. If they had access to that kind of information about Mr. Tollman's travel plans, it is obvious they could easily obtain his business and residential addresses in London.

44 I find as a fact that the United States authorities knew Mr. Tollman was living in London and that, if they did not have his precise address, it would have been easy for them to obtain it.

45 The charges against Gavin Tollman are similar in nature to the charges against his uncle and aunt, Stanley and Beatrice Tollman, who live in London. Stanley Tollman was first charged in 2002, and Beatrice in 2003. The United States first requested extradition of Stanley and Beatrice Tollman from the United Kingdom in March 2003, but withdrew that request in April 2004. Then in August 2004 the United States commenced new extradition proceedings against Stanley and Beatrice Tollman and provisional warrants were issued for their arrest. Those proceedings were still outstanding in November 2004 when the charges were brought against Gavin Tollman.

46 When the arrest warrants were issued for the senior Tollmans in August 2004, they were at their country home. Their solicitor arranged for their surrender to the police in London a few days later and they were granted bail that same day in the amount of [pounds]50,000, with one surety and on the condition that they surrender their U.S. and South African passports with the police and

reside in London. There is good reason to believe Gavin Tollman would have been treated similarly if extradition proceedings had been brought against him in the United Kingdom.

47 The senior Tollmans are contesting the extradition proceedings against them on the grounds of abuse of process and assert that the United States was obliged to proceed under the 1989 legislation rather than the legislation that existed after amendments in 2003 which provide a less onerous standard for the requesting state to meet. That litigation has been hotly contested and protracted.

48 Mr. Okula was fully aware that Gavin Tollman was ordinarily resident in London and was obviously familiar with the United Kingdom extradition process. He had previously drafted material for use in an attempt to arrest Mr. Tollman on a planned trip to Australia. He then went to considerable effort to track Mr. Tollman's whereabouts from London to Bermuda, including obtaining RCMP assistance to pinpoint the precise flight upon which Mr. Tollman would be entering Canada on January 18, 2005. It seems clear that Mr. Okula was determined, for whatever reason, to seek Mr. Tollman's arrest outside his home jurisdiction.

49 There is no right to be informed when a warrant is issued for your arrest. There is no obligation on the authorities to move promptly to execute an arrest warrant, rather than to wait for a more opportune time. There is no right to be extradited from your country of choice, rather than the country where you happen to be located when the authorities seek to enforce their warrant. Here, however, Gavin Tollman alleges, and has alleged from the outset, that the United States deliberately set out to seek his detention in a place away from his home and family in order to make it more likely he would be held in custody as a fugitive and to therefore bring pressure upon him to simply surrender. There is, in my view, substantial evidence to support that logical inference and the United States has chosen not to respond to it. I conclude that this was in fact the intention of the United States authorities.

(ii) Disguised Extradition

50 As a result of my earlier order on Mr. Tollman's application for disclosure, the CBSA produced a volume of documents (Exhibit 7) including a trail of e-mail correspondence providing damning confirmation that the United States initially sought to have Mr. Tollman arrested at the Toronto airport on the strength of the American arrest warrant and turned over to American authorities at the nearest US border. In my ruling on May 30, 2006, I held there was an air of reality to all four of the bases alleged by Mr. Tollman to be an abuse of process, and that the evidence in support of the disguised extradition allegation was "particularly compelling": Reasons for Decision, May 30, 2006, at para. 26. Indeed, I found that the evidence on this particular aspect went beyond the "air of reality" test required at that stage and demonstrated a *prima facie* case. Notwithstanding this clear ruling, no evidence has been filed by either the United States or any of the Canadian immigration officials involved to explain their conduct or to rebut what I have already indicated is a *prima facie* case of immigration proceedings being used as a disguised extradition.

The Groundwork is Laid

51 The paper trail begins with an e-mail from Mr. Okula to Naydene Baca at the American Homeland Security office in Ottawa on January 13, 2005. It is apparent that the two had either spoken or communicated by e-mail earlier, but those communications were not produced by the United States. Only those e-mails that eventually were forwarded to Canadian officials have been disclosed. In the January 13 e-mail Mr. Okula enclosed a provisional arrest warrant (apparently previously drafted for Gavin Tollman's anticipated arrest in Australia) and a New York driver's license. That same afternoon, Ms Baca confirmed receipt of the material and advised she was in contact with Gord Morris and would be sharing the material with him. She described Mr. Morris as "the supervisor for detain and removal" at the airport in Toronto and said he "has been extremely helpful". On January 14, 2005, Ms Baca forwarded the material from Mr. Okula by e-mail to Gord Morris.

52 It would appear that Gord Morris agreed, on behalf of the CBSA, to assist the United States in having Mr. Tollman arrested in Canada as soon as he arrived in Toronto and then turned over to the United States. Ms Baca e-mailed Mr. Okula on January 14 at 5:24 pm stating, "Gord Morris confirms that when he [Gavin Tollman] arrives he will be taken into custody and we will be notified and begin the process of escorting him to the US Port of Entry into your custody." Naydene Baca subsequently forwarded that e-mail to Gord Morris and there has been no denial by Mr. Morris as to what had been agreed.

53 Also on January 14, 2005, Mr. Okula e-mailed an RCMP officer attached to the Canadian Embassy in Washington, confirming an earlier conversation, and requesting assistance to identify the specific Air Canada flight upon which Gavin Tollman would be travelling from Bermuda to Toronto between January 17 and January 20.

54 At 9:23 am on January 17, the RCMP e-mailed Mr. Okula advising him that Mr. Tollman was booked on Air Canada Flight 947, leaving Bermuda at 1:10 pm on January 18 and arriving Toronto at 3:20 pm. Mr. Okula e-mailed this information to Naydene Baca, stating, "Based on the strength of our arrest warrant, we seek to have him refused entry into Canada and turned over to United States law enforcement." Ms Baca forwarded that e-mail to Gord Morris at 8:26 am the next morning, Tuesday January 18.

55 Between 9:45 am and 9:47 am on January 18, Gord Morris forwarded to Russ Dagg, a CBSA supervisory level employee at the Toronto airport, all of the e-mails he had received from the US authorities along with the attachments. There were no comments attached, as was customary with Mr. Morris. It is obvious Mr. Morris and Mr. Dagg must have discussed this at some point, although no documentation of that appears to exist.

56 Mr. Okula forwarded the e-mail from the RCMP to Naydene Baca at 9:26 am on January 18 and she forwarded it to Greg Morris in Toronto at 10:33 that same morning (a Tuesday), with the following message:

> OK, Gord let's do it! You've got the info, please call me as soon as you have him

> and hopefully we can get him back no later than the end of the week.
>
> [Emphasis added]

57 Mr. Morris immediately forwarded that e-mail to Russ Dagg, again without comment.

58 At 11:00 am Mr. Okula e-mailed Naydene Baca and Gord Morris inquiring as to where the American IRS agents would receive Gavin Tollman. He wrote:

> Assuming everything works as planned, into whose custody do you anticipate Gavin Tollman being placed? I ask because I have to plan to have him presented in US Federal Court before the "nearest" Magistrate Judge in the US, as required by Rule 5 of the Federal Rules of Criminal Procedure. Would IRS-CI agents take him through Buffalo? Detroit? Fly him to NYC? Please advise.
>
> [Emphasis added]

59 Ms Baca replied to both Mr. Okula and Mr. Morris at 12:26 pm stating that CBSA would more than likely put an immigration hold on Mr. Tollman and that he would be turned over in Buffalo. She asked Mr. Morris to confirm that location. If Mr. Morris replied it would not appear to have been in writing, which is consistent with his custom.

60 At about this same time, the first direct contact between Russ Dagg and Mr. Okula occurred. At 12:41 pm Mr. Okula e-mailed Mr. Dagg directly attaching the text of the American laws that Mr. Tollman allegedly violated. The two obviously had a telephone conversation as well, although the only record of it produced in this proceeding is an e-mail from Mr. Okula to Ms Baca. It was during this conversation between Mr. Dagg and Mr. Okula, that extradition was mentioned for the first time, not by Mr. Okula but by Mr. Dagg. Mr. Okula immediately sought reassurance from Ms Baca at Homeland Security. In his e-mail to her sent at 1:10 pm that day (January 18), Mr. Okula wrote:

> I just got a call from Russell Dagg of Canadian Customs, who seemed nice and asked for copies of the statutes violated, which I e-mailed to him. But he said, somewhat troublingly, that his view of the process is that, after Tollman was denied entry and put in an immigration hold (where he would probably but not definitely be denied bail), we would have to go through formal extradition proceedings to get him back. Based on my communications with you, I did not think that was the case; rather, I thought that because he was denied entry, he would be summarily turned over to the US.
>
> [Emphasis added]

Gavin Tollman Arrives in Toronto

61 Gavin Tollman's plane arrived in Toronto as scheduled shortly after 3:00 pm on the afternoon of January 18, 2005. Members of the DART team met the plane. Mr. Tollman was identified as he was exiting the aircraft and escorted to a separate area of the airport where he was to be interviewed by an immigration officer.

62 The interview was conducted by Immigration Officer Sally Contenta, in the presence of Russell Dagg. Officer Contenta prepared detailed typewritten notes of the interview, which were produced voluntarily by CBSA in the early stages of this abuse of process proceeding. Her account of the interview is consistent with the oral testimony given by Gavin Tollman before me at the abuse of process hearing.

63 It is apparent from Officer Contenta's notes that the sole basis for detaining Mr. Tollman was that he was "wanted for trial in the USA": Examining Officer's Notes, p. 1 (Exhibit 4, p. 233). Mr. Tollman was given the opportunity to look at the Request for a Provisional Arrest Warrant and the US Arrest Warrant. Officer Contenta reported that Mr. Tollman said he was "astounded" to learn of the arrest warrant. She asked him if he was guilty of the allegations of tax fraud and he told her he was not. He disclosed the convictions and charges against various family members and employees of the Tollman-Hundley hotel chain. Interestingly, Officer Contenta asked Mr. Tollman if he was prepared to return to the USA, to which he relied, "Well not now. I'd like to just return back to the U.K. or to South Africa. Am I able to do that?" Officer Contenta then replied, "I'm not in a position to offer you a withdrawal since the US has informed us that you are wanted for trial in criminal proceedings."

64 Mr. Tollman's account of this interview is very similar to what is disclosed in Officer Contenta's notes. I should state at this point that I found Mr. Tollman to be a highly reliable witness, with a good recall of details and a forthright, honest manner. His evidence was consistent with whatever documentary record there is and is essentially uncontradicted by any other evidence. He was not given to exaggeration, even on points where he would be aware he would not be contradicted. I accept his evidence without hesitation. Mr. Tollman testified that Officer Contenta told him about the warrant and then passed over to him a file that contained about 20 or 25 pages. The first document was the US arrest warrant, which he read. After that, there were a number of e-mails and he started to read those. At that point, Mr. Dagg caught the attention of Officer Contenta and she took away the file, indicating to Mr. Tollman that he was only supposed to read the document on the top. Mr. Tollman does not challenge the accuracy of any of the notes made by Officer Contenta. However, he reported one discussion with her that was not recorded in her notes. He said that he asked her what would now happen and she told him he would be held in one of two places: either a jail or a facility that was like a converted hotel. She advised him that she would recommend he be placed in the "converted hotel" and he thanked her for that consideration. I accept

Mr. Tollman's evidence on that point.

65 Mr. Tollman asked for and was given the opportunity to make a phone call. He tried to reach his wife, who was in South Africa, but without success. He did reach his lawyer, Elliott Sagor, in New York and reported to him what had happened.

66 There was then a very long and inexplicable delay. Other officers came and went and Officer Contenta returned at one point, expressing surprise to find Mr. Tollman still there. Eventually, another officer arrived and told Mr. Tollman he would be taken to the Metro West Detention Centre. In answer to Mr. Tollman's inquiry as to whether this was the hotel type accommodation, the officer told him it was not (an understatement if there ever was one!). Mr. Tollman was handcuffed and transported to the Metro West Detention Centre, arriving at 9:30 pm, having spent more than six hours at the airport since his arrival there. There has been no explanation for what was going on during this period of time.

67 At the end of her notes of the interview with Mr. Tollman, Officer Contenta indicated that she had prepared her "44 report" and the file was being reviewed. The final entry in Officer Contenta's Notes is:

> At approximately 1800 CBSA Customs Officer informed me that US Embassy in Ottawa was inquiring about the status of PC [Gavin Tollman]. I confirmed that PC is in our custody and file is currently being reviewed.

68 I would infer from this that by 6:00 pm Officer Contenta had completed all of her work including her report under s. 44 of the IRPA, but that it had not yet been reviewed by someone else. However, there is no specific information disclosed in that regard. In Officer Contenta's s. 44 report she determined that Mr. Tollman was inadmissible to Canada under s. 36(1)(c) of the IRPA in that there were reasonable grounds to believe he had committed an offence outside Canada that, if committed in Canada, would be punishable by a maximum term of imprisonment of at least 10 years, essentially merely tracking the language of the legislation. The fact of the charges against Mr. Tollman in the United States is cited, but nothing else.

69 At 6:25 pm on January 18 Naydene Baca sent an e-mail to Mr. Okula and Greg Morris, in response to Mr. Okula's e-mail earlier that day when he advised that Russ Dagg had told him "somewhat alarmingly" that the US would need to bring extradition proceedings to get Mr. Tollman's return. Ms Baca had clearly spoken to someone at CBSA in the meantime. In her e-mail, Ms Baca advised:

> Mr. Tollman has been intercepted and will be detained overnight. It appears that we may be able to have him escorted to the POE [Port of Entry] tomorrow and have our agents take custody. We will have to work quickly tomorrow after I touch base with Gord Morris.

It is particularly telling that Ms Baca's e-mail was sent to Gord Morris. Interestingly, the e-mail was also copied to Betsy Burke at the Department of Justice in Washington, which is the US office that is supposed to handle requests to foreign states for extradition. This is the first apparent involvement of anyone in that capacity.

70 At 7:17 pm on January 18, 2005, Officer Contenta sent an e-mail to Russ Dagg, as follows:

> I wrote the guy up - A 36(1)(a) - see FOSS
>
> <u>US embassy called from Ottawa</u> asking about the status of PC [Gavin Tollman]. <u>They apparently want PC deported (at POE). Told her that is not an option at POE</u> - PC is currently at the review stage. Brian Of. [Officer Brian O'Farrell] is the SIO.
>
> [Emphasis added]

71 This e-mail clearly suggests that Officer Contenta had a direct conversation with a woman at the US Embassy, the inescapable conclusion being that this was Naydene Baca since her office was there. This is at odds with Officer Contenta's notes of a call at 6:00 pm in which she reports merely being advised of the call by another Officer. Either her notes are less than forthcoming, or there was a second call from the Embassy in which Officer Contenta spoke directly with Ms Baca.

72 Ultimately, the detention order was signed by Brian O'Farrell as the Minister's delegate. It was he who decided that Mr. Tollman should be held at the Metro West Detention Centre rather than the Immigration Holding Centre. I heard evidence from Lorne Waldman, a Toronto lawyer with extensive experience in immigration, that persons in immigration detention are generally held at the Holding Centre, which is a secure facility from which people are not free to come and go. In his experience, only persons who have committed crimes of violence or who are a security risk are housed in a jail. There was no evidence to contradict his testimony, either as to the general practice or as to the reasons for the choice of the jail facility for Mr. Tollman. The documentation signed by Officer O'Farrell indicates that Mr. Tollman was ordered detained because of "serious criminality", because he was a "flight risk" and because he was a "fugitive". He stated in his report that, "It has been communicated to this office that the nature of the charges may be involving millions of dollars." He said, "US authorities are cognizant of Mr. Tollman's presence in Canada" (which was obviously very true) and that they "have already initiated interdiction [sic] proceedings" (which was clearly not true). He then concluded that "Mr. Tollman has little to gain in voluntarily reporting for an admissibility hearing if released to do so" and ordered him detained.

73 There is nothing in the documentation to explain the decision to detain in the Metro West Detention Centre, as opposed to elsewhere. However, it would appear that Officer O'Farrell had input from US authorities before making that decision. In a separate document entitled "Minister's

Delegate Notes" Officer O'Farrell wrote "Provisional Arrest Warrant copy on file detailing nature of criminal proceedings Mr. Tollman has allegedly failed to appear for." This is obviously wrong. Mr. Tollman did not fail to appear for any criminal proceedings and, as is clear from Officer Contenta's interview, knew nothing about the criminal charges against him. In the same document, Officer O'Farrell states, "Information is that U.S. authorities will initiate extradition proceedings A.S.A.P." He does not indicate the source of that understanding and it is clearly at odds with the content of the e-mails from Ms Baca and Mr. Okula, who were still at that point trying to effectuate Mr. Tollman's delivery into their custody at the US border without any further ado.

74 Officer O'Farrell sent an e-mail to Russ Dagg at 9:00 pm on January 18, 2005. It states:

> Detained MTWDC [Metro West Detention Centre] for admissibility hearing; @ 2100H this date. Did not/not [sic] personally liaise with U.S. Authorities"
>
> [Emphasis added]

I confess to being puzzled about why Officer O'Farrell felt it necessary to document that he did not have "personal" contact with the US authorities. It is not clear if this is true. The source of whatever information or input he may have received indirectly from the US authorities is unknown.

Steps Taken By US Authorities While Gavin Tollman is in Custody

75 At approximately 4:00 pm on January 18, 2005, Gavin Tollman called his New York counsel, Elliott Sagor and advised him what had happened. Mr. Sagor immediately called Mr. Okula and asked what was going on. Mr. Okula replied that he had obtained an arrest in conjunction with a sealed complaint. Mr. Sagor understandably assumed from this that Mr. Tollman was being held on an extradition warrant issued in Canada. He offered to go to Canada and accompany Mr. Tollman back to the United States and have him surrender. Mr. Sagor refused, saying that "it was too late for that" and that he had already been "burned" by Stanley Tollman who had resisted extradition in the U.K. Mr. Sagor raised the possibility of waiving extradition. Mr. Okula did not correct Mr. Sagor's obvious misapprehension that an extradition warrant had been issued. Instead, he told Mr. Sagor that if he simply consented, Mr. Tollman could be brought by agents to Buffalo and then flown to New York. They discussed possible terms of bail in New York and exchanged e-mails late that evening and the next morning on that topic.

76 At 10:04 the next morning, Wednesday, January 19, Russ Dagg passed on to Gord Morris the information from Brian O'Farrell that Mr. Tollman was being detained for an admissibility hearing. He stated that the US officials had been informed and "no doubt will be seeking extradition", although there is no indication as to why he believed that to be the case. He then indicated that he had discussed the situation with Mr. Okula and had been advised that Mr. Okula had discussed the matter with Mr. Tollman's US lawyer and that it "looks like subject may voluntarily' surrender to US officials".

77 Mr. Tollman's counsel in London took immediate steps on January 18, 2005, to retain Canadian counsel. Michael Code, a criminal specialist, was first retained and he, in turn, consulted with Lorne Waldman who is an immigration lawyer. Mr. Waldman contacted CBSA authorities that evening and learned that Mr. Tollman was being detained under s. 36(1)(c) of IRPA on the grounds of a serious criminal offence committed outside Canada. Mr. Code and Mr. Waldman met with Mr. Tollman later that same night at the Metro West Detention Centre.

78 Later in the morning of January 19, and following the exchange of e-mails about possible jail terms in New York, Mr. Sagor spoke to Mr. Okula on the phone and again raised the question of waiving extradition. Mr. Okula then, for the first time, told Mr. Sagor that Mr. Tollman was not being sought by way of extradition, but rather was in immigration custody. Of course, by this time Mr. Tollman's Canadian lawyers were already aware that no extradition request had been made and Mr. Sagor would inevitably have obtained that information later that day as he was coming to Toronto to meet with them. In the January 19 telephone discussion, Mr. Okula told Mr. Sagor that he wanted Mr. Tollman to waive his immigration hearing, at which point he would be taken to Buffalo for an identity hearing and then flown to New York. He again refused to agree to Mr. Tollman voluntarily coming to New York with Mr. Sagor.

79 No steps were taken by the US authorities to commence extradition proceedings in Canada on January 19, 2005, although Russell Dagg had told them on January 18 that this would be necessary. It would appear that the US efforts on January 19 were directed towards persuading Mr. Tollman, through his US counsel, to surrender to the US.

80 At this point, Mr. Tollman's admissibility hearing under the IRPA had not yet been scheduled.

81 On January 20, 2005, Gord Morris had a telephone conversation with Mr. Okula, in respect of which he kept a handwritten note. According to that note, Mr. Morris advised Mr. Okula to start the extradition process. This would appear to have been the first time Mr. Morris took that position. By this time, CBSA officials would have been aware that Mr. Tollman had retained experienced, well-regarded immigration counsel in Toronto (Mr. Waldman) and that issues were being raised about the appropriateness of his detention under the IRPA. Mr. Waldman made repeated demands of CBSA officials on January 19 and 20 to schedule the admissibility hearing and was advised on January 20 that the hearing would proceed on the morning of Friday, January 21.

82 The US authorities took no steps to commence extradition proceedings on January 20, 2005. It would appear that US efforts on January 20, 2005, were directed towards ensuring that Mr. Tollman remained in custody rather than obtaining bail. According to Gord Morris' notes of his conversation that day with Mr. Okula, he was told that two members of Mr. Tollman's family were fighting extradition (which was true, this would be Stanley and Beatrice Tollman who took the position that the extradition proceedings against them were an abuse of process) and that two other family members were also fugitives (which was not true). Mr. Okula also told Mr. Morris that Mr. Tollman might try to flee to Switzerland as the United States did not have an extradition treaty with

Switzerland that covered tax fraud and that he could skip out on any amount of bail as he had access to a South African passport (which was not true, as Mr. Tollman's South African passport was in his luggage and had been seized by the authorities at the time of his detention). Mr. Okula recommended that Mr. Tollman not be released on any amount of bail.

83 Thus, the evidence discloses that the only steps taken by the US authorities once Gavin Tollman was in custody and prior to the IRB Release Order were: to arrange for US officers to be at the border in Buffalo waiting to receive Mr. Tollman into their custody; to suggest to Mr. Tollman's counsel that Mr. Tollman should simply surrender to the US authorities and abandon his rights in Canada; and, to provide information to Canadian immigration authorities to support an argument before the IRB that Mr. Tollman should be denied bail. The respondents were given ample opportunity to present other evidence as to their actions and/or intentions during this time period, but failed to do so.

84 I conclude, based on the unrebutted evidence before me, that the intention of the American authorities was to ensure Gavin Tollman was kept in custody in difficult conditions for as long as possible, in the hopes that he would abandon his rights under Canadian law and surrender to the American authorities in Buffalo. Their objective from the outset was to get Mr. Tollman into American custody without extradition proceedings anywhere. Counsel for the requesting state argued before me that the US authorities were under some "misunderstanding" as to the appropriate process to invoke and that I ought not to infer an improper motive from their conduct. There is no evidence of any "misunderstanding" or "confusion" as to their motives. The evidence strongly supports the inference suggested by the applicant and the US has failed to put forward any evidence to the contrary, despite ample opportunity to do so and ample warning as to the likely consequences of remaining silent. I find that the US authorities deliberately set out to avoid extradition proceedings in the U.K. or elsewhere, or alternatively, to have Mr. Tollman extradited from a jurisdiction where he would be under significant pressure to abandon his rights to resist extradition.

Reasons for Canadian Immigration Action

85 In all of the documentation produced, formal and informal, there is not a whisper of any legitimate Canadian concern about Mr. Tollman's presence in our country. On the face of the documentary record, the sole basis for detaining Mr. Tollman was the existence of charges against him in the United States. There does not appear to have been any inquiry as to the substance of those charges or the evidence to support them. There likewise was no evidence that Mr. Tollman was a "fugitive" from the American justice system using Canada as a "safe haven". All indications were that he had no knowledge of the charges prior to being told about them by Officer Contenta and that he was a businessman ordinarily resident in London who was in Toronto for a pre-arranged legitimate business meeting. There is substantial evidence that in the planning stages senior Canadian immigration personnel gave assurances that Mr. Tollman would be detained, deported and summarily passed over to US authorities at the border so that US authorities could proceed with their prosecution against him. When Mr. Dagg first raised the prospect of extradition being

required, Mr. Okula appeared to be dismayed. However, he still did not take steps to initiate those proceedings. Rather, he sought to persuade Mr. Tollman's US counsel to have Mr. Tollman simply surrender to US authorities and waive his rights in Canada. There is not a hint in any of the material that Canadian authorities had any concerns of their own about Mr. Tollman or about whether his presence in Canada constituted any kind of threat to Canadian interests. They acted at all times solely at the request of the US authorities and on the strength of the US warrant for his arrest.

(iii) Failure to Comply with IRB Release Order

86 The admissibility hearing proceeded before Member Gratton of the IRB on the morning of Friday January 21, 2005. The representative of the CBSA recommended a continuation of Mr. Tollman's detention until a full-scale admissibility hearing could be scheduled. He vigorously argued that Mr. Tollman should be denied bail in the interim, stating he was "an indescribable flight risk". Member Gratton found that Mr. Tollman had no prior knowledge of the US charges against him and was not seeking to avoid the jurisdiction of the United States. She further held that Mr. Tollman was unlikely to jeopardize his career and his relationship with his family members by fleeing and becoming a fugitive from justice. She ordered Mr. Tollman's release, but on strict conditions with respect to residence, curfew and reporting. There were two individual sureties, Cheryl Gregory and Guy Young, who were required to post $25,000 and $75,000 in cash respectively. In addition, Mr. Young was required to provide a performance bond in the amount of $125,000 and Ms Gregory was required to provide a performance bond, on behalf of Trafalgar Tours, of $2 million, as well as to deposit as security, on behalf of Trafalgar Tours, a further $500,000. The hearing concluded at 11:00 am.

87 In order to effect Mr. Tollman's release in accordance with Member Gratton's order, Mr. Waldman was required to present the required cash and documents and attend with the sureties at the Rexdale Boulevard office of the CBSA, which office closed at 3:00 pm that Friday. Mr. Waldman checked with the Rexdale office and was advised that if he attended there by 3:00, Mr. Tollman would be released that day.

88 After the hearing before Member Gratton, the release order was sent by fax to the CBSA Rexdale office. It would appear that the officer who was to be in charge of processing the release was a CBSA official named Peter Missio. There is no direct evidence as to whether anybody spoke to Mr. Missio about the file, and in particular no direct evidence as to whether he had any contact with any of the US authorities or with Greg Morris.

89 At 2:10 pm, Mr. Missio faxed a memo to a supervisor (p. McCann) attaching the release order and asking if a company was an acceptable guarantor. It is not clear from the memo whether Mr. Missio was independently raising the issue himself, or whether, perhaps, someone else might have suggested that to him and he was requesting clarification. The memo states:

> Sections R. 47(1) and (2) refers to PERSONS only paying or posting bonds. The attached bond refers to a "Cheryl Gregory on behalf of Trafalgar Tour". Is a

> company acceptable as a guarantor? Will we have to put a lien on the company?
>
> [Emphasis in the original]

There is no evidence as to whether Ms McCann or any other supervisor provided an answer to Mr. Missio's questions.

90 In the meantime, Mr. Waldman had assembled all of the necessary material and attended at 2:50 pm at the Rexdale office with the sureties. He met with Peter Missio. Mr. Missio advised Mr. Waldman that he did not believe the IRB had jurisdiction to impose the conditions it did with respect to Ms Gregory posting security and a performance bond on behalf of Trafalgar Tours and that he was therefore not prepared to release Mr. Tollman. Mr. Waldman took the position that in the absence of a stay of the IRB order, the officer was obliged to comply with its terms and to release Mr. Tollman. Mr. Missio nevertheless refused, stating that he would have to consult with his superiors. At 3:00 pm, he left work for the day. Mr. Tollman was still in custody.

91 Mr. Waldman was able to reach Mr. Missio's supervisor, Peter Dietrich, that afternoon. Mr. Dietrich said that in his view the order was valid and that if Mr. Waldman re-attended the next morning (Saturday), Mr. Tollman would be released.

92 Mr. Waldman attended the next morning and again met with Mr. Missio. This time, Mr. Missio refused to release Mr. Tollman on the immigration bail on the grounds that Mr. Tollman had been arrested late Friday night on a provisional arrest warrant under the *Extradition Act* and was therefore no longer in immigration custody.

93 Even after January 22, and indeed, even after a release order was made in the extradition proceedings, some CBSA representatives continued to quibble about whether the term relating to Trafalgar Tours was valid and continued to refuse to process the immigration release order. It was only in the face of Nordheimer J. advising that if the immigration authorities did not release Mr. Tollman forthwith he would entertain a *habeas corpus* application, that CBSA officials finally agreed to release Mr. Tollman (although on different terms than had originally been imposed, but which were agreed to by Mr. Tollman). At one point, the CBSA requested the IRB to re-open the matter, but the Member refused. At no point did the CBSA ever appeal the order or seek a judicial stay of the order. They simply refused to honour it.

94 For purposes of this case, I do not need to determine whether there was any irregularity in the release order made by Member Gratton on January 21, 2005. That is immaterial. If the CBSA believed there was a problem with the order, they ought to have appealed it and sought a stay of the order pending the appeal. It was absolutely improper for a CBSA official to simply refuse to implement an order of the IRB on the grounds that he did not believe the Member had jurisdiction to make the order.

95 At 2:46 pm on January 21, 2005, Jason Carter, a lawyer with the US Department of Justice, Criminal Division, Office of International Affairs, sent an "urgent" e-mail to Chris Mainella at the International Assistance Group ("IAG") of the Canadian Department of Justice in Ottawa ("DOJ"). That is the proper line of communication for a foreign state requesting Canadian assistance to apprehend a person in Canada. This was the first contact by any US authority to anyone in Canada in respect of Mr. Tollman using this line of communication. Prior to that, all contact was directly with CBSA officials. Mr. Carter requested that a provisional arrest warrant be obtained under the *Extradition Act* on an urgent basis. He stated that Mr. Tollman was in immigration custody but that "he has been granted, and could make at any time, bail in connection with the pending immigration case against him." He said Mr. Tollman poses "a significant risk of flight". This e-mail was sent at 2:46 pm, which was just prior to Mr. Waldman's arrival at the Rexdale CBSA office and Mr. Missio's refusal to comply with the IRB order directing Mr. Tollman's release. In the e-mail, Mr. Carter advised Mr. Mainella that the Canadian immigration officials familiar with the matter were Greg Morris and Vince Greco. The reference to Greg Morris is not surprising as he had clearly been involved from the outset. This, however, is the first reference to Vince Greco.

96 This reference to Vince Greco at this time and in this context is intriguing. There are numerous e-mails after January 21 about the "disputed" terms of the IRB release order and Vince Greco is shown as a recipient in some capacity in virtually all of them. It appears that he is a person senior to Peter Missio in the chain of command and works in the same general area, rather than in the areas dealt with by Mr. Morris. By 2:46 pm the US authorities in Washington already knew that Vince Greco was in charge of this aspect of the matter. Obviously, his actual involvement started earlier than that, and in particular, was therefore earlier in time to Mr. Missio's refusal to release Mr. Tollman pursuant to the IRB order.

97 At 3:50 pm on January 21, Greg Morris faxed 22 pages of material to Mr. Lemon, the solicitor at the Toronto DOJ office who would be handling the application for the provisional arrest warrant. Mr. Morris made a handwritten note on January 21 recording three things: (a) that he had received a call from Chris Manella [sic] (Ottawa) who said he would be looking after the extradition request; (b) that he also spoke to Jason Carter (Washington) about the extradition request; and (c) that he had faxed Tom Lemon (Toronto) the material for the warrant request. There is no time shown on this note, and no indication of which of the three things happened first. Since the material was faxed to Tom Lemon at 3:50 pm and this is the last entry on the page, it is likely that the note was written sometime after 3:50 pm and that the two phone calls with Mainella and Carter occurred prior to that. In the note, Mr. Morris stated that he advised Mr. Carter "to proceed as quickly as possible for extradition." It is a logical inference that this discussion preceded Mr. Morris' discussion with Mr. Mainella, by which time Mr. Carter had already started the extradition request. It is also a logical inference that Mr. Carter, or at least some US authority, had spoken with both Mr. Morris and Mr. Greco before the e-mail was sent at 2:46 pm, and therefore before Mr. Missio refused to comply with the IRB order.

98 I do not say it is an inescapable inference that there was contact between the US authorities

and either Mr. Greco or Mr. Missio before Mr. Missio took the action he did in refusing to release Mr. Tollman. However, there is a troubling accumulation of coincidences here. A refusal by a CBSA official to honour an Order of the IRB must surely be a very unusual event, at least I would hope that to be the case. That this would fortuitously happen at the very moment when US authorities were making an urgent request for a provisional arrest warrant under the *Extradition Act* is an astonishing coincidence. When that is combined with the discussion between Mr. Morris and Mr. Carter in which Mr. Carter advises him to move quickly and the reference by Mr. Carter to Vince Greco being one of the two central people with information about what is happening on the immigration side of things, the suspicious nature of these circumstances is heightened. This is troubling and unexplained.

(iv) Improperly Obtained Extradition Arrest Warrant

99 On Friday, January 21, 2005, the Canadian Department of Justice, on behalf of the United States, sought a provisional arrest warrant to apprehend Gavin Tollman under the *Extradition Act.* In support of the application was filed the affidavit of RCMP Corporal Louie Casale. The application was made *ex parte* outside normal court hours on the grounds of urgency. The arrest warrant was issued by a judge of this court at 10:00 that night.

100 Cpl. Casale states in the first paragraph of his affidavit that the matters to which he is deposing are based on: his review of materials provided by the United States; his review of police and Citizenship and Immigration files; information provided to him by immigration officials, fellow law enforcement officers and officials of the Department of Justice; and his personal knowledge. He then states that he believes the information and the materials to be true. This part of the affidavit appears to be boilerplate.

101 If Cpl. Casale had any personal knowledge of Mr. Tollman's case, that is not apparent from the affidavit. It appears to be based entirely on what he read and what he was told by others.

102 If other law enforcement officers provided any information to Cpl. Casale, that also is not apparent from the affidavit. There is no information directly attributed to any law enforcement officers. Likewise, it is not apparent that any documents from police files were included in the affidavit or reviewed by Cpl. Casale.

103 If Cpl. Casale ever spoke to citizenship or immigration officials about Mr. Tollman's case, that is not apparent from the affidavit. He does not name any such officials and does not state the source of any particular information as being from such officials. He does attach the notes of Officer Contenta's interview of Mr. Tollman at the airport, some documents seized at the airport (airline ticket and passport), and the IRB Order for Release, but does not disclose any information beyond those documents.

104 If Cpl. Casale received other information from Department of Justice officials, that is not apparent from the affidavit. No such officials are mentioned by name and no particular information

is attributed to such a source. Perhaps this reference is solely with respect to paragraph 4 of the affidavit in which Cpl. Casale states he was "advised" of the requirements for issuing a provisional arrest warrant under s. 13 of the *Extradition Act* and proceeds to summarize them. Otherwise, it does not appear that he received any information from the Department of Justice.

105 If Cpl. Casale ever spoke to American authorities to obtain evidence or verification of information received, that is not apparent from the affidavit. The only materials attached to the affidavit that would appear to have come from the United States authorities are: the request from the US for a provisional arrest warrant; a copy of Gavin Tollman's photograph from his New York driver's license; the arrest warrant and complaint issued in the United States in November 2004; and an e-mail from Jason Carter (Washington counsel) to Chris Mainella (Ottawa DOJ) sent at 3:10 pm on January 21, 2005.

106 In describing the request for the provisional arrest warrant, Cpl. Casale stated in the affidavit that it included "a description of the facts of the case and a statement of the urgency for provisional arrest request." That is not correct. The provisional arrest request does provide facts about the case. However, it does not say anything whatsoever about urgency.

107 At paragraph 5(c) of the affidavit, Cpl. Casale stated:

> TOLLMAN arrived at Pearson International Airport on Tuesday, January 18, 2005, on a flight from Bermuda. He was scheduled to take a British Airways flight to London, England on January 20, 2005 ... He was examined by an Immigration officer to determine whether he was admissible to Canada based on the fact that he was wanted in the United States for the tax fraud offences referred to above ...

108 This paragraph gives the impression that Canadian immigration authorities learned of the United States tax fraud charges independently. The affidavit does not disclose that US authorities had been dealing with Canadian immigration officials since January 13, 2005, had provided flight information and other particulars to the CBSA and had requested they detain Mr. Tollman and deport him to the United States.

109 The interview notes of Officer Contenta are attached as an exhibit to the affidavit. Some information from that interview is summarized at paragraph 5(d) of the Casale affidavit. For example, Cpl. Casale refers to the South African passport, the fact that Mr. Tollman admitted his cousin was serving two years in prison in the United States and his uncle is alleged to be a fugitive in England, and the fact that Mr. Tollman had stated he did not wish to return to the United States now but would like to go back to the U.K. or South Africa. Cpl. Casale stated that Mr. Tollman "said that this was the first time that he was made aware he was wanted", but provided no further information on that point. Other information from the interview that could be helpful to Mr. Tollman, and not helpful to those seeking the arrest warrant, is not referred to in the Casale affidavit. For example, there is no reference to the nature of Mr. Tollman's business and the reason

for his trip to Toronto or to Mr. Tollman's statement that the US authorities knew where he lived in the U.K. and knew who his lawyer was and how to reach him.

110 The US arrest warrant and complaint are attached as an exhibit. In the body of the complaint, it is labeled as "Sealed Complaint". However, there is no other mention anywhere in that document or in the entire affidavit that the arrest warrant and complaint had been sealed since November 8, 2004, and that Gavin Tollman could not have known of their existence prior to his detention at the Toronto airport.

111 The text of the e-mail from Jason Carter is reproduced verbatim in Cpl. Casale's affidavit. The source of Mr. Carter's information is not stated. Essentially, the e-mail states that: 1. Mr. Tollman is in the custody of Canadian immigration officials but could make bail at any time and is a substantial flight risk; 2. Mr. Tollman left the US in late 2003, has enormous financial resources and owns home in London and New York valued in the millions of dollars; 3. Mr. Tollman possesses "multiple passports from the United States and South Africa, where he was born and is believed to be a dual citizen with the United States"; 4. Mr. Tollman is a "world traveller" and is believed to ordinarily reside in London and to have financial accounts in Switzerland; 5. the offences are serious, some persons involved have been successfully prosecuted in the United States and "other persons are in extradition proceedings from third countries".

112 The reference to "multiple passports" is misleading. Mr. Tollman had two passports; one from the United States and one from South Africa. The American passport was seized when Mr. Tollman arrived at the Toronto airport. He freely disclosed that his South African passport was in his luggage, which was also seized by the authorities. It was a term of the IRB release Order that Mr. Tollman surrender his passports to the authorities. That is not specifically mentioned, although it is in the IRB order which was attached as an exhibit.

113 The Carter e-mail refers to Mr. Tollman being a "world traveller" but does not state that he is the CEO of an international tour company with its head office in the U.K., which is a large part of the reason he travels extensively and was the particular reason for his trip to Toronto.

114 The IRB release order is attached as an exhibit. The affidavit states that Mr. Tollman was released "on a $600,000 cash bail in addition to a $2,125,000 performance bond with various conditions". The conditions are not otherwise described. The basis for the release and the findings of the IRB Member are not mentioned.

115 Cpl. Casale states at paragraph 5(e) of his affidavit, "Although he [Gavin Tollman] was ordered released, he has not yet made bail, but could be released as early as 8:30 am tomorrow (Saturday, January 22, 2005) when the office opens at the Immigration Holding Centre, where he is presently [sic] being held." This is somewhat incorrect, as Mr. Tollman was being held at the Metro West Detention Centre. It is also somewhat misleading as it states Mr. Tollman "has not yet made bail", which suggests he simply had not satisfied the conditions of the bail terms, rather than that immigration officials were refusing to release him allegedly because they believed the order was

invalid, although they had not appealed it or sought a stay.

116 In his concluding paragraph, stating the reasons why it would be in the public interest to issue the provisional arrest warrant, Cpl. Casale summarized the grounds by stating, "Tollman has no ties to the community, is facing serious charges in the United States (charges he knows several individuals have been convicted of and his uncle is a fugitive from), is extremely mobile and has the monetary affluence to flee the country should he so chose [sic]."

117 In describing Mr. Tollman as "extremely mobile", no reference is made to the onerous terms of Mr. Tollman's IRB release order, which required him to live with his surety, surrender his passports, report daily to a Canadian immigration centre in Mississauga, observe a curfew and not enter any airport or board any aircraft.

118 Cpl. Casale describes Mr. Tollman as having "no ties to the community", but does not refer to the two sureties who lived in Toronto and who posted substantial bail for him, one of whom was also going to have Mr. Tollman living with him in his home. There is also no mention of the fact that Mr. Tollman is married and that his wife and children and other close family members live in the United Kingdom. The affidavit does not disclose that the United States was aware of Mr. Tollman's ties to the community in the United Kingdom, was aware of his presence there and deliberately waited until he was outside that community to seek his arrest.

119 It is the norm that requests for an arrest warrant are made *ex parte*. This, however, was not a normal situation. In this case, there could be no harm in giving some notice to Mr. Tollman's counsel and providing him with an opportunity to be heard. There could be no danger that advance warning to Mr. Tollman could result in his escape; he was locked up in a cell at the Metro West Detention Centre and could not possibly be released until the next morning. The US authorities were aware of the involvement of Mr. Tollman's US lawyer, Mr. Sagor, and had been actively negotiating with him since January 18, 2005. The Canadian authorities were well aware that Mr. Tollman had retained both a criminal lawyer and an immigration lawyer in Toronto and had been in regular contact with counsel since Mr. Tollman's initial detention on January 18, 2005. It is difficult to understand why Mr. Tollman's lawyers were kept in the dark about this pending application, and even more difficult to understand why the existence of counsel and the failure to notify counsel is not disclosed in the affidavit.

E. ANALYSIS AND CONCLUSIONS

120 It is often said that actions speak louder than words. The actions taken by the United States against Gavin Tollman in this country speak loudly of a deliberate plan to engineer the return of Mr. Tollman to the United States to face tax fraud charges without having to go through the nuisance of an extradition proceeding. The fall-back plan was that if extradition had to be resorted to at all, it would be pursued in this country where Mr. Tollman had no ties to the community, away from his wife, his children, his friends and his work; a place where he was more likely to be held in custody or to have his freedom severely curtailed, and therefore more likely to waive his rights and simply

surrender to the United States. When the actions taken are coupled with the words found in the exchange of e-mails between US and Canadian authorities, the nefarious nature of the plan is all too clear. There have been no words of explanation in the face of the serious allegations now made; the actions taken and words said at the time of the events speak all the more clearly.

121 As I have already indicated, I do not propose to analyze each of the four allegations of abuse separately, as if they were water-tight compartments. A determination as to whether any one of these situations would be sufficient, standing alone, to warrant a stay for abuse of process should be left for a case in which the issue arises in isolation. Here, the four allegations do not arise in isolation, but are part of a chain of events that must be seen cumulatively in order to be properly understood.

122 The evidence is clear that the United States first approached Canadian immigration officials seeking to have Gavin Tollman turned over to them for prosecution without having to go through the extradition process. United States authorities sought not only to bypass the logical route of extraditing Mr. Tollman from the country where they knew him to be ordinarily resident; they sought to bypass the extradition route in Canada as well. There is clear and binding authority that it is an abuse of process to use the immigration system for the purpose of effecting extradition. We have extradition treaties and extradition legislation for a purpose, just as we have immigration legislation for a purpose. Where there is a legitimate Canadian immigration purpose for finding a person inadmissible to Canada and ordering his deportation because of criminal charges elsewhere, Canada is not obliged to decline its jurisdiction to do so, regardless of whether the country where the charges arose is or is not requesting extradition. (paras. 26-31, *supra*)

123 Here, however, there was no legitimate Canadian immigration concern about Mr. Tollman. The stated and sole purpose for Canadian authorities meeting Mr. Tollman's plane and detaining him was that the United States asked them to do so. Prior to those communications, Canada had no knowledge of the charges against Mr. Tollman, and neither did Mr. Tollman. He was not trying to avoid the jurisdiction of the United States, nor was he seeking out Canada as a safe haven. He was in Canada for business meetings and was to be here for only two days. He posed no threat whatsoever to Canadian interests. In this regard, the case before me is distinguishable on its facts from the decisions of my colleagues A. Campbell J. in *Bembenek v. Canada (M.E.I.)*, [1991] O.J. No. 2162, 69 C.C.C. (3d) 34 (Ont.Ct.Gen.Div.) [Bembenek cited to C.C.C.] and Dambrot J. in *United States of America v. Quintin*, [2000] O.J. No. 791 (S.C.J.), on which decisions the requesting state relies here.

124 In *Bembenek* the applicant had escaped from a Wisconsin prison where she was serving a life sentence for first degree murder and was living and working illegally in Canada under a false name. After a television broadcast of "America's Most Wanted" she was recognized in Thunder Bay, Ontario, and was arrested on October 17, 1990, under the *Immigration Act.* Canada proposed to deport Ms Bembenek to the United States and she contested that determination, seeking to claim refugee status. The United States made a request for extradition on October 26, 1990, but no steps

were taken to proceed with that while the immigration process was ongoing. Ms Bembenek had initially been held in custody. However, on September 12, 1991, an adjudicator ordered her release on a $10,000 cash surety and a $10,000 performance bond posted by the Thunder Bay restaurant owner for whom she had been working illegally. She was released on September 13, 1991. The next day, the extradition proceedings were activated, an arrest warrant was obtained and Ms Bembenek was taken into custody under the *Extradition Act.* Ms Bembenek sought *habeas corpus* on the grounds that the immigration proceedings were a form of disguised extradition and therefore an abuse of process. Her application was dismissed by A. Campbell J. who found that there was a legitimate Canadian immigration purpose for the proceedings against her under the *Immigration Act*. The fact that the American authorities were assisting the Canadian authorities in the immigration hearings did not mean the proceedings were a sham. Further, deliberate delay for a few hours in effecting Ms Bembenek's release from immigration custody once the release order was made was found to be objectionable, but not to change the underlying legitimacy of the proceedings themselves. Campbell J. held (at p. 56) that there was nothing in the record to indicate the Canadian officials were "controlled, directed or instructed by the American officials". He identified the central issue as: "are Canadian officials acting in good faith in the legitimate albeit vigorous pursuit of valid Canadian objectives or are they acting under the direction of American officials for a purpose inconsistent with the good faith administration of the *Immigration Act*?": p. 54 He then held, at p. 62:

> It is very difficult to prove that these immigration proceedings are a bad faith sham, because the applicant's conviction and life sentence for murder in the United States provide a plausible and rational basis for the Minister and the immigration officials to seek her deportation from Canada. The Minister and the immigration officials have an obvious and legitimate duty to discourage escaped American convicts from using Canada as a safe haven from which to challenge their American convictions. The applicant cannot succeed in the absence of clear evidence of bad faith. She must show that the immigration proceedings were not taken or continued for the legitimate Canadian objective of deporting an escaped American convicted murderer.

125 The facts in *Bembenek* stand in stark contrast to the case before me. The Canadian immigration authorities acted independently to arrest and deport Ms Bembenek. They were not instructed, or even requested, to do so by the United States. Ms Bembenek was living and working illegally in Canada under an assumed name. She was a fugitive from American justice using Canada as a safe haven. There is a legitimate Canadian objective in discouraging individuals from using Canada in this way. Mr. Tollman, on the other hand, was not residing in Canada. He was here, openly and legally, for two days on a legitimate business trip. He was not seeking to avoid the American justice system. He had no idea the American authorities had laid a complaint against him or were seeking his return to the United States. The only reason the Canadian immigration authorities detained him at all was because the American authorities sought his return to the United States and asked them to do so. That is the very essence of a disguised extradition.

126 In *Quintin* the applicants applied to stay their extradition proceeding on the grounds that an earlier immigration proceeding had been brought at the behest of the American authorities, which was alleged to be a disguised form of extradition and an abuse of process. Dambrot J. held that he had no jurisdiction to consider the abuse of process issue. This decision preceded the Supreme Court of Canada's decision in *Cobb* and the Court of Appeal decision in *USA v. Larosa* and is distinguishable on that ground alone. Any other findings made by Dambrot J. are therefore *obiter*, but are also distinguishable. Dambrot J. held that even if he did have jurisdiction to consider the issue, there was not a sufficient evidentiary basis to establish an air of reality to the allegations and he therefore did not permit evidence to be called as to the alleged collusion between Canadian and American officials. That is different from the case before me where there is evidence of the communications between the US and Canadian authorities. Finally, the case is also distinguishable on its facts, on the same basis as *Bembenek*, since the individuals involved were fugitives from the American justice system, living illegally in Canada and seeking to use Canada as a safe haven to avoid the American charges against them.

127 Counsel for the United States in the case before me pointed to the eventual extradition advice from CBSA officials as evidence of good faith on the part of the Canadian authorities. I cannot agree. Initially, the arrangement with the CBSA (through Gord Morris) was that Mr. Tollman would simply be detained at the airport and then delivered up to the American authorities who would be waiting for him at the Buffalo border. The sole purpose of the proposed Canadian action was to assist the United States in prosecuting Mr. Tollman, which is a clear example of using the immigration system to effect a disguised extradition. As the plan progressed, and within hours of the scheduled arrival of Mr. Tollman's flight, a CBSA officer on the ground (Russ Dagg) raised for the first time that if the US wanted Mr. Tollman returned, they would have to commence extradition proceedings. Mr. Dagg was present for Officer Contenta's interview of Mr. Tollman. After Officer Contenta had found Mr. Tollman inadmissible, she also told a person at the US Embassy (most probably Naydene Baca) that she was mistaken in thinking Mr. Tollman would simply be turned over to the US authorities at the port of entry. Officer O'Farrell, who made the decision to detain Mr. Tollman in a full-scale prison after his initial detention, noted (incorrectly) that the US would be starting extradition proceedings as soon as possible. In my view, the recognition by CBSA authorities that the US would need to bring extradition proceedings to obtain the return of Mr. Tollman is an implicit recognition that his detention under the IRPA was not for a valid Canadian immigration purpose. In *Larosa*, the Ontario Court of Appeal held that it would be an abuse of process to hold a person in custody in Canada for the purpose of facilitating the making of an extradition request. As Doherty J.A. stated at para. 62:

> Counsel next submitted that the appellant was prejudiced by what he described as the Crown's "change in position" because he was in custody for a year on the Canadian criminal charges before the extradition request proceeded. In my view, <u>this contention does not make the extradition proceedings an abuse of process absent some basis for the finding that the Canadian criminal charges were a ruse or were manipulated to effectively hold the appellant in custody pending an</u>

> <u>extradition request.</u> There is no suggestion that there were not reasonable and probable grounds for the laying of the Canadian criminal charges against the appellant.

128 Again, the issue comes down to the purpose for the action taken by Canadian officials. If Mr. Tollman was detained under the IRPA in order to keep him in custody until the US authorities could commence extradition proceedings, that is also improper. It is not clear if all the CBSA officials involved had reached a consensus on this at the time of Mr. Tollman's initial detention. However, there is no evidence that Canada had any interest of its own in deporting Mr. Tollman, absent the United States' request for assistance. Whether that assistance was to involve actually handing Mr. Tollman over to US police, or holding him in custody until the extradition process was underway, such action constitutes disguised extradition.

129 Further, this is not simply a case of disguised extradition. The US authorities did not simply discover that a fugitive from their justice system was living in Canada and attempt to persuade Canada to turn him over, rather than commence extradition proceedings. The entire process in this case was engineered by the United States. Because the complaint and warrant were sealed, Mr. Tollman had no idea the United States was seeking to prosecute him. He went about his life in the normal course. US authorities waited for Mr. Tollman to leave his own country and tracked him to Canada. He was only going to be here for two days and the US was keen to have him arrested before he could get back home to the United Kingdom. US authorities deliberately laid in wait to trap Mr. Tollman in a jurisdiction where he would be without any kind of support system, where it would be relatively easy to effect his removal and where they expected to have the cooperation of local authorities. That is not to say that the CBSA was privy to all of the United States' machinations. However, the CBSA was willing to take action it would not otherwise have taken, solely to assist the US in obtaining Mr. Tollman's return and are therefore complicit, at least to that extent, in the scheme. The United States hoped that once arrested in a foreign country Mr. Tollman would be held in custody or under restrictions that were sufficiently onerous that he would waive his rights and surrender. Against this engineered backdrop the actual steps taken by way of disguised extradition take on an even more sinister character.

130 It is odd that Mr. Tollman was detained at the Metro West Detention Centre, the most restrictive facility in which he could be imprisoned. He had no criminal record and no history of violence and the offences with which he was charged were non-violent in nature. He had no history of disobeying court orders and, apart from the outstanding charges in the United States, appeared to be a respectable, law-abiding citizen. The usual detention centre for immigration matters is a secure facility and people held in custody there are not free to come and go as they wish. Such a facility would surely have been adequate to ensure Mr. Tollman did not simply leave the jurisdiction. His passports had been seized. There was no reason to believe he would "break out of" the usual immigration detention centre and then illegally flee the jurisdiction. The only basis for believing him to be a flight risk was his financial worth. In these circumstances, it is unusual that he would have been kept in custody in such harsh conditions. The allegation was made in this application that

Mr. Tollman's placement at the Metro West Detention was part of the overall scheme to intimidate him into giving up. Those allegations have gone unanswered. There is good reason to believe that the US authorities influenced the decision as to where Mr. Tollman would be detained, and further that their purpose in doing so was to ensure that his detention was as unpleasant as possible so as to pressure him into abandoning his rights and surrendering to the United States. This is a contributing factor to the abuse of process.

131 At the IRB review hearing on January 21, 2005, the CBSA representative, based on information obtained from the United States authorities, vigorously opposed any form of bail for Mr. Tollman. It is somewhat ironic that, but for the decision of Canadian immigration to deport Mr. Tollman, by the time of this hearing he already would have finished his two days of scheduled business meetings and have departed Canada for home. In the course of the hearing, IRB Member Gratton saw through the engineered fugitive status and concluded that Mr. Tollman had no knowledge of the charges against him, had not been trying to evade the jurisdiction of the United States and, in that sense, could not be said to be truly a "fugitive". She ordered his release, on stringent terms to ensure he stayed in the jurisdiction pending his full hearing. It was only at this point that the US authorities took steps to commence these extradition proceedings.

132 It stretches credulity to suggest that at the very time the United States was scrambling to get the extradition process commenced and arranging to apply on an urgent basis for an extradition arrest warrant, by pure happenstance, the person charged with the responsibility of carrying out the IRB order for Mr. Tollman's release, all on his own, willfully refused to do so, and then left for the day, closing the office. How fortuitous. I acknowledge there is no direct evidence linking this deliberate refusal to obey a valid IRB order to any motivation to delay Mr. Tollman's release until an extradition warrant could be obtained. However, it is clear there were communications at various levels about what was going on, communications that that were either not committed to writing, have not been preserved, or were not in the records of the CBSA that were ordered to be disclosed. The refusal to release in the face of an order that was not under appeal, the timing of that refusal, the all-too-convenient delay as a result of the release, and the communications that were ongoing between US and Canadian authorities raise a very real concern about the *bona fides* of the delay in releasing Mr. Tollman. The motivation behind this conduct was very directly challenged in the applicant's material from the outset. Those people who are clearly in a position to clarify what happened have remained silent. That does not remove the heavy onus from the applicant to prove his case. However, in my view, this situation falls within the words of Donovan L.J. in *Brixton Prison* (at p. 664) in that the evidence that has been brought forward "sow[s] such substantial and disquieting doubts in the mind of the court about the bona fides ... that the court will consider that some answer is called for." In my opinion, the reasonable inference from the evidence (and the lack of any responding evidence) is that CBSA officials were deliberately dragging their feet in dealing with Mr. Tollman's release, under the ruse of a jurisdictional problem with the IRB order, in order to give the US authorities and the DOJ sufficient time to obtain an extradition arrest warrant. That was improper and abusive.

133 It is of fundamental importance to the integrity of the judicial system that orders of courts and tribunals be obeyed. Deliberate violation of an IRB order by CBSA officials charged with the enforcement of the legislation is an outrageous breach of fundamental justice. If there was a legitimate jurisdictional problem with the order, it could have been appealed and a stay sought pending that appeal. In the absence of such an order, it was final and binding and ought to have been obeyed: *Wilson v. The Queen*, [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 97; *Quebec (Attorney General) v. LaRoche*, [2002] 3 S.C.R. 708, 169 C.C.C. (3d) 97; *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188, 85 D.L.R. (4th) 694 (C.A.). Refusal to obey such an order is a breach that undermines the integrity of the justice system and hence invokes the abuse of process jurisdiction. In *R. v. Lichtfield*, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97 at 110, Iacobucci J. held that an order of a court cannot be the subject of collateral attack, but rather must be obeyed until it is varied or reversed, stating the reason for that rule as follows:

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal.
>
> [Emphasis added]

134 In *R. v. Domm* (1996), 31 O.R. (3d) 540, 111 C.C.C. (3d) 449 (C.A.) [*Domm* cited to O.R.], a reporter published information about the Karla Homolka trial in violation of a non-publication order, hoping to have the legality of that order challenged. The Court of Appeal held that the validity of the order could not be challenged in collateral proceedings, but rather the order must be obeyed, citing, *inter alia, Litchfield* and *Wilson.* Doherty J.A. noted, for example, that this principle was applied in *R. v. Reed*, [1994] B.C.J. No. 1817, 91 C.C.C. (3d) 481 (C.A.) to prevent an accused from defending a charge of breaching a probation order based on an argument that the particular term at issue was invalid. If an accused is held to the strict performance of a probation order even when of the view that a term is invalid, the government authority with responsibility for enforcement of the law can be held to no lower standard. As Doherty J.A. stated in *Domm* at p. 557:

> Courts exist to settle disputes and determine rights. They do so by making orders. If those orders are disobeyed and then challenged when proceedings are taken in respect of the breach, the authority of the court is reduced to little more than a mirage.
>
> [Emphasis added]

135 On that Friday night, January 21, 2005, while Mr. Tollman was being held without legal

authority at the Metro West Detention Centre, and long after regular court hours, the DOJ attended before a judge of this court alleging urgency and seeking a warrant for Mr. Tollman's arrest under the *Extradition Act*. No notice of this emergency motion was provided to Mr. Tollman or his counsel. It is well established in our jurisprudence that a party seeking an *ex parte* order from the court, whether in criminal or civil proceedings, is under a duty to make full, fair and frank disclosure of all material facts within that party's knowledge: *R. v. Araujo*, [2000] 2 S.C.R. 992, 149 C.C.C. (3d) 449 at paras. 46-47; *United States of America v. Friedland,* [1996] O.J. No. 4399 (Gen.Div.); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.). The duty is to disclose all material facts, including those that are helpful to the party against whom the order is sought and not helpful to the party applying for the order. It is crucial to the integrity of our judicial system that the court be able to rely on parties to comply with this fundamental requirement. In *Araujo*, the Supreme Court warned against the dangers of using boilerplate and other language that could have the potential "to trick the reader into thinking the affidavit means something that it does not." The Court also warned counsel and police officers seeking *ex parte* orders not to be "led into the temptation of misleading the authorizing judge, whether by language used or strategic omissions.": *Araujo* at para. 47.

136 It is disturbing that not even minimal notice of this motion was given to Mr. Tollman's counsel, even though the US and Canadian authorities were fully aware he had retained counsel here and had been dealing with both his Canadian and American lawyers for several days before the attendance on the motion. This was not disclosed to the presiding judge. Since Mr. Tollman was in prison and could not be released until the next morning at the very earliest, there could have been no prejudice to the United States by giving notice, apart from the fact that a fuller picture of the events would no doubt have been placed before the presiding judge.

137 By alleging urgency, the requesting state, through the DOJ, was able to obtain a special appointment to attend before a judge of this court late on a Friday night. Any urgency that did exist at that time was a direct result of the United States delaying the commencement of extradition proceedings while it attempted to have Mr. Tollman deported instead. The United States authorities had started their efforts to have Mr. Tollman arrested in Toronto as early as January 13, 2005, a full eight days before they took any steps to request extradition. That was not disclosed to the presiding judge. They had been warned that extradition proceedings would be necessary as early as January 18, 2005. They still took no steps. The affidavit gives the impression that Mr. Tollman just happened to be detained by Canadian immigration officials on January 18, 2005. The US knowledge and involvement in that process was not disclosed. That is a "strategic omission", to use the language of the Supreme Court in *Araujo.*

138 There were other "strategic omissions" in the affidavit. For example, one of the grounds cited in the affidavit as giving reason to believe Mr. Tollman was a flight risk was that he was the holder of "multiple passports". In fact he had two passports. What was not disclosed was that he did not have access to either of his passports and that if he had been released on the IRB bail, one of the conditions was the surrender of his passports.

139 The affidavit states that Mr. Tollman told the immigration authorities at the Toronto airport that he was not aware of the US charges against him. What the affidavit fails to state is that there was no way Mr. Tollman could have known about the charges as they had been sealed since they were issued. The affidavit referred to the hearing before the IRB which led to the release order, but did not set out the reasons given by the Member for the order made, and in particular did not disclose the finding by the Member that Mr. Tollman was not a "fugitive" and had no knowledge of the charges against him.

140 The Crown argued before me that the obligation to make fair disclosure in this regard was met because the IRB release order was attached as an exhibit to the affidavit. A similar argument was made about the failure to provide particulars of Mr. Tollman's business interests and why he had come to Canada. It was submitted that since Mr. Tollman gave some of that information to Officer Contenta and her interview notes were attached as an exhibit, any disclosure requirement was satisfied. Likewise, the US complaint is attached as an exhibit and if one examines it closely enough, one can see that it has the heading "Sealed Complaint". This submission ignores the practical reality of the *ex parte* application. The obligation is to ensure that the judge hearing the application receives more than one side of the story. When the affidavit tells one side of the story, it is no answer to say that if the judge had combed through the text of the attached exhibits, he or she would have been able to find the rest of the story. This is particularly problematic where parts of an exhibit are summarized (for example, the Contenta notes), but other parts favourable to the person sought are not. An *ex parte* application is not a scavenger hunt, where the presiding judge is charged with the responsibility of hunting through the material attached to the affidavit for hidden information helpful to the person sought. The judge is entitled to assume that all material facts helpful to the person sought and relevant to an issue on the application are clearly and candidly stated in the body of the affidavit. The affidavit in this case did not meet that standard.

141 I recognize that the affidavit of Cpl. Casale was undoubtedly put together under enormous time pressures that did not permit DOJ counsel to be as thorough as is usually the case. However, as I have stated, and as was quite likely unknown to the DOJ at the time, the urgency in this situation was entirely manufactured. There was no real danger of Mr. Tollman escaping the jurisdiction. A more fulsome examination of the grounds for detaining Mr. Tollman in custody, particularly in light of the IRB decision that had already been made, might well have resulted in a more tempered application before this court. However, everyone appears to have been caught up in this engineered emergency, without pausing for sober reflection. That said, while this may explain some of the deficits in the affidavit material, it does not excuse it.

142 Counsel for the United States argues that there can be no prejudice to Mr. Tollman once the extradition arrest warrant is issued; that ultimately he got what claims he is entitled to - an extradition hearing rather than a deportation hearing, with all of the rights that entails. Therefore, it is argued, even if there were any irregularities in what preceded the extradition warrant, those were solely related to the immigration proceedings, are of no moment now, and cannot be characterized as an abuse of process within the extradition proceedings. I do not agree. First of all, the success or

failure of the abusive steps taken is irrelevant: *Cobb.* The US hoped to obtain custody of Mr. Tollman without having to undergo an extradition proceeding; they have not been successful. However, the Canadian judicial system was engaged when the US attempted to achieve extradition through the immigration process. It is not open to a party to excuse previous abusive actions by eventually resorting to the appropriate legal processes.

143 Further, the integrity of the judicial extradition process is directly affected here. The extradition warrant was obtained in this proceeding while Mr. Tollman was being held in custody in violation of an IRB order that he be released upon satisfying certain terms. The motion for that warrant was made without notice in circumstances in which notice could have, and ought to have, been given. Those circumstances were not disclosed in the supporting affidavit, and the affidavit also failed to disclose other material facts favourable to Mr. Tollman. Therefore, the process by which this extradition proceeding was commenced was itself tainted.

144 Further, as a result of the arrest warrant obtained under the *Extradition Act* on January 21, 2005, Mr. Tollman continued to be held at the Metro West Detention Centre until Nordheimer J. ordered his release, on terms, on January 27, 2005. One of the primary grounds cited by Nordheimer J. for ordering Mr. Tollman's release was the fact that he had no knowledge of the charges against him and therefore could not be said to be attempting to avoid the jurisdiction of the United States. This was also a major factor relied upon by IRB Member Gratton in ordering Mr. Tollman's release under the IRPA. Nordheimer J. also referred to the fact that Trafalgar Tours executives in Canada were prepared to vouch for Mr. Tollman and to pledge personal assets on his behalf, also a factor relied upon by IRB Member Gratton. Nordheimer J. noted that Mr. Tollman had a wife and children and significant business interests. He found that Mr. Tollman was unlikely to leave all of that behind to flee to a country from which he could not be extradited in order to escape the US charges against him. The most Mr. Tollman would likely face if tried and convicted in the United States would be a few years in prison. His cousin Brett Tollman, who faced far more serious charges, received a sentence of under three years. Similarly, Member Gratton considered Mr. Tollman's status as CEO of a major international company and found he would be unlikely to "be on the lam" with his wife and children and "besmirch [his] name even further by being a fugitive from justice": Transcript of January 21, 2005, hearing, at p. 51. It is important to note that Mr. Tollman was eventually released in the extradition proceedings for very similar reasons and essentially the same terms as had been ordered by the IRB nearly a week earlier. This underscores the materiality of the failure to disclose the basis upon which Mr. Tollman had been released by the IRB.

145 Although the circumstances under which Mr. Tollman now finds himself within the jurisdiction of this court are less extreme than occurred in the case of the *Horseferry Road Magistrate's Court*, in my view the same principles apply. In *Horseferry Road Magistrate's Court* there had been no abuse of process with respect to the criminal charges before the court, but the accused's presence in the jurisdiction had been improperly procured in breach of international law and the laws of another state. In Mr. Tollman's case, there is no abuse in respect of the extradition

hearing itself. However, Mr. Tollman was held in this country improperly and in a manner that constituted an abuse of process and it was while he was thus being held that the extradition process was begun and the arrest warrant obtained. But for the abuse of process in the disguised extradition, he would not have been in this jurisdiction by the time the extradition proceedings were commenced. In a very real sense, therefore, his presence in this jurisdiction was obtained as a result of the abuse of process. This is a situation, as recognized by the Ontario Court of Appeal in *Larosa*, where proceeding with the extradition committal hearing would be a breach of fundamental justice, no matter how fairly that hearing might be conducted.

146 In my opinion, the actions of the United States against Mr. Tollman in this country, whether with the willing or unsuspecting cooperation of the Canadian authorities, are abusive. Canadian legal processes were manipulated in an attempt to get Mr. Tollman into US custody to face charges without the safeguards of an extradition proceeding. Efforts were made to keep Mr. Tollman in a harsh prison setting, away from his family, friends and community, in order to pressure him into abandoning his rights. Those attempts failed, but that is no answer to the allegations of abuse. Indeed, but for the egregious conduct against him, Mr. Tollman might well have simply surrendered into US custody, as his counsel in New York was negotiating at the outset. It was his sense of outrage at what was being done that stiffened his resolve to resist. A man with less moral fibre, and certainly a man with less personal wealth, would likely have succumbed to the pressure exerted. The fact that Mr. Tollman has chosen to assert his rights does not diminish the abusive nature of the conduct: *Cobb.*

147 In this case, the abusive conduct was personally harmful to Mr. Tollman and also harmful to the integrity of the judicial system in Canada.

148 I do not propose to detail all of the ways in which Mr. Tollman has suffered personally. The first, and most obvious, is that he spent 10 days in custody in harsh circumstances at the Metro West Detention Centre. Since his arrival here for a two-day business on January 18, 2005, he has been unable to leave the jurisdiction. Quite simply, he does not want to be here. He has been able to work, but not efficiently and without the ability to travel that is vital to his ability to do his job well. His wife has joined him here, but had to abandon her own job to do so. She has had health problems while she was here that were difficult for the Tollmans to deal with as outsiders to our medical system. Most importantly to Mr. Tollman, he has missed his children terribly. He is a devoted father. His children live in London in the custody of their mother. Mr. Tollman has been able to arrange for them to travel to Canada a few times to spend vacation with him here, but that is hardly a substitute for the almost daily contact he had with them in London. He sees this loss of contact as a personal tragedy of huge proportion. I found his evidence on this point to be genuine and moving. There is no doubt that he has suffered personally as a result of the actions taken against him.

149 In addition to the personal impact on Mr. Tollman, the conduct here must be condemned as contrary to the fundamental principles upon which our justice system is based. The justice system must be fair for all who become enmeshed in it, regardless of intellect, wealth or station in life. Mr.

Tollman was able to insist on his rights, albeit at considerable personal and financial cost. However, he was armed with intelligence, stamina, a social position of power and prestige, and enormous personal wealth. Very few people would have been able to do what he has done. If the system went awry for him, what hope is there for the weak, the poor and those less powerful? The answer must be in the vigilance of the justice system itself. Misconduct of this sort cannot ever be tolerated, for to do so is to condone, perhaps even to invite, similar conduct in the future. This is the kind of conduct that offends this community's sense of fair play and decency. Having conducted itself in this manner, the requesting state is disentitled to any relief from this court. Accordingly, this extradition proceeding is permanently stayed.

A.M. MOLLOY J.

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