IN THE SUPREME COURT OF NEW ZEALAND SC 30/2013

[2013] NZSC Trans 14

KIM DOTCOM
FINN BATATO
MATHIAS ORTMANN
BRAM VAN DER KOLK
Appellants

v

THE UNITED STATES OF AMERICA
Respondent

Hearing:	30 July 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Blanchard J
Appearances:	P J Davison QC and W Akel with R C Woods for the Appellant Dotcom G J S R Foley and L F Stringer for the Appellants Batato, Ortmann and van der Kolk M R Heron QC and F Sinclair for the Respondent

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CIVIL APPEAL

MR DAVISON QC:
May it please your Honour, I appear with my learned friends Mr William Akel and Mrs Rachael Woods for Mr Kim Dotcom, the appellant.

ELIAS CJ:

Thank you, Mr Davison, Mr Akel, Ms Woods.

MR FOLEY:

May it please your Honours, counsel's name is Foley. I appear with Ms Stringer for the appellants Ortmann, van der Kolk and Batato.

ELIAS CJ:

Thank you, Mr Foley and Ms Stringer.

SOLICITOR-GENERAL:

May it please your Honours, Heron and Sinclair for the respondents.

ELIAS CJ:

Yes, thank you, Mr Solicitor and Mr Sinclair. Mr Davison.

MR DAVISON QC:

If your Honours please, I propose to make some introductory remarks and then review the argument that has been presented in our written submissions, and then address some submissions in response to the submissions filed on behalf of the respondent.

The issue in this appeal is whether a New Zealand Court has power to order that the State requesting the extradition of persons from New Zealand has the power to make an order for disclosure to the persons sought or evidence or materials considered relevant to the issue of prima facie case, being the issue which the extradition Court must determine under the Act. The supplementary issue is the necessity to recognise the rights of persons sought in their ability to exercise their legal rights to ensure that they achieve a fair hearing on the issue of whether prima facie case is made out against them before any order is made and before their surrender can occur.

Mr Dotcom is not a fugitive in the conventional sense in which many extraditions take place. He has never been to the United States. He is not a former resident of the United States. He has come to New Zealand to reside via Hong Kong, where he was residing beforehand. The circumstances of his arrest at his residence in Coatesville

on the 20th of January last year by the New Zealand Police utilising the Special Tactics Group are well known and widely reported. At the same time that that occurred, the New Zealand Police executed a search warrant which had been obtained under the provisions of the Mutual Assistance in Criminal Matters Act 1992 to authorise the seizure of items and they seized all items from the residence that were considered to be capable of holding or storing electronic data. These items included Mr Dotcom's personal computers, a number of computer hard drives, cellphones, and all manner of other household items which were capable of storing data. His business records and correspondence were stored on those computers. The Megaupload business, which was the business that is at the centre of this matter, was operated administratively from Hong Kong and the business records, such as they were related to that, were either there or copies of them that Mr Dotcom had and which were seized.

WILLIAM YOUNG J:
What happened to the records in Hong Kong?

MR DAVISON QC:
They were seized too, Sir.

ELIAS CJ:
Mr Davison, at some stage can you take us to – I can't remember where we find the statement that you provided to the lower Courts about scope of the discovery that you're seeking or disclosure you're seeking. Is there any succinct statement of it in the material we have?

MR DAVISON QC:
What it was focused on was the elements of the offences and the District Court Judge's judgment contained a schedule –

ELIAS CJ:
Yes, I'd seen that, but I wondered whether it had been updated at all.

MR DAVISON QC:
It hasn't been updated in the sense that any further schedule has been provided by us to the Crown.

ELIAS CJ:

Right. So that's really the scope of what you say is required for the purposes of the prima facie determination.

MR DAVISON QC:

That was in our first proposition. In fact, what Judge Harvey ordered was something tighter than we had initially asked for, and then her Honour Justice Winkelmann in her judgment, again, trimmed it back and so the state of play in terms of the judicial authority or order would be Justice Winkelmann's.

ELIAS CJ:

I see. So that's all that you are seeking to defend?

MR DAVISON QC:

Yes.

At the same time as the execution of the search warrant, the United States obtained, with the assistance of the New Zealand Government and the Crown Law Office, registration of a US Court's restraining order that was also executed that day to freeze all assets of Mr Dotcom or the businesses or companies and that involved the freezing of bank accounts and the seizure of tangible property from the residence and other locations in New Zealand and Auckland. Despite subsequent requests for access to and return of the computers since that occurred some 18 months ago, Mr Dotcom is yet to receive any of his computers or data back. There is presently, following Justice Winkelmann's most recent judgment, some discussion underway between the parties which is directed at clones of the computers being provided back to Mr Dotcom, but that has not yet been perfected.

The US subsequently made a request to the New Zealand Government for the surrender of Mr Dotcom for extradition to face a number of charges in an indictment that had been issued and in a subsequent indictment which was filed which increased the number of charges to a total of 13.

GLAZEBROOK J:

Mr Davison, can I just check? If your client did get clones of the computers would that satisfy, in fact, the disclosure requirement? Because as I understand it, most of the material – that that's the concern in respect of most of the material, that it's

material that he had access to but no longer has access to. But there may well be other documents as well, though.

MR DAVISON QC:

Well, your Honour, in part it would certainly provide him with access to documentation that he would consider relevant that he doesn't have access to at present, but that does not, in fact, meet his request for disclosure because what he's seeking in his request for disclosure, although it may end up being including some of the documents on the computers that have been seized from him is the selection of material that is relevant to the issues before the Court so that he doesn't have to sift through everything to say, "Well, they must be thinking that this is relevant or I expect that they're thinking that's relevant", because the volume of this material is significant and access to the material is one thing. Information about the fact that it has been selected and considered relevant by the prosecutors would be a valuable piece of information.

ELIAS CJ:

So are you after disclosure of any documents that are referred to in the ROC?

MR DAVISON QC:

Certainly the ones that are referred to, and as I'll take the Court to at some stage, the ROC is supposed to be a summary of evidence. So one would expect that behind a summary are sources: either witness statements or documents. Now, where they are witness statements, one can readily see how a summary is an effective way of fast-tracking it. Where they are documents, first of all, the best summary of most of those documents or the easiest way is simply just the provision of the document. But in some instances, your Honour, propositions are advanced in the ROC which are really not a summary of evidence at all. They're submissions. They're conclusory statements, and where those exist we would wish to have the documents or the materials that underpinned those propositions, because we can go through the ROC and identify – you're well aware, I'm sure, that there is a first ROC and there is now a supplementary ROC and the supplementary ROC in particular contains quite a lot of specific reference to documentation, so we could go through it and identify the particular documents which are referred to there. We don't necessarily have them but we could see what they were. But in the other instances where there are propositions made, we're left guessing. They're propositions in respect of some central issues of the case related to the existence of a conspiracy.

Your Honours –

GLAZEBROOK J:

Well, is the argument in respect of that that the ROC doesn't actually comply with giving a summary of the evidence because, in fact, it's not summarising documents?

MR DAVISON QC:

In part, yes, your Honour. The ROC, if one looks at section 25 of the Act, and I wasn't planning to go diving straight into it, but it's required to be a summary.

GLAZEBROOK J:

I'm happy for you to leave the question if I'm interrupting the flow.

MR DAVISON QC:

No, no, not at all, your Honour. I'm just making the point that the record of case must contain section 25(2), must contain a summary of the evidence acquired to support the request, and in my respectful submission a summary is not a series of submissions or propositions in the nature of argument. It is what it is supposed to be, a facilitation of the provision of evidence the long way by sworn statements or witness briefs and the like, and in this case the ROC falls short of that in a number of respects.

GLAZEBROOK J:

That's not exactly the issue before us in the way that it's been put though, is it? Because I can understand the argument, but the answer to that might be, well, they should provide summaries of those documents upon which they're relying. So if that argument is right, that's all they have to provide because that's what they ROC procedure is, and the argument, this argument might merely be, well, they should provide a summary of those documents upon which those propositions are based and that, they would say, is all they have to provide. You would say, well, they have to provide the documents that back that up, but not the witness statements.

MR DAVISON QC:

Not the witness statements. We've readily accepted –

GLAZEBROOK J:

There is an "other" in terms of documents.

MR DAVISON QC:

In some cases, they might be photographs. They could be electronic documents of some kind. You're quite right, we haven't addressed this as a deficiency of ROC argument. We've seen the deficiencies in the ROC and we're seen the absence of any other documents or any documents which would enable us to be informed in the way that we consider we ought to be and so we've responded to it by an application for disclosure, and I would say that we include in the grounds for that the inadequacy of the ROC, because as has been stated over and over again, it's up to the requesting State to determine what it selects to put before the requested country and the Court of the requested country. We've identified what we respectfully submit is the power of the Court to order further disclosure. It may well be that we could develop an argument that there is also a power in the Court to direct the requesting State to comply with section 25 in a more specific way where there are deficiencies and deal with it in that way. It's my submission that there would be that inherent power to do that, but rather than adopt that approach we've adopted the disclosure approach. So as the Court is well aware, the US commenced the extradition request by making a request to the New Zealand Government for the extradition of Mr Dotcom and his associates and as an exempted country it was entitled to, and chose to us, the record of case which it has done.

This record of case is to satisfy the test in section 25(2)(d)(i) that the case in respect of an extradition offence would justify the person's trial had the – sorry, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand. Mr Dotcom and his associates have made an emphatic and unqualified denial of any wrongdoing in relation to the manner in which they conducted the business of Megaupload.

Just a few observations in relation to Megaupload. As with all Internet service providers, it was anticipated and it is, in my submission, commonly well known amongst all service providers that there will be a large number of users involved in transferring and distributing copyright-infringing data. That is simply the reality of the Internet. The widespread nature of it is obviously a significant problem, and the volume of it is such that it is simply physically impossible to monitor Internet traffic by a site like Megaupload in order to remove or screen copyright-infringing material. As

you have probably read, at the time of the arrest, Megaupload was receiving something like 50 million hits on its site a day and so the volume of that just speaks for itself, and that's not – those levels are not unusual, so that ISPs are able to avail themselves of the statutory protections or safe harbour provisions contained in legislation that, provided they adhere to them, will not expose them to liability, and such enactments in the United States is the data, Digital Millennium Copyright Act.

ELIAS CJ:
What was the date of that Act?

MR DAVISON QC:
1998.

ELIAS CJ:
Thank you.

MR DAVISON QC:
And in Europe, the European Union, in the Electronic Commerce Directive of 2000, a similar provision, and in New Zealand, in our Copyright Act under section 31 there's a similar form of protection, not quite the same but there is an ISP protective provision there.

McGRATH J:
Are all those provisions covering both criminal and civil liability?

MR DAVISON QC:
They cover both forms of liabilities, so far as I'm aware, your Honour. There is – and they are the mechanism by which the law recognises that it's impossible to keep out this sort of traffic, but if steps are taken to deal with it once it's identified and deal with it promptly and remove it then it absolves the ISP from legal liability.

ELIAS CJ:
In the original record of the case, the deponent, I guess, does make a point about the safe harbours not attaching to criminal liability. Is that a matter that we need to be aware of?

MR DAVISON QC:

Your Honour, the provisions in our legislation relate to, extend to the punitive, or liability, provided in the Copyright Act. In the US if you're not amenable to liability or you have no liability by compliant, so far as I'm aware that covers the civil situation, there being no direct criminal breach of copyright crime that would capture it as directly as that. Here, the allegation that there's been a conspiracy in place to carry out that activity which is civilly unlawful gives rise to the criminal component, so…

ELIAS CJ:

Sorry, so what's the answer to that?

MR DAVISON QC:

So the answer is that, in my submission, the Court can be, can address this, or the Court can approach this, by recognising that ISPs one, have this traffic, two, there are legal recognitions in place that would protect them from liability and provided they are protected from civil liability then there would need to be something else, something quite independent of their management of the problem, that elevated it to a point whereas a criminal liability could arise.

ELIAS CJ:

Well, I'm still quite unclear.

MR DAVISON QC:

Sorry, if you could ask me that again then I'll try and be more specific.

ELIAS CJ:

Well, it may not, it may not matter at all but whether there are safe harbours does seem to be pretty critical and what inference is to be drawn from the extent to which there has been non-compliance, or there has been copyright infringement, seems to be particularly relevant to the inferences that the Court is being asked to take from the – in terms of the prima facie case.

MR DAVISON QC:

Yes.

ELIAS CJ:

I'm just wondering whether it has any relevance under the US law.

MR DAVISON QC:

Your Honour, I'm not aware that there is anything in the US law that would elevate non-compliance or expose non-compliance to necessarily criminality. It would certainly expose it to civil liability and…

ELIAS CJ:

So it's the conspiracy dimension?

MR DAVISON QC:

Yes.

ELIAS CJ:

Is it? That's –

MR DAVISON QC:

It is the conspiracy dimension which –

ELIAS CJ:

I see.

MR DAVISON QC:

It's the – it's –

ELIAS CJ:

Well, there's conspiracy and –

MR DAVISON QC:

It's the deliberate –

ELIAS CJ:

– racketeering and a number –

MR DAVISON QC:

Well, it's been – yes.

GLAZEBROOK J:

Well, would the – I'm assuming the argument is that even if they met the safe harbour, if there was a conspiracy nevertheless –

MR DAVISON QC:

Yes.

GLAZEBROOK J:

– to facilitate in some manner while meeting the letter of the law, the –

MR DAVISON QC:

Safe harbour wouldn't –

GLAZEBROOK J:

– copyright infringement, then safe harbour wouldn't stop you from that criminal liability but that –

MR DAVISON QC:

Yes.

GLAZEBROOK J:

– so that you have to have the added mens rea element of conspiracy. Is that –

MR DAVISON QC:

Your Honour, that –

GLAZEBROOK J:

I'm assuming that's –

MR DAVISON QC:

I think that is the correct summary of it, with respect and, of course, what's suggested here is that there was, it was less than complete compliance with the provisions, which indicates that this, that there were other intentions afoot.

GLAZEBROOK J:

So it's an evidential matter effectively?

MR DAVISON QC:

Yes, yes. Just – perhaps a good time to just use the example of the abuse tool, which you've read about, if you've gone through the… In the ordinary course the copyright holder gets in touch with the ISP and provides them with details of their copyright infringement and the ISP acts within a timeframe and takes it, takes that infringing work off its site. What Mega did was said to the principal copyright holders for the music and movies, "Here, you take the tool. You take – you have – we'll give you direct access to our system. You needn't come through us. When you find anything, take it down, you take it down yourself." What's being said is that that was misleading because when they took down they – what was disabled was the URL –

ELIAS CJ:

The particular URL –

MR DAVISON QC:

Yes, the –

ELIAS CJ:

– not all the URLs.

MR DAVISON QC:

Yes.

ELIAS CJ:

Yes.

MR DAVISON QC:

And the reason for that is that the system operated a D duplication model, so that if five people uploaded, happened to upload the same song or the same movie, the first in time had the file created of the movie, the second in time, when it recognises it's exactly the same movie, just gives a link to it. So there might have been, let's, for argument's sake, I'm sure there are many more, but just for argument's sake, there were 10 URLs for a single movie where the studio took down or the rights' holder took down a URL that they found to be infringing, it was just that which went. They – it's being suggested that they were encouraged to assume or conclude that that meant the file itself went and – when in fact the file remained and other URLs remained, and Mega, Mega's position on that was simply that there are – some

parties may be acting illegally and some parties will have authority, as a result of the D duplication, well, we don't know that all of those URLs are associated with people who are infringing. If you say that one is, take it, and – so that's the issue there, the point being that, as I was saying, the position of Mega is that, and Mr Dotcom is, that there is a strong assertion of no fault or no criminal intent in relation to the operation, hence the issues which are now emerging. From the prosecution's point of view they are inferring intent, both from the, some of the features of the system or some of the ways in which it was conducted, and this just brings me to this point that the US has alleged against Mr Dotcom and his associates that the Megaupload business was designed to engage and benefit from the activities of third parties who were themselves infringing copyright, so the architecture of the business was to achieve that benefit by that method.

The prosecutors have relied upon such features as the fact that the company ran a premium user system whereby some users were rewarded for the volume of traffic that they generated, and Mega generated revenue from premium users and from advertising, which was sold in relation to the traffic on its site. The Court will, I am sure, is well aware that there are many cyber locker type sites. Some of them are designed to promote activity, promote further use by other Internet users. Some are designed to act as cyber lockers or storage facilities. Now, with something like YouTube, for example, as the Court will know, one can search it. One can go into YouTube and look for whatever search criteria and it will run a search engine across its data and pick up those references to songs or music or events or whatever it might be. Mega didn't have a search function like that. You couldn't go into Mega and wander around it or search through it for anything. It was more consistent with it being a cyber locker so that the Internet users, as I say, couldn't search its content. What they could do is by directed by someone who had a URL to say, "Look at this URL. You will get something." So that's how the Internet users were getting their – and in my submission that's a significant distinction.

So the case that has been summarised in the ROC is entirely circumstantial. There has not been one document or piece of evidence referred to, summarised, or otherwise, that would indicate any direct planning, any connivance or criminal intention in the way in which this was set up. Mr Dotcom is confronted with a ROC document that is to be treated as presumptively reliable and although it's susceptible to being challenged, it is presumptively to be regarded as reliable and in order to engage in a process which he wishes to engage in to demonstrate that the

inferences are not just inferences that can be – that are the inferences, maybe, referred to, that the propositions are just totally untenable, that the proposition that this was a business that was operating pursuant to an illegal conspiracy is just wholly without foundation once factual material is reviewed. The situation is, for now, that although he's entitled to a fair hearing he's confronted with a ROC that the US has chosen to employ with serious deficiencies but has the protection of being regarded as presumptively reliable. He has no information of his own because the seizure of his computers has resulted in that. He has had his assets frozen, and although there are arrangements made to release some of the funds –

ELIAS CJ:

That's not relevant, is it?

MR DAVISON QC:

Well, it's not relevant in one sense but suppose a requesting country had taken a series of steps that made the – whether by design or by unhappy consequence left the hearing as a totally one-sided process then that, in my submission, would be relevant and the Court's remedial ability to prevent an abuse of process would engage the power to order such steps as might be directed at rectifying that.

ELIAS CJ:

Is there somewhere in the material that we've got, is there the section 18(4) statement? That's the statement of the offence, the description of and the conduct constituting the offence, or does the ROC supplant this? I'm really trying to get my head around the scope around this case and wondered if there is some constitutive document that gives a description of the case as opposed to summarising the evidence.

MR DAVISON QC:

Your Honour, there is the indictment and superseding indictment, much more content than the sort of indictments we are familiar with.

ELIAS CJ:

I see. Do we have that?

MR DAVISON QC:

No, but I can provide it to you. It's in the form of almost a narrative of information in the indictment.

So to move on, the issue arises as to whether Mr Dotcom, to get a fair hearing, what to be provided with further disclosure to enable him to address the issues of relevance to the essential elements of the charges that he's sought for. A further issue will necessarily arise before the extradition Court in relation to double criminality. It will be contended that the provisions of section 101B of the Act, which came into force in September 2003, that is, after the Court of Appeal's decision in *Government of the United States of America v Cullinane* [2003] 2 NZLR 1, has operated to require double criminality to be established in relation to the offences relied up as extraditable. Now, I'll address that if need be in due course, but it is another live issue that will be before the Court, the extradition Court.

Your Honours, I just want to conclude this introduction by making these comments. Firstly by reading the words of La Forest J in the *McVey v United States of America* [1992] 3 SCR 475 case. In a passage which is very similar to what Her Honour Chief Justice McLachlin said in *United States of America v Ferras* [2006] 2 SCR 77, and it's this, that the function, referring to the extradition Court Judge, "This function, if modest in scope, is critical to the liberty of the individual," in referring to and citing from the Canadian case of *Canada v Schmidt* [1987] 1 SCR 500, "The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless prima facie evidence is produced that he or she has done something there that would constitute a crime mentioned in the treaty if committed here," and there are two aspects of the functions of an extradition Court and the compliance by New Zealand of its obligations under a treaty. They are the functions and objects identified in section 12 of the Act, the object being to provide for the surrender of an accused or convicted person from New Zealand to an extradition country or from an extradition country to New Zealand in particular to enable New Zealand to carry out its obligations under extradition treaties.

The concept of comity which pervades the submissions of the Crown isn't overarching in the sense that it applies without recognition of legislative provisions and if I could just briefly turn to what was said by this Court in *Kim v Canada* [2010] FC 149, [2011] 2 FCR 448, at para 42…

ELIAS CJ:

Sorry, where do we find that?

MR DAVISON QC:

It's not before you, your Honour. It's referred to in my learned friend's materials and a copy can be made available, but it's a decision of the 10th of December 2012 and apart from the late Sir Robert Chambers, four of this Court, of course, sat on the *Kim* decision, and there the Court said, this Court said, at para 42, dealing with a particular provision of the Extradition Act, "The meaning of, quote, 'The person is accused who having committed an offence', in section 3(a) of the Extradition Act must be determined having regard to the purpose of the provision and the context in which the phrase appears under the Act. Under section 12, the Act's object is to provide for surrender of an accused or convicted person and the object extends to providing a means of giving effect to individual requests for extradition to – for non-Commonwealth countries and those with which New Zealand does not have an extradition treaty. Thus the overall purpose of the Extradition Act includes facilitation of the bringing to justice of those in New Zealand accused of serious crimes committed outside of New Zealand. It is well recognised that this purpose calls for a contextual construction of extradition statutes that accommodates the different legal systems to which they apply rather than once premised on meanings reflecting the context of criminal procedures under New Zealand domestic law. This is an instance of the well-established presumption of statutory interpretation that, as far as the wording allows, legislation should be read in a way that is consistent with international obligations."

And, in my submission, that's where this case sits. It is that "as far as the wording allows", and as I will hopefully develop in the course of this argument, the wording of our New Zealand key documents, the treaty, New Zealand/US treaty, the Act, make it clear that New Zealand's position is that it is meeting its international obligations by reference to the treaty and that the Act provides specific provisions to be adhered to that in meeting its – that are not inconsistent with the obligations in the treaty at all and which must be adhered to, to provide the fair hearing that Mr Dotcom is entitled to receive.

Justice Winkelmann, in her judgment at paragraph 34, recognised that the second level of obligations or objects of the Act where she commented that, "The Act has as its purpose the creation of procedures that allow for the just and expeditious

disposition of requests for extradition," and so although the purpose is set out at section 12 as being the meeting of international obligations, that cannot be, with respect, at the expense of affording and adhering to the procedures contained in the Act for the just and expeditious disposition of requests. It's the appellant's submission that the obligation arising from the concept of comity has been met and is being met by reference to the treaty and is embodied in that comity and recognition of the US/New Zealand relationship, that particular closeness that has led to arrangements between our two nations, is reflected in a number of ways. Firstly, New Zealand has addressed the issue of nexus or closeness by creating a Part IV and a Part III regime, a two-tiered process or two-tiered structure with the nearest nations, those regarded as of sufficient nexus, I suppose, to warrant total reliance on their believable systems and procedures such as don't warrant or don't require any establishment of prima facie case, so for Part IV countries, Australia, the United Kingdom, the Cook Islands and Pitcairn Island, no prima facie case, and no ability, section 45(5) of the Act, no ability to present any evidence to challenge the extradition. And then for the US, it sits, obviously, within Part III but Part III is two tiers in itself. It's got the non-exempted countries, if you like, and those that are exempted under section 17 and those that are exempted obviously have the ability to use section 25 in the ROC procedure. So as Justice Winkelmann noted in paragraph 14 of her judgment, the ROC itself recognises comity because it affords to the US this streamlined system of presenting evidence that's not available for others, other countries, so it's my respectful submission that it is not a correct approach to look at the issue of comity as if it has some sort of broad scope of application.

ELIAS CJ:

It is not as large.

MR DAVISON QC:

It's not as large, no. And that issues of comity are, with respect, not for the Court. They are for the legislature, and the legislature has addressed that and recognised degrees of comity in the way that it has slotted different nations into different levels of our structured extradition process.

McGRATH J:

One aspect, Mr Davison, of comity, though, that might be a part of our function is the provision in section 11 and I wondered if you are going to address that, the provision that the Act must be construed to give effect to the Treaty. I mention it because you

place some emphasis on the *Kim* case and the passage in the airline pilots' case, but that is really a case involving Part V of the Act, no treaties involved. This case does have a treaty, and at some stage with the question of interpretation, you're going to have to look at that aspect of comity that gives an unusual direction to the Court as to how to best approach the question of interpretation.

MR DAVISON QC:

Exactly, your Honour, I do propose to address that and it's a very important part of the argument that we advance, but the bottom line of it, if you like, is that comity requires nations to adhere to their contractual or treaty obligations, that that's what comity is, maybe to do other things in other contexts, but in this context it's to adhere to the treaty, and it's my submission, that I'll develop in due course, that one can do that, and New Zealand does do that, by applying the treaty and in particular the provisions whereby in Articles IV and IX the nations have contracted with one another that extradition will take place on the basis that New Zealand law will govern the process. So if one is doing that, it would not be consistent with issues of comity to take a different course. It's my respectful submission that that's where that goes, but I'll perhaps get there.

Your Honours –

ELIAS CJ:

Do you want to indicate to us, Mr Davison, how you're proposing to structure your argument? Where are you wanting to take us?

MR DAVISON QC:

What I would like to do subject, of course, to your directions to me, I'd like to take you to the written synopsis that we have filed and pick up some key aspects of that, and once I've done that I would then to address issues raised by the Crown in their materials, effectively responding rather than try and overlay that too much, although there may well be a measure of overlay. So that's where I would like to go.

ELIAS CJ:

All right, thank you. We have, of course, read the submissions so you can emphasise rather than take us through.

MR DAVISON QC:

Yes, I won't take you through them. So if I could invite your attention to page 7 in paragraph 19, which is where the treaty is dealt with. You'll find it, if you haven't already had it open, it's in the bundle of authorities at tab 19. This is the Order in Council and the treaty is set out as 1, and I would invite your attention to Article I. Each contracting party agrees to extradite to the other in the circumstances and subject to the conditions described in this treaty. Now, as this Court dealt with in *Cullinane*, Article II is the enumerative listing of the extradition offences, and then Article IV, "The extradition shall be granted only if the evidence can be found sufficient according to the laws of the place where the person sought shall be found."

BLANCHARD J:

That includes the Extradition Act.

MR DAVISON QC:

In my submission, if one doesn't read down the Extradition Act – the Extradition Act, of course, is according to the laws of New Zealand, of course.

BLANCHARD J:

But the question of whether the evidence is found sufficient is determined in accordance with the Extradition Act.

MR DAVISON QC:

Yes.

BLANCHARD J:

So I don't know if this point takes you anywhere.

MR DAVISON QC:

Well, it takes me, in my submission, or takes the argument in my submission, your Honour, as an acknowledgement and agreement between the nations that the laws of New Zealand, including the Extradition Act, or the laws of New Zealand shall reply. That must be the starting point, otherwise there is no point for Article IV to have been there.

BLANCHARD J:

I wouldn't disagree with that.

MR DAVISON QC:

But it doesn't – either to justify his committal for trial of the offence of which he is accused has been committed in the place or to prove that he is the person convicted, so moving, then, to Article IX, the mandatory statement there that the determination that extradition based upon the request, therefore, should or should not be granted shall be made in accordance with the laws of the requested party and the person whose extradition is sought shall have the right to use such remedies in the courses provided by such law. It's my respectful submission that taken together the rights and remedies that would prevail and be applicable are those that obvious exist in a domestic legal environment.

As noted in paragraph 21 of the synopsis, this direction to domestic laws' use and application is reflected in the United Nations Model Treaty on Extradition and in the United Nations Convention against Trans-National Organised Crime which, in fact, is being relied upon by the prosecution in this case because in the enumerated list of offences there is no criminal copyright infringement there. So it's being employed in this case, particularly I note section 101B of that Convention against Trans-National Organised Crime, which guarantees fair treatment at all stages of the proceedings to any person charged, including the rights and guarantees provided by the domestic law of the State party and the territory in which that person is present. I could take you to those provisions, but there are a number of statements within the Convention. At paragraph 13(7) and 13(8) are examples where domestic law of the requestor state is stipulated. It's in our bundle of authorities at tab 10. This Convention was adopted and imported into our Extradition Act. In section 101B of our Extradition Act which provides certain crimes with transnational aspects deemed to be included in extradition treaties, so a series of offences are deemed to be offences described in any extradition treaty concluded before the commencement of section 6 of the Extradition Amendment Act 2002 which introduced this, and for the time being enforced between New Zealand and any foreign country that's a party to a conventional protocol, and the offences include (a) section 98A, which is the organised criminal group section, and then under 101B(1)(c) one of the deeming offences is – deemed offences is any offence against any enactment if imprisonment of four years is the punishment or more; (ii) the offence for which extradition is requested is alleged to involve an organised criminal group as defined in article 2(a) of the TOC convention; and the person who's sought is in or on their way to New Zealand.

McGRATH J:

So that's section 101?

MR DAVISON QC:

101 capital B. Capital B, Sir. And so if you flip back to tab 10, there is the UN conventions reproduced and organised criminal group is defined in article 2A.

ELIAS CJ:

So is there no document that indicates to us what the charge is before us? You say that there's a substantial indictment but there's no – there's nothing that summarises it.

MR DAVISON QC:

No, your Honour, but there is, of course, the –

ELIAS CJ:

Because this is the context –

MR DAVISON QC:

Yes, of course.

ELIAS CJ:

– in which we're being asked to look at all of this, so I'm…

MR DAVISON QC:

Well, I can see that it's going to be necessary for you to see the current indictment, which is called the superseding indictment because it wasn't the first iteration of it, and we ought to make that available to you.

ELIAS CJ:

Well, is there – is it agreed that the Court of Appeal, for example, sets it out correctly so that we don't need to go beyond that?

MR DAVISON QC:

It's –

ELIAS CJ:

I would just like to see –

MR DAVISON QC:

It's much more than has been –

ELIAS CJ:

It's more than that?

MR DAVISON QC:

Yes, much more.

ELIAS CJ:

All right, thank you.

MR DAVISON QC:

Just –

GLAZEBROOK J:

You were –

MR DAVISON QC:

I was just referring to – yes, your Honour.

ELIAS CJ:

But you're saying that this is the provision that's relied on under 101B. It's the membership of an organised criminal group of three or more persons.

MR DAVISON QC:

Yes.

ELIAS CJ:

Well, at the moment we're not able to poke our fingers in that worm.

MR DAVISON QC:

Well, the superseding indictment doesn't use the term "organised criminal group". It uses the term "conspiracy".

ELIAS CJ:

Yes.

MR DAVISON QC:

And it being, as the Court's obviously well aware, that one's considering the conduct rather than the label and here the conduct described by the definition of an organised criminal group is the conduct, sufficiently or repl – captures the conduct which is being alleged to be the conspiracy, as I understand it.

ELIAS CJ:

Well, if it's accepted we don't need to go further than that.

MR DAVISON QC:

Well, part of the issue that we will deal with, or we would seek to deal with, is to test the issue of whether there is an extraditable offence and whether double criminality needs to be established because unlike the situation at *Cullinane* where there were all the numerated offences, now we're looking at an undefined.

ELIAS CJ:

Yes, but that's in other proceedings.

MR DAVISON QC:

Yes.

ELIAS CJ:

For the purpose of this disclosure argument, we can accept, can we, that what is being alleged is within section 101(B)?

MR DAVISON QC:

As I understand it, your Honour, yes, that's exactly right. If I could invite your attention to page 13 of this convention document, at tab 10, there is – sorry, my mistake, page 16, extradition, and it's to apply to those situations described in Article III paragraph 1(a) and (b) which are a description of offending of a certain type. If it involves an organised criminal group and the person who's the subject, et cetera, paragraph 3. "Each of the offences shall be deemed to be included as an extraditable offence," and then 7, "Extradition shall be subject to the conditions

provided for by the domestic law of the requested state party or by applicable extradition treaties." Then 8, "Parties shall, subject to the domestic law, endeavour to extradite." So there are clear signposts, if you like, including paragraph 13 of Article XVI, which guarantees fair treatment at all stages of the proceeding, including enjoyment of all the rights and guarantees provided by the domestic law of the state party," so it's my respectful submission that this Convention which has been imported into and being applied by our Act contains a series of signposts directing us to the domestic law, and being an acknowledgement by the parties to the Convention of the contracting states, if one deals with it like that, that that is their intention and that is the whole purpose of this, to facilitate extradition of people that fall within those definitions of offences.

Now, the next point I just wish to raise is the Court of Appeal, in its treatment, placed considerable focus on Article XII of the treaty. Tab 9. It provides that if the requested party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that party shall require. It's my respectful submission that that doesn't deal with the issue of the Court's power or the Court's process in dealing with extradition under the Act. What that deals with is the nation-to-nation relationship and the executives' actions or responses to a request being the requested party, and it's my respectful submission, as set out in paragraph 24, that there are two separate and distinct processes, as recognised by *Ferras* and other authorities, that there is the request, of course, and then there is the judicial phase that must be independent of the executive and maintain its own judicial integrity as an effective and informed decision as to whether the person is the right person, whether the offence is an extraditable offence, whether there is prima facie evidence that would satisfy the prima facie standard here in New Zealand. That has nothing whatsoever to do with a request which might be made under Article XII, and Article XII doesn't, in my submission, form any part of the Court's process.

McGRATH J:
Now, the case is against you on that in England, I seem to recall from the submissions.

MR DAVISON QC:
I'm going to come to the legislative framework of the different jurisdictions, but the short point is that in the UK and the US there have been put into a category which

requires no prima facie case to be provided at all. There isn't any judicial process of the kind that is provided for here in New Zealand.

WILLIAM YOUNG J:
The UK cases on this point start before that, don't they?

MR DAVISON QC:
They do, Sir, and I'm going to address that too. There's the *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72. There's quite a lot made of that in my learned friend's submissions. My proposition in response to that is that the *R v Wellington case* and others stand for the proposition that there is no right of general disclosure, that they stand for no disclosure, but they don't stand for there being no power to require disclosure of a particular kind and of a particular case. It's just a much broader proposition than that. These cases are not akin to criminal procedure.

WILLIAM YOUNG J:
Don't they suggest that the United Kingdom could have resort to the equivalent of Article XII but that's – and perhaps the Court could ask the United Kingdom Government to do so but there's not a power of disclosure of the kind that the District Court and the High Court Judges exercise?

MR DAVISON QC:
Yes, Sir, and that's been identified as the remedial pathway, if you like. If there was a sense of unease but with respect we don't need to have recourse to that, because there is a power here to deal with it and it's my submission that –

WILLIAM YOUNG J:
With the source of power being? The committal provision?

MR DAVISON QC:
In New Zealand, the source of power, in my submission is the inherent power of the Court to ensure that its processes are not abused and that it's able to undertake a statutory function in a way which isn't compromised by it.

WILLIAM YOUNG J:
So you're really relying on the inherent power rather than the statutory interpretation as around the committal provision or section 102?

MR DAVISON QC:
I do rely considerably on section 102.

WILLIAM YOUNG J:
As supporting it?

MR DAVISON QC:
As supporting it.

ELIAS CJ:
Well, the one arises out of the other, doesn't it? If there weren't the committal function there would be no need for – or there might not be need for recourse to the ancillary power.

MR DAVISON QC:
Yes, your Honour, with great respect, that's exactly it. If the function isn't one that requires that sort of level of supervision or reassurance by the need to take remedial action then, of course, there is no power. The power arises because of the function, in my submission. I think I can move fairly quickly through the next section of the written material which dealt with the ROC and come to section 25. But before I come to section 25 perhaps I could jump ahead a little and deal with section 102 because it seems to be a good time to deal with it. Could I invite your attention, please, to section 102 of the Act?

First of all, it's my respectful submission that this is a very significant statutory interpretative signpost and I note that in my learned friend's submissions it attracts a brief paragraph at the end of the written synopsis and with some comment that if regulations were promulgated then issues of varies might arise. In my submission, that just doesn't stand close examination. Clearly the New Zealand legislature, which is the only country, which I'll come to show you when I do the comparative process, directed its attention to the creation or promulgation of regulations and what they would necessarily relate to. So 102(1)(b), regulations for all or any of the following purposes, prescribing additional matters to be included in the record of the case

under section 25. Now, I'll just ask you to note that and put it to one side because I want to contrast it with the content of 102(1)(d). Prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including without limitation, the prehearing disclosure of information. The phrase "prehearing disclosure of information" is something quite different from "additional matters to be included" in section 25, and so the Court – sorry, the legislature has identified two quite discrete processes that may be the subject of regulation. The fact that there has been no regulation or regulations promulgated, in my submission, doesn't in any way detract from the fundamental proposition that I'm advancing, that there is nevertheless sitting underneath this a power that does need regulating or does potentially might be regulated if regulations are passed.

ELIAS CJ:

My understanding, and it may be different with the High Court Rules, is that to the extent not regulated by rules the inherent powers of the Court to regulate its practices apply. So I'm just thinking that in other words at least in respect of the High Court it is not necessary for there to be any legislative inferral of power to order prehearing disclosure or practice. I mean, prehearing disclosure may be slightly different.

MR DAVISON QC:

Well, I would submit the same applies to the District Court in an exercise of its statutory ...

ELIAS CJ:

Yes, I understand that submission.

MR DAVISON QC:

And significantly under (e)(ii) the regulations to deal with the powers of the Court when information required to be disclosed by the regulations is not disclosed or not disclosed in accordance with the requirements specified in the regulations or by the Court. So, again, dealing with non-compliance matters.

Now the appointment of an expert witness in sub (4), and then significantly in 102(2), regulations made under (1)(e) for the provision of disclosure, pre-hearing disclosure of information, may provide for different practice and procedure in relation to proceedings under Part 3 and in relation to proceedings under Part 4, and so a recognition that there's going to be a difference, or may well be a – there's a

distinction being identified and that regulations may address that as one would expect, because Part 4 the issues in, the live issues are very limited and largely administrative in terms of – well, certainly not including a prima facie case, whereas Part 3 they do engage that and a broader level or different level of disclosure is being recognised as being susceptible to being regulated under sub (2).

So it's my respectful submission that in dealing with an interpretation of the Act one is seeing a very clear signpost in section 102 of what the New Zealand legislature regards the powers of the Courts as being and, when we come to contrast or compare them with the other jurisdictions, there's nothing like that anywhere else.

So just coming back to the ROC procedure in section 25 for a moment, and I'll deal with that. And I'm just addressing para 33 of the written synopsis at this stage, but there's nothing in section 25 of the Extradition Act that gives any indication that there was an intention that the ROC procedure would extend to altering the extradition hearing process other than streamlining the provision of evidence to the Court. There's nothing that would imply or suggest that the adversarial nature of a committal hearing is to be effected in any way and, with great respect, it would be surprising if that were so because a party such as the US has a choice between using section 25 or not and if by employing section 25 and using the ROC the nature of the adversarial process was severely compromised then, in my submission, that would be a surprising outcome in itself, electing to enable a litigant to or a requesting state to determine a matter such as that.

So it's my respectful submission that had there been an intention to alter the legal landscape by the ROC and fundamentally alter the nature of the proceedings under Part 3 of the Act, then it would need to be expressly set out in the Act, just as it was expressly set out in section 45(5) in relation to Part 4.

As the Court will have noted, the requirements, the mandatory requirements, of section 25 include sub 25(2), the case must contain a summary of the evidence which I've dealt with and other relevant documents, and it's my respectful submission that properly interpreted this provision requires more than the documents simply that might be chosen by the requesting State and requires the provision of documents that are relevant to the charges and the evidence and which necessarily need to be provided to justify the committal which is being sought, or the order that's being sought.

In the synopsis, we included –

ELIAS CJ:

So will you say that if the evidence summarised referred to, to take a simple example, video footage of somebody conducting a transaction, selling drugs or something, that the tape of the transaction will have to be supplied?

MR DAVISON QC:

If that was – I'm assuming in your example that that was really the key piece of evidence, yes, in my submission, yes, and if I could just answer you by coming round in a little bit of a circle by noting that in the Bill prior to the enactment of section 25 the wording proposed, and this is set out in the document at the Crown's volume 2 at tab 35, that's where the Bill is. The wording before the other relevant documents' wording was selected was – must contain "a certified copy, reproduction or photograph of all exhibits, documentary evidence, and depositions of witnesses." And obviously the short phrase "other relevant documents" was selected and enacted, but to answer your question more directly, your Honour, it's my submission that the nature of a case shouldn't dictate disclosure. The nature of the evidence against a party shouldn't dictate disclosure so that suppose it was a fraud case involving an instrument that just had one fraudulent document, it's easy to produce that, or a homicide that had a limited amount of evidence that could be readily reproduced as the other relevant documents. That's complying. But the fact that this is a case that is full of documents or appears to have lots of documents in it, and I suspect that there will be quite a lot, is in no way to derogate from the principle, in my submission, and although the proposition has been advanced that this sort of order is onerous and unwieldy, et cetera, it's my respectful submission that that is – that just flies in the face of the fact we're dealing with digital data, make a digital file, push a button. It's nothing seriously much more than that, because the evidence that has been assembled already has been placed before two grand juries and presumably a selection has been made, so in my submission the idea that it's onerous or burdensome doesn't have a great deal of force to it in the nature of these sorts of electronic documents which are largely emails which are said to associate with the evidence. Your Honours, I don't know whether you are proposing to take a break. It's a convenient point.

ELIAS CJ:

Yes, we'll take the break.

COURT ADJOURNS 11.30 AM

COURT RESUMES 11.47 AM

MR DAVISON QC:

Just before I just resume my submission on section 25, I just wanted to pick up and address a point your Honour Justice McGrath raised with me about Part 5 and the issue of comity. It's my submission that in a Part 5 circumstance the Court doesn't engage with the assessment of comity in that instance either because when the request is made to the executive in a Part 5 situation where there is no treaty, the executive makes a decision to either put it within Part 3, whereupon it takes its course, or not to respond to it, so it's an executive decision and doesn't engage a comity assessment by the Court. That's my submission on that point.

Another point to be made in relation to section 25 is the contents of section 25(4)(b) which provides that nothing in section 25 limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender, and it's my respectful submission that that makes clear the reservation or protection of the requested person's right to tender evidence. It's not in any way limiting the ability of the requested person, and the significance – there is a significant difference between evidence as to whether a person is eligible for surrender in (4)(b), 25(4)(b), or the phrase used in 25(2)(a), a summary of evidence acquired to support the request for surrender. Clearly the section 25(2)(a) summary and other relevant documents are matters being advanced to support the request for surrender and if section 25(4) was dealing with the very same subject matter, you would expect the same phrase to be dealt with, to be used, but the eligible for surrender is a broader concept and, in my submission, reflects the fact that the section is envisaging that other evidence would be provided by the requested party that was relevant.

GLAZEBROOK J:

Can you just explain why they use the word "other" in section 25(2)(b), because 24(2)(a) says a summary of the evidence. Why, having summarised the evidence, would you then effectively provide all of the documents which must include witness statements if your argument is right, mustn't it?

MR DAVISON QC:

I'm not submitting that witness statements would be included within the –

GLAZEBROOK J:

Well, why do they say "other relevant documents"? Because that assumes that they aren't included in the summary of evidence or summarised in the summary of evidence, doesn't it, and that's very different from the Bill is introduced, I would have thought. There's no point doing a summary of evidence if, in fact, you just have to dump all the evidence you're relying on anyway.

MR DAVISON QC:

Quite. Your Honour, the other relevant documents, the choice of the word "other" is obviously something distinctly different from the summarised or the summary, which is a summary of evidence including that which would otherwise be included in affidavits or statements or briefs of evidence. The "other" is the sort of evidence that's not captured by a witness' observation or statement and which is of a tangible nature, and which is – documents can be summarised.

ELIAS CJ:

Real evidence, do you mean?

MR DAVISON QC:

Yes, real evidence, if you like, as a distinction between observational evidence or an account of an event, and the best example, perhaps, is just a photograph or an exhibit or a document of some kind that the oral evidence summarised is referring to, so it's other evidence relevant or other relevant documents including photographs.

GLAZEBROOK J:

But you can't really read down a summary of the evidence as meaning merely a summary of the oral evidence, because many cases have very little oral evidence apart from here are the documents. I suppose in a fraud case you might have an accountant giving his or her interpretation of the evidence, but ...

MR DAVISON QC:

Well, your Honour, I accept that –

GLAZEBROOK J:

Or how the documents were got or ...

MR DAVISON QC:

Other relevant documents, the choice of the word "document" for a start, it's referring to a tangible thing, and if there is a – yes, of course there can be a summary of matters contained in a document, but when one is seeking to advance a prima facie case there will be a conflict, there will be both accounts, witness accounts, or witnesses producing documents in an ordinary case not required here. The documents, as her Honour Justice Winkelmann noted in her judgment under 25(2)(b) can just be put forward and the qualification relevant, of course, which is going to require the documents to be those which fit that description, too, so it's my respectful submission that you take the section 25(2) provision as a whole and it can be summarised to provide that what is being provided to the requested person is a sufficient combination of summary and tangible documents as to give them a fair and full appreciation of the case that's being mounted against them.

WILLIAM YOUNG J:

There are no documents, I take it?

MR DAVISON QC:

There have been none provided, Sir.

WILLIAM YOUNG J:

No, so it's just a record of the case.

MR DAVISON QC:

Yes. Next point I wish to address is the application of the Criminal Disclosure Act, and I think I can perhaps just summarise my submission here by saying that we support –

ELIAS CJ:

Sorry, is that submission, then, that section 25(2) has to be purposively construed as in combination what is necessary to satisfy the Court that there is a prima facie case?

MR DAVISON QC:

Yes.

WILLIAM YOUNG J:

You don't say it means all relevant documents, or do you? Do you maintain it's a disclosure regime?

MR DAVISON QC:

Your Honour, we initially argued before Justice Winkelmann that it was broader. Section 25 isn't in the end our final point on the entitlement to disclosure. In my submission, it informs the provision of a greater range of documents than just the summary of case with the other, but if one is entitled to disclosure as well, then just for the reasons that are reflected in section 102 in the regulations section, there may be other material which is relevant which needs to be provided.

WILLIAM YOUNG J:

I read, I think, paragraph 40 of your submissions suggesting that it was in the nature of a disclosure requirement.

MR DAVISON QC:

Your Honour, we've – I have relied upon it for that purpose, but we've also recognised Her Honour's ruling on that and section 25 may be a narrower description of documents to be provided other than what one might be entitled to by way of a disclosure order. I won't entirely give it away but I can see that there is – that the other relevant documents is more closely aligned to the summary than would a broader disclosure order.

GLAZEBROOK J:

You would say for purpose of interpretation that it can't only be what's necessary to satisfy the Court that there's a prima facie case but also what's necessary in order to enable the person sought to be extradited to put forward enough to show there isn't a prima facie case, ie effectively to challenge that evidence and a summary of evidence may not be sufficient to allow them to do that.

MR DAVISON QC:

I think that's a fair summary, your Honour. It would be sufficient to inform, properly inform, the requested person so that they are able to engage in the process and secure a fair hearing.

ELIAS CJ:

Well, wouldn't it be a contextual assessment, then, so that if you had simply evidence of eyewitnesses who identified someone summarising that might be sufficient, but if you had someone, say, from the photograph shown to me I recognise someone, then you might want the photograph because it supports it.

MR DAVISON QC:

Yes, it is totally contextual.

ELIAS CJ:

And your argument is that because the summary is in large part of conclusions you need to see the material on which those conclusions are based?

MR DAVISON QC:

Yes. This might be a good time to take the Court to some examples of that.

GLAZEBROOK J:

So in terms of section 25, now you do accept that section 25(2)(b) while it can be seen as a disclosure or authorising disclosure is effectively tied to that contextual assessment?

MR DAVISON QC:

Yes, yes. Your Honours, case on appeal volume 2 at tab 18, which is the first tab, contains the record of the case. I'll take you to some examples. At the foot of – there are 51 pages of this first document, and then the second supplementary record is the next tab, but I'll confine myself to the first one. At the top of page 3, just picking up the beginning of the sentence which starts at the foot of the previous page, "Furthermore, the members of the Mega conspiracy do not meet these criteria" – that's the criteria of compliance with the DMCA and the take-down process – "because they are wilfully infringing copyrights themselves on these systems. They have actual knowledge that the materials on their systems are infringing, or alternatively they are aware of facts or circumstances that would make infringing activity apparent, such as red flags indicating blatant copyright infringement." That's not a summary of evidence. That's effectively – then at paragraph 13 at the page of 3, "The Mega conspiracy attempts to mask the large percentage of infringing materials available on their sites and attempts to mirror a true cyber locker by omitting complete and accurate search functionality." Now, you'll recall my

description of that way in which there is no search functionality. Well, the absence of search functionality is equally as consistent with a private storage facility and yet the ROC is saying – the evidence is summarised to be the conspiracy, or members of it, or some of them attempt to mask the large percentage of infringing material available on their site. On what basis is it alleged that there's been an act of masking when a cyber locker generally wouldn't provide a search function?

Just over the page, instead of hosting a search function on its own site, the Mega conspiracy business model relies on thousands of third party linking sites. Well, again, is there some document which reveals that that is the plan, that that is the basis upon which the business is proceeding, or –

ELIAS CJ:
Well, I've actually read through this document and it did seem to me that there were a number of sources that are drawn on. There are emails. There's the analysis that's been undertaken of the system. That's really about it, isn't it?

MR DAVISON QC:
Yes, there's an analysis of the system that has been undertaken which –

ELIAS CJ:
Which was taken from the hard drives which had been cloned?

MR DAVISON QC:
No, not from the hard drives which were cloned. Well, start again. Before the search warrant was applied for, before the arrest warrant was applied for, the indictment had been issued in the United States and so the grand jury had already assessed the evidence which had been assembled which had been drawn from a variety of sources including FBI interceptions or obtaining of copies of a vast array of emails that had gone back for many years, or a number of years. So what's been seized is not – wouldn't be reflected in the ROC itself.

BLANCHARD J:
Mr Davison, you're complaining that the statement at the top of page 3 they have actual knowledge that the materials on their systems are infringing is merely conclusory, but I haven't read the whole of this, I've only skimmed it, but this seems to be merely an introduction and if you go over to page 38, for example, there's a

heading, “Co-conspirators’ knowledge of copyright infringement,” which looks to be quite particularised.

MR DAVISON QC:

It’s much more particularised, your Honour. You’re absolutely correct, but again, there is – and there are certainly references in this section of the document record of case that enable us, for example, to look at a particular email or in some instances some emails are specifically referred to, but taken as a whole, it’s – well, at a minimum those refer to documents and the associated email chains that they were drawn from would be an absolute basic level of disclosure that enabled any reader of this document to compare the statements about those documents with the summary and take issue with any inaccuracy or mistake or misdescription or whatever it might be.

GLAZEBROOK J:

What’s the point of allowing a summary if you then have to provide all the documents, though?

MR DAVISON QC:

The purpose of the summary was – the purpose of the ROC or the expedited process, as I am sure the Court will have seen in the *Yuen Kwok-Fung v Hong Kong SAR* [2001] 2 NZLR 463 (CA) decision that arose from the difficulties of some nations not being able to readily comply with the common law requirements of evidence and the formalities that were associated with that, so what is the advantage? Well, the advantage in relation to evidence is that one needn’t go through all those procedures of law or formalities. One can just summarise what your witnesses are expected to say, and that is obviously a much more streamlined process. In terms of a document, funnily enough, in my respectful submission, the best way of communicating a relevant document is to provide the document. It’s more onerous when you sit down and try and summarise documents, but in my submission there is nothing which is inconsistent with the streamlined objective of evidence that arises from the provision of copies of the relevant documents that are referred to and relied upon as providing the basis for the prima facie case.

BLANCHARD J:

Well, that may be the reason why the record of the case is to contain other relevant documents, because they haven't been summarised because it was simply too jolly difficult to do it.

MR DAVISON QC:

Well, that may be. It's one way of reading it, Sir. I would still adhere to my proposition that it's – well, I'll put it this way. Either adopting that approach and therefore the documents are summarised within the record of case or other documents not summarised come as others. In respect to those which are summarised and therefore embedded in the ROC an application for disclosure from another vantage point, if you like, not relying upon compliance with section 25, but the inherent power to ensure that there's a fair hearing. And so in my respectful submission you can logically limit it in that way but to the extent you do you just leave an equivalent corresponding entitlement to disclosure.

ELIAS CJ:

Mr Davison, I am getting a little worried about the time. We need to try and move things on a bit.

MR DAVISON QC:

I'll press on. So I was just going to say in relation to the Criminal Disclosure Act I'm not going to advance anything further and in my submission it provides support for the assistance of the nature of the inherent power rather than standing alone. The Bill of Rights Act submission, this has been in my submission fairly well rehearsed in our written material and it's my respectful submission that sections 24 and 25 can be read as giving effect and be giving effect to in this context.

WILLIAM YOUNG J:

What bits do you rely on in sections 24 and 25? Facilities to prepare a defence?

MR DAVISON QC:

Well, yes, facilities to prepare a defence. 25A.

WILLIAM YOUNG J:

Which is?

MR DAVISON QC:
Fair and public hearing by a fair and impartial Court.

WILLIAM YOUNG J:
Isn't that just section 27 as well? Does that add anything to section 27 except that it's in public?

MR DAVISON QC:
Well, whether you have to choose between 27 or 25, it's my submission that 24 and 25 inform the nature of the right that's sought to be recognised and section 24 and 25 in combination are those features that would render a criminal process fair – they are no less apposite in this context and where they can be recognised ought to be. In the event that they are not specifically recognised, they necessarily overlap with or coincide with the same form of right that arises under – that always existed and has arisen and should be recognised under section 28. Your Honour, section 27 and natural justice again, another starting point. Could I move on, your Honour?

The Canadian authorities and the United Kingdom authorities, what I'd like to simply emphasise here is that in *United States v Dynar* [1997] 2 SCR 462 and in *Yuen Kwok-Fung*, it ought not be overlooked that the requested parties in each instance actually got the evidence that supported the prima facie case. It was the other disclosure they were looking for in relation to the charter issues that they were denied, so in *Dynar* at paragraph 134, the requesting State concedes that the fugitive is entitled to know the case against him in light of the purpose of the hearing. This would simply entitle him to disclosure of materials on which the requesting State is relying to establish its prima facie case, and also in the judgment at paragraph 135. The defendant had been provided with adequate disclosure of the materials that were being replied upon to establish a prima facie case against him. The page reference I have is 519. The first passage I read from was at the foot of page 518 at paragraph 134. The second passage was at the top of the following page. So although the case – that case didn't concern the issue of the provision of materials that were being relied upon to establish the prima facie case because Mr Dynar had been provided with that material.

BLANCHARD J:
Was that a ROC procedure?

MR DAVISON QC:

No. It was a pre-ROC procedure, Your Honour. Both *Dynar* and *Kwok* were pre-ROC, and a similar statement in *Kwok*, which is at tab 30 of the same volume at page 582 and at paragraph 101. In this case, the appellant was entitled to know the case against him, including the materials upon which the United States relied upon to establish a prima facie case. So it's my respectful submission that although these were pre-ROC cases the issue of the availability of that level of information material appears to have been accepted.

If we go to *United States v Michaelov* [2010] ONCA 819 at paragraph 49, which is, of course, a post-ROC situation, "The extent of disclosure required in extradition cases is shaped by the nature of the proceedings." Quoting *Dynar*, "The degree of disclosure required includes the materials relied upon by the extradition partner but does not coincide with domestic disclosure standards."

WILLIAM YOUNG J:

Looking at paragraph 52 on that page 16, "The extradition charge may only order disclosure of materials relevant to the issues properly raised at the hearing." You say that means, is there a prima facie case, as opposed to there isn't a prima facie case because we complied with the abuse tool met our obligations under the safe harbour legislation?

MR DAVISON QC:

That is the issue relevant to the issues properly raised at the hearing, is the existence of a prima facie case.

WILLIAM YOUNG J:

Is that what *Kwok* says at 100?

MR DAVISON QC:

That's exactly what *Kwok* is dealing with. *Kwok* was dealing with issues relevant properly raised being this – these cases involved challenges to charter compliance issues.

GLAZEBROOK J:

Kwok does say that at paragraph 100. It says "may only order" so it assumes that they can order the materials relevant to the issues properly raised at the committal

stages which refers back to the – 101 is clearly referrable to the prima facie case so, in fact, you would say, I assume, that paragraph 52 supports your argument that there is an ability toward the disclosure of anything relevant to the prima facie case, which must be the prima facie case relied on by the United States in this case but subject, obviously, to the duty to provide material that counters that, which is a separate duty.

MR DAVISON QC:
A separate duty, yes, your Honour.

WILLIAM YOUNG J:
101 says in this case the appellant was entitled to know the case against him, including the materials upon which the United States relied, but he's not entitled to anything else.

GLAZEBROOK J:
That's because he was trying to put up a Charter breach.

WILLIAM YOUNG J:
It's to do with material that's held by Canadian authorities.

MR DAVISON QC:
Yes, your Honour, her Honour Justice Glazebrook just commenting that these cases involved contentions or allegations of Charter breaches and the requests for disclosure were directed at obtaining additional material, not material rated to the prima facie case but material which in some way informed the issue of whether a breach had occurred of the Charter.

GLAZEBROOK J:
What was the charter breach they were saying? Oh, I see, it was actually the Canadian investigation rather than the US investigation, wasn't it?

MR DAVISON QC:
They'd run in parallel in some way.

GLAZEBROOK J:

The Canadians have some slightly weird thing that charter breaches outside of the country don't have an effect, which is slightly strange, but here they were looking at charter breaches in the Canadian investigation?

MR DAVISON QC:

Yes, and the qualification has been that that catchphrase "air of reality", if you can't demonstrate an air of reality to your complaint you're not going to get over the line and get an order.

WILLIAM YOUNG J:

But I suppose my problem with 101 is that I don't quite understand what the Judge meant. In this case, the appellant to know the case against him, including the tariff upon which the United States relied. The appellant has been told that, and is therefore not entitled to further disclosure. Now, it's complicated because the disclosure is on what you might call collateral issues.

MR DAVISON QC:

That's exactly the point.

WILLIAM YOUNG J:

What's not so clear is whether an issue properly raised at the committal stage of the process means the general issue, commit or not commit, or as in I think the *Michaelov* case, whether some specific documents had been forced. So whether it's a discrete issue or whether it's the whole thing.

MR DAVISON QC:

Yes. Your Honour, I'd sharpen the thing by going back a step. The appellant was entitled to know the case against him, including the materials upon which the United States relied. There was, in that instance, no quibble about the adequacy of that. Had there been, obviously the standard was he was entitled to know so if there was any shortcoming, presumably he –

WILLIAM YOUNG J:

But here – I know it's a bit of a bootstraps issue but here, self-evidently, your clients know the case against them and the material relied on because everything that's relied on is in the ROC or the supplementary ROC.

MR DAVISON QC:

Well, the answer, I'm sorry to say, is yes and no. Yes they know in a general sense, but no, they don't know in a sufficiently specific sense which would inform them so that they could engage in the process. Knowing the allegation or broadly stated allegation doesn't enable you to engage in an analysis which is directed at rebutting general propositions.

GLAZEBROOK J:

And you'd say, too, I suppose, that a summary of the document, because it is a summary, is never going to give the full flavour, so where specific documents are referred to, a summary isn't enough, generally, to know because you don't know how accurate that summary is?

MR DAVISON QC:

You don't know how accurate it is and you don't know the context of it.

ELIAS CJ:

If it's challenged, I suppose, because it may be accepted.

GLAZEBROOK J:

Yes, obviously.

ELIAS CJ:

Yes, so it's only where there is contention.

MR DAVISON QC:

Your Honours, I'll try and be as quick as I can. Could I just expedite things somewhat by handing up to you a table which just compares the legislation? Before I get too far into that, I don't want to duck the point that perhaps has been raised about the UK cases, but our submission on that is set out at paragraphs 84 and following, and it's just simply that the UK context is such which will become evident from this comparative that I'm about to hand up.

ELIAS CJ:

Yes, that's fine.

MR DAVISON QC:

Your Honours, what this is, is a comparison of the legislative environments created in the different jurisdictions. The purpose of it is to demonstrate that although there has been a general concurrence of international views between these countries is to co-operation and facilitation of extradition. The separate countries have addressed this individually in different ways, which have reflected their own assessments of the need to protect citizens or individuals in their own countries and to meet issues of comity or address and recognise issues of comity, so it's my submission that this becomes very evident when you undertake a comparative such as this, which I'll quickly go through. For example, extradition offence New Zealand, imprisonment for not less than 12 months, UK the same, 1B, 12 months, Canadian provision maximum of two years, so what one can see is that there's a different level of sensitivity, if you like, as to where the extradition offence sits and if we go across to the second page under section 11 of our New Zealand Act which protects the provisions of section 24(2)(d), preserving that New Zealand law will govern sufficient for a committal. Also 11(1)(d), the protection of the powers on a Minister or a Court, no equivalent in Canada or the UK either before or after the passing of the 2003 Act. Exempted countries, over the next page, section 17, where we have under Part III nuanced it with the accepted or not. In Canada, the ROC applies across the board, so there's no subset and so my submission it shows that the New Zealand legislature has addressed the issue of refining the issues of comity in that way.

It shows that in the case of those countries which have been granted exempted status, there has been a clear assessment of the degree of comity that should be applicable to them. That's in the case of the US. Then section 22, and comparing that, that except as expressly provided in section 22(1) or in regulations made, (a), the Court has the same jurisdiction and powers and must conduct the proceedings in the same manner as if the proceedings were a committal hearing or on an information. That provision is not qualified by the provisions of paragraph 22(1)(b) where it says the following provisions shall apply – these are the Summary Proceedings Act provisions – so far as applicable. So it's only the Part A Summary Proceedings provisions which are to be applicable so far as they can be made to sit comfortably, but otherwise there is the mandatory must conduct. Now, that's not replicated in the other jurisdictions. The Canadian jurisdiction, any modifications that the circumstances require under 24(2) applies to the actual hearing itself that can be modified. Same in the UK under 77(1) as nearly as may be applies to the whole of the extradition hearing. We have been more nuanced in our New Zealand approach

and we have only limited or only qualified it in relation to the Summary Proceedings Act proceedings. If we go across the page and deal with section 24(2) of the protected provision, the protection of the prima facie case in 24(2)(d) there are perhaps no material differences in relation to that and it reflects the treaty, so perhaps comparatively nothing much arises from it. But in relation to the UK, if we go to what is 78(7) – sorry, 84(1) under sub 7 where the Court is empowered where the Judge is to proceed under the section and must not decide under subsection 1. That is the provision that bypasses the prima facie case in the UK, and so the UK has dispensed with the prima facie case or countries which are designated, which the US is in that context.

ELIAS CJ:
Is that the proceeding under section 87?

MR DAVISON QC:
Yes.

Then if we go across to the page which starts with 25(2) at the top left, this compares the New Zealand provision where there is the mandatory must be prepared by an investigating authority and must contain. The Canadian equivalent has "must" to include but may, 33(2), include other relevant documents. Section 31, for the purposes of sections 31 to 38, this is the Canadian legislation, document means data recorded in any form and includes photographs, copies of documents. Over at 25(4), which provides that nothing prevents the country from satisfying the test with the procedures that are applicable to countries which are not exempted, and then 25(4)(b) limits the evidence that may be admitted at any hearing and this obviously avoids any suggestion that the ROC would preclude the provision of any further evidence, and there's just simply no equivalent in either the Canadian or UK jurisdictions.

Then in relation to Part IV countries, there's nothing of that kind in Canada and in the UK they have it for category 1 European countries. They have a backed warrant, no prima facie case.

Just turning over two pages, we get to category 2 designated countries. It's possible for them to be designated and under section 84(7) exempts them from presenting the prima facie case, and the last page of the comparative table is the regulations, New

Zealand regulations, dealt with and there's nothing equivalent in the other jurisdictions.

So, your Honours, I'm conscious of the time and I've prepared a section of submissions which are directed at responding to the Crown's submissions. If I could have 10 minutes to tick some of these things off and I'll await hearing from my learned friend so I can reply in due course if there's anything further.

ELIAS CJ:
Yes.

MR DAVISON QC:
The prosecution have submitted that the disclosure request is one of, in practical terms, being a disclosure of all its trial and investigative materials. In my submission, it's much less extensive than that. It is focused and it's intended to be as focused as one can make it when you're dealing with information you're not quite sure of the scope of. The order sought is said to imply virtually an automatic right to disclosure in Part III and we say far from it. One has to show that there is a legitimate basis for the Court to order it. Just in relation to the three key propositions advanced by the Crown, it's submitted that there is no disclosure obligation upon the US to provide materials for the purpose of opposing extradition and they say there are three reasons for that, that it's not an obligation which is recognised under extradition law, whether in New Zealand or the Act, and it's my submission that in fact it is recognised under the law of New Zealand and the Act. The Crown say disclosure is not permitted within the terms of the treaty on extradition between the US and New Zealand and it is burdensome and frustrates the clear obligation. In my submission, there's nothing in the treaty whatsoever that prevents or precludes or prohibits disclosure being provided. I've made my submissions about burden and the practicalities of providing it.

The Crown have said that mutual co-operation between the parties requires both parties to – sorry, the Crown are saying that because of the obligation that this was extend to numerous other bilateral agreements and that will impose a burden, in my submission. It only applies in this instance in relation to this treaty when it's examined and analysed. In terms of complying with international obligations, it's my submission that complying with the treaty and giving its effect pursuant to our Act

such as can be done which is not inconsistent with the treaty is complying with the international obligations of comity.

Just in relation to the submission that the US is not a party to the proceedings and an order can't be made against it, the Crown have made a submission that it is beyond the jurisdiction of the New Zealand Court to make an order against it. It is my submission that firstly by entering into the treaty it has agreed that New Zealand domestic law will govern and deal with an application such as is made and so has subjected itself in that sense. Secondly, it has elected to participate in the process in order to secure what it sees as its objective of the surrender of Mr Dotcom. Having done so, it has again subjected itself to the process of New Zealand Courts and is a party.

ELIAS CJ:
But is it necessary to go as far as that? Because the Crown, pursuant to the treaty, makes this application and presumably if the Court determines that there should be disclosure before the matter can – the extradition proceedings can go ahead that simply gets communicated by the party to the treaty to the other party.

MR DAVISON QC:
Yes, your Honour.

ELIAS CJ:
So it's not a question of subjecting the US to jurisdiction of the New Zealand Courts.

MR DAVISON QC:
It's not in that formal sense, and I accept that an order made would be communicated and either adhered to or not adhered to, and there would be consequences, perhaps, if it wasn't, in terms of what happens in New Zealand. I just want to make the point that the Crown had cited *Schreiber v Canada* (A-G) [2002] 2 SCR 269 in this context where Mr Schreiber had been arrested on a German-initiated warrant and put in jail for a while before he was released, and he then sought damages of a civil proceeding, and the Court held in that case that the German Government, by taking issue with the jurisdiction of the Canadian Court to deal with that civil proceeding hadn't initiated proceedings in a way that subjected themselves to their jurisdiction, and in my submission, that's a quite separate and distinctly different kind of issue than is here. As this Court has commented in *Cullinane*, the way perhaps to look at it

is to regard the US as being represented by New Zealand Government or Crown counsel but the US is still a party. In my submission, nothing in the end is going to turn on that because for the very reason your Honour mentioned.

Perhaps finally the issue of by doing this Mr Dotcom and the others leapfrog the US criminal procedure and get disclosure of information that they would otherwise have to await for a particular stage of the US proceedings if they were extradited. My response to that is, well, that's really no issue at all. It's about the New Zealand process that we are concerned, and if matters proceed as Mr Dotcom would have them, there would not be a US phase and there would not be a mutual disclosure situation arising in that context, so saying we're getting ahead of ourselves really in my submission is getting ahead of the argument.

Your Honours, I think that that's a – I think I've covered very quickly my answers and I'm not sure whether you will afford me an opportunity to respond.

ELIAS CJ:
You will have an opportunity to reply.

MR DAVISON QC:
Those are my submissions. May it please the Court.

ELIAS CJ:
Thank you, Mr Davison. Mr Foley, do you want to be heard separately?

MR FOLEY:
Thank you, your Honour.

May it please the Court, Mr Davison in his oral submissions and the pair of us through the written memorandum of submissions which has been supplied has covered most of them. The important points from the appellants' point of view that the Court may wish to explore, I wish to speak briefly now in respect of three of the appellants, Mr Ortmann, Mr van der Kolk, and Mr Batato, who were involved in the business of Megaupload. I put them in that order rather than the order which you'll find in the intituling. That's the order on my instructions and also the US case in which they were involved in this Internet business, the successful Internet business. Mr Ortmann was a substantial shareholder, Mr van der Kolk much less so, and Mr

Batato not at all. He was involved in marketing and advertising. They were here, as perhaps you know from the papers, for Mr Dotcom's birthday, which was in January, except for the day after the raid, when the police pounced.

Mr Ortmann is a German national resident in Hong Kong. Mr van der Kolk hails from the Netherlands, but is resident here with his family. They came before the raid to settle here with a small child. Mr Batato is a German national who now has a partner and a child here in New Zealand.

In relation to the appeal itself, and addressing the single at the same time broad point on appeal for those men, I suppose the decisions of both Judge Harvey in the District Court and Justice Winkelmann in the High Court and, of course, submit that, with respect, the Court of Appeal erred. I adopt Mr Davison's oral submissions to you today and wish to speak briefly to a couple of points, and then to answer any questions that you might have.

The first point, and one of the stronger, if not strongest to my mind for these men, section 102(1)(e)(i) of the Extradition Act, so the power to promulgate regulations for the control of the prehearing disclosure, and in my strong submission the existence of that provision is a strong – to use that word again – signpost as to the legislature's intent. Your Honours don't have the '65 Act before you but that provision didn't appear in the 1965 Act so someone, the draftsman, Parliament, I suppose, has turned their mind to creating and inserting it into the new Act in 1999. So the provision for the promulgation of regulations under the '65 Act was narrower, very much narrower, and in my submission that strongly supports these men's appeal, that the statutory machinery from the Summary Proceedings Act, which has been essentially plugged into extradition proceedings to provide a judicial component allows and expects, in my respectful submission, prehearing disclosure. It makes sense.

The second point, in relation to – it's been covered briefly by Mr Davison and by members of the Court in questioning him the extradition Court and committal Court must have an inherent power to control its own processes and that must, in my respectful submission, allow for a pre-hearing disclosure. Without that, it would be impossible for those subject applications to surrender to properly defend themselves.

I pick up Mr Davison's point from *Yuen* as to the point of the ROC procedure, and as I understand it from my reading it was to allow nations who weren't making the grade, if you like, in terms of the drawing of perhaps affidavits in usual criminal systems from the United Kingdom to an easier mechanism to get their evidence in their case before the Court. It wasn't, in my submission, a deliberate plan to so truncate the committal aspect of extradition proceedings that without luck, because that's what it would be, without luck you would also be surrendered. That seems wrong. It seems wrong because, in my respectful submission, it is.

The third point. In relation to disclosure requested, appended to District Court Judge Harvey's decision with a further appendix to her Honour Justice Winkelmann's decision setting out what was requested, at the heart of disclosure I follow Mr Davison in relation to what is sought, but at the heart of disclosure must be the wilfulness aspect and matters that point to the conspiracy, and I suppose the acts as a criminal lawyer is what I'm most interested in here, given the nature of the ROC, the way it's drawn, and the conclusions which are put forward, asserted within that document. Without those, I as counsel for my clients, can't advise them.

Mr Davison spoke to you, your Honours, the fourth point, about the business model, the DMCA protections, and of course the world is just the world. It's not the United States right throughout the world, and different jurisdictions have different models in terms of copyright protection. The Netherlands, for example, is very light.

ELIAS CJ:
Sorry, what is the submission on this?

MR FOLEY:
In relation to the business model, I was touching on DMCA protections, your Honour. It must be focused then on offending in the United States. So that's why linking it back to my interest as their counsel for essentially anything pointing to wilfulness, anything pointing to conspiracy.

WILLIAM YOUNG J:
Well, there's quite a lot in there about that. There are headings and examples given by reference to emails primarily.

MR FOLEY:

Yes.

WILLIAM YOUNG J:

Now, if the emails are fairly summarised then is that enough or not?

MR FOLEY:

We say they're not fairly summarised at the end of the day and they're taken out of context. There's a very large number of emails. One of the footnotes, I think, to my learned friend's memorandum of submissions is that there's five million emails. Well, that sounds like a lot to us but I imagine you can put them all on a small hard drive now the size of a glass of water. That wouldn't take long. It might take 10 minutes, perhaps less. So, Sir, we don't accept that what's set out in the ROC is set out fairly, and we don't accept the assertions, and we say email correspondence between, perhaps, two of my clients, I'm thinking of one email example was taken out of context. It was a joke. The US in terms of their application were relying on a joke. We wish to demonstrate that.

WILLIAM YOUNG J:

Well, I take it you haven't. There hasn't been a letter or anything or an affidavit saying these two emails are a joke, which you will see if you look at emails at each side of it. Can we have the 10 emails on each side of these two?

MR FOLEY:

No, there hasn't been a letter like that. Sir, we don't yet have copies of our own laptops in terms of the clients. The appellants don't yet have copies of their own laptops. This is a tech case.

WILLIAM YOUNG J:

I understand that. You put up something affirmative and you say two emails relied on as evidence of a conspiracy were, in fact, a joke.

MR FOLEY:

Yes.

WILLIAM YOUNG J:

Now, that's something that's concrete and could mount – you could say, well, we can illustrate that if we can see the emails on each side of them.

MR FOLEY:

Yes, but to be fair, we may have access through gmail because our gmail accounts to a number of those emails but it is not just that particular exchange. I'm thinking of one in particular. We wish to properly put into context the United States allegations and to meet them and essentially to be able to prove to the extradition Court that there is no case. I don't wish to have a trial. I don't wish to have a fight, competing inferences. We wish to have a fair hearing in terms of the committal hearing.

GLAZEBROOK J:

But that disclosure goes a lot further than disclosure which Mr Davison concedes is only related to the prima facie case, doesn't it? Because the United States, even if they're required to provide all of those emails, are not on the case as it's set now in terms of disclosure obliged to provide a whole pile of other material except to the extent that they're under an obligation to do so in terms of matters that destroy their case, so one assumes in that case if there is an email saying, "Yeah, yeah, joke, got you," they probably would be obliged to disclose that.

MR FOLEY:

If an emoticon smiley face is "yeah, yeah, that's a joke", your Honours will answer that. The email I'm thinking of in fact had that embedded within the email, so yes, demonstrably on the face of it we could show that.

GLAZEBROOK J:

The other material that you were referring to was material that put things into context.

MR FOLEY:

Yes, very much.

GLAZEBROOK J:

But the disclosure order wouldn't cover contextual material, would it?

MR FOLEY:

It would cover everything, and I imagine –

GLAZEBROOK J:
So you actually have a different indication of disclosure?

ELIAS CJ:
Well, context is directed at a prima facie case. I mean, I don't think that it can sensibly be suggested that it goes further than that, and Mr Davison didn't suggest it. So you do limit it by that, don't you?

MR FOLEY:
Yes, I do limit it by that, thank you, your Honour.

GLAZEBROOK J:
Well, I misunderstood because it seemed to me you were suggesting there was disclosure other than the material that the United States were relying on.

WILLIAM YOUNG J:
Can I take you to page 213 of the case, volume 1? It's item 1(d)(ii) of the order made by the Chief Judge in the High Court.

GLAZEBROOK J:
That's the disclosure made by the District Court.

WILLIAM YOUNG J:
What's the alteration she's made?

MR FOLEY:
All documents evidencing communications between the applicant and any alleged co-conspirators displaying either knowledge or wilfulness on the part of the applicant or the absence thereof.

WILLIAM YOUNG J:
I think in paragraph 118 she adopts it, doesn't it?

GLAZEBROOK J:
She does seem to be, actually. I'm looking at 119 and she said that it doesn't go beyond what is necessary.

WILLIAM YOUNG J:
So (d)(ii) documents demonstrate either guilt or innocence, effectively. The two little bullet points are exhaustive. It's everything that is in that category.

MR FOLEY:
In this modern age, with respect, is that wrong, in terms of emails? It's just so simple to collate and provide the starter. That point was made by Judge Harvey in the District Court in terms of e-discovery in the High Court Rules.

WILLIAM YOUNG J:
What I thought we were having a debate about was whether you were seeking simply the documents that the United States was relying on or whether they were seeking effectively all the documents on particular aspects of the case and it does seem that it's the latter.

MR FOLEY:
I would go further in relation to the emails, given that the power, the weight the USA appears to put on them and their use in the ROC.

ELIAS CJ:
Mr Foley, do you want to make any more – are there more submissions you wish to make?

MR FOLEY:
Yes, three.

GLAZEBROOK J:
I don't quite understand the point about the emails. Given the weight they're putting on them, what do you say they should be disclosing?

MR FOLEY:
It's a modification on Mr Davison's position, but for my clients I'd like all of the emails. There seems to be no particular objection to that.

GLAZEBROOK J:
So every email they sent or received?

ELIAS CJ:

To each other in furtherance of the conspiracy or touching on the conspiracy?

MR FOLEY:

Yes, your Honour, of course, completely on the conspiracy. What is the conspiracy? How is it shaped?

ELIAS CJ:

Well, that's what I asked at the outset and haven't yet got a very good answer to.

GLAZEBROOK J:

If they got their computers back, presumably they would have access to those.

MR FOLEY:

They have access to them already, to a degree. Consider cloud accounts, if you like. Probably not all of them, and it's the focus of the interest of the prosecutors in the US that are of interest to us to be able to understand what their case.

GLAZEBROOK J:

Well, I can totally understand the submission which is what I thought Mr Davison was saying, that anything the US is relying on you want to be able to see. So I can understand that submission and then the US obviously has a duty if there's something that is slam-dunk contradictory to that to put that in as well. But you seem to want to go further than that.

MR FOLEY:

I do. In terms of the emails, discretely.

GLAZEBROOK J:

But how do you phrase that, then, or are you just relying on the District Court order which is all emails passing between the applicant and all of the alleged co-conspirators, which is page 213.

MR FOLEY:

Yes. For the same reasoning as I understand it the process taken by Judge Harvey and Mr Davison, which is that it's more work, really, to try and extract, perhaps, the

emails than to give us the lot, but at the end of the day we'd need it articulated, what's what. Your Honours, I see the time.

ELIAS CJ:
How much longer do you expect to be, Mr Foley?

MR FOLEY:
Two or three minutes subject to questions.

ELIAS CJ:
Yes, carry on, thank you.

MR FOLEY:
The US, as the respondent today, make three main points in this appeal. The first is that disclosure obligation is not recognised in New Zealand law or across jurisdictions and the orders and decisions to date apart from the Court or Appeal's decision are novel. I reject that. I won't go through them but I rely on section 22(1)(a), 11(2)(d), 102(1)(e) and the Bill of Rights. I say for these men that this is not novel. This is an application of the law. In relation to the legislative regimes, the table that Mr Davison has prepared meets, in my respectful submission, a comparative exercise.

The second point, disclosure is not permitted within terms of the treaty. For the appellants, I reject that. I refer respectfully to Articles IX and IV.

The second point in relation to this, the suggestion of a burden can be met easily by almost all of this information is digital and that's touched on or directly referred to by the District Court and the High Court.

Third and final point, no legitimate basis for disclosure of orders. The committal mechanisms and preliminary hearings are essentially decoupled – that's my word – from disclosure rights.

My answer to that, in short is that that is wrong. There are fair hearing rights. The way in terms of preparation for this hearing I thought about that is that what would have happened back in 1999 had a private prosecutor brought a prosecution and there was no ability to have disclosure? Of course the Court would have ordered disclosure against a private prosecutor. It would be wrong, couldn't use the Official

Information Act then. Second and final point in submission, the treaty does not trump the essential machinery of the Extradition Act. The committal machinery itself is the judicial phase. That's important. It needs to be given oxygen to function properly. Without it, in my respectful submission, the ROC procedure simply becomes a rubber stamp. Unless I can assist the Court further, those are my submissions.

ELIAS CJ:
Thank you, Mr Foley. We will take the lunch adjournment now and resume at 2.15.

COURT ADJOURNS 1.07 PM
COURT RESUMES 2.15 PM

ELIAS CJ:
Yes, Mr Solicitor.

SOLICITOR-GENERAL:
May it please the Court, thank you. The simple submission for the Crown is that the Court of Appeal was correct to find that the disclosure order was not appropriately made and that is so whether the question is approached as one of jurisdiction, power or the absence of a necessary basis, and I want to divide my submissions up. You've heard from my learned friends. There were three primary arguments. I want to divide them into a total of five, if I may, and then as a sixth point address section 25 and the regulation making power.

So if I can just outline those so you can follow me, the first of the six is that the international case law, and I'll deal with this first, over the past two decades has considered and rejected the same arguments for disclosure in this context.

The second heading is that a disclosure order against the requesting state is contrary to the object and purpose of the Act and the Treaty.

The third point is that it's accepted that the appellants are entitled to a fair extradition hearing but that does not give rise to rights akin to some kind of criminal disclosure, albeit we are hearing very differing stories as to, or submissions as to what exactly it is, but, whatever the scope, it doesn't give rise to disclosure orders against a requesting state, and I make the point, and you will have noted it, there is no supporting authority, no such order has been made or upheld at an appellate level

across the common law so that were it to be made in this Court we would stand alone.

The fourth point is that the District Court does not have an implied power to order disclosure in this context, never did. It's been assumed far too lightly in this case that it does, but it does not.

The fifth is that, and it's a point that came up in discussion, is that this order is in effect, no matter how one expresses it, it's an order against a foreign state and the law is very clear that in the context of submitting an extradition request to another state and then that state acting upon it, there is no surrender or waiver of sovereign immunity. So that's the fifth point, and the sixth, as I said, was to deal with section 25 and the regulation-making power.

Now clearly, your Honours, I will be distracted on my journey. I'll flag the parts that are, of my submissions, that I am referring to and I'll try and summarise those.

The first point is the international case law. This overlaps with the second about the treaty and the Act, but we are concerned, of course, with a statute that is to be interpreted to give effect to extradition treaties, and in this case I note that this was New Zealand's first such treaty in 1970. Section 11 of the Extradition Act makes that very clear. The object of the Act, and the object of the treaty, is clear: to facilitate extradition, to make it more efficient, more easy to enable it. So one must immediately approach the Act with that in mind, as is made clear by decision law of the Court of Appeal in *Yuen Kwok-Fung v Hong Kong SAR*, decision in *Cullinane*, Justice Glazebrook's decision, and the broader authorities such as *Re Ismail* [1999] 1 AC 320 (HL) and the commentary which picked up *Ismail* in *Kim*, decision of this Court.

ELIAS CJ:
Wasn't there a fall-back position recorded, I think, in the Court of Appeal judgment whereby it was suggested that there would be limited disclosure to material affecting the reliability of the evidence? Was that –

SOLICITOR-GENERAL:
It seems to have –

ELIAS CJ:

Who put that forward?

SOLICITOR-GENERAL:

– just moved a lot of the time as to what it is. The…

ELIAS CJ:

I thought it was the respondents that put that forward.

SOLICITOR-GENERAL:

No. What – that will have been the obligation or duty of candour which you'll see through the authorities. Now that obligation as referred to deals with the requirement of the requesting state to put forward any material that would fundamentally undermine, effectively contradict, what's being asserted, not just a competing inference or more context but something that would fundamentally detract from the assertion. That's the obligation of candour.

Now the authorities have said again and again, "Yes, that exists," but the Court, the committal Court, can't enforce that. It merely can note it, perhaps draw it to the attention. If it's really troubled by it, it can draw a line through the evidence, for example, or if it's truly troubled it can say, "Well, I decline to commit."

ELIAS CJ:

I'm referring to what's at page 110 of the Court of Appeal decision –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– in which the other question, I suppose, that needs to be raised is is that accurate, because it says the United States sought relief.

SOLICITOR-GENERAL:

The United States in this proceeding –

ELIAS CJ:

And it sought –

SOLICITOR-GENERAL:

– sought relief.

ELIAS CJ:

– orders.

SOLICITOR-GENERAL:

By way of judicial review, is that what you mean, your Honour?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes, that's what occurred, so Judge –

ELIAS CJ:

Why are you appearing then? I'm just trying to work out –

SOLICITOR-GENERAL:

Yes, a very good point. The diagram should elaborate. The extradition is a state to state process.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The Minister of Justice decides –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– if the matter is to come before the Court.

ELIAS CJ:

Yes. No, I understand that.

SOLICITOR-GENERAL:

And the order, as you'll see in Judge Harvey's decision, was made against no one.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

It was just an order for disclosure, which is a problem in itself.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But it was made, and when you look at paragraph 1 of Judge Harvey's decision, it was made in respect of information held by the prosecuting authorities. So that is the US. This is a United States prosecution but New Zealand is obliged under the Treaty to provide all assistance, all reasonable, lawful assistance.

ELIAS CJ:

No, I understand that. It's just in view of the emphasis you're placing on the fact that this is an order against a foreign state –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– I wondered why the Court of Appeal had said that this was relief that the United States had sought, because my understanding was that you make through the, the application in the Court, and presumably the effect of the order is that if it's not complied with then the Court has to decide whether to continue with the committal would be an abuse of process.

SOLICITOR-GENERAL:

Yes. Now –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

But the pragmatic –

ELIAS CJ:

So there's no necessary attempt to grant an order against a foreign state.

SOLICITOR-GENERAL:

Well, in practice that's what it is because they're the people who hold this information. It would be utterly inappropriate for a Court to say, "Well, I'm not going to make it against you in name but I know that you're the only one that holds it. I will make it against the Crown in New Zealand or the Minister," knowing full well that the Minister doesn't hold it. That would be an artifice, with respect, and some of the cases –

ELIAS CJ:

Well, it's just it becomes the condition on which the committal proceedings carry on.

SOLICITOR-GENERAL:

Well, I can see that, yes, but, with respect, an improper one.

ELIAS CJ:

Well, it used to be the case that injunctions weren't granted against the Crown and the Courts used to make declarations.

SOLICITOR-GENERAL:

Yes, yes, I understand, in the High Court, of course, the Court of inherent jurisdiction. The –

ELIAS CJ:

Sorry, but the point – I'm sorry, I was just a bit distracted by the way it was put in paragraph 110.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But in paragraph 110, there is an indication that the United States, the fall-back position was that any disclosure may be made only if, and then there are those two conditions set out. Nobody has made any reference to that.

SOLICITOR-GENERAL:

No.

ELIAS CJ:

That's off the table, is it?

SOLICITOR-GENERAL:

It's certainly off the table from our perspective, your Honour.

GLAZEBROOK J:

Is that 110 of the Court of Appeal decision, is it?

McGRATH J:

Yes.

GLAZEBROOK J:

Sorry, just catching up.

SOLICITOR-GENERAL:

And there is some history to this, your Honour, that the Canadian case law, as the Court of Appeal grappled with, you'll recall Justice Arnold saying that there is some possibility of an order being made in Canada and therefore we're going to refuse the Crown relief of an order that says, "Never," in effect, and there was some confusion in the lower Court on the part of, I think, all people as to what the power would be, and really, from our perspective, that is off the table.

ELIAS CJ:

Well, presumably it was put on the table by the United States at an earlier stage if this paragraph is correct.

SOLICITOR-GENERAL:

Yes. That's right. My understanding was that that mirrors the obligation of candour, so that if there was such evidence that was effectively disclosed that the ROC was manifestly unreliable then there would be an obligation to disclose it.

ELIAS CJ:

Well, it doesn't read like that. Don't take any more time on it, but this is about the respondent satisfying the Court that there are specified items of inherently cogent evidence and so on.

SOLICITOR-GENERAL:

The respondents must be the appellants there.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes. Well, they haven't chosen to do it. This proceeding was just – this application was initiated by a memo applying for a disclosure, so there's no targeted –

ELIAS CJ:

Well, what is wrong with this approach, however? Is that something that you would say doesn't fit within the statutory and treaty framework?

SOLICITOR-GENERAL:

Yes. Well, our submission primarily is that the Court just doesn't have that power, can't make such an order. The US, of course, are subject to an obligation of candour. We have made that abundantly clear to them. They're well-versed in extradition as you can see from the case law.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

Your Honours, the arguments, as I've said, raised by the appellants are not new. I'll come to the series of case law. But they have been extensively considered and rejected over the past two decades, so we have in the UK it starts with the decision

of Lee and that was in approximately 1993, and in Canada it starts with *Canada v Kindler* [1991] 2 SCR 779 and goes on to the leading cases which you've heard of already of *Dynar* and *Kwok*, and I'll come on to those.

But it has been consistently held at the highest level that the person sought is not entitled to disclosure of foreign materials beyond those the requesting state relies on to meet the threshold. It immediately arises that conversation that was held before about *Dynar*, *Dynar* was not saying that you get disclosure of material beyond that which you put in front of the Court. It was simply saying, you're entitled to disclosure of material that you rely on in front of the Court. You're entitled to know the case against you. That's the sum of the authorities, *Dynar*, *Kwok*, and following, and I'll come to the one point the Court of Appeal discussed in a moment.

The statutory and treaty settings are directly comparable to our own. It's the law as found by the British Courts both before and after the Extradition Act 2003, a point that was made earlier, so there was a traditional process and a truncated process. The same line of reasoning for those three. The same as the case in Canada prior to ROC, the case of *Dynar* and *Kwok* and post-ROC cases as well. Nothing changes as a result of *Ferras*. *Ferras* dealt with a problem in a case called *United States of America v Shephard* [1977] 2 SCR 1067 and you might recall *Shephard* said that the extradition Court needs to accept the evidence even if it is manifestly unreliable. *Ferras* said, well, no, that can't stand in light of section 7 fundamental justice, and therefore we alter the law in respect of extradition that there is this limited weighing.

ELIAS CJ:
So do you say it's simply an ex facie examination, that you don't look behind the ROC?

SOLICITOR-GENERAL:
Yes. That's right. Much like a committal hearing.

ELIAS CJ:
But if it's inconsistent or if it doesn't stack up and it doesn't amount to a prima facie case then you can decline?

SOLICITOR-GENERAL:

Absolutely, and in *Cullinane* it's far from a rubber stamp exercise, because the appellant is entitled to be heard, receive all the evidence, make submissions, is there evidence on the face of each element of an extradition offence and then they're entitled to make submissions as to is there a mandatory restriction, is extradition otherwise in accordance with the treaty, and you can see from *Cullinane* what a complex and non-rubber stamp exercise it is. In fact, my friends have asked for a three or four week hearing in the District Court so it's a big rubber stamp, with respect, and it's just not that because of all those steps that the requesting State and the Crown on its behalf, or the Minister, must go through.

McGRATH J:

So can a reliability assessment be made on the summary of the evidence in the ROC?

SOLICITOR-GENERAL:

A limited one, with respect, yes. If, much like *Ferras*, if it's inherently or manifestly unreliable – and this is another opportunity the appellants have, they're entitled to lead evidence, as my learned friend said, to establish that it's manifestly unreliable, that the ROC can't be relied on.

ELIAS CJ:

Why do you acknowledge that? Why do you say that they can call evidence?

SOLICITOR-GENERAL:

Well, it seems clear that there's no limit on them.

ELIAS CJ:

Yes, but if they can put up evidence and if the applicant has the evidence they need, what's the – if the statute contemplates that there will be some joining issue on the evidence, doesn't that take you a long way down the track to some disclosure?

SOLICITOR-GENERAL:

Not in my submission, at all.

ELIAS CJ:

Why not?

SOLICITOR-GENERAL:

Because nowhere in the treaty or the Act does it contemplate the Court ordering disclosure. There is no specific reference to that. At best, we have the arguments around section 103 which the regulation power, or section 25, and I'll deal with those, but to say that one can't raise an issue without disclosure of material held by the appellant, with respect, is over-simplifying, because the appellants, of course, know full well their business, know full well and they've conceded they have access to much material. If you look at the affidavits of Mr Prabhu, he outlines that. There's no affidavit to the contrary.

ELIAS CJ:

Where is that to be found?

SOLICITOR-GENERAL:

That's in the case on appeal. You can see there's two affidavits of Mr Prabhu at tab 21 and 22. We deal with that in a footnote, footnote 34 of our submissions. There are three affidavits, I beg your pardon. At tab 20 –

GLAZEBROOK J:

What are you relying on them for?

SOLICITOR-GENERAL:

Simply to say that Mr Prabhu has deposed to the fact that the appellants have a great deal of material available to them, irrespective of what the US holds.

GLAZEBROOK J:

What tabs are those?

SOLICITOR-GENERAL:

Tab 20 paragraph 14 of the case, page 369. With the greatest of respect, the Crown position is it doesn't matter whether they have the material or not. It doesn't matter how onerous. There isn't a power to make this order and it's contrary to the treaty and the Act. We don't rely on onerousness, although we say it is onerous. That's not at the heart of this.

Can I come back, then, this first point is about the international perspective and in particular the case law, and if I could just – you will, I'm sure, have read the submissions that deal with interpretation consistent with international obligations, and this is paragraph 16, talks about *Kindler*, 17, *Dynar*, explains the role of the extradition Court as modest but important. The extradition relationship is founded on the acceptance – this is comity – that the requesting country will afford a fair trial process. That runs through the entirety of extradition. So I'm at paragraph 17. Then I'll skip through 18. These are uncontentious. The commentary about *United States v Ismail* [1994] 48 F.3d 1212 treaties and extradition legislation are to be accorded a broad and generous construction so far as the text permit it in order to facilitate extradition. That runs through the Treaty, the Act, the case law.

WILLIAM YOUNG J:

Looking at something in the affidavit, there's a reference to some of the data being encrypted and passwords having not been supplied. Is that still the position?

SOLICITOR-GENERAL:

It still is. The Crown has offered over the last, roughly, I think, 16, 18 months, perhaps, that in exchange for passwords to encrypted material we'll provide the clones. Now, you know that's what's been ordered by Justice Winkelmann and as Mr Davison rightly says that's subject to negotiation at the moment, so upon provision of passwords the appellants will have the clones. The US quite rightly say to us, "Well, how can we provide them with material that we've seized or you've seized on our behalf that's encrypted without getting the passwords?" Justice Winkelmann has agreed.

WILLIAM YOUNG J:

What did Justice Winkelmann say about passwords?

SOLICITOR-GENERAL:

That the clones would be supplied upon receipt of passwords for the encryptions.

WILLIAM YOUNG J:

And that aspect of it is not resisted by the respondent?

SOLICITOR-GENERAL:

That's right. I think that was offered by my learned friend in the case.

WILLIAM YOUNG J:
But your client, the United States. The United States doesn't resist?

SOLICITOR-GENERAL:
No, we've offered that all along the way.

WILLIAM YOUNG J:
What's the response to that?

SOLICITOR-GENERAL:
My learned friend no doubt differs, but I think it's under negotiation. So the clones, of course, were made in New Zealand and can be provided. That's the order that's extant at the moment, in exchange for passwords.

ELIAS CJ:
That's the order that's made at the moment?

SOLICITOR-GENERAL:
That's right. The search warrant judgment is under appeal. I'll just check with my learned friend. We're not quibbling with that aspect. It can be provided. She's ordered it and it's subject to negotiation so with the greatest of respect, given the length of time away the extradition hearing, which is a sad indictment, with respect, on the process that there can be no issue from their own material. They have the key to it.

Can I just touch, Your Honours, at –

ELIAS CJ:
I'm sorry, that is not subject to this appeal.

SOLICITOR-GENERAL:
No. Bearing in mind, of course, we're talking about Judge Harvey's order which binds on the material held by the prosecuting authorities that underlying the ROC. Now, it may encompass, as my learned friend said, I agree, there will be an overlap.

WILLIAM YOUNG J:
Presumably the encrypted material isn't relied on as part of the ROC.

SOLICITOR-GENERAL:
It certainly isn't. None of the New Zealand seized material is.

WILLIAM YOUNG J:
I see. So we're actually talking about – right, thank you.

SOLICITOR-GENERAL:
It forms no part of it. Now, whether it existed also in another jurisdiction is another case, so of course there may be an overlap, but it's not the basis of the ROC at all.

Paragraph 19 I was going to touch upon, the origins of the Act and the ROC provision were dealt with by the Court of Appeal and we summarised that the Canadian and New Zealand statutes had similar – were the same genesis, both passed in 1999, both developed from discussions from Commonwealth ministers, and the aim was to modernise and streamline, so once again, one has to interpret section 25 in particular and 22 in light of that object, and in particular section 11 mandates that.

We deal along the way with the extradition doesn't engage civil or criminal fair trial protections. That's decided again and again House of Lords United Kingdom Supreme Court, Privy Council, Supreme Court of Canada.

GLAZEBROOK J:
You're not really suggesting that you don't get an interpreter or that you don't know the charges against you or that you don't have a fair hearing.

SOLICITOR-GENERAL:
No.

GLAZEBROOK J:
So it's a fairly meaningless statement, isn't it? What are you suggesting, that you don't get just disclosure?

SOLICITOR-GENERAL:
The reason it's said is that it was relied on by applicants to say, "Well, fair trial rights apply, I must get disclosure," and it's been flipped around so the points your Honour made are well made.

Can I skip through to paragraph 34 where I discuss the authorities? I just want to take care to deal with these to the extent the Court requires. 34 we deal with the point, I think it was raised in argument, that in the Canadian/US extradition treaty it has the equivalent article as Article XII, and I'll come back to this point, and that is that it is a state-to-state process to obtain further evidence. *Kwok* and *Dynar* both involved that treaty. If I can come then to the first point, which is paragraphs 35 through to 52, and I'm going to summarise, if I may, firstly the United Kingdom authorities, paragraph 37. It is settled that the extradition Court may not order disclosure of materials held by the requesting state, and we cover the text and then I go on to cite the authorities.

Paragraph 56, the Court of Appeal accepted the submission that certain cases must be approached with caution, as under the 2003 Act the United States was not required to establish a prima facie case. Now, our submission is that represented no divide. This is paragraph 39. The decision in *Wellington* and perhaps if it's convenient to your Honours I'll give you the paragraphs. *Wellington* is tab 12 of our bundle and the key paragraphs are paragraphs 20, 22, and 26. This is – so tab 12 paragraph 20 is the first and perhaps if I can just read that, "Nothing in the Strasbourg jurisprudence" – of course, European human rights jurisprudence – "requires the person accused of an extradition crime to have the opportunity to cross-examine witnesses against him or to require the requesting state to furnish material against which the evidence on which it does rely can be tested." Paragraph 22, "Neither case supports the proposition that the applicant is entitled not only to the material on which he has been detained but to other material on which the requesting state does not rely." It goes on to talk about in the absence of bad faith, which I'll come to deal with.

GLAZEBROOK J:
Isn't the – because let's assume that these cases stand for the proposition that you're only allowed what's given to you, but in these cases, at least before a record of case procedure, what was given to you were the documents upon which the requesting state was relying, because by their very nature before you had a record of case

procedure you didn't just get summaries. You got the actual documents on which they're relying, and if the state wasn't relying on a document then you didn't get it and if the state had documents that it could have relied on but you didn't get them, well, that was too bad because the requesting state stood or fell on what it put up, but isn't the real issue in this case if you're looking at it in a very narrow sense are you entitled merely to put a summary of a document in or do you have to put the document itself in? Most of the cases that say that you're not allowed anything else do all assume you are allowed the documents that the requesting state is relying on because that's the very nature of a fair process in the circumstance. You are entitled to know the case against you that the requesting state is relying on, in the very narrow sense of the case against you on the extradition itself, not the more broad case against you.

SOLICITOR-GENERAL:

Precisely, and the key is in the documents on which the requesting state relies. It's not the underpinning documents. It's those which are –

GLAZEBROOK J:

I understand that, but in a ROC procedure, well, say in a very simple ROC where it's, say, a threat to kill, the summary might say, well, here is a letter that was sent by the accused person saying, "I threaten to kill you." Now, the question is, do you have to provide not only the summary of that but the letter itself? Say, for instance, the defence is that is absolutely clearly a forgery. There is no possible way that it is anything other than a forgery, therefore there is no prima facie case. Now, without the document itself, there's no way that somebody is going to be able to say that is quite clearly a forgery.

SOLICITOR-GENERAL:

That's a very good point. The answer is twofold. The forgery case is dealt with in one of the Canadian authorities where exactly that was requested, *Michaelov* was one example. There are others of documentary cases where they request the underlying handwriting and the Court says, no, you can't have that. But the –

GLAZEBROOK J:

Well, why do they say you can't have that? Now, the *Michaelov* case, I think, was different because that wasn't even particularly relevant to what they were saying. But

in this particular case there that I am positing, would you say you ask under Article XII or the equivalent of Article XII?

SOLICITOR-GENERAL:

Well, if the Court reached a point – and some of the English cases pick this up – and said, "Well, look, I'm satisfied from what I've heard that I've got real issues with the reliability," either the Court then says, "Well, I'll give you the opportunity to go and request it if you want to by noting that," or it says, "Well, I'm going to rule a line through that evidence," or alternatively it says, "Well, I'm going to dismiss it." So by that mechanism it protects its process.

WILLIAM YOUNG J:

Was it a function of a committal regime that – and I suppose the best evidence rile – that before the ROC procedure the exhibits had to be adduced or copies of them had to be adduced?

SOLICITOR-GENERAL:

Of those which you wanted to produce, so you had depositions and exhibits.

WILLIAM YOUNG J:

So you have a deposition and it would say, "I refer to and produce an agreement for sale and purchase," or whatever.

SOLICITOR-GENERAL:

Yes, and that's still available under Part III.

WILLIAM YOUNG J:

Yes. And I suppose the issue in a sense is whether under section 25 it's possible to summarise what would otherwise be the exhibits without an obligation to make them available under section 25(2)(b).

SOLICITOR-GENERAL:

This was in part my second answer to Justice Glazebrook's question. If you summarise a document, and that means you have to produce it, what's the purpose of the section 25?

GLAZEBROOK J:

Well, the purpose of the ROC procedure was only that you didn't have to go through the hoops, because some of the civil law countries couldn't comply with the sort of hoops that were required, so that was the purpose behind it. They just weren't able to produce evidence in the form that would be best evidence or accepted in a common law Court.

SOLICITOR-GENERAL:

Sorry, it's much broader than that, because then why would you have ROCs for the US and Canada? They're not civil countries.

GLAZEBROOK J:

Because Canada, unlike us, just decided to do it across the board, didn't it? So that was all that was going to be required, but the question is whether that by its nature then said, "Well, you didn't have to produce documents." Because in the example I'm giving, without producing the document, there is no way that you could say anything other than assertion in terms of that's forged, and without seeing the document, there's no way you could prove conclusively that it was forged. Why wouldn't you, in that case, require a document to be produced, whether, through an Article XII procedure, although the Article XII procedure in the cases seems to be if you're worried about an abuse of process? Well, you may just say in order to give somebody a proper opportunity to address that question and a fair opportunity to say that there isn't a prima facie case, they have to see the document.

SOLICITOR-GENERAL:

Yes, now can I deal with that particular example? I agree you may say that and the English authorities says the Court may say that, but then it goes on to say that it doesn't have the jurisdiction to order it.

GLAZEBROOK J:

Well, no, forget the jurisdiction. Can you possibly have a fair trial of the very narrow issue of whether there's a prima facie case in the circumstances I'm positing without seeing the document? The answer would have to be no, wouldn't it?

SOLICITOR-GENERAL:

No, I wouldn't accept that because, for example, the person can say, “Here is my normal handwriting. Here’s the expert evidence that says that doesn’t look anything like” –

GLAZEBROOK J:

They haven’t seen the document so they certainly couldn't say that.

SOLICITOR-GENERAL:

So they say, for example, they could say, “I just wasn’t in a position to sign that. I wasn’t in the country. I wasn’t there.”

GLAZEBROOK J:

But you might have been there. You just didn't happen to sign it.

WILLIAM YOUNG J:

All right. If someone goes on oath and says, “I didn't sign that document, cross my heart and hope to die,” and that has consequences if it’s later shown that they did, then that might not warrant the production of the document. Someone who, as it were, as the Canadians would say in a slightly different context, lends an air of reality to the proposition rather that I want to see everything you’ve got.

SOLICITOR-GENERAL:

Yes. Possibly – as opposed to I want to see everything, but can I come back to that point, though, that if that’s the case then haven’t you raised that real question about the reliability of the summary and then the Court can say I’m either not going to commit on this or I’m going to give you the opportunity to provide the document.

GLAZEBROOK J:

Well, I don’t know, really, because there’s so many people who stand up and say, “I was somewhere else at a different time,” that if every time that happened someone decided there wasn’t a prima facie case then we would be in some difficulty, I think, not that we have committal proceedings any more.

SOLICITOR-GENERAL:

No. But that’s not the case we’re dealing with here.

GLAZEBROOK J:

I understand what we're dealing with. I'm just trying to test the proposition that effectively, however that is done, whether it's done through Article XII or whether there is some kind of disclosure obligation that comes about through section 25 –

ELIAS CJ:

Or through the context.

GLAZEBROOK J:

Or through the context.

SOLICITOR-GENERAL:

I'm just not understanding the last point, the context.

GLAZEBROOK J:

Well, just in terms of section 25 looked at in terms of whether a summary is sufficient in the document.

SOLICITOR-GENERAL:

Right, yes.

GLAZEBROOK J:

Because, of course, in some instances a summary will be totally sufficient. In other cases, it may not. Forgery cases is the absolutely clear one where until you see the document there's no way you can get your expert to say categorically this is absolutely not this person's handwriting.

SOLICITOR-GENERAL:

You're dealing with quite an extreme, and with respect –

GLAZEBROOK J:

Which is why I picked the extreme, because it does illustrate that if the requesting state is relying on a particular document and says so then it can be difficult to challenge that on merely a summary. Because for a start it might not be an accurate summary, it might not be a complete summary, and that's without any bad faith on behalf of the summariser because we all summarise things in a different way.

SOLICITOR-GENERAL:

Yes. It's important, though, that this Court doesn't drift into trial. The extradition Court –

GLAZEBROOK J:

But that would be a clear indication there wasn't a prima facie case. The prima facie case is there's a threat to kill by this particular person. If it was a forgery, then that is the end of the case. There is no prima facie case, so that's not drifting anywhere.

SOLICITOR-GENERAL:

If you can establish a real issue that that is a forgery, you see, the Canadian cases have dealt with this and my learned friend says that *Diab* is a handwriting case, and again, I have to come back to – no order has been made of this nature.

WILLIAM YOUNG J:

Well, it may be a case where the record of the case says a handwriting expert says or there's some – we can show that this document was printed off the printer in the defendant's room or something of that sort.

SOLICITOR-GENERAL:

Yes. That's right.

GLAZEBROOK J:

Or it may be the document has just been given to them and they've had every opportunity to decide whether to put that evidence forward or not. Because if they'd had the document and there's an argument about it, well, that doesn't mean there isn't a prima facie case, but if they haven't had the document then they haven't had the opportunity to challenge the prima facie case.

SOLICITOR-GENERAL:

In the circumstance you describe, yes, and with respect, we are worlds away in this case.

ELIAS CJ:

Well, I wonder because to some extent, I don't know whether it's a substantial extent or not, but to some extent the ROC is a statement of expert opinion. Having examined all these materials, I am of the view that it shows that there is a conspiracy

going on. It's not unlike the example that's been given to you because it may be that without the raw material to know whether that inference reaches a prima facie standard you can't challenge it.

SOLICITOR-GENERAL:
Well, with respect we're dealing – that's trial territory, competing inferences –

ELIAS CJ:
Well, prima facie is a step towards trial. It's on the same continuum. I think we all understand that there's a difference between a prima facie case and a determination of guilt.

SOLICITOR-GENERAL:
Yes. Now, in the ROCs that we're talking about, there isn't just reference to expert evidence, reference to –

ELIAS CJ:
No, no, I understand that.

SOLICITOR-GENERAL:
– emails, reference to evidence, reference to copyright holders' evidence, reference to rewards, people given rewards for uploading material that is repeatedly downloaded and I can come to particular examples. So there's a wealth of evidence summarised and, as I understand my learned friends, they say, "Well, if we had more we could give it context and it wouldn't perhaps bear the meaning that they're saying," but, with respect, that's a trial issue. It cannot possibly go – unless they can point to something that – because bear in mind, of course, that the evidence is certified as available. So if that person, if that evidence is not available, well, then you're into abuse of process, you're into potential offending in New Zealand. So the investigator has to certify the evidence as being available. These people are expected to say or this document is here. So, with respect, how can that trigger a disclosure obligation contrary to all other authority?

ELIAS CJ:
I understand.

SOLICITOR-GENERAL:

The – and the final point just on the ROC there is, as I think Justice Blanchard made a point, that there is, of course, an introduction but then there follows 30 or so pages in the first ROC of detail, then in the second 50 or so pages of intricate detail. Now it's not suggested by the appellants, there's no, nothing to suggest, "Oh, well, that material doesn't actually exist." They're simply saying, "Well, we can put a different light on it." Now that's never, not in any case given rise to a disclosure order, and bear in mind in the UK and Canada they've dealt with situations where abuse is potentially alleged and still haven't ordered disclosure, but that's where this one murky, well, slightly less clear point that I want to deal with comes. And so if I can –

GLAZEBROOK J:

Could I just say –

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

– I'm still concerned about the proposition that post-ROC you only need to disclose summaries rather than the documents themselves.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

The prior-ROC cases, they would've had the documents disclosed themselves.

SOLICITOR-GENERAL:

Not necessarily.

GLAZEBROOK J:

Well, they would have done in terms of the ones that the requesting authority was relying on –

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

– because there wasn't any other mechanism for putting in summaries of those documents apart from putting in the documents themselves.

WILLIAM YOUNG J:

Can you not say, "We have done a metadata analysis and we have discovered that of the 20 million downloads – sorry, the data as to who was uploading the material, it all came from premium customers." I don't know if you have to refer to every upload. You might have to –

GLAZEBROOK J:

But previously you would have had an affidavit to that effect to say that's what the expert had done.

WILLIAM YOUNG J:

Here we've got the ROC saying that.

GLAZEBROOK J:

I understand that.

WILLIAM YOUNG J:

You could refer to documents without actually producing them. It's just the crunchier they were the more likely best evidence rule or some version of it would come into play.

SOLICITOR-GENERAL:

Yes, would have come to play.

If one goes back to committal proceedings, and some of us – and I was laughing with Mr Davison about the hours that we spent in the Pukekohe District Court and elsewhere and members of the Bench will remember – Justice Young's committal hearings and fraud that went interminably, and the read-back et cetera. But the point there was, and this comes from a case called *W v A-G* [1993] 1 NZLR that it was always for the prosecution to determine what evidence it put before the Court.

GLAZEBROOK J:

I'm not suggesting anything other than that. All I'm suggesting is if they do put that evidence before the Court is a summary of a document enough under section 25 or do you have to put the underlying documents to the extent that a summary may not be sufficient to accord the person who is up for extradition a fair ability to challenge that? Only in terms of it being a prima facie case, not in terms of the reliability in a more general sense, which is a trial issue. That's the narrow point that I'm interested in.

SOLICITOR-GENERAL:

I suppose the Court of Appeal left that to – it was not prepared to say "never" so you may have a situation, at least on a Court of Appeal decision, that an issue could be raised. It was fundamental to reliability and there might be a point, we would say, it's not possible for that to be ordered but the other remedies lie to prevent –

GLAZEBROOK J:

Article XII, for example.

SOLICITOR-GENERAL:

Article XII, for example, of if you were really unsatisfied you would just decline to commit or you'd strike a line through the evidence.

I gave you that *W v A-G* because there is a real parallel that there is no such implied power in a committal Court and particularly not prior to the Official Information Act, Privacy Act.

ELIAS CJ:

What does that mean, though? Prior to the Official Information Act – we live in that world now.

SOLICITOR-GENERAL:

Yes, but the reason, and my learned friends and it's referred to in Justice Winkelmann's decision, *Downey*, for example, is a case in support of the implied power of a committal Court, but it only had an implied power post-*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA), Official Information Act –

WILLIAM YOUNG J:

So what you say is that there is no implied jurisdiction to direct disclosure, rather, it is the Court's enforcing obligations that otherwise exist, for instance, under the Official Information Act?

GLAZEBROOK J:

Well, the Bill of Rights may well have given that in terms of a fair trial, because – so even aside from that, it might have been in order to have a fair trial there needed to be disclosure.

SOLICITOR-GENERAL:

At a trial level, sure. But not at a committal level.

ELIAS CJ:

But what about fairness? What about section 27?

SOLICITOR-GENERAL:

Well, when one looks at it, its equivalent in Canada, fundamental justice section 7, and *Dynar* considered exactly that and said no, you don't get disclosure, it's extradition, it's not –

WILLIAM YOUNG J:

That's what the European Court of Justice says, too.

SOLICITOR-GENERAL:

Absolutely, and the UK Supreme Court and all other relevant authorities have said no in this context. Now, I'm happy to go through the English authorities. They're all set out there.

ELIAS CJ:

I think you should touch on the authorities.

SOLICITOR-GENERAL:

By way of example, I've listed Wellington. I've talked about that. The House of Lords in Norris, that's tab 16. I'm in particular referring to paragraph 107, the system of extradition et cetera, then it says, "It is also well-settled that consistently with that

approach in extradition proceedings the accused has no right to disclosure of the kind that would be available in domestic proceedings. *Wellington* and *Jenkins v United States of America* [2005] EWHC 1051 is cited there. Then it goes on.

ELIAS CJ:

This is all following on, is it, from the fact that the District Court Judge has no occasion to enquire into the evidence?

SOLICITOR-GENERAL:

This occurs both pre and post, so in Norris this is talking about the 2003 Act.

WILLIAM YOUNG J:

Norris is post the streamline system but it approves Wellington which is a pre ...

SOLICITOR-GENERAL:

That's right, and *Lee* is pre it, as well.

ELIAS CJ:

Yes, but whether it would have – oh, well. Can you really say more than Norris in the light of the 2003 Act said there's no right to disclosure? It positions it on the fact that the District Judge has no occasion to enquire into the evidence under the 2003 Act. That's what it hangs on.

SOLICITOR-GENERAL:

I accept that's what it says there but it cites with approval *Wellington* and *Jenkins.*

ELIAS CJ:

I know, I know, but they're in different circumstances and it's not what the case is saying here.

SOLICITOR-GENERAL:

Yes. Well, perhaps if I pick up a case called *Knowles v Government of the United States of America* [2007] 1 WLR 47, which doesn't involve the 2003 Act –

ELIAS CJ:

Is it pre?

WILLIAM YOUNG J:

They do say it is also well settled. *Knowles* is the Privy Council.

GLAZEBROOK J:

Well, no right to disclosure of the kind that would be available. I don't think anyone's suggesting that anyway, although I'm not sure because I think possibly Mr Foley was but Mr Davison didn't seem to be.

SOLICITOR-GENERAL:

When you look at the order, that is trial disclosure. It's massive.

WILLIAM YOUNG J:

Mr Parbhu said, in fact, all the carve-outs were irrelevant because what was carved out was picked up later. Did that evoke any response from anyone?

SOLICITOR-GENERAL:

Well, no, we haven't – there's no affidavit in response. You'll see in our submissions the reference to millions of emails et cetera but again, that's not the point. The point, just finishing on Parbhu on that question, he does make the point that this is not only in excess of US disclosure. US disclosure is Court ordered and supervised. US disclosure, this order did go beyond US disclosure. It was not Court supervised, so contrary to their views it was not able to be enforced against counsel appearing and it was not reciprocal, as they have. We don't have much of a reciprocal obligation, so sorry, I was distracted, but *Knowles*, Privy Council, again, the US Government, tab 14 of our bundles, it was a Bahamas case. I'm trying to find the easiest reference to the process.

GLAZEBROOK J:

It seems not totally in your camp if you look at 34 and 35.

SOLICITOR-GENERAL:

Well, those are the operative paragraphs I wanted to refer to. I was looking for the prima facie test. Do you mean by that talking about the obligation of candour?

GLAZEBROOK J:

Well, it does say the Judge said the Government was under a duty to disclose details of prior statements that might tend to throw doubt and that earlier inconsistent

statements should be disclosed if they existed? That's at 33. They don't seem to throw total cold water over that. They just –

WILLIAM YOUNG J:
I don't think anyone disputes that, do they?

GLAZEBROOK J:
Well, I think Mr Heron was saying that there could be no duty of disclosure – sorry, there's a duty of candour but no ability to ask for disclosure, which doesn't seem to be quite what this is saying.

SOLICITOR-GENERAL:
I submit it is, but at paragraph 35 –

GLAZEBROOK J:
Well, there are many respects in which extradition proceedings must be lawful and fairly conducted. They're not under any general duty of disclosure but there is duty of candour and good faith.

SOLICITOR-GENERAL:
Yes, so it must in pursuance of that duty disclose evidence which destroys or very severely undermines the evidence on which it relies. That's accepted. That's the duty of candour.

GLAZEBROOK J:
But you're saying even in those cases there's no ability to order disclosure which doesn't seem to me quite what's being said here, and actually not what was in the declaration that was sought by the Crown, either, which you're now saying is no longer sought.

SOLICITOR-GENERAL:
No, we say that if there is a breach of candour the remedies for it are, as we've said, you can disregard that evidence. You can decline to commit, or you can note and say, "Well, you better provide me the information," but there isn't an ability to make an order for disclosure.

McGRATH J:

Well, Bingham says that it's for the party asking to resist an order to establish a breach of duty by a requesting state, and that's information to the duty of candour.

SOLICITOR-GENERAL:

That's right.

McGRATH J:

But he then moves on immediately afterwards to deal generally, the Board would endorse the general approach, and he comes back to the *Wellington* case, but that's the general approach that's taken to disclosure. If you don't have the person persisting disclosure meeting that threshold, you have to raise it.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

Knowles is actually picked up and followed on – it's a Bahamas case but it's followed in England subsequently, too. You're about to take us to that, are you?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Although that does suggest if there is a breach of candour you can order disclosure.

SOLICITOR-GENERAL:

No.

WILLIAM YOUNG J:

To my way of thinking, the sensible approach is that if there are indications that there has been a breach of candour, if there are indications that there are documents held which detracts seriously from the case as produced, then one way or another one would expect those documents to be obtained, perhaps formally via the Article XII process which might be triggered by something the Court does.

SOLICITOR-GENERAL:

Yes, and I expect that's right, but we do draw the line on the Court having the power to make an order –

WILLIAM YOUNG J:

To put it another way, what's not accepted is that there's a part order general disclosure to see if there has been any breach of the candour.

SOLICITOR-GENERAL:

Absolutely, and of that there can be no debate, with respect.

ELIAS CJ:

Of course, disclosure in the sense that we now understand it, is relatively recent, or certainly in New Zealand until the Official Information Act litigation. I just had a recent occasion to look at – even in the UK the cases that most often get cited are relatively recent cases, like *R v Mason* [1976] 2 NZLR 122.

SOLICITOR-GENERAL:

R v Mason is 1976.

WILLIAM YOUNG J:

That's the best that there was before the OIA.

SOLICITOR-GENERAL:

That's right. In fact, I think we footnote that as being – but that was never a power of the committing Court. That was a power of the trial Court, a common law power.

ELIAS CJ:

I suppose one of the things I'm querying is whether some of the older cases are at a time when the domestic disclosure requirements weren't very secure or well understood either, and whether it's good enough to just go along with them as universal propositions in those circumstances is a query I have.

SOLICITOR-GENERAL:

Yes, I understand that query but I would pick up that my learned friend just reminded me of the Canadian cases, you will recall, of course, *R v Stinchcombe* [1991] 3 SCR 326, being the leading disclosure case in Canada, and that led to the, in effect, the

Commissioner and Ombudsman revolution but even broader, as I recall it, the Canadian cases that we refer to actually deal with *R v Stinchcombe* and therefore perhaps that might deal with Your Honour's point. But I was going to say that – now, we deal with *Jenkins*, which is 2005, and then the Bow Street Magistrates' case which is 2006, and *Raissi v Secretary of State for the Home Department* [2008] EWCA Civ 72, all of which, with respect, are relatively recent cases and continue the no disclosure principles.

Now, I'm at paragraph 40. I think I've made this point, that the appellants say that the 2003 adjustments limit the relevance of the authorities but with respect there is the continuity of reason and directly relevant context ex parte Lee and Wellington and the directly relevant context includes in some cases the same article as Article XII. We make the point there that you can't distinguish cases on the basis that, well, some of them involved alleged abuses of process, because in some there weren't. If disclosure is not available in an alleged abuse of process, then surely it's not available in a general, we want disclosure case, is our point.

The summary, that's 41. We're just summarising the UK decisions. The line in *Wellington* is continued.

Can I just pick up the duty of candour at 41.5? The extradition Court must protect its process from abuse, and the requesting state has a duty not to abuse. But it is presumed there are certifications there to back that up. So unless there's real evidence to raise an issue, nothing is triggered at that point. The duty is not enforceable by inspecting or interrogation. We recite there *Jenkins* paragraph 29. There's also a reference in the Bow Street Magistrates case which picks that up again and says, well, the Court could draw it to the attention of the requesting state but has no jurisdiction to order it.

Can I come, then, to *Dynar* and *Kwok*? They remain the leading Canadian authorities. There, the application to this at 43 extended to material in the hands of the US. *Dynar* sought full disclosure as listed there. This was a view to making full answer and defence. *Kwok*, it was drug offending and there were parallel investigations in the US and Canada and he sought, amongst other things, communications between Canada and the US. He argued that both states were obliged to disclose all relevant information because of the infringement.

Now, *Dynar* stands for the principles I've set out in 44. If I may just take you through those paragraphs, I'm just mindful of the time. I might quickly note the paragraphs in *Dynar* because these apply here. The Extradition Act and the treaty were the sole source of jurisdiction, that's at 120. Fundamental justice did not entail full rights of disclosure. 44.3, extradition proceedings must not take on the characteristics of a trial and the context and purpose of extradition shaped the level of procedural protection. Paragraph 130, there's a quote from there. In particular, paragraph 132 – could I come back to 120 very briefly and refer you – because this line originates with *Kindler* and *McVey* paragraph 120 which is, I think, page 513, the jurisdiction of the extradition Judges derived entirely from the statute and the relevant treaty, and then they cite *McVey* and state, "Courts should not reach out to bring within their jurisdiction or ambit matters which the Act has not assigned to them. Absent express statutory or treaty authorisation, the sole purpose is to ensure the evidence establishes a prima facie case." My point there is we're in exactly the same position. There is no express statutory or treaty authorisation, in fact, to the contrary. Article XII points the other way.

I've referred to some of the other paragraphs. *Dynar* submits to dispose of the disclosure issue in *Kwok*. Neither case was disclosure seen to arise from the charter, and from that, with respect, we can read the Bill of Rights, the committal analogy or the treaty. The Supreme Court did not contemplate any disclosure from the requesting state, and that's important because at 46 I deal with the language in *Kwok*. Again, responding to my learned friend's point about *Dynar*, that somehow the language there mandated disclosure of underlying material. It's never stood for that proposition. It stands for the proposition that the person subject to extradition is entitled to the material relied upon against them, the record of the case, the evidence, whichever. Nothing more. If that's a convenient time, I'll come back and deal with *Kwok*.

ELIAS CJ:

I think we'll carry on.

SOLICITOR-GENERAL:

I just want to cover the point that was left standing in the Court of Appeal. It may not trouble your Honours at all, but there is language in *Kwok* about the disclosure jurisdiction in a proper case, and our submission on that is that this is talking about Canadian-held materials, where there's a air of reality to a charter breach, there the

Courts and *Kwok* in particular said, well, in a proper case where there was an air of reality to a charter breach, the Court might have such power but as we set out in 46, Justice Arbor saw the reach of that as extending only to the requested state. The reason that's important is because there is language which follows in cases such as *Gunn v Canada* [2006] FCA 281, *Rosnow, LaRossa* and other Canadian cases which deal with whether disclosure was properly ordered or available to be ordered by saying, well, there was no air of reality, and what they don't distinguish is, are we talking about requesting state or requested state, and the knowledge is a little loose, but with respect, reading *Kwok* and *Dynar* you can only reach the conclusion that we are here talking about Canadian-held material, ie requested state, so the equivalent is New Zealand. So, for example, if there was an air of reality to a Bill of Rights breach at a stage that was relevant, not committal, with respect, but at another stage there might be disclosure of underlying material and we really don't need to debate that. All I'm making the point is that the language in the subsequent Canadian cases does not support an order against the requesting state. That's why we say at 48 no case clearly supports the appellants' proposition, and I probably can't stress this enough, Your Honours, that there is no case across the common law where such an order has been upheld.

ELIAS CJ:

You're referring to the Canadian Charter. I might be wrong in this, but I think one point of distinction between the charter and the New Zealand Bill of Rights Act is section 3. The judiciary, I don't think, are specifically subject in judicial work to the charter.

SOLICITOR-GENERAL:

I don't recall that arising at all in *Dynar* and they were considering fundamental justice, so I frankly don't know, your Honour. But I'd be surprised if there was a difference.

ELIAS CJ:

I might be wrong, anyway.

SOLICITOR-GENERAL:

We make the point at 49 that *Ferras* doesn't alter the law. If you read *Ferras*, it's not a disclosure case at all. It doesn't mention the word. It's about this limited weighing in the rule in *Shephard* which was overruled.

Just to finish on that, what has occurred in the Canadian authorities is they've used this air of reality test, and said at appellant level, oh, well, the appellant doesn't satisfy it. They haven't grappled with, well, are we talking about the requested state or the requesting? They often cover both. So the language is a little loose which, in my respectful submission, leads to the slight uncertainty. But what in my submission this comes in response to my learned friend's point about submission, the Canadian cases also need to be read with *Schreiber*, and I'll point you to that briefly. Schreiber makes it clear that by requesting extradition there is no waiver of sovereign immunity, so that reading those together it's clear that there could be no order against the USA, for example, in Canada.

I took much longer on the case law because that's of grave importance.

ELIAS CJ:
Yes, I asked you to. Where do you want to take us?

SOLICITOR-GENERAL:
The second point, and I'll deal with this very briefly, it's covered in paragraphs 9 through to 34 in the submissions. I'll summarise this. To read such an obligation into the statute would be contrary to the Act and the treaty, and you've heard much of this already. The treaty prescribes the evidential obligation and that's in IV. The treaty is tab 9 of the appellants' bundle. If I can take you to one point. My learned friend referred to Article I. It's important to look at the preamble. "New Zealand and the USA desire to make more effective the co-operation of the two countries for the reciprocal extradition agreed as follows." Desiring to make more effective. This is the treaty which the Act must be read consistently with.

Article IV, as I said, is the evidential rule. Extradition shall only be granted if the evidence be found sufficient to justify committal. So it talks about evidence. Article XII, as the Court of Appeal agreed, says if the requested party requires additional evidence or information to enable it to decide such evidence or information shall be submitted to it within such time as that party shall require. Now, nothing in the Act barring the points made in section 25 and 103, which I'll come to, supports the inference or implication of a power to order disclosure given to the Court against the requesting state, and it runs quite contrary to the whole scheme of extradition.

ELIAS CJ:

Is there anything in the Treaty that suggests the provision in the Act that permits evidence to be called by the person against whom the extradition order is sought?

SOLICITOR-GENERAL:

It would probably be Article IX, made in accordance with the laws and, I suppose, the committal, Article IV, so committal hearing always allowed for the defendant to call evidence. It was pretty rare, as you might recall, but it was possible and it was always allowed.

ELIAS CJ:

Is it equally important in your argument that you say the District Court in the committal proceedings doesn't have a disclosure power.

SOLICITOR-GENERAL:

Very much so, yes. It's fundamental to our argument. The committal Court never did have one and it obtained one by inference or to back up the official information following the commissioner and police.

GLAZEBROOK J:

Didn't they have it to back up the Bill of Rights to have a fair trial?

SOLICITOR-GENERAL:

No.

GLAZEBROOK J:

It's all very well but we all know that being committed for trial is actually not only an important step on the way but also quite an interference with liberty, reputation, et cetera, and extradition even more so if you're being sent somewhere where you have no connection, as in this case. You're not being sent home.

SOLICITOR-GENERAL:

Well, firstly, the extradition decision's not made by the Court. It's simply a decision that they're eligible.

GLAZEBROOK J:

No, but the Court's decision is an important step along the way to being extradited and an important safeguard.

SOLICITOR-GENERAL:

Yes. That's right. It's solely to determine is there prima facie evidence of an extradition offence and that matching process is important. By way of an aside, we don't accept my learned friend's categorisation that the only way in for the appellants is through the section he referred to. In fact, the treaty is, as Justice Glazebrook will recall from *Cullinane*, it allows direct reference to offences and, for example, there are fraud-related offences specifically enumerated so there's a number of options and ways in for extradition but coming back to your point, the Bill of Rights 1990 post-Ombudsman I don't, with respect, well, I think we must argue that section 27 does not give a disclosure right to a committal Court in an extradition and I don't think there's any authority to say that it gave it to a committal Court in a criminal proceeding. I don't know of any but I could be wrong.

GLAZEBROOK J:

Well, it didn't need to, did it, though, because there were already disclosure obligations there.

SOLICITOR-GENERAL:

Precisely, good point. So there may well not be any such.

It's not hard to see, with respect, how an order in this case will hinder the objectives of the treaty. They are to facilitate extradition. If we have a disclosure order, will that be the end of it? Of course not. There will be arguments about what's disclosed, how much is disclosed, what do you miss out, applications to the Court. How will the Court determine what's relevant? It would have to see it. We'll end up with everything being disclosed.

GLAZEBROOK J:

That's not the only thing that extradition – because in the model treaty in the UN there are three objectives and one of the important objectives is to give the person who is subject to extradition a fair hearing.

SOLICITOR-GENERAL:

Yes, and we put that right up front, those three principles in our submissions.

GLAZEBROOK J:

So it's not just extradition it's extradition with the possibility of a fair hearing and if there isn't a possibility of a fair hearing, however that may happen, then surely – and there is not a possibility of a fair hearing because there hasn't been the limited disclosure that's – whatever that might be in the particular case that's necessary to challenge whether there's a prima facie case or not, then one of the objectives of extradition law isn't met, is it?

SOLICITOR-GENERAL:

Yes. That's right.

GLAZEBROOK J:

So however that might happen, through an Article XII request or merely a request not backed up by an order but with a, well, we can't have a fair hearing otherwise and therefore we won't extradite.

SOLICITOR-GENERAL:

Well, that's right. Ultimately the Court –

GLAZEBROOK J:

So it's like a threat, if you like.

SOLICITOR-GENERAL:

Yes. The Court has that and the English authorities make that clear, that the Court has the ability to protect its own process by saying, well, I'm not satisfied that there can be a fair hearing and I'm declining to commit. Now, it would be exceptional or very rare, as the English cases talk about, but it must be possible.

GLAZEBROOK J:

But wouldn't you say, well, I'm not satisfied I can have a fair hearing unless there's been this disclosure. I can't order you to make disclosure. I could request through Article XII or I could merely say, well, as I can't – until I have this disclosure I can't conduct a fair hearing.

SOLICITOR-GENERAL:

Yes, that might be one option.

GLAZEBROOK J:

Not I'm going to refuse because it may well be after a fair hearing there's a perfectly good prima facie case, but until there has been a fair hearing I can't determine that.

SOLICITOR-GENERAL:

Well, I accept all that's possible but it's certainly not envisaged by the ROC and it's quite contrary to the scheme of the Act, that kind of process, so it must be exceptional, and the English cases say so, that it will be rare and we just haven't got anything of a sense of bad faith or ...

GLAZEBROOK J:

But is that where that air of reality comes in, though, that a mere assertion that I can't defend myself isn't enough but maybe an assertion, well, I can't defend myself without being able to get an expert to prove that that document was clearly a forgery, in my example that I gave earlier, and that might be an air of reality in terms of saying, well, I need that document, not just I want it but I need it in order to show there's not a prima facie case.

SOLICITOR-GENERAL:

I accept that the only – I'm just cautious that we would not accept that even in that situation the Court could go on and say, well, I'm ordering it.

GLAZEBROOK J:

I understand the sovereign immunity argument totally and the Article XII procedure argument.

SOLICITOR-GENERAL:

Yes. In fact, we list – I think it's footnote 32, some of the English cases deal with – and I made this point, an article which is almost identical to Article XII, so *Wellington*, for example, I think *Bow Street* and *Jenkins* deal with the same kind of article. So they're clearly looking at a similar information and evidence gathering process.

ELIAS CJ:

I think you've dealt pretty well with no such orders made seen anywhere in the world and so is there anything further you want to say about District Court not having the power?

SOLICITOR-GENERAL:

I'll make sure my third point was fairness, which I think I've covered in terms of the UK and the Canadian authorities. They've considered the Human Rights Act, Strasbourg jurisprudence Canadian charter, and all said, well, no, there isn't this right to disclosure. That was my third. The fourth was implied power which I've covered. Sovereign immunity I think I've covered. I would just draw your attention to *Blaxland v Commonwealth Director of Public Prosecutions* [2003] 323 F3d 1198 which is in our index, in our bundle. It's a US case but against Australia.

WILLIAM YOUNG J:

It's something equivalent to malicious prosecution of extradition proceedings.

SOLICITOR-GENERAL:

In the case of *Schreiber* I think it was.

WILLIAM YOUNG J:

And *Blaxland* too, I think.

GLAZEBROOK J:

Well, you just rely on the general principle of that, and those cases to say that just because you apply for extradition doesn't mean that you waive it.

SOLICITOR-GENERAL:

That's right. Yes.

GLAZEBROOK J:

So, in fact, you're a party to the proceeding, if you like, but not in any real sense that takes away immunity.

SOLICITOR-GENERAL:

That's right. I mean, the party nomenclature is a little misleading. It's a bit like – well, it's thrown around loosely and it really doesn't mean –

ELIAS CJ:

What about the certifying officer?

SOLICITOR-GENERAL:

Well, I think that's a good point, isn't it?

ELIAS CJ:

If he perjures himself, is he amenable to New Zealand process?

SOLICITOR-GENERAL:

He must be and that's another safeguard. There's plenty of cases on affidavits submitted from overseas that if an act that was done –

GLAZEBROOK J:

It might be a sovereign act, though, still.

SOLICITOR-GENERAL:

Well, there might be an argument. I don't want to implicate Mr Poston.

GLAZEBROOK J:

There might be a bad faith exception to the particular person although I'm not certain in that. It may actually still be a sovereign act.

SOLICITOR-GENERAL:

Yes. I confess I don't know. It would be fact-specific, I expect.

GLAZEBROOK J:

I think we might need Professor McLachlin's book on this subject. I don't know if he's finished it yet, though. Apparently everyone's got it wrong and the conceptual basis is quite different from what one would think. I can't immediately recall what the conceptual basis is, you understand.

SOLICITOR-GENERAL:

I confess I'm not there, so I can leave that point. That, then, leaves me just with the sixth point, which was to pick up section 25, which is at paragraph 76.

We talk about the similar genesis here, and the fact that New Zealand has exempted only five countries. The US and Canada are two of those. It's a half way measure between the ordinary part 3 and the backed endorse warrant, part 4. Our argument doesn't turn on the language of section 25. We just say that it can't weaken the argument, and when you look at the phrase "other relevant documents" in 25(2)(b) we probably can't improve on the Court of Appeal's language and that's at paragraphs 92 to 97. The Court – my submission is that must mean that if a requesting state wants a document in and says, well, that's relevant, then it must attach it to the record of the case. With respect, it's the only way one can read that consistent with the treaty. It doesn't mean they have to attach all relevant documents because that would just fly in the face –

WILLIAM YOUNG J:
Well, that's inconsistent. Because documents are exhibits that would be inconsistent with the entitlement to summarise.

SOLICITOR-GENERAL:
It would defeat the whole. Other must mean something. But our argument is, let's not have this intense scrutiny on the small words because they can bear a number of meanings. The High Court differed from the Court of Appeal but in our submission the only way it works is relevance is determined by the requesting state, at least principally, much like in a deposition hearing. It was for the prosecution to determine what it wanted to put forward and other relevant documents simply means that if it wants to introduce it by way of a ROC it must attach it. It can't say, well, I'm going to put up other documents. Because I've summarised them in a ROC I am somehow entitled to. I've got to put them in with them. Now, I did –

ELIAS CJ:
Well, why on earth would they ever want to put it in if they're entitled to summarise it and nobody can go behind it?

WILLIAM YOUNG J:
It may be easier to put it in.

SOLICITOR-GENERAL:

Well, I'll just give you one example if I may, and I don't think this actually is in the record, but it seems to be appended. If you go right to the end of the record of the case you can see reference to an exhibit 1.

GLAZEBROOK J:

Is this the first one?

SOLICITOR-GENERAL:

Yes, the first ROC, tab 18. Passports, I think. Now, the US might choose – and I don't think they have yet but it's exhibit 1 to Mr Parbhu's affidavit, we have Mr Kim Schmidt, Mr Kim Vestor, and Mr Kim Dotcom in the three passports. They have summarised his citizenship and residency but they might choose to put that in, attach it. Other examples were videos, CCTV footage, perhaps, if they wanted to.

GLAZEBROOK J:

So if they want to rely on it specifically as a document, they've got to put it in otherwise they've got to rely on the summary?

SOLICITOR-GENERAL:

Yes. That meaning is not impossible. It's consistent with the treaty. It's a logical one. The Court of Appeal doesn't disagree, at least, and doesn't suggest that all documents must be attached.

Now, unless there's any questions, can I deal with the power to make regulations? This is at paragraph 93. My learned friend deprecated my brevity in paragraph 93. With the greatest of respect, of course the regulations contemplate some regulations regarding disclosure. But we can't improve on the Court of Appeal language, well, they don't take the issue further. You can't assume that the regulations would give the Courts power to order a requesting state to disclose something. They talk about additional material in the record of the case. Now, that would be in effect saying, well, in order to comply with our process you need to put this sort of material in. Again, all of that suggests, well, it's the executive who would be making those rules, mindful of Article XII, and it takes one to the point right to the beginning of the argument, is that a committal Court has no inherent jurisdiction. It's a statutory Court. It's only got statutory jurisdiction and then such power as is necessary to perform that. So when you look at 102 –

ELIAS CJ:

So do you say that regulations couldn't be made for the District Court under this provision?

SOLICITOR-GENERAL:

No. They could be made but they couldn't and wouldn't say, well, the Court has a general power to order disclosure from the requesting state, if it's satisfied it's necessary.

ELIAS CJ:

Well, what could they say?

SOLICITOR-GENERAL:

They could say, well, the Court could set the timing, how it's going to be served, how it will be filed, limits.

GLAZEBROOK J:

What does it mean if it says you can make regulations for disclosure if it doesn't mean you can make regulations for disclosure?

SOLICITOR-GENERAL:

It means precisely that, I agree.

GLAZEBROOK J:

Well, then, if there isn't any power to order disclosure, why would it be making regulations to say you can order it within a certain timeframe?

SOLICITOR-GENERAL:

Well, it would be giving the specific power, the executive under regulation, and the reason why it details in section 102 is just modern drafting, so you can't give a blanket regulation power –

WILLIAM YOUNG J:

Say there was a power in exceptional cases require the disclosure of specific information. Such regulations could define the circumstances and the manner by which such applications could be made.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But they wouldn't be the source of the power.

SOLICITOR-GENERAL:

No, it would have to be consistent with the Act and the treaty. They couldn't go beyond that.

WILLIAM YOUNG J:

The Chief Justice says there has to be a power to make the orders before they regulate them.

ELIAS CJ:

The executive can't empower the judiciary to do something that they don't have jurisdiction to do.

SOLICITOR-GENERAL:

Yes, yes.

ELIAS CJ:

The regulation-making power assumes that there is power in the Court to make some sort of disclosure orders. Justice Young has suggested in exceptional circumstances, but there must be some power to make the order.

SOLICITOR-GENERAL:

Well, an obvious one, I imagine, is, well, if you're filing a record of the case you must make it available to the other side, and if you're not going to, I'm going to order it. So that I accept, and the timing, and perhaps the points Justice Young – but I don't accept that because there's a regulation-making power and it's silent none have been made, that means the Court has a general power.

ELIAS CJ:

What sort of power do you say the Court has? Not a general power?

SOLICITOR-GENERAL:

No, and actually, I forgot the other, obvious, point. There may be New Zealand material involved here. There may be New Zealand relevant material and that is, of course, where a regulation becomes very relevant. We're not suggesting, well, there wouldn't be power to say, well, you haven't complied with section 25. I'm going to order you or unless you fix this, so ...

ELIAS CJ:

The Crown is the party – or it's the attorney, is it? Who is it?

SOLICITOR-GENERAL:

It's the Minister of Justice who makes the reference.

ELIAS CJ:

The Minister of Justice is the party, so this is your evidence that's before the Court.

SOLICITOR-GENERAL:

This is the evidence that we have referred, yes.

ELIAS CJ:

So why not an order to you?

SOLICITOR-GENERAL:

Because we don't – do you mean in the context of this order?

ELIAS CJ:

Why not an order to the Minister of Justice to make disclosure?

SOLICITOR-GENERAL:

If that was in respect of the material that the Minister of Justice had, sure.

ELIAS CJ:

But you're the convoy for other information. Why can you not be the subject of an order that you need to put further information before the Court?

SOLICITOR-GENERAL:

Because it's an artifice, your Honour.

ELIAS CJ:

Well, the whole thing is slightly artificial.

SOLICITOR-GENERAL:

It is a statutory artifice, of course, but so are all courts of statute. You can't – there's a whole line of authorities which – in fact, Justice Chambers was one of the leads of it, *Solicitor-General v Keogh* HC Whangarei CRI-2006-488-000014, 3 May 2007 (HC), *Livingstone v Attorney-General* Auckland M443-SW99, 14 May 1999 (HC). They made it clear that you couldn't order the police to produce something that they didn't have control or power over. You could – this was the intoxiliser manuals, you'll remember, and years of litigation over that.

ELIAS CJ:

Well, this Court hasn't considered it.

SOLICITOR-GENERAL:

No, it hasn't. That was all previous Supreme Court, as best I can recall.

WILLIAM YOUNG J:

I have a vague recollection of being troubled by it myself.

GLAZEBROOK J:

There was a manual case that came here.

SOLICITOR-GENERAL:

I suppose the other point, Mr Sinclair kindly reminds me, that if you made an order against the Crown, the Minister, or a law officer myself who I'm obliged under the treaty to provide assistance, you would in effect be subjecting the US to an order. That would be the effect of it, much like the intoxiliser manuals case. The Courts have said no, you can't do that, particularly not in a summary statutory Court.

ELIAS CJ:

What's your best authority on that? I just want to check it.

SOLICITOR-GENERAL:

Livingstone, I think.

WILLIAM YOUNG J:

Everything else will refer to *Livingstone*, I think.

SOLICITOR-GENERAL:

The other point, I suppose, in respect of the regulations is the presumption against extra-territoriality, but we've probably dealt with that.

ELIAS CJ:

What's your best authority on that?

SOLICITOR-GENERAL:

You've got me there, Your Honour. It's a presumption principle that I think is applied unless express terms extend beyond the jurisdiction.

ELIAS CJ:

Yes, but that's just the way it's expressed, really, isn't it? You are before the Court. The Minister is before the Court and is asking for orders before them.

SOLICITOR-GENERAL:

Consideration of whether there is a prima facie case.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

That is as I understand it.

ELIAS CJ:

Good.

SOLICITOR-GENERAL:

I'll just check whether there's anything other points in response. My only other point as a general point, and I invite you to read the records of the case, that the submission that this is simply interpretation of a business model, with respect, is a massive oversimplification. There is direct evidence, direct analysis, there's undercover activity, first-hand. There's actual emails. To say it's interpretation of a

business model is a lovely euphemism but it's just not accurate at all. This is a massive copyright and other fraud alleged.

ELIAS CJ:
I understood, though, that in the lower Courts it was accepted by both parties that this case did rest on inferences. That's what the lower Courts have said.

SOLICITOR-GENERAL:
That's what they've said. I don't think it's ever formally – that's certainly not the US position. It's not our case. So it's not for me to say, but if you read the ROC.

GLAZEBROOK J:
If it was merely a business model then one might wonder why disclosure is needed, because if anyone understands the business model it should be its architect.

SOLICITOR-GENERAL:
Exactly. Unless there's other questions, your Honours.

ELIAS CJ:
Thank you, Mr Solicitor. Mr Foley, do you wish to be heard?

MR FOLEY:
I do not wish to be heard, your Honour.

ELIAS CJ:
Thank you, Mr Foley. Yes, Mr Davison.

MR DAVISON QC:
To respond to the proposition that an order of this sort would stand on its own without precedent, I simply submit the reason for that would appear from an examination of our statutory context and the fact that in New Zealand would make provision for this where it doesn't arise in the other jurisdictions. That fact that it hasn't been done before is no bar to the application of the statutory context appropriately.

The English or UK case, I should say, of *Wellington* that was cited from, I just invite your attention to the content of paragraph 26, which – under sub (2) of paragraph 26 sets out the six propositions. The second, "The requesting state is not under any

general duty of disclosure similar to that imposed on a prosecution at any stage in domestic criminal procedures." That's what it stands for and it doesn't preclude disclosure in appropriate cases.

The issue around abuse of charter obligations or Bill of Rights issues which may give rise to collateral issues being raised is what was the subject or has been the subject of those Canadian cases? The whole issue of an air of reality is to create a threshold before the Court can go beyond its fundamental function of determining prima facie case and look at something else. Here, prima facie case is the subject of, it is the reason why the Court is looking at the matter. There is no need for that, hence no need to establish an air of reality as the Courts below have found, in both the District and High Courts.

My learned friend came up with the construction of section 25 and agreed that the "must" in section 25 would entail a requesting state to place its material in the ROC or provide it and it had to provide it in that way as an additional document. That seems to overlook the import of 25(4), which stipulates that nothing in the section would prohibit or preclude the filing of relevant material, so my submission is that that interpretation doesn't square with that. Why have a section 25(4)?

WILLIAM YOUNG J:
Possibly to permit a document, if I can put it that way, to produce evidence.

MR DAVISON QC:
Well, in my submission it's not so limited. It doesn't stipulate that at all. If the ROC covers the position of the requesting state and one needed to make clear that the other party, the requested party, still had the power one would have defined it in that way, looking at the way in which that section has been constructed. Section 25(4) is not limited.

WILLIAM YOUNG J:
Was 25(4) in the original bill?

MR DAVISON QC:
I think in the original.

WILLIAM YOUNG J:
In the extradition bill.

MR DAVISON QC:
I think it was, Sir, yes.

WILLIAM YOUNG J:
Because in the extradition bill, the obligation on the requesting state was much more onerous. It looked as though it was absolutely comprehensive with all evidence.

MR DAVISON QC:
It was much more comprehensive, yes.

WILLIAM YOUNG J:
Which may suggest that subsection 4, if it was there originally, it did have a more responsive purpose.

MR DAVISON QC:
Well, your Honour, I certainly accept that 25(4) is something which requested people or would point to, to ensure that they had the right to present evidence but it's not limited in that way.

Finally, I just wanted to raise the issue about whether or not an order of the Court requiring disclosure is effective upon another sovereign state. But perhaps one way of looking at the utility of Article XII would be to address the situation of where our domestic Courts have ruled that this is an instance where disclosure is required and make an order to that effect, rather than seeking to give an extra-territorial effect from a sort of Court to sovereign state connectivity that the Government utilises Article XII that they've got an order of the Court. Some further information is required. The Court has adjudicated on the issue.

WILLIAM YOUNG J:
It ought to be, I hereby order the Minister of Justice to make a request. It's really a requirement under Article XII, require the provision of additional documents.

MR DAVISON QC:

Well, no, with respect, the order wouldn't need to come from the Court. It simply says, if you'll recall, if the requested party requires additional evidence and the requested party, if the order was made against the Crown, against the Attorney-General representing the US requiring the provision of further disclosure then the mechanism contemplated by the treaty is sitting there in Article XII to enable the intergovernmental exchange to take place.

BLANCHARD J:

What would the form of the order be?

MR DAVISON QC:

The order would be directed to the party before the Court and the party before the Court seeking extradition is the US. There's no question about it. But what I'm saying is the manner in which it would be sought to be implemented would be via the provision created in Article XII. The reality, Sir, is that the Crown Law Office representing the Attorney-General representing other parties involved in this, the police at times, the US Government directly at times, has an assembly of roles if you like. It's the hub through which this process is of intergovernmental co-operation is taking place.

BLANCHARD J:

It would be a bit odd, though, for an order to be made in those circumstances. It would be more or less like the Court saying here's an order against the US Government. Would you mind passing this on?

MR DAVISON QC:

Well, I would put it this way, Sir. The Court is dealing with a request for extradition that has been initiated by the US Government, which is being represented in the Court by counsel.

BLANCHARD J:

But it still has sovereign immunity.

MR DAVISON QC:

It certainly has sovereign immunity, but it has accepted – it's availed itself of the jurisdiction to achieve the benefit it seeks, namely the extradition. It can't be there for some purposes and not for others.

WILLIAM YOUNG J:

Well, it's not necessarily there at all, is it?

ELIAS CJ:

Well, the Canadian cases, they all seem to be around the place but the Canadian cases seem to be the Attorney-General of Canada on behalf of the United States, with some exceptions, where it's the United States that's the litigant.

MR DAVISON QC:

There's no quibble about the sovereignty issue, of course.

ELIAS CJ:

No.

MR DAVISON QC:

But in terms of international comity, if you like, the bridge for co-operation in terms of further information is there in Article XII so that Article XII can be the mechanism by which a Court-ordered requirement of further disclosure can be facilitated, and so it doesn't provide the answer that the Court of Appeal has postulated, in my submission. It does provide the mechanism that once an adjudication has been made that disclosure is required. Your Honours, those are my submissions.

ELIAS CJ:

Thank you, Mr Davison. Thank you, counsel, for your submissions. We will take time to consider our decision in this matter.