IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United States v. Rogan,*
2014 BCSC 1016

Date: 20140606
Docket: 26287
Registry: Vancouver

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

Between:

In the Matter of the Attorney General of Canada on behalf of
The United States of America

Respondent/Requesting State

And

Peter George Rogan

Applicant/Person Sought

Before: The Honourable Mr. Justice Fitch

Reasons for Judgment

Counsel for the Attorney General of Canada on behalf of the Requesting State:	Diba B. Majzub
Counsel for the Person sought:	David J. Martin
Place and Date of Hearing:	Vancouver, B.C. November 25-29, 2013
Place and Date of Judgment:	Vancouver, B.C. June 6, 2014

A. Nature of Application

[1] The United States of America seeks the extradition of Peter Rogan for prosecution in relation to offences corresponding to the Canadian crimes of perjury and attempting to obstruct justice.

[2] Mr. Rogan has filed an application to stay the extradition proceedings on abuse of process grounds. He asserts that the extradition proceedings are a continuation of an abuse of process which commenced in 2007 and is rooted in steps taken by Canadian authorities to accommodate their American counterparts by utilizing immigration proceedings to deport Mr. Rogan from Canada in what is alleged to be a "disguised extradition".

[3] I expect Mr. Rogan will argue that the decision by Canadian authorities to seek his deportation was motivated by a desire to facilitate his prosecution in the United States, and to achieve this under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). *IRPA* affords fewer procedural and constitutional protections than are available under the *Extradition Act*, S.C. 1999, c. 18.

[4] Mr. Rogan's proposed abuse of process argument is founded on the "residual category". It is aimed not at the fairness of the pending extradition proceedings *per se*, but on an assertion that these proceedings undermine the integrity of the judicial process: *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 73; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paras. 87-92.

[5] Specifically, I expect Mr. Rogan will argue that the extradition proceedings are so tainted by the earlier deportation proceedings, the real object and purpose of which was to hand him over to the United States for prosecution, that continuing with the extradition proceedings will perpetuate or aggravate prejudice caused to the repute of administration of justice, and that no remedy short of a stay of proceedings is capable of removing that prejudice.

[6] In support of the anticipated motion to stay, Mr. Rogan seeks, by this application, to obtain a wide-ranging order compelling the respondent to disclose:

> All communication and correspondence between Canadian law enforcement agencies regarding Mr. Rogan, including, but not limited to, all communication and correspondence between the R.C.M.P., the C.B.S.A., and the Department of Justice (both of Vancouver office and the Ottawa office), and communications and correspondence between Canadian authorities and U.S. authorities including, but not limited to communication and correspondence between Canadian authorities and the F.B.I., Canadian authorities and the U.S. Attorney's Office in Chicago, and Canadian authorities and the U.S. Office of International Affairs.

[7] The parties agree that where additional disclosure is sought in connection with alleged state misconduct, the test an extradition judge must apply is set out in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont.C.A.).

[8] For the reasons that follow, I am satisfied a disclosure order should be granted.

[9] The scope of the order, the timeframe for compliance with it, and the process through which claims of privilege can be determined are matters to be addressed in a subsequent hearing.

B. Factual Background

(a) The Allegations Underlying the Extradition Request

[10] Mr. Rogan is a 68-year-old citizen of the United States. He holds a Ph.D. in hospital administration. He was the owner and principal manager of the Edgewater Medical Center ("Edgewater") in Illinois for more than 10 years until it closed in 2001.

[11] The charges giving rise to these extradition proceedings have their genesis in a civil action commenced by the United States against Mr. Rogan in 2002.

[12] In that action, the United States alleged that Mr. Rogan conspired with physicians to defraud Medicare and Medicaid in a scheme involving payments from Edgewater to physicians in exchange for patient referrals in violation of U.S. law, and the submission of false claims for medical procedures that were unnecessary or never performed.

[13] A criminal investigation into Mr. Rogan's conduct while he was at Edgewater was discontinued in May 2004.

[14] On September 29, 2006 the United States obtained a civil judgment against Mr. Rogan in the amount of $64 million. The trial judge found that Mr. Rogan: directed the destruction of 20 boxes of documents in 2000 after being served with grand jury subpoenas in connection with an ongoing federal investigation of Edgewater; engaged in conduct that obstructed justice, including by encouraging a senior Edgewater employee to accept full responsibility for (and not implicate Mr. Rogan in) the fraudulent scheme in exchange for which Mr. Rogan would take care of him and his family; and testified falsely at his trial.

[15] On a February 20, 2008 the Court of Appeals for the Seventh Circuit upheld the trial judgment.

[16] Mr. Rogan left the United States and entered Canada as a visitor on October 9, 2006, less than two weeks after being found civilly liable. He began renting an apartment in Vancouver and has never returned to the United States. Mr. Rogan has used Canada as a base to travel to other destinations, always returning directly to Canada. Mr. Rogan and his wife applied for permanent residency in February, 2007.

[17] In seeking to enforce its judgment, the U.S. discovered that Mr. Rogan was the beneficiary of a trust established in the Bahamas in 1996 and known as the "Peter G. Rogan Irrevocable Trust 001" (the "trust"). New World Trustees (Bahamas) Ltd. ("New World") was the named trustee. New World was later succeeded as trustee by Oceanic Bank and Trust ("OBAT"). The "Deed of Settlement" named Mr. Rogan as "discretionary" beneficiary; in other words, he could receive distributions from the trust only at the discretion of the trustee.

[18] The trust was established by Mr. Rogan and his long-time lawyer and friend, Frederick M. Cuppy ("Cuppy").

[19] As set out in the Record of the Case ("ROC"), the requesting state has evidence that the mechanics of the trust were altered, including by the presentation of a "Letter of Wishes" to the trustee in which Mr. Rogan notified the trustee that he "wished" the trustee to distribute all of the income of the trust to him. It is the position of the requesting state that the "Letter of Wishes" was prepared to ensure that Mr. Rogan, as settlor and beneficiary of the trust, would have control over the investments and income of the trust.

[20] The requesting state asserts that despite the legal façade of an independent trustee, the income and *corpus* of the trust was actually Mr. Rogan's. The trustee's records, which are available for trial, reflect that Mr. Rogan was the direct beneficiary of the trust's substantial income and that the trustee, through its employee, Charles Hepburn ("Hepburn"), promptly distributed the income to Mr. Rogan upon each of his requests. The ROC reflects that between 1996 and 2003, Mr. Rogan directed the trustee, through Hepburn, to distribute to himself, and to others, nearly $8 million. The total amount distributed from the trust to Mr. Rogan directly, or to his benefit, is alleged by the requesting state to be not less than $11.8 million.

[21] In support of its post-judgment collection efforts, the Financial Litigation Unit ("FLU") of the U.S. Attorney General's Office for the Northern District of Illinois submitted an affidavit to the U.S. District Court stating that Mr. Rogan "has ready access to the assets of this trust…"

[22] In response to this affidavit, Mr. Rogan swore an affidavit on December 21, 2006 and filed it with the U.S. District Court declaring that:

- "I am a discretionary beneficiary of the Peter G. Rogan Irrevocable Trust established in 1996 ('Irrevocable Trust')";
- "I do not have and have never had any control or underlying financial records regarding the Irrevocable Trust and its income or the assets of the Trust";
- "The [FLU Affidavit] wherein it states that 'he [Peter Rogan] appears to readily have access to the assets of this trust as well as other trusts in the names of his children' is without any factual basis and is totally false."

[23] In addition, and as set out in the ROC, Dexia Credit Locale ("Dexia"), a European bank, extended a line of credit to Edgewater. Dexia also filed a civil suit against Mr. Rogan alleging he engaged in fraud and breach of fiduciary duty by directing the criminal health fraud scheme at Edgewater, and concealing the existence of that scheme from Dexia.

[24] On May 3, 2007 Dexia obtained default judgment against Mr. Rogan in the amount of $124 million. No appeal was taken from that judgment.

[25] In post-judgment enforcement proceedings taken by Dexia, Mr. Rogan submitted an affidavit sworn August 11, 2004 stating, "I do not have any documents relating to foreign assets because I do not own any foreign assets". The magistrate presiding over Dexia's enforcement proceedings expressed skepticism that Mr. Rogan could not obtain additional records from the trustee and directed Mr. Rogan's then lawyer to contact the Bahamian trustee.

[26] As set out in the ROC, Mr. Rogan's lawyer attempted to contact Hepburn, the same OBAT employee who had handled Mr. Rogan's previous requests for the disbursement of money from the Bahamian Trust. OBAT records show that on September 16, 2004 Hepburn contacted Cuppy by email, advised Cuppy that Mr. Rogan's lawyer had been attempting to contact him and asked, "Who is this person?" Cuppy and Hepburn spoke the next day and Hepburn summarized that conversation in an email he sent to his OBAT colleagues relaying Cuppy's advice that, "Under no circumstances are we [OBAT] to divulge information to [the lawyer representing Mr. Rogan in the Dexia enforcement proceedings] except by his specific instructions".

[27] Mr. Rogan's lawyer in the Dexia enforcement proceedings is expected to testify that on September 17, 2004 Hepburn told him that Mr. Rogan was not at liberty to request any documents relating to the trust. Mr. Rogan's lawyer conveyed this to the court together with information that, "Mr. Rogan has never knowingly contacted the trustee." Neither Mr. Rogan nor Cuppy told the court that Cuppy contacted Hepburn and instructed him not to release information to Mr. Rogan's

lawyer in the Dexia enforcement proceedings. Mr. Rogan's lawyer also argued that the terms of the "Deed of Settlement" precluded the trustee from disclosing information. Neither Mr. Rogan nor Cuppy advised the court that the mechanics of the trust had been altered.

[28] On October 6, 2004 Mr. Rogan testified under oath about unproduced financial records, including records pertaining to the Bahamian trust. Notwithstanding the representation Mr. Rogan's lawyer made to the presiding magistrate a few weeks earlier that he had "never knowingly contacted the Trustee", Mr. Rogan testified that he requested the trustee to send money to accounts he designated. He testified that he never authorized Cuppy to make contact with the Bahamian trustee on his behalf. Further, he testified that when the trust was established he had to accept that he was giving up complete control over this money as if the money was never his.

[29] On September 30, 2008 a United States District Court judge found that Mr. Rogan had obstructed court-ordered discovery in the Dexia enforcement proceedings by conspiring with Cuppy to cause the Bahamian trustee to refuse to cooperate with Mr. Rogan's lawyer in the Dexia enforcement proceedings. In addition, a finding was made that Mr. Rogan caused to be produced to the court in the Dexia enforcement proceedings incomplete information respecting the mechanics of the trust with the intention of creating a misimpression as to the fundamental nature of the trust, including Mr. Rogan's ability to control its operations and access its funds. The District Court judge directed Mr. Rogan to show cause why he should not be held in criminal contempt. As noted earlier, Mr. Rogan had left the United States for Canada in 2006 and has not returned to the United States since.

(b) Overview of the Immigration and Extradition Proceedings

(i) The Legislative Framework

[30] The Canada Border Services Agency ("CBSA") is charged with enforcing the *IRPA*. Under ss. 36(1)(c) and 36(1)(d), foreign nationals are inadmissible to Canada if there is a sufficient basis to believe they have engaged in criminal conduct that, if committed in Canada, would be punishable by a term of imprisonment of at least 10 years, or would constitute an indictable offence.

[31] A criminal conviction is not a condition precedent to an inadmissibility finding under s. 36; a reasonable belief that an act has been committed outside Canada that is an offence in the place where it was committed, and would also be a defined offence if committed here, is enough: *Bankole v. Canada (Citizenship and Immigration)* (2011), FC 373 at paras. 44-45.

[32] Section 33 of the *IRPA* establishes "reasonable grounds to believe" as the standard of proof for finding a foreign national inadmissible under s. 36.

[33] Under s. 44(1) of the *IRPA*, an enforcement officer "who is of the opinion that a … foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister".

[34] Where the Minister's delegate concludes that a report prepared pursuant to s. 44(1) is well-founded with regard to a foreign national, he or she may refer the person concerned to an admissibility hearing before the Immigration Division.

[35] As noted by Campbell J. in *Bembenek v. Canada (Minister of Employment and Immigration)* (1991), 69 C.C.C. (3d) 34 (Ont. Ct. (Gen Div.)) at p. 50, "If there is apparently a good-faith basis to seek deportation, then it takes a very strong evidence to show that there is some disguised reason for the immigration officials to do what it is ordinarily their duty to do."

(ii) Evidentiary Record in Support of the Disclosure Application

[36] In *Larosa*, at para. 74, Doherty J.A. noted that while disclosure applications that are "fishing expeditions" should not be tolerated, an individual alleging an abuse of process may find it difficult to obtain evidence necessary to support the allegation as much of the relevant information will be in the possession of the state against whom the allegations of misconduct or made. As a consequence, requests for production often lack particularity.

[37] It is noteworthy that Mr. Rogan has already obtained disclosure of some documents potentially relevant to his claim. That disclosure was obtained: in the course of proceedings before the Immigration Division that have continued from May 2008 to the present; in response to applications Mr. Rogan made pursuant to the *Access to Information Act*, R.S.C., 1985, c. A-1; and as a consequence of the initiation of extradition proceedings.

[38] The evidentiary record before me also includes transcripts of cross-examinations conducted by Mr. Rogan's counsel of CBSA Enforcement Officer Chris Papp ("Papp") and CBSA Hearings Officer Gregory Zuck ("Zuck"). Papp is the enforcement officer who, in early 2007, was assigned to investigate whether Mr. Rogan was inadmissible to Canada on the basis of criminality. Zuck is the hearings officer who had initial conduct of the inadmissibility hearing before the Immigration Division.

[39] Both officers were cross-examined before the Immigration Division in March, 2012. The cross-examinations were permitted by the Immigration Division as part of a constitutional challenge Mr. Rogan has mounted in the context of the admissibility hearing. Specifically, Mr. Rogan argues that ss. 36(1)(c) and 36(2)(c) of the *IRPA* infringe s. 7 of the *Charter* because they allow for the deportation of foreign nationals to foreign states where they face criminal prosecution and a loss of liberty without affording them the substantial and procedural safeguards afforded to similarly situated persons proceeded with under the *Extradition Act.* The cross-examinations address issues relevant to Mr. Rogan's claim that removal proceedings under the

IRPA were a sham, not genuinely motivated by a determination that Mr. Rogan's presence in Canada was not conducive to the public good, but by a desire to surrender him to the United States for prosecutorial purposes.

[40] In addition, an order was made in July 2012 that all documents pre-dating Mr. Rogan's arrest by CBSA officers on May 26, 2008, relied on by Papp and Zuck to refresh their memories prior to testifying, be provided to the Immigration Division member assigned to the admissibility hearing. The Immigration Division member subsequently amended the order to include all documents used by Papp and Zuck to refresh their memories prior to testifying up to and including June 30, 2008. After the *ex parte* procedure described in *Canada v. Khalon*, 2005 FC 1000, Mr. Rogan was given this additional disclosure.

(iii) Chronology of Events

[41] I will not review all of the background events that might be relevant to the abuse of process claim. Instead, and for the purposes of these reasons, I will focus on the events I consider to be most relevant to the application of the *Larosa* test.

[42] On January 12, 2007, U.S. consular officials based in Vancouver contacted the CBSA regarding Mr. Rogan's presence in Canada. From handwritten notations on the file, it is clear that the CBSA understood the United States was seeking information about Mr. Rogan in aid of recovery proceedings in connection with its $64 million civil judgment. Despite knowing that the interest of the United States related solely to the collection of a civil debt, a CBSA investigation was commenced and the matter assigned to Papp.

[43] Papp testified before the Immigration Division that he was informed Mr. Rogan was a person of interest to the United States who might be criminally inadmissible to Canada.

[44] A few weeks later, Papp spoke with FBI Agent Kray Te ("Te"). Papp testified that he would have asked Te for a "Cole's Notes" overview of the case and whether

Te had any documents he could send to Papp that would aid him in an inadmissibility investigation.

[45] On January 29, 2007 Papp obtained from Te the civil judgment in which Mr. Rogan was found liable in damages to the United States. He concluded that, despite the factual findings adverse to Mr. Rogan reflected in the judgment (see above, para. 14) the civil judgment was not helpful as nothing in it made Mr. Rogan inadmissible to Canada.

[46] Papp testified that he subsequently asked Te whether the U.S. was interested in, or pursuing obstruction of justice or perjury charges. Te confirmed this was something they were exploring by way of further investigation.

[47] Between January 2007 and May 2008, Papp stayed in contact with Te and received updates about the FBI investigation. Throughout this period, Papp understood that the U.S. investigation related to the factual findings made by the trial judge in the civil judgment. Papp remained of the view that he had no evidence Mr. Rogan was criminally inadmissible to Canada. He concluded that a removal order could only be obtained if the United States decided to lay criminal charges against Mr. Rogan.

[48] On February 1, 2007 Papp emailed Te asking, "What's the timeframe that we're looking at with regards to you guys getting him [Rogan] with contempt and the subsequent warrant? Once you have that, it be [sic] a lot easier on our end."

[49] Also on February 1, 2007 a CBSA officer, likely Papp, made an entry on the Field Operations Support System ("FOSS"), the main immigration database, alerting other officers that, "Mr. Rogan is under investigation in Canada and in the United States for defrauding the U.S. Medicare system of million dollars; he is attempting to set up residence in Canada; and he has historically avoided his legal obligations in the United States." CBSA officers were asked not to divulge any of this information to Mr. Rogan.

[50] Between January 2007 and April 2008, as Mr. Rogan travelled to and from Canada, CBSA officers made numerous FOSS entries reflecting concerns that he: might be criminally inadmissible to Canada; was avoiding travel to the U.S.; and might be using Canada as a safe haven.

[51] On March 21, 2007 Te asked Papp whether he had any news about Mr. Rogan. Papp responded that, "We are still deciding what, if any, allegations we have to have him removed from Canada to the States." I note that Papp provided this response despite having concluded he had no evidence to ground an inadmissibility report under s. 44 of the *IRPA*.

[52] On March 27, 2007 Te asked Papp to find out whether Mr. Rogan and his wife were going to renew their lease in Vancouver and "whatever else you can find".

[53] On April 4, 2007 Papp reported to Te that he was having trouble getting in touch with the property owner regarding Mr. Rogan's lease. He said he had been "past the residence twice the last couple of evenings and observed no apparent movement." Te advised Papp that they were still working on getting their arrest warrant and were proceeding on a couple of additional matters that would hopefully "add fuel to the fire".

[54] On August 29, 2007 an unidentified CBSA officer made a FOSS entry stating, "Subject is avoiding USA. Does not have the right to remain in Canada in order to avoid consequences resulting from civil action against him."

[55] On August 30, 2007 an unidentified CBSA officer made a FOSS entry questioning whether Mr. Rogan was criminally inadmissible under s. 36(1)(c) of the *IRPA*, or a non-genuine visitor attempting to hide in Canada and avoid the police and Department of Justice in the United States.

[56] On September 5, 2007 Papp made a FOSS entry alerting other immigration officers that:

> FBI and US DOJ are seeking warrant for failure to appear but both need to establish a track record of non-appearance which is taking some time. If able,

> do not divulge to client that he or his spouse are being investigated as they will flee Canada and the U.S. and we will not be able to apprehend and return to the U.S.

[57] On February 7, 2008 an unidentified CBSA officer made a FOSS entry stating:

> It should be observed that Mr. Rogan, now, only enters Canada from other than U.S.A. - Why? - Subject fears that he will be arrested in a neighbouring state and sent to Illinois or Michigan for interview and investigation by F.B.I. for fraud. C.I.C. is basically a safe haven for Mr. Rogan to avoid justice system in U.S.A. If Immigration does not deny or refuse admission to Mr. Rogan he will never be interviewed by F.B.I., never charged with fraud or theft. If subject gets Immigration Status he will have successfully avoided and fled the U.S.A. justice system.

[58] On April 16, 2008 the same U.S. consular official who had alerted the CBSA to Mr. Rogan's presence in Vancouver in January 2007 wrote to then Chief Superintendent Harriman of the RCMP, providing background about the U.S. government's successful civil suit against Mr. Rogan, and advised that the U.S. was seeking Mr. Rogan in connection with "these civil judgment liabilities". There is no reference in this letter to an ongoing criminal investigation in the United States.

[59] The letter of April 16, 2008 also states there is no known information as to why Mr. Rogan would choose to reside in Vancouver, except to evade paying the U.S. government its civil judgment. The letter asserts that Mr. Rogan is a U.S. citizen "who is more then [sic] likely in violation of Canada's immigration laws and should be deportable to the United States." The letter concludes with this request:

> RCMP is requested to conduct logical [sic] investigation to locate Peter G. Rogan in the Vancouver area. Determine if he is in violation of Canadian Immigration laws and can be deported to the U.S. or if extradition proceedings will be required to return him to the U.S.

[60] The RCMP referred this letter back to the CBSA and it was brought to Papp's attention. Papp, who had already determined that neither the U.S. civil judgment nor the findings of fact contained within it made Mr. Rogan criminally inadmissible under the *IRPA*, testified before the Immigration Division that, "I'd never seen anything like this before."

[61] Papp also testified that the letter "had really no bearing on my investigation for [Rogan's] inadmissibility to Canada".

[62] On April 28, 2008 an unidentified CBSA officer made a FOSS entry stating that the subject is not a genuine visitor and is evading U.S.A. law enforcement efforts. The note concludes with this remark, "USA authorities will not apprehend the subject if Canada keeps admitting him."

[63] After Papp received a copy of the April 2008 letter from the U.S. consular official addressed to the RCMP, Te advised Papp he wanted the U.S. Department of Justice to become involved in discussions about Mr. Rogan's situation. Papp was not comfortable participating in such a call on his own, so he involved Hearings Officer Zuck.

[64] Papp, Zuck, Te and Assistant U.S. Attorney Daniel Gillogly had a conference call on May 8, 2008. The U.S. authorities asked if Mr. Rogan would be allowed to stay in Canada. Zuck informed the U.S. authorities about the inadmissibility provisions of the *IRPA* and the types of evidence that would be required to lay the foundation for an inadmissibility report under s. 44. In particular, Zuck mentioned a certificate of conviction, police reports, indictments and warrants, and confirmation that the foreign act, if committed in Canada, would constitute an indictable offence here. Zuck testified before the Immigration Division that when the U.S. authorities asked about extradition, he referred them to the Canadian Department of Justice and said he was focussed on the inadmissibility provisions of the *IRPA*. In response to questions posed by the U.S. authorities during the call, Zuck confirmed that perjury and obstruction of justice charges could trigger the inadmissibility provisions of the *IRPA*. According to a note prepared by Zuck following this conference call, the U.S. authorities "stated they would discuss this and get back to us".

[65] Zuck testified before the Immigration Division that he had no further contact with U.S. authorities until May 23, 2008, and had no specific information about whether the U.S. would be proceeding with criminal charges.

[66] Despite this, on May 9, 2008 Zuck sent an email to the Citizenship and Immigration office that had been processing Mr. Rogan's permanent residency application advising them that:

> Enforcement in Vancouver is currently investigating Mr. Rogan for an admissibility hearing. The allegation is A36(1)(c) … I expect that an A44 report will be written for Mr. Rogan within the next three or four weeks.

[67] On Friday, May 23, 2008 the U.S. Attorney's office filed a criminal complaint alleging that Mr. Rogan had perjured himself and obstructed justice by swearing and filing, in the post-judgment enforcement proceedings, the affidavit of December 21, 2006 denying that he ever had control over the assets or income of the Bahamian trust.

[68] Also on May 23, 2008, Papp received from Te the criminal complaint filed in the U.S. District Court, an affidavit sworn by Te for the purpose of establishing probable cause to charge Mr. Rogan with perjury and obstruction of justice, and the arrest warrant for Mr. Rogan issued that day in connection with these charges.

[69] Te's affidavit reflects that it was not until late 2007 and early 2008 that OBAT produced financial records relating to the Bahamian trust to the United States. The United States relies on these records to establish that, contrary to Mr. Rogan's affidavit sworn December 21, 2006, between 1996 and 2004 Mr. Rogan directly or indirectly instructed the trustee to make distributions totalling approximately $8 million from the trust to himself, or to persons or entities he specified.

[70] Papp confirmed in his evidence before the Immigration Division that based on his conversations with Te prior to May 23, 2008 he understood the criminal investigation of Mr. Rogan in the United States related to and arose out of the factual findings made by the trial judge who presided over the civil proceedings.

[71] When Papp received the material from Te on May 23, 2008, he realized the criminal complaint had nothing to do with the factual findings made by the trial judge in the civil proceedings, but was based on the affidavit sworn by Mr. Rogan in 2006. Papp did not recall previously discussing this affidavit with Te.

[72] Papp testified before the Immigration Division that, after consulting with Zuck and conducting the required double-criminality equivalency analysis, he formed reasonable grounds to believe that the conduct described in the materials Te provided amounted to the Canadian offences of perjury (s. 131(1) of the *Criminal Code*) and attempting to obstruct justice (s. 139(2) of the *Criminal Code*), and that Mr. Rogan was inadmissible to Canada. He acknowledged that in performing this analysis he relied on the criminal complaint and the supporting court documents. He testified that he never evaluated the substance of Te's affidavit to assess whether the conduct underlying the criminal complaint filed in the United States would also constitute an offence if committed in Canada. He acknowledged in cross-examination before the Immigration Division that in order to perform the equivalency analysis, it is necessary to look not only at Canadian *Criminal Code* offences that potentially correspond to the foreign charges, but also to evaluate whether the conduct underlying the foreign criminal complaint would be an offence in Canada.

[73] Papp testified that he was aware when he received this material that Mr. Rogan was scheduled to return to Canada on Monday, May 26, 2008. Papp acknowledged in his evidence before the Immigration Division that even though he had no prior knowledge of the allegations underlying the criminal complaint filed in the United States, he issued s. 44 reports within a few hours. He testified that he was not moving more quickly in this case than any other.

[74] Papp then prepared two reports pursuant to s. 44(1) of the *IRPA*. The first asserts Papp's reasonable grounds to believe that, pursuant to s. 36(1)(c) of the *IRPA*, Mr. Rogan is inadmissible to Canada on grounds of serious criminality for committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years. This report notes that a criminal complaint had been filed in the United States whereby Mr. Rogan had been charged with willfully subscribing as true a material matter that he did not believe to be true contrary to U.S. law and that this conduct, if committed in Canada, would equate to the offence of perjury.

[75] The second s. 44 (1) report asserts Papp's reasonable grounds to believe that, pursuant to s. 36(2)(c) of the *IRPA*, Mr. Rogan is inadmissible to Canada on grounds of criminality for committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence. This reports states that a criminal complaint had been filed in the United States whereby Mr. Rogan had been charged with knowingly and corruptly endeavoring to influence, obstruct and impede the due administration of justice contrary to U.S. law and that this conduct, if committed in Canada, would equate to the offence of obstructing justice.

[76] In a Highlights report prepared by Papp in conjunction with the two s. 44 reports, he provided the following additional remarks in support of his determination that he had reasonable grounds to believe that Mr. Rogan was inadmissible to Canada:

> From 2005 - 2006 Rogan was under investigation for schemes to defraud Federal Health care programs primarily through unlawful referrals and kickbacks in violation of the anti-kickback and Stark statutes. In a civil suit the court ordered the ex CEO of Edgewater hospital (Rogan) to pay back $64.2 million to settle all illegal claims and kickback charges. Rogan was accused and now has been convicted in civil Court of conspiracy with physicians to falsify Medicaid billings. The judge stated in the civil ruling … that the owner acted with deliberate indifference and reckless disregard of the truth or falsity of the claims."
>
> Monies have not yet been recovered and in working with the US authorities CBSA has received documentary evidence that the US District Court, District of Illinois Eastern Division, on 23 May 2008 have indicted him on criminal charges including perjury, and obstruction of justice contrary to Title 18 Sections 1621 and 1503 of the United States Code. Further to that the United States District Court, District of Illinois Eastern Division, on 23 May 2008 have issued a warrant for his arrest relating to the above charge.
>
> Mr. Rogan currently has an application for permanent residency pending. On 10 May 2008, the CBSA confirmed that the client does have a residential address … in Vancouver, B.C. During the course of my investigation I learned that the client and his wife … departed Canada to Beijing, China and are scheduled to return to Canada from Shanghai, China on 26 May 2008 at 11:45 on flight AC038.
>
> Recommend that due to the fact the client is wanted in the United States, and the criminal complaint has been filed, he has previously failed to comply with the court order with regards to the payment of the $64 million civil settlement, and client has significant funds at his disposal should he attempt to flee. For these reasons, it is recommended that a warrant be issued for his arrest.

> The next conduct the CBSA will have with the client will be at a port of entry, therefore due to his criminal inadmissibility he will either be allowed to withdraw his application to come to Canada, or proceed to an admissibility hearing for a deportation order will be issued.

[77] It is noteworthy that the Highlights report refers the civil suit and the adverse findings of fact and credibility made against Mr. Rogan in that proceeding. It does not reference the substance of the conduct said to make Mr. Rogan inadmissible to Canada; specifically, the provision of false evidence to a U.S. court respecting Mr. Rogan's ability to direct the payment of income and capital from the Bahamian trust.

[78] Papp was supplied by U.S. authorities with a letter revoking Mr. Rogan's U.S. passport, apparently for the purpose of co-ordinating its service upon him by U.S. authorities on his return to Canada.

[79] On Monday, May 26, 2008, Mr. Rogan was arrested at the Vancouver International Airport on his return from China. A CBSA officer, acting pursuant to the passport revocation letter dated May 23, 2008 and issued by the U.S. Consulate, seized Mr. Rogan's passport.

[80] Based on the material before me, including Regulations passed pursuant to the *IRPA*, it seems likely that if Mr. Rogan was removed from Canada as a consequence of an inadmissibility finding, the country of removal would be the United States. Having said this, the seizure by CBSA officials of Mr. Rogan's passport had the effect of ensuring that if he was made the subject of an exclusion order under the *IRPA*, he could not be removed to any country other than the United States. In any event, Mr. Rogan was referred to an admissibility hearing before the Immigration Division to determine if he was inadmissible to Canada under ss. 36(1)(c) or 36(2)(c) of the *IRPA*.

[81] On May 27, 2008 (and again on May 29, 2008) Mr. Rogan's counsel wrote to a lawyer in Canadian Department of Justice alleging that Canadian officials had co-ordinated Mr. Rogan's removal from Canada with their U.S. counterparts, that the *IRPA* provisions were being used for an improper purpose (to effect a disguised

extradition), and requesting that U.S. authorities be informed that they cannot obtain Mr. Rogan's removal from Canada under the *IRPA* but must, instead, comply with the *Extradition Act*.

[82] On May 28, 2008 Mr. Rogan appeared before the Immigration Division and sought his release from custody. Judgment on the application for judicial interim release was reserved.

[83] On May 29, 2008 Zuck advised the Manager of Hearings and Appeals for the CBSA that if Mr. Rogan was released on bail, Zuck's supervisor wanted a lawyer with the International Assistance Group of the Canadian Department of Justice to be notified.

[84] On May 30, 2008 counsel for the CBSA wrote to Mr. Rogan's counsel advising that the s. 44 reports were prepared in pursuit of a valid Canadian immigration objective, not to effect Mr. Rogan's extradition to the United States for prosecution.

[85] Unbeknownst to Mr. Rogan or his counsel at the time, in late May 2008 the United States made a provisional request for Mr. Rogan's arrest under s. 11 of the *Extradition Act*. On May 28, 2008 a delegate of the Minister of Justice issued an authorization to permit the Attorney General of Canada to apply for a provisional arrest warrant in relation to Mr. Rogan.

[86] On June 2, 2008 numerous emails passed between Zuck, senior officials with the CBSA, and counsel for the Citizenship, Immigration and Public Safety Law Section of the Canadian Department of Justice. The contents of these emails have been redacted for reasons of privilege in versions disclosed to Mr. Rogan.

[87] Also on June 2, 2008, and in response to a voice message, Zuck provided the RCMP with a status update on the case, including that Mr. Rogan remained in custody awaiting the release of judgment on his immigration bail application.

[88] On June 3, 2008 Zuck called U.S. Assistant Attorney Gillogly to inform him that no decision had been made on the bail hearing. Zuck confirmed the conversation in a report to file. The note reports that Mr. Gillogly expressed the view that the "U.S. should not have to chase Mr. Rogan to another country".

[89] On June 3, 2008 Mr. Rogan was released on terms and conditions by the Immigration Division. That same day, U.S. Assistant Attorney Gillogly contacted Zuck asking if the CBSA had any recourse. Zuck advised that the CBSA needed time to assess its options.

[90] On June 4, 2008 Dohm A.C.J. issued a Warrant for Provisional Arrest under the *Extradition Act*. The next day, the United States withdrew its provisional request. As a result, on June 24, 2008 the Canadian Department of Justice sent a request to the registry of this Court to vacate the provisional arrest warrant.

[91] On or about June 12, 2008, Mr. Rogan's counsel sought disclosure under the *Access to Information Act* of all documents held by CBSA in Ottawa and Vancouver in relation to Mr. Rogan's case.

[92] On July 10, 2008, following a suggestion by Zuck that the factual findings made in the civil proceedings might support reasonable grounds to believe that Mr. Rogan was inadmissible to Canada, CBSA Officer Fast issued two further s. 44 reports. Both reports assert reasonable grounds to believe Mr. Rogan is inadmissible pursuant to s. 36(1)(c) of the *IRPA*. Both reports are premised on the adverse factual findings made against Mr. Rogan by the trial judge in the civil proceedings between the United States and Mr. Rogan. In other words, these two additional s. 44 reports were based on the same uncharged conduct that prompted Papp to conclude, 18 months earlier, that nothing in the civil judgment made Mr. Rogan criminally inadmissible to Canada.

[93] Zuck testified that after Mr. Rogan's referral to an admissibility hearing on the first two s. 44 reports, he had more time to go over the $64 million civil judgment in favour of the United States. In light of the trial judge's findings that Mr. Rogan gave

false and misleading testimony and obstructed justice by shredding documents during the FBI investigation, Zuck recommended that an enforcement officer (Fast) consider whether those factual findings would ground two further s. 44 reports.

[94] In his evidence before the Immigration Division, Zuck testified that proceeding on the two subsequent s. 44 reports would be "quicker and easier" having regard to the fact that grounds for an inadmissibility finding would rest not on mere allegations, but on judicial findings of fact made against Mr. Rogan in the civil proceedings.

[95] On February 23, 2009, Mr. Rogan applied to the Immigration Division for a disclosure order in support of his allegations that the s. 44 reports had been prepared as part of a disguised extradition.

[96] On January 7, 2010 the Immigration Division dismissed Mr. Rogan's disclosure application on grounds that it lacked jurisdiction to consider the proposed abuse of process argument.

[97] On January 25, 2010 Mr. Rogan filed a leave application in Federal Court seeking judicial review of the Immigration Division's dismissal of his disclosure application.

[98] On March 5, 2010 Mr. Rogan filed in the Federal Court four applications for leave and for judicial review of the May 2008 and July 2008 referrals. At the heart of these applications is the same issue Mr. Rogan seeks to put before this Court - whether Canadian immigration officials, in seeking Mr. Rogan's deportation, acted in bad faith without a legitimate Canadian immigration objective.

[99] On May 14, 2010 the Federal Court dismissed Mr. Rogan's application for leave and for judicial review of the Immigration Division's interlocutory order dismissing his application for disclosure.

[100] On May 28, 2010 Mr. Rogan filed his Notice of Constitutional Question on the admissibility hearing before the Immigration Division.

[101] On June 8, 2010 Mr. Rogan successfully applied to summons witnesses in connection with the constitutional challenge, including CBSA Officers Papp, Fast and Zuck. The Minister applied to cancel the summons. On June 14, 2010 the Immigration Division dismissed the Minister's application.

[102] On June 23, 2010 the Minister commenced applications for leave and for judicial review of the Immigration Division's orders of June 8 and June 14, 2010.

[103] On June 25, 2010 Mr. Rogan discontinued his Federal Court applications to judicially review the s. 44 reports on grounds that the referrals amounted to a "disguised extradition".

[104] On September 20, 2010 the Federal Court dismissed the Minister's applications for judicial review of the Immigration Division's refusal to set aside summons issued to CBSA Officers Papp, Fast and Zuck.

[105] On October 24, 2011 the Immigration Division wrote to counsel inquiring about the status of the matter, noting that more than a year had passed without a word from either party.

[106] On November 6, 2011 the CBSA filed a fifth s. 44 report. This report was said to be based on an article in the media that Mr. Rogan had been indicted by a U.S. grand jury for fraud and obstruction of justice. After filing this fifth report, the CBSA argued that the orders compelling Papp, Fast and Zuck to testify applied only to the four previous reports, and not to the report filed on November 6, 2011. The CBSA argued that they could suspend the hearing on the original reports and proceed with the admissibility hearing only on the fifth report. As the new report was based on open source (media) information discovered without the assistance of the United States, the CBSA argued that proceedings on the fifth report could proceed in the absence of any further disclosure or discovery of the CBSA officers involved. The presiding Immigration Division member rejected the CBSA's argument.

[107] On March 12, 13, 14 and 15, 2012 CBSA Officers Papp and Zuck were examined before the Immigration Division as part of Mr. Rogan's constitutional

challenge to the *IRPA* provisions. Mr. Rogan applied for additional disclosure of the CBSA file.

[108] On July 23, 2012 Assistant U.S. Attorney Gillogly certified a Record of the Case in support of a request for Mr. Rogan's extradition. A delegate of the Minister of Justice issued an Authority to Proceed on November 9, 2012 for the Canadian *Criminal Code* offences of perjury, contrary to s.131, and obstruction of justice, contrary to s.139(2) - the same allegations underlying the immigration proceedings. No immediate steps were taken on behalf of the requesting state to arrest Mr. Rogan under the *Extradition Act*.

[109] On July 24, 2012 the Immigration Division ordered the CBSA to produce its file so that, pursuant to the *ex parte* procedure described in *Khalon*, the Immigration Division member could determine whether the contents of the file were potentially relevant to Mr. Rogan's constitutional challenge.

[110] The *Khalon* procedure was completed on July 24, 2013 and additional disclosure was made to Mr. Rogan on August 1, 2013.

[111] The parties are still at loggerheads on the issue of whether the Immigration Division member has, in fact, been provided with the entirety of CBSA's file in connection with this matter.

[112] Counsel acting on behalf of the requesting state sought and obtained a Warrant of Arrest under the *Extradition Act* on March 8, 2013. The warrant was not executed until April 11, 2013.

[113] On April 18, 2013, following a contested bail hearing, Mr. Rogan was released by Davies J. on his own recognizance, with no sureties or deposit, and on conditions that mirror those governing the immigration bail. During the bail hearing, Davies J. said:

> But it is rare counsel, I have to say, it is rare when civil proceedings in relation to debt find their way into extradition after a discussion about what might be extraditable. Rare. Because civil proceedings, as we all know, are usually dealt with by the parties….

> I can say frankly … that there is rarely a case when assets are being dealt with but there's not nondisclosure or intentionally perjurious statements about one's assets. One compares what the litigant says to the bank manager when he wants to get the loan as opposed to what he tells the court his real financial position is, both statements under oath. That's the usual course in civil litigation. It's rare, I've never heard of a case in Canada where obstruction of justice was alleged in civil proceedings … Perjury maybe but rare. At best rare.
>
> So that's why this case is bothersome. I don't have to decide this but I'm perfectly frank, it is bothersome that civil proceedings have ended up in criminal allegations with apparent assistance of Canadian authorities. It's troubling…
>
> And if it was not the U.S. Government that was the … creditor, I suspect we wouldn't be here and that's because I've never seen it. If it was just Dexia without the assistance or the involvement of the U.S. Government, this proceeding would not be happening because the U.S. Government would have left the litigants to get on with it in the usual course. They wouldn't be jailing people or seeking to jail people. It's the debt owed that is the motivating factor. Maybe … that's not fair. It's the - certainly the original motivating factor. I don't know what the factor - I don't know what the motivation is now.

C. Analysis

(a) The Test Applicable to Stay Applications in Relation to Disguised Extradition Claims

[114] Deportation and extradition have fundamentally different underlying objectives. Deportation is a discretionary decision made by Canadian immigration authorities aimed at protecting the public good. Extradition, which is initiated by foreign authorities, is aimed at delivering a person sought for prosecution to that foreign authority: *Canada (Attorney General) v. Kissel*, [2006] O.J. No. 5020 (S.C.), at para. 137.

[115] A person subject to extradition proceedings has a panoply of constitutionally-enshrined protections not available to a person subject to an *IRPA* admissibility hearing. For example, a person ordered extradited is immune from prosecution in the requesting state for offences that have not been identified in the surrender order. By contrast, there are no restrictions on what a deported person can be prosecuted for once removed from Canada.

[116] The essence of a "disguised extradition" claim is that removal proceedings were not instituted to pursue a valid immigration objective, but to procure, on behalf of a foreign state, a person's return for prosecution: *Bembenek*, at p. 40; *R. v. Brixton Prison (Governor)*, [1962] 3 All E.R. 641 per Lord Denning at p. 661.

[117] A heavy onus rests on the party advancing a disguised extradition claim to establish, on clear and convincing evidence, that deportation proceedings were a mere artifice, sham, façade or device to achieve the ulterior objective of extradition.

[118] In the face of such a claim, it is open to the Court to inquire whether the conduct of government reflects good faith pursuit of a legitimate Canadian immigration objective, or bad faith utilization of the power to deport for the collateral purpose of surrendering a person to a foreign state for prosecution. To succeed with a claim of disguised extradition, a person must first demonstrate that the Minister did not genuinely consider it to be in the public interest to expel the person in question in pursuit of a legitimate Canadian immigration objective: *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839 at p. 844; *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (F.C.T.D.) at p. 12.

[119] Where, as in this case, a stay of proceedings is sought, the remedy will only be granted in the clearest of cases where the conduct at issue so shocks the conscience of the community that preservation of the integrity of the justice system requires termination of the proceedings by judicial order: *R. v. Power*, [1994] 1 S.C.R. 601 at paras. 6-12.

[120] Given the high bar erected by the governing tests, it has been said that "disguised extradition" claims will succeed only in extremely rare cases: *Halm v. Canada*, per Rothstein J., quoting with approval Anne Warner La Forest ed., *La Forest's Extradition to and from Canada*, 3rd ed. (Aurora: Canada Law Book, 1991) at 45.

(b) The Test Applicable to Disclosure Applications in the Extradition Context

[121] An extradition hearing is not a trial. The person sought is not entitled to the same level of disclosure as if he or she were on trial in Canada for a domestic criminal offence. As a general rule, the person sought is only entitled to those materials upon which the requesting state relies to establish a *prima facie* case for committal: *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at paras. 128-130, 134.

[122] As explained in *United States of America v. Kwok*, [2001] 1 S.C.R. 532, however, the person sought may in addition be entitled to "those materials relevant to a *Charter* issue that is properly justiciable before the extradition judge and to which there is an 'air of reality'". If there is no air of reality to the proposed *Charter* claim, there is no obligation to provide additional disclosure: *Kwok*, at para. 106.

[123] As noted earlier, the parties agree that the test governing resolution of this disclosure application is set out in *Larosa* at para. 76:

> [B]efore ordering the production of documents and compelling testimony in support of allegations of state misconduct, this court should be satisfied that the following three criteria have been met by the applicant:
>
> - the allegations must be capable of supporting the remedy sought;
> - there must be an air of reality to the allegations; and
> - it must be likely that the documents sought and the testimony sought would be relevant to the allegations.

[124] The *Larosa* test was adopted in *United States v. Costanza*, 2009 BCCA 120.

[125] It has been said that the "air of reality" test is relatively low: *U.S.A. v. Welch and Romero*, 2007 BCSC 1567. An "air of reality" in this context "means some realistic possibility that the allegations can be substantiated if the orders requested are made": *Larosa*, at para. 78.

[126] The test in *Larosa*, and the purpose it serves, was addressed by Molloy J. in *United States of America v. Tollman*, [2006] O.J. No. 5588 at para. 21:

> The function of the "air of reality" test is two-fold. First, it provides a mechanism to weed out frivolous applications before incurring the expense and delay of a lengthy evidentiary hearing. Second, it imposes a threshold of plausibility before the applicant will be entitled to relief such as production of documents, particulars, or the compelling of *viva voce* testimony [citations omitted]. The level of plausibility required to survive the air of reality test is somewhat amorphous. Typically, when cases are dismissed as having no air of reality, the allegations can fairly be characterized as ludicrous or preposterous. However, in my opinion, the actual test is, and must be, higher than that. Obviously, at this point, the applicant cannot be expected to reach the standard of proof on a balance of probabilities, as that is the ultimate standard to be applied at the abuse of process hearing itself. However, it is not enough for the applicant to demonstrate that his allegations are not ridiculous; he must be able to show some reasonable prospect of success on the application.

[127] Clearly, the "air of reality" criterion will not be satisfied by "wishful thinking" or the mere assertion that the disclosure sought will assist in determining the issue the applicant seeks to raise: *Larosa* at para. 74. Further, the "air of reality" test will not be satisfied on the basis of vague and unsubstantiated suggestions, or conjecture and speculation: *United States v. Bennett*, 2011 BCSC 1746 at para. 100, aff'd 2014 BCCA 145; *Wacjman v. Canada (Minister of Justice)*, [2002] Q.J. No. 5094 (Que. C.A.) at para. 86. As explained in *Larosa*, "fishing expeditions are not tolerated in any judicial proceeding, particularly one [an extradition proceeding] which is intended to provide a simple and expeditious means of responding to Canada's international obligations".

[128] Turning, then, to the application of the *Larosa* criteria, it is now well established that an extradition judge has the jurisdiction to stay an extradition proceeding on abuse of process grounds, including when a "disguised extradition" has been established. Further, and subject to concerns I have about overbreadth in framing the relief sought, I am satisfied the information sought would likely be relevant to the "disguised extradition" claim.

[129] Accordingly, it is my view that this application turns on whether Mr. Rogan has, on the record before me, demonstrated an "air of reality" to the allegation that the immigration proceedings were animated by a desire to return Mr. Rogan to the United States for prosecutorial purposes.

(c) Application of the "Air of Reality" Component of the *Larosa* Test to the Case at Bar

[130] I do not propose embarking on a detailed analysis of the circumstances supporting the disclosure order Mr. Rogan seeks. Doing so simply invites the premature adjudication of factual issues on what might turn out to be an incomplete record.

[131] Suffice it to say that Canadian officials cannot use their powers under the *IRPA* to remove a foreign national to his or her country of origin for the purposes of enabling that country to prosecute the person so removed. The record before me on this disclosure application raises questions that are neither frivolous nor speculative about the motivation of Canadian authorities in seeking Mr. Rogan's removal from Canada. Among the factors I have taken into account in coming to this conclusion are:

- several FOSS entries reflect CBSA's pre-occupation with the concern that Mr. Rogan would not be returned to the United States *for prosecution purposes* if immigration authorities continued to admit and allow him to remain in Canada;

- Papp's email of May 9, 2008 reflects his expectation that a s. 44 report would be written in three or four weeks, despite the fact that, by his own admission, he had no specific information until May 23, 2008 that criminal charges would be laid against Mr. Rogan in the United States;

- Papp's rationale for proceeding with the s. 44 reports on May 23, 2008 as reflected in his Highlights report and, specifically, the extent to which the s. 44 reports appear to be based not on the conduct underlying the criminal charges filed in United States, but on the civil suit, the amount of money Mr. Rogan owed the U.S. government, and the adverse findings of fact and credibility made against Mr. Rogan in the civil proceeding - considerations Papp previously concluded would not make Mr. Rogan inadmissible under s. 36 of the *IRPA*; and

- Zuck's suggestion, adopted by Fast, that two additional s. 44 reports subsequently be prepared based on the factual findings made in the civil proceeding - circumstances which Papp considered but ultimately rejected as the foundation for reasonable grounds to believe that Mr. Rogan was inadmissible to Canada under s. 36 of the *IRPA*.

[132] On the totality of the circumstances detailed in these reasons, I am satisfied that Mr. Rogan has demonstrated a realistic possibility that the disguised extradition claim can be substantiated.

[133] I recognize the heavy onus that rests upon Mr. Rogan to make the case for a stay of proceedings on grounds that the immigration proceeding is, in reality, a disguised extradition motivated by a desire on the part of Canadian officials to facilitate his return to the United States for prosecutorial purposes. The onus Mr. Rogan faces is not made easier by the fact that he now has, under this extradition proceeding, the very protections he sought following the institution of immigration proceedings.

[134] While the challenge Mr. Rogan faces in establishing that this extradition proceeding is tainted by an abuse of process that occurred in the context of the immigration proceedings may properly be characterized as formidable, I am satisfied that the circumstances of this case justify the making of a disclosure order. In short, I am satisfied that the "air of reality" test is met and that Mr. Rogan ought to be given the opportunity to fully litigate his abuse of process/stay of proceedings application on the basis of documents and evidence likely to be relevant to the claim.

[135] I emphasize that Mr. Rogan's various contentions are allegations only. Resolution of the stay application must take account of all the circumstances, not just those that have motivated this disclosure order. Nothing in these reasons should be construed as pre-judging the merits of the disguised extradition claim. Nothing said in these reasons constitutes final or conclusive findings of fact or credibility that may ultimately be made on the abuse of process application. Finally, nothing said in these reasons should be read as impugning the credibility, integrity or professionalism of the CBSA officers involved in this matter.

D. Disposition

[136] As Mr. Rogan has met the *Larosa* test, a disclosure order will issue. What remains to be resolved is the scope of the order, the timeframe for compliance with it and the process through which privilege claims can be resolved.

[137] I invite the further submissions of counsel on these issues at a date and time to be fixed. If counsel wish to file written submissions concerning the ambit of the disclosure order, those submissions shall not exceed 10 pages.

[138] The terms of the disclosure order must take account of the following considerations:

- the disclosure Mr. Rogan has received to date;
- extradition proceedings are designed to enable a summary and expeditious determination about whether there is sufficient evidence to commit the person sought for surrender, and the terms of this order must establish a process and timeline that respects this fundamental goal;
- the focus of the abuse of process allegation is, and must remain, on the motivation of Canadian officials; in other words, the purpose for which they acted in initiating and maintaining immigration proceedings;
- although misconduct by foreign officials can properly form the basis of an abuse of process claim in an extradition context as, for example, when the misconduct reaches into and infects or otherwise prejudices the fairness of an ongoing Canadian proceeding (*United States of America v. Cobb*, [2001] 2 S.C.R. 587) an extradition judge has no business inquiring into or questioning the motivation behind an extradition partner's decision to lay criminal charges and pursue extradition: *Argentina (Republic) v. Mellino*, [1987] 1 S.C.R. 536 at pp. 348, 350-351;
- there is nothing improper in American authorities making a tactical choice between deportation and extradition, so long as Canadian immigration authorities are motivated to pursue deportation for a valid immigration objective, and not some ulterior objective including ensuring that a foreign national is returned to his or her country of origin for prosecution: *Republic of Korea v. Cho*, unreported (August 28, 2008) Vancouver Registry Docket 24454 (S.C.) per Silverman J. at paras. 22-23; *Bembenek*, at pp. 61 and 63; *Canada (Attorney General) v. Kissel*, [2006] O.J. No. 5020 (S.C.) at para. 151;

- this Court has already determined it has no jurisdiction to make an order compelling the disclosure of information in the possession of the requesting state: *United States v. Akrami et al*, 2000 BCSC 1438; *Welch*, at paras. 50-51; *United States v. Ibrahim*, 2011 BCSC 357 at paras. 9-21.

[139] Counsel should be guided by these considerations in proposing to the Court language to be incorporated into a disclosure order giving effect to these reasons.

"FITCH J."