IN THE SUPREME COURT OF NEW ZEALAND

SC 30 /2013
[2014] NZSC 24

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

Hearing:	30 July 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Blanchard JJ
Counsel:	P J Davison QC, W Akel and 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 Solicitor-General M R Heron QC and F R J Sinclair for the First Respondent
Judgment:	21 March 2014

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. Costs are reserved.

REASONS

Elias CJ	[1]
McGrath and Blanchard JJ	[89]
William Young J	[201]
Glazebrook J	[246]

ELIAS CJ

[1] This interlocutory appeal is concerned with disclosure of documents relied on to establish eligibility for surrender under Part 3 of the Extradition Act 1999. Eligibility for surrender is established under s 24 if a judge of the District Court is satisfied that the evidence given or produced would justify the person's trial in New Zealand and that no restrictions on surrender apply. The determination is made at a hearing conducted on the same basis as a committal hearing for an offence committed in New Zealand. Although the final decision whether to surrender someone found to be eligible is a government decision, the question of eligibility for surrender is determined by judicial process and according to New Zealand law, as is made clear by both the Act and the extradition treaty between New Zealand and the requesting country in this case, the United States of America.[1]

[2] The Minister of Justice has applied for extradition of the appellants to the United States on criminal charges of copyright infringement, money laundering, racketeering, and wire fraud arising out of the operations of the Megaupload group of companies which provided storage of electronic files. These storage sites are said to have been used for massive sharing of files, in evasion of copyright.

[3] Since the United States is an "exempted country" under the Act,[2] the judicial hearing to determine eligibility for surrender is being conducted, in accordance with s 25 of the Act, on the basis of a "record of the case". Under s 25(2) such record must include both "a summary of the evidence acquired to support the request for the surrender of the person" and "other relevant documents, including photographs and copies of documents". Once the formalities of production required by s 25 are complied with,[3] the record of the case is admissible as evidence without further proof of the matters summarised or the documents contained in it.

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1 The terms of the "Treaty on Extradition between New Zealand and the United States of America" [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970) are contained in sch 1 of the Extradition (United States of America Order) 1970.

2 Extradition (Exempted Country: United States of America) Order 1999.

3 The record of the case must be accompanied by an affidavit of the prosecutor stating that it was prepared by or under his direction and that the evidence has been preserved for use at trial and by a certificate that in the opinion of the prosecutor the record of the case "discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country": Extradition Act 1999, s 25(3).

[4] Two principal questions arise on the appeal. First, whether documents evidencing the commission of the offence charged which are relied upon to justify the person's trial may be summarised or must be provided in the record of the case. Secondly, whether the court determining eligibility for surrender may require additional material to be disclosed.

[5] The Court of Appeal[4] has overturned orders for disclosure first made in the District Court[5] and upheld on judicial review to the High Court.[6] It held that s 25 does not require provision of copies of the documents relied on to establish a prima facie case if their effect is summarised in the summary of evidence in the record of the case.[7] It held also that the court may require disclosure of documents not included in the record of the case only where necessary "to protect the integrity of its processes".[8] The Court accepted that someone resisting a prima facie case might be "able to point to gaps or flaws in the material summarised or analysed in the record of the case, or … to point to documentary or other evidence which causes the extradition court to doubt the reliability of the material proffered by the requesting state" and to conclude that a prima facie case is not established.[9] But it considered that "a challenge which does not go to the reliability of the material in the record but to its interpretation – that is, to the inferences that should be taken from it – is more appropriate to a trial than to an extradition hearing".[10] Because of this analysis of the limited functions of the extraditing court, the Court of Appeal concluded that the disclosure orders in the case had been wrongly made.

[6] For the reasons given in what follows, I disagree with both conclusions in the Court of Appeal. I consider that s 25(2) requires the provision to the person against whom extradition is sought of the documents relied upon to establish a prima facie case justifying trial and therefore extradition. Since it is accepted that the record of the case on this view is incomplete, the deficiency must be remedied if the Minister wishes to proceed on it. That conclusion would be sufficient to dispose of the

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4 *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 (Arnold, Ellen France and French JJ) [*Dotcom* (CA)].
5 *Dotcom v United States of America* [2012] DCR 661 (Judge DJ Harvey) [*Dotcom* (DC)].
6 *United States of America v Dotcom* [2012] NZHC 2076 (Winkelmann J) [*Dotcom* (HC)].
7 *Dotcom* (CA), above n 4, at [89].
8 At [107].
9 At [108].
10 At [108].

appeal, since the disclosure ordered in my view does not go further than to remedy the deficiency in the record of the case and I consider the court has power to require compliance with s 25(2).[11] Mine is however a minority conclusion in this Court. It is therefore necessary for me to explain why I consider that the court determining eligibility for surrender has inherent power to compel disclosure for the purpose of the fair determination whether a prima facie case of commission of the offence has been established. Such powers in my view clearly extend to documents which are relied on to evidence the commission of the offence and justify putting the person on trial (and which, in the case of an exempted country, may be provided in the record of the case).

[7] Since I consider that the disclosure ordered here goes no further than the disclosure necessary to inform those who are the subject of the hearing of the prima facie case against them, I would allow the appeal from the Court of Appeal and substantially reinstate the orders made in the District Court. On that basis, recourse to a power to order wider disclosure than is required by s 25(2)(b) was not necessary to make the orders here (although it is necessary for me to express disagreement with the views expressed by other members of the Court that there is no such power available to the court which it may exercise in an appropriate case).

The disclosure ordered by the District Court

[8] In the District Court, Judge DJ Harvey held that the record of the case submitted on behalf of the United States did not comply with s 25(2)(b) because it did not contain the relevant documents.[12] He treated this as important background when considering the application for disclosure. Although it may make no difference in result, I consider non-compliance with s 25(2)(b) is better treated as a stand-alone deficiency which the court may order remedied rather than immediately declining to admit the record of the case as evidence.

[9] As Winkelmann J in my view correctly identified, the orders made by Judge DJ Harvey were limited to the documents relied on as evidence to justify committal for trial on the charges, determination of which was the responsibility of

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11 See below at [56].

12 *Dotcom* (DC), above n 5, at [232].

the Judge under s 24(2)(d)(i).[13] The orders made, which are attached as a schedule to these reasons, were structured on the elements of the offence and were in substance limited to disclosure of documents which evidenced those elements of the offence on which the court was required to be satisfied that a prima facie case had been demonstrated.

[10] The disclosure ordered by the District Court Judge was grouped under the charges of criminal breach of copyright, money laundering, racketeering and wire fraud.[14] The documents relating to the criminal breach of copyright charge were broken down into those evidencing copyright ownership, those evidencing infringement, those evidencing the "commercial element" of benefit to Megaupload and its employees and "premium" users and those documents evidencing "knowledge/wilfulness". The documents required to be disclosed for the purposes of the "money laundering" charges were those evidencing the transfer or handling of funds for the purpose of money laundering and those containing descriptions of transactions or recording financial transactions undertaken (directly or indirectly) "for the purpose of money laundering". The documents ordered to be disclosed in relation to the charges of "racketeering" were all those which evidenced "the formation and/or existence of an enterprise involved in 'racketeering activity'", all documents said to evidence participation by those charged in such enterprise, and all documents said to evidence engagement in "racketeering activity" by those charged and/or the said enterprise. In respect of the charges relating to "wire fraud", disclosure was ordered in respect of all documents said to be evidence that those charged, by means of one of the specified mechanisms of transmission, received a benefit or caused a loss "as a result of false or fraudulence pretences". Secondly, disclosure was ordered of all documents said to evidence "the fraudulent and/or falsity of the basis on which the applicant is alleged to have received a benefit or caused a loss".

[11] The terms of the orders for disclosure made may perhaps in some respects be expressed too widely (principally in the requirement of disclosure of "all documents either connected to, related to or evidencing" legal ownership of copyright or

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13 *Dotcom* (HC), above n 6, at [22]–[23].

14 *Dotcom* (DC), above n 5, at "Appendix – Documents to be Disclosed".

infringement of it). But it is clear that the orders were directed at disclosure of documents relied on as evidence of ownership, infringement, commercial gain, knowledge and so on.

[12] Winkelmann J was not impressed by the argument that the requirement to provide the documents evidencing the elements of the offence would be a substantial burden. She pointed out that much of the material is already in electronic form.[15] What is more, she considered that the size of the task simply reflected the complexity of the particular case and that "[t]he size of the task in a particular case cannot be permitted to shape the general principle to be applied".[16]

[13] I agree with the views expressed by Winkelmann J. I would re-express the orders made to make it clear that they are confined to documents relied on as evidencing the offences. So confined, I consider the orders made were not properly regarded as general discovery (as they are characterised in the reasons given by other members of this Court) and were confined to what was necessary if those whose extradition was sought were to understand and have proper opportunity to meet the prima facie case against them. For the reasons given in paragraphs [41] to [56] I am of the view that this was no more than was required by s 25(2) to be included in the record of the case.

Determining "eligibility for surrender" under the Extradition Act

[14] Since New Zealand and the United States are parties to a treaty for extradition,[17] the procedure to be followed before extradition is ordered for removal to the United States is that set out in Part 3 of the Act.[18] Under Part 3, a person arrested for the purposes of extradition (on warrant issued by a District Court judge) must be brought before the District Court for determination whether he is "eligible for surrender" under s 24(1) of the Act. "[E]ligibility for surrender" under s 24(2)(d)(i) requires the court to be "satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act …

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15 *Dotcom* (HC), above n 6, at [118].
16 At [118].
17 That treaty is given effect by an Order in Council (the Extradition (United States of America) Order 1970) in accordance with s 15 of the Act.
18 Extradition Act, s 13.

justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand".[19]

[15] The basis on which eligibility for surrender is determined is explained in s 24(2) but the full text of s 24, so far as is relevant to the present appeal, is as follows:

> **24 Determination of eligibility for surrender**
>
> (1) Subject to section 23(4), if a person is brought before a court under this Part, the court must determine whether the person is eligible for surrender in relation to the offence or offences for which surrender is sought.
>
> (2) Subject to subsections (3) and (4),[20] the person is eligible for surrender in relation to an extradition offence for which surrender is sought if—
>
> (a) the supporting documents (as described in section 18(4) in relation to the offence have been produced to the court; and
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> (b) if—
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> (i) this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions, or qualifications that require the production to the court of any other documents; or
>
> (ii) the terms of an extradition treaty in force between New Zealand and the extradition country require the production to the court of any other documents—
>
> those documents have been produced to the court; and
>
> (c) the court is satisfied that the offence is an extradition offence in relation to the extradition country; and
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> (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—
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> (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
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> …

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19 The person is not eligible for surrender if he satisfies the court that a mandatory statutory or treaty restriction applies or that a discretionary restriction should be exercised in his favour: ss 24(3) and (4).

20 Provisions which, not being relevant to the argument on the appeal, it is unnecessary to set out.

[16] The Part 3 inquiry is to be contrasted with that under Part 4 of the Act. Part 4 is concerned with extradition to Australia and has been extended by Order in Council to apply to the United Kingdom and Pitcairn Island.[21] Part 4 contains no requirement equivalent to that contained in s 24(2)(d). Eligibility for surrender under Part 4 does not require the determination of the court that a prima facie case to put the person on trial is shown on evidence. The role of the court is limited to being satisfied that the formal steps required by the legislation have been complied with, that the person is extraditable, that the offence is an extradition one, and that no statutory or treaty bars to extradition apply.[22] When extradition is conducted under Part 4 procedures, the court may not admit or entertain evidence concerning the justification for trial of the person whose extradition is sought, as s 45(5) makes clear:

> (5) In the proceedings under this section,—
>
> (a) the person to whom the proceedings relate is not entitled to adduce, and the court is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which surrender is sought; and
>
> (b) nothing in this section requires evidence to be produced or given at the hearing to establish the matters described in subparagraphs (i) and (ii) of section 24(2)(d).

[17] In the present case, where eligibility falls to be determined under Part 3, the District Court has "the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand", except where other provision is "expressly" made in the Act or in regulations made under s 102 of the Act.[23] In addition, Part 5 of the Summary Proceedings Act 1957 (as it stood immediately before enactment of the Criminal Procedure Act 2011) applies to proceedings under Part 3 when a person is brought before the court for determination of eligibility for surrender in accordance

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21 An equivalent process applies in respect of the Cook Islands under Part 8 of the Cook Islands Act 1915.

22 Extradition Act, s 45(2) and (3).

23 Section 22(1)(a).

with s 24, except where a provision is inapplicable or necessarily requires adaptation in the context of extradition.[24]

[18] These provisions concerning the powers and procedure of the court determining eligibility for surrender are contained in s 22 of the Act. As far as is it is relevant, s 22 provides:

> **22 Powers of court**
>
> (1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—
>
> (a) the court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and
>
> (b) the following provisions apply to the proceedings, so far as applicable and with the necessary modifications:
>
> (i) Parts 5 and 5A and sections 203, 204, and 206 of the Summary Proceedings Act 1957:
>
> (ii) Parts 1 (except sections 9 to 12), 2, and 4 of the Bail Act 2000:
>
> (iii) the Criminal Procedure (Mentally Impaired Persons) Act 2003.
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> …
>
> (4) The enactments (other than this Act, its provisions, Parts, and regulations made under it) specified in this section must be read as they read immediately before the commencement date as defined in section 394 of the Criminal Procedure Act 2011.

[19] The regulation-making power contained in s 102(1) includes power to make regulations "prescribing additional matters to be included in the record of the case under section 25"[25] and "prescribing the practice and procedure of District Courts in relation to proceedings under this Act".[26] The power to make regulations prescribing practice and procedure is elaborated to include, "without limitation":

> (i) the pre-hearing disclosure of information:

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[24] Section 22(1)(b)(i).
[25] Section 102(1)(b).
[26] Section 102(1)(e).

(ii) 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:

(iii) requiring the person whose surrender is sought to give notice of his or her intention to put a restriction on surrender in issue in the proceedings:

(iv) the circumstances in which the court may appoint an expert witness, the procedure to be followed after the expert witness is appointed, the rights of the parties in relation to the evidence given by the expert witness, and the manner in which the expert witness is to be remunerated.

Under s 102(2) it is provided that any regulations made prescribing the practice and procedure of the court "may provide for different practice and procedure in relation to proceedings under Part 3 than in relation to proceedings under Part 4".

[20] Section 22 makes it clear that a court determining eligibility for surrender under Part 3 of the Act has all the general jurisdiction and powers, statutory and implied, available to it when conducting a committal hearing. Only to the extent that such general powers are excluded "expressly" by the Act or in regulations made under the Act are they not available to the judge.[27] No regulations governing the practice and procedure of the court in extradition matters have been made. Whether the general powers of the court are "expressly" modified by the record of the case procedure under s 25 turns on the meaning of s 25 and is further considered in paragraphs [77] to [80] below. The law applicable to a committal hearing includes that provided for in statutes of general application, including the New Zealand Bill of Rights Act 1990 and the Evidence Act 2006, to the extent that they are not expressly modified by the Extradition Act. A committal court also has the general powers conferred under the Criminal Disclosure Act 2008. Whether the powers under that Act are "expressly" modified by the Extradition Act is further considered at paragraphs [81] to [82].

[21] The statutory provisions referred to in s 22(1)(b) (including Part 5 of the Summary Proceedings Act) are not statutes of general application. They are however expressly applied by the Extradition Act to the hearing to determine eligibility for surrender "so far as applicable and with the necessary modifications".

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[27] Section 22(1).

Since Part 5 of the Summary Proceedings Act contains obligations of disclosure on the part of the prosecutor and the defendant in ss 168 and 176 (which include provision of exhibits referred to in "the formal written statements that form all or part of the evidence for the prosecution … at the committal hearing")[28] it is necessary to consider at paragraph [48] whether these disclosure provisions are applicable or require modification and whether the provision of the documents covered in the order for disclosure in the District Court is within the disclosure required by Part 5 of the Summary Proceedings Act.

Effect of submission of a "record of the case"

[22] Section 25 of the Act is set out below at paragraph [41]. It permits an "exempted country" to submit a "record of the case" which will be "admissible as evidence" at the hearing if specified formalities are complied with. The record of the case does not affect the function of the court in determining eligibility under s 24. The court must still be satisfied that the evidence before it would justify the person's trial "according to the law of New Zealand" if the conduct constituting the offence had occurred in New Zealand.[29] Nor does the submission of a record of the case under s 25 affect the powers of the court, recognised in s 22, in proceedings under Part 3. The court has the "same jurisdiction and powers, and must conduct the proceedings in the same manner" as if the proceedings were a committal hearing of an indictable offence within New Zealand.[30]

[23] Section 25 does not cut across the obligations and powers of the court under Part 3 (which are equivalent to its powers and obligations in committal proceedings). It simply provides that a "record of the case", properly authenticated, is admissible as evidence, modifying the rules of evidence applicable under the Evidence Act.

[24] Apart from enabling an exempted country to avoid having to adduce evidence at the hearing in the form in which it would usually be admitted under New Zealand law, the s 24 determination and the Part 3 process more generally are not affected if the record of the case option is taken by the exempted country. The question the

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28 Summary Proceedings Act 1957, s 168(1).
29 Extradition Act, s 24(2)(d).
30 Section 22(1)(a).

court has to determine (that committal for trial is justified according to New Zealand law) and the standard required (that the court be "satisfied" on the evidence) is unaffected by use of a record of the case. Nor are the parties or the court confined to the record submitted (as is the effect under Part 4).[31] The exempted country may choose to proceed without submitting a record of the case.[32] And the adoption of the record does not limit other evidence.[33] The advantage obtained by the exempted country is as to the manner in which evidence is put before the court.

[25] That is consistent with the reasons which led to adoption of the record of the case procedure. The background to its adoption by a number Commonwealth States, including New Zealand, was described by the Court of Appeal of Ontario in *United States of America v Yang.*[34] The purpose was to overcome the need to comply with technical rules of evidence, particularly the prohibition on hearsay, which had no counterparts in some requesting jurisdictions.[35] The discussions which led to the reform affirmed the need for judicial assessment of eligibility for surrender according to the prima facie test applied to committal proceedings. The record of the case was proposed as a means to overcome evidential rules such as the need for affidavits to contain first hand rather than hearsay accounts.[36]

[26] That the purpose of the s 25 procedure within Part 3 was intended to overcome technical evidential rules is illustrated by the legislative history of the provision. As introduced, it required inclusion in the record of the case of a "recital of the evidence" together with a "certified copy, reproduction, or photograph of all exhibits, documentary evidence, and depositions of witnesses".[37] As enacted the "recital" was replaced with a "summary" and the more particular specification of the documents to be included was replaced with the present wording of "other relevant documents".

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31 See s 45(5).
32 Section 25(4)(a).
33 Section 25(4)(b).
34 *United States of America v Yang* (2001) 203 DLR (4th) 337 at [24]–[29].
35 Extradition Bill 1998 (146-1) (explanatory note) at ii–iii is a further indication of this purpose.
36 See *United States of America v Yang*, above n 34, at [28].
37 Extradition Bill, cl 25.

[27] I am unable to read the changes to "summary" and "other documents" as having restricted the scope of what would have been required to be provided in the Bill. The language of "summary" in s 25(2)(a) is more accurate if, as seems clear, full setting out of briefs of evidence was not envisaged. And the change to "other relevant documents" in s 25(2)(b) is a reference of greater inclusiveness, not less. In particular, I do not think these changes indicate a "less stringent" prescription of the material required to be supplied.[38] What *is* material in the changes made from the Bill as introduced is the dropping of the requirement that the documents included be "certified". I consider that this was of a piece with the purpose of the Bill in doing away with technical requirements of proof.

[28] In the High Court, Winkelmann J accurately identified the purpose of the reform contained in s 25 as being "to smooth the evidentiary path for the requesting state".[39] Its adoption did not otherwise change the nature of the hearing to determine eligibility under Part 3:[40]

> … all that s 25 confers is "threshold" reliability. In *Ferras* the Supreme Court of Canada described the notion of threshold reliability for the [record of the case] as conferring on evidence "sufficient indicia of reliability to make it worthy of consideration" by the extradition Judge.

[29] I agree. Section 25 is a provision concerned only with the way evidence may be produced to the court. It relaxes the New Zealand law of evidence to make further formal proof of the material supplied unnecessary. It does not affect the purpose of the eligibility hearing or the powers of the court, except in the manner of production of the evidence.

The treaty background and its effect

[30] Is what I would consider to be the ordinary sense of the language and scheme of the Act (that New Zealand domestic law applies to the manner of hearing and the jurisdiction and powers of the judge determining eligibility for surrender unless expressly modified and subject to further consideration of whether s 25 is such modification) affected by the treaty between New Zealand and the United States?

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38 Compare McGrath J's reasons at [146] below.

39 *Dotcom* (HC), above n 6, at [70].

40 At [70], quoting *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77 at [53].

[31] If there is a treaty between New Zealand and the requested state, s 11 of the Act requires that its provisions "must be construed to give effect to the treaty". This strong direction on construction of the legislation is, however, subject to the equally strong direction in s 11(2). As relevant to the present appeal, it provides:

> (2) Despite subsection (1), no treaty may be construed to override—
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> …
>
> (b) section 24(2)(d) [the requirement that the court must be satisfied that the evidence produced would justify trial according to New Zealand law] or section 45(5) [the prohibition on adducing contrary evidence and obviating the need to produce substantiating evidence under Part 4]; or
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> …
>
> (d) any provision conferring a particular function or power on the Minister or a court.

[32] Section 11(2) makes it clear that the terms of the treaty between New Zealand and the United States do not affect the court's obligation to determine whether the evidence justifies trial under New Zealand law and cannot affect the functions and powers conferred upon the court, including the confirmation that the court has all the powers of a New Zealand court exercising committal jurisdiction. In agreement therefore with Winkelmann J, I do not consider that the terms of the treaty are relevant to the issue of disclosure the court has to decide.[41]

[33] In any event, however, I consider that the terms of the treaty are wholly consistent with the ordinary meaning and scheme of the Act. Article 4 of the treaty provides the basis on which extradition is granted. As is relevant, it reads:

> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, … to justify his committal for trial if the offence of which he is accused had been committed in that place …

[34] Article 9 of the treaty similarly makes it clear that the determination whether extradition based on a request "should or should not be granted":

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[41] *Dotcom* (HC), above n 6, at [41].

> … shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

[35] The terms of the treaty accordingly emphasise that the sufficiency of the evidence is judged according to the domestic law of New Zealand and that the person affected has the right in the hearing "to use such remedies and recourses" as are provided by New Zealand law. This is the same approach adopted by s 22(1)(a) of the Act.

[36] In the Court of Appeal and in the reasons of the other members of this Court emphasis is placed on art 12 of the treaty, which provides:

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

The Court of Appeal accepted the submissions for the Minister that this article was inconsistent with any power of the court to require disclosure. Although the requesting state had a duty of "candour and good faith",[42] art 12 was held in the Court of Appeal to indicate that it was not for the courts to order disclosure beyond the material provided by the requesting state.[43] A request for further information might be conveyed by the court to the Minister, but it was for the Minister to decide whether to seek further information under art 12 from the requesting state.[44]

[37] The reliance on art 12 and on the "duty of candour and good faith" was justified in the Court of Appeal by reference to English authority, most of which was decided in the context of extradition processes comparable to those under Part 4 of the Extradition Act and which did not require the court to determine that a prima facie case had been established on evidence at a hearing conducted "in the same manner" and in respect of which the court has the same "jurisdiction and powers" as if the proceedings were a committal hearing. I discuss these authorities in paragraph [64] to [68] when considering the ability to order disclosure beyond that provided for under s 25(2). For the purposes of the meaning and effect of s 25(2) it is sufficient to

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42 *Dotcom* (CA), above n 4, at [106].
43 At [107].
44 At [107].

say that art 12 cannot be isolated from the effect of arts 4 and 9, which emphasise application of the laws and procedures of New Zealand and recourse to them by the person affected.

[38] Nor do I think that the Court of Appeal was right to suggest that the requesting state is "nominally" a party (and that art 12 supports the view that the court cannot make an order against a sovereign state).[45] Under the New Zealand legislation the Minister of Justice makes the application, as I think should have been reflected in the intituling.[46] If, contrary to the view I take, the United States is properly regarded as a party, then I consider that it is amenable to the court's jurisdiction.

[39] Extradition is in part a government to government process. The Minister has functions to fulfil in acting on the request even after eligibility for extradition under s 24 has been determined in accordance with New Zealand law. On its terms, art 12 sets up a process for the requested state to seek additional information from the requesting state which does not affect the function being exercised and the processes being followed as a matter of domestic law by the New Zealand courts. Additional information may be required for a number of reasons to do with the government functions undertaken under the legislation. The need for invocation of art 12 to provide additional information for the court seems unlikely. Indeed, evidence required to satisfy the court of eligibility for surrender is not obviously described as "additional". It is likely that art 12 will be resorted to more commonly in cases where a requested state wants information about the future treatment of a person extradited or some information of the sort required for discharge of the Minister's functions under s 30 after the court has determined whether a person is eligible for surrender.

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45 At [63]–[64].

46 This is to be contrasted with *R v Director of Public Prosecutions ex parte Thom* [1994] TLR 660 (QB), in which it is suggested that under the Extradition Act 1989 (UK), the Director of Public Prosecutions is in the position of a private lawyer acting for a foreign client. I do not think that the New Zealand legislation permits that view here. It may be noted that, in any event, *Thom* was doubted in *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836 (CA) at [138].

[40] I consider that whether the District Court was able to order disclosure of the documents relied on as evidence to justify eligibility for surrender turns on New Zealand domestic law, as both the Act and the treaty envisage.

The meaning of s 25(2) and its application in the present case

[41] Section 25 provides:

> **25 Record of case may be submitted by exempted country at hearing**
>
> (1) For the purposes of any determination under section 24(2)(d)(i), a record of the case may be submitted by or on behalf of an exempted country.
>
> (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain—
>
> (a) a summary of the evidence acquired to support the request for the surrender of the person; and
>
> (b) other relevant documents, including photographs and copies of documents.
>
> (3) The record of the case is admissible as evidence if it is accompanied by—
>
> (a) an affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person's trial; and
>
> (b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.
>
> (3A) A person referred to in subsection (3)(b) is—
>
> (a) the Attorney-General or principal law officer of the exempted country, or his or her deputy or delegate; or
>
> (b) any other person who has, under the law of the exempted country, control over the decision to prosecute.
>
> (4) Nothing in this section –
>
> (a) prevents an exempted country from satisfying the test in section 24(2)(d)(i) in accordance with the provisions of this Act that are applicable to countries that are not exempted; or

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

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

[42] While the record of the case must contain "a summary of the evidence acquired to support the request for the surrender of the person", it must also contain "other relevant documents, including photographs and copies of documents". If all "relevant documents" can be summarised under s 25(2)(a), it is difficult to see what the record "must" additionally contain under s 25(2)(b). Perhaps because of this difficulty, counsel for the respondent, in the High Court, suggested that the "relevant documents" required to be included were "critical documents such as photographs supporting identification".[47] As Winkelmann J said, it is hard to see on what basis s 25(2)(b) can be so read down.[48] Such interpretation sets up a criterion (what is "critical") which is not based on anything in the statute and which would require assessment of degree in every case, a circumstance hardly compatible with a statutory specification of what must comprise the record.

[43] If "other relevant documents" are not restricted by the limiting description in paragraph (a) (in relation to the summary of evidence) to those "acquired to support the request for the surrender of the person", they would potentially cover any documents relevant to determination of a prima facie case, rather than simply the documents relied upon by the requesting state to establish its case. Since she considered that s 25(2)(a) required only the evidence relied on by the requesting state to be summarised, Winkelmann J considered that the most sensible reading of s 25(2) was that paragraphs (a) and (b) are linked. On that basis, the "summary" is one "document" to which "other documents" "acquired to support the request for surrender of the person" must be added to comprise the record of the case:[49]

> By its language s 25(2) imposes upon the requesting state an obligation to include within the [record of the case] both a document summarising the evidence acquired to support the request for surrender of the person and also other relevant documents that support that request. This suggests a [record of the case] will typically be comprised of an overview of the case for

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47 *Dotcom* (HC), above n 6, at [111].
48 At [111].
49 At [111].

> extradition, a summary of the evidence of witnesses of fact. It will also addend documents which provide the basis for the summary or are referred to in it, those documents thereby becoming admissible without the requirement that their authenticity be proved in accordance with the usual rules of evidence.

I agree with this analysis.

[44] It should be noted that the record of the case procedure provided for under the Canadian Extradition Act 1999 differs from s 25 of the New Zealand Act. Under s 33 of the Canadian Act, the record of the case "must include … a document summarizing the evidence available to the extradition partner for use in the prosecution" and "may … include other relevant documents".[50] The Canadian authorities for this reason need to be applied with care in relation to the New Zealand statute. In my view the Canadian cases relied upon by the Court of Appeal to permit a summary of documents relied upon as evidencing elements of an offence do not accord with the meaning of s 25. And, as Winkelmann J pointed out, the fact that the Canadian model was not followed in New Zealand so that the provision of "other documents" is not a matter of discretion but obligation, is a legislative choice to which the courts must give effect.[51]

[45] For reasons that have already been explained my view is that s 25 is concerned with the manner of production of evidence and offers an exempted state the advantage of providing its evidence in the form of a record of the case.[52] It does not affect the Part 3 process further than that. I reach that conclusion on the basis of the text of s 25 and the structure and purpose of Part 3. It is a conclusion also confirmed by the wider statutory context in which the Extradition Act operates. That context includes Part 5 of the Summary Proceedings Act, the Criminal Disclosure Act, and the New Zealand Bill of Rights Act.

[46] Part 5 of the Summary Proceedings Act applies to an eligibility hearing under Part 3 of the Extradition Act by reason of s 22. Section 22 provides that the procedure to be followed in determining eligibility for surrender under Part 3 of the Extradition Act is that prescribed by Part 5 of the Summary Proceedings Act for "a

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50 Extradition Act SC 1999 c 18, s 33.
51 *Dotcom* (HC), above n 6, at [112].
52 See above at [22]–[29].

committal hearing".[53] The court has the "same jurisdiction and powers, and must conduct the proceedings in the same manner" when conducting a hearing to determine eligibility for surrender under Part 3 of the Extradition Act "as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand". It therefore needs no oral evidence order under the Summary Proceedings Act before the procedure at a committal hearing is used for a Part 3 Extradition Act proceeding. Section 22 establishes the procedure directly without court order. Unless the record of the case procedure is used (and even where it is, if the record is supplemented by other evidence), Part 3 hearings are conducted on the basis of the usual procedures of the court as to evidence and witnesses. In this view, therefore, I prefer the approach taken in the District Court to that of Winkelmann J who considered that oral evidence orders were required in respect of any witness required to give evidence in extradition proceedings under Part 3.[54] Nothing however turns on the point in the present case.

[47] The definition of "prosecutor" in Part 5 of the Summary Proceedings Act refers to and adopts the definition in the Criminal Disclosure Act.[55] "Prosecutor" is defined broadly to mean "the person who is for the time being in charge of the file or files relating to a criminal proceeding". It includes "any counsel representing the person who filed the charging document in the proceedings". "Criminal proceeding" is not defined in the Summary Proceedings Act but the cross-reference in respect of "prosecutor" invokes the definition in the Criminal Disclosure Act, by which "criminal proceedings" excludes ancillary matters (bail, name suppression and such) but means "proceedings for an offence for which a conviction may be entered".[56] As it is relevant to application of the Criminal Disclosure Act more generally, it may be conveniently noted here that the powers of the court under s 22(1)(a) in respect of Part 3 of the Extradition Act are "as if the proceedings were a committal hearing of

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53 The "standard committal" under the Summary Proceedings Act as it stood before the enactment of the Criminal Procedure Act 2011 (which did not require determination of whether there was a prima facie case) is inapplicable as is made clear both by the reference to "committal hearing" in s 22 of the Extradition Act and by the requirement in s 24 that the court be "satisfied that the evidence produced or given at the hearing would … justify the person's trial".

54 See *Dotcom* (DC), above n 5, at [160]; compare *Dotcom* (HC), above n 6, at [87].

55 Summary Proceedings Act, s 146, definition of "prosecutor"; Criminal Disclosure Act 2008, s 6(1), definition of "prosecutor".

56 Criminal Disclosure Act, s 6(1), definition of "criminal proceedings".

an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand". And "extradition offence" is defined in the Extradition Act as "an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty"[57] and which, if it had occurred within New Zealand "would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty".[58] As is further explained at paragraph [83], the effect of these definitions is that a hearing to determine eligibility for surrender is a hearing in proceedings for which a conviction may be entered.[59] Counsel for the Minister or for the requesting state (when it appears directly) is a prosecutor in this scheme.[60]

[48] Section 168, contained in Part 5 of the Summary Proceedings Act, requires the provision of exhibits referred to in the "formal written statements that form all or part of the evidence for the prosecution … at the committal hearing" within 42 days (or such other time as may be allowed by the court) after the date on which the defendant appears in court in relation to an information laid indictably. In cases not involving a record of the case, s 168 can be applied without modification. Where the record of the case procedure is followed on behalf of an exempted country, s 25(2)(a) requires the "necessary modifications" looked to by s 22(1)(b). The "formal written statements that form all or part of the evidence for the prosecution … at the committal hearing" may be provided in the "summary of the evidence" permitted by s 25(2)(a). But the "exhibits" referred to in s 168 of Part 5 of the Summary Proceedings Act are treated distinctly to the "formal written statements that form all or part of the evidence". I consider it is consistent with s 168 of the Summary Proceedings Act, itself invoked by s 22 of the Extradition Act, that exhibits which are documents are treated distinctly from the evidence referred to in s 25(2)(a) and that s 22(2)(b), properly understood, requires their separate inclusion in the record of the case. No modification to the requirement of provision of the documents is

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57 Extradition Act, s 4(1)(a).

58 Section 4(2).

59 Other members of this Court consider that, as a matter of ordinary meaning, this refers to conviction by a New Zealand court: see judgment of McGrath J at [126] below. I take the view that "conviction" is not subject to geographical limitation. This interpretation is supported by the approach of Wilson J in *Canada v Schmidt* [1987] 1 SCR 500 at 535, which was followed by Baragwanath J in *Poon v Commissioner of Police* [2000] NZAR 70 (HC) at 77.

60 Compare judgment of McGrath J at [163] below.

"necessary". And no policy served by the record of the case procedure (which as explained at paragraph [23] is concerned with production as evidence) justifies their exclusion in Part 3 proceedings.

[49] The wider legislative context includes the Criminal Disclosure Act. As is further explained in relation to the scope of disclosure,[61] I consider that the Criminal Disclosure Act applies to proceedings to determine eligibility for surrender, as it does to a committal hearing. For the purposes of considering the interpretation of s 25(2)(b), however, the relevance of the Criminal Disclosure Act is the context provided by the legislative policy of that Act. Under it, early information ("initial disclosure") is required to "fairly inform" the defendant of the facts and to provide him with information from which he can request provision of key documents.[62] Under s 13 "full disclosure" is required on first appearance on a charge laid indictably. That corresponds to the time at which the person whose extradition is sought is brought before the court for determination of eligibility for surrender. Full disclosure requires provision of a list of all exhibits (including those held but not relied upon by the prosecutor), from which disclosure can be requested.[63] Section 19 provides for copies of exhibits to be provided "if … reasonably capable of reproduction" or made available for inspection. The court has power under s 30 to order disclosure where information to which the accused is entitled to has not been provided.

[50] The wider legislative context also includes the New Zealand Bill of Rights Act and the right to natural justice contained in s 27 of that Act. An interpretation of the record of the case to require provision of documents which are evidence of the necessary elements of an offence is consistent with the right to natural justice because such interpretation allows the person subject to the eligibility hearing to know the case against him and provides him with the opportunity to challenge any inferences not supported by the documents. The interpretation of s 25(2)(b) to require inclusion of such documents for reasons of natural justice is therefore to be preferred under s 6 of the New Zealand Bill of Rights Act.

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61 See below at [81]–[84].
62 Criminal Disclosure Act, s 12.
63 Section 13(3).

[51] It is accepted by the parties that s 27 of the Bill of Rights Act applies to extradition proceedings. That is sufficient for the purposes of the interpretation of s 25. I do not wish to be taken, however, to agree with the view expressed in this Court and in the Courts below that ss 24 and 25 of the Bill of Rights Act do not also apply to proceedings to determine eligibility for surrender because those they concern are not charged with offences under New Zealand law.[64] I agree that some of the provisions under ss 24 and 25 are not relevant to extradition proceedings. But others apply equally to the position of someone charged in another jurisdiction and facing a hearing in New Zealand to determine whether on that charge there is sufficient evidence according to New Zealand law for him to stand trial. Those facing committal hearings under Part 5 of the Summary Proceedings Act for New Zealand offences were clearly entitled to observance of a number of the rights contained in ss 24 and 25 in a hearing to the same effect as the determination of eligibility for surrender. There is no evident reason to deny these human rights on the basis that the underlying offence, although it must be equivalent to an offence in New Zealand, is not a New Zealand offence. As Baragwanath J pointed out in an extradition context, the policy for differentiating in the application of fundamental values between those in custody for extradition purposes and those in custody because they faced charges in New Zealand is elusive.[65] In both cases the underlying justification for the exercise of judicial authority is that the individual is charged with an offence.

[52] So, it seems to me to be relevant when considering what natural justice requires in relation to a hearing to determine eligibility for surrender that s 24 for example requires that those charged are to be informed "in detail of the nature … of the charge", and are to have "the right to adequate time and facilities to prepare a defence", together with rights to legal assistance and the assistance of an interpreter. They are rights that must apply to the necessary steps in the extradition process, such as the determination that a prima facie case is made out. Similarly, the minimum rights of criminal procedure, although expressed to be "in relation to the determination of the charge" include rights in relation to sentence and appeal and

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64 See judgment of McGrath J at [105]–[116] below.

65 *Poon v Commissioner of Police*, above n 59, at 77; and *X v Refugee Status Appeals Authority* [2006] NZAR 533 (HC) at [58]–[59]. The latter case concerned refugee status but raised extradition issues.

equally, in my view, are not to be confined to matters of trial alone, to the exclusion of critical steps along the way to determination of the charge. If so confined, the rights would be effectively eroded before the trial was reached. The right to a fair and public hearing by an independent and impartial court and to be presumed innocent until proven guilty for example are directly relevant to judicial determination of whether trial is justified. And the legislation is properly to be interpreted in conformity with these standards.

[53] Like the committal hearing on which the Extradition Act patterns it, the eligibility hearing is intended to provide opportunity to be heard on the question whether the threshold prima facie case has been demonstrated by the requesting state. Fairness requires that the subject of the proceedings has access to sufficient information to enable him to participate effectively at the hearing. That is the policy of the Criminal Disclosure Act also. In extradition cases, these policies may not support the disclosure appropriate to fair trial. But they suggest that fair hearing under Part 3 requires disclosure of the documents relied on to establish the elements of the offences charged for the purposes of the determination of whether there is a prima facie case. Where a record of the case is employed (so that documents included need no other proof), that context supports an interpretation of s 25(2)(b) that includes provision of copies of the documents relied on as evidencing the prima facie case.

[54] Against the background of the record of the case procedure, what is required is provision of material that is necessary to fairly inform the person the subject of the application of the evidence against him and provide him with the opportunity to test it to the prima facie standard envisaged. That is not simply a formal check on the assumption that the material in the record is accurate. (If so, the Part 3 procedure would be little different from the Part 4 procedure.) It is intended as an effective opportunity to answer the prima facie case.

[55] This interpretation of s 25(2)(b) does not undermine the benefits of the record of the case procedure. The requesting country does not have to prove the documents to the standard required by the New Zealand law of evidence. Their inclusion in the record of the case means that they can be considered as evidence by the court.

[56] The record of the case here does not in my view comply with s 25 because it does not include the documents relied on as evidence of the offence. I would allow the appeal on this basis. I consider that the Court has power to order that the record be completed in relation to the omitted documents under its inherent powers to secure the proper administration of justice.[66] I would recast the orders made in the District Court, after giving the parties an opportunity to be heard on their terms, so that they are limited to the documents relied upon in the evidence summarised in accordance with s 25(2)(a) to justify trial.

The role of disclosure in determination of eligibility for surrender

[57] I do not think it is helpful to label the disclosure ordered in the District Court and affirmed in the High Court as "general disclosure", as if it permitted wide-ranging on-demand discovery unanchored to the prima facie case put forward on behalf of the requesting state and uncontrolled by the court. As the Supreme Court of Canada said in *United States v Dynar*, the context and purpose of the extradition hearing shapes the level of procedural protection required.[67] Similarly the House of Lords has emphasised that fairness must be assessed in the context of the extradition hearing, rather than the fairness of trial.[68]

[58] This approach applies to the procedural protection of disclosure. The evidence relied upon by the requesting state to establish the existence of a prima facie case, justifying trial, is a matter for the requesting state, subject to an obligation of candour to reveal evidence which undermines the evidence it has put forward.[69] Matters bearing on justification and defence will usually not be appropriate for disclosure at the hearing to determine whether the threshold for trial is met.[70] Nor will it usually be relevant to inquire into (and therefore seek disclosure of) matters which might affect trial fairness (such as delay or information bearing on the credibility of witnesses for the prosecution in issue in *Knowles v Government of the*

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66 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 (SC) at [18] (per Elias CJ) and [113]–[114] (per McGrath, William Young and Glazebrook JJ).

67 *United States of America v Dynar* [1997] 2 SCR 462 at [128]–[129].

68 *R v Governor of Brixton Prison ex parte Levin* [1997] AC 741 (HL) at 748.

69 *Knowles v Government of the United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [35].

70 See, for example, *United States of America v Kwok* [2001] 1 SCR 532, where the Supreme Court of Canada was prepared to allow that it might extend in a particular case to disclosure of information about the facts on which a Charter challenge was made.

United States of America[71]) in respect of which it is consistent with the principles of comity between nations on which extradition is based that reliance is placed upon the processes to ensure fairness in the requesting state.[72] In the same way, information that is relevant to the subsequent role of the Minister is not properly sought in the proceedings to determine eligibility for surrender (and may properly be left to be sought on a state to state basis as by the procedure envisaged by art 12 of the treaty between New Zealand and the United States).

[59] The focus on the particular hearing to determine eligibility for surrender does not however affect the entitlement in accordance with the law of New Zealand of the person the subject of the hearing to know the case against him and to have adequate opportunity to test whether it meets the threshold for committal for trial. This entitlement arises, as is discussed further below, under statutes and the common law.

Disclosure is not properly treated as "exceptional"

[60] The Court of Appeal accepted that the court may order disclosure in proceedings under Part 3 of the Extradition Act, even where a record of the case has been submitted.[73] But it suggested that such exceptional course would be warranted only where necessary in order to protect the integrity of the court's processes in deciding the limited challenges to the record of the case, such as where the person affected can point to a gap or flaw or other material indicating that the record of the case cannot be relied on.

[61] Because the court determining eligibility for surrender must ensure that the person whose extradition is sought has proper opportunity to counter the case for committal made by the requesting state, disclosure is not properly to be regarded as an "exceptional" course for a court making a s 24 determination.[74] No doubt when a complying record of the case is provided, it will usually be unnecessary for more information to be provided for the purpose of the prima facie determination than is contained in the summary of the evidence and the supporting documentary material

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71 See *Knowles v Government of United States of America*, above n 69, at [31] and [33].
72 *Argentina v Mellino* [1987] 1 SCR 536 at [32].
73 *Dotcom* (CA), above n 4, at [107].
74 Compare *Wellington v Governor of Her Majesty's Prison Belmarsh* [2004] EWHC 418 (Admin) at [29] and judgment of McGrath J at [177]–[180] below.

provided under s 25(2). But where the record is not sufficient fairly to inform the person of the case against him to enable him to test it, disclosure is properly ordered under New Zealand procedural law.

[62] Nor do I accept that an evidentiary burden must in all cases be discharged by the person whose eligibility for surrender is in issue. If proper substantiation is not provided for assertions or if inferences are relied on, then the material that allows testing of the assertions or the inferences must I think be provided if in the hands of the requesting country. The Court of Appeal took the view that a challenge which goes to the interpretation of the material summarised in the record of the case – "that is, to the inferences that should be taken from it", rather than its reliability – was "more appropriate to a trial than to an extradition hearing".[75] This approach seems to me to mischaracterise the nature of the hearing to determine eligibility for surrender. As Winkelmann J said of the effect of the argument, it is "to parlay the procedural privilege granted to exempted countries through the [record of the case] procedure into a hearing with a far narrower focus than that of a traditional committal hearing …".[76]

[63] Inferences from the material contained in the record of the case may be critical to the determination the judge has to make whether a prima facie case has been established. Cases such as the present one which rely on circumstantial evidence and the inferences to be drawn from patterns of activity inescapably require the judge to consider whether the inferences relied upon by the requesting state are safe in determining whether a prima facie case is made out. Such inferences can properly be questioned in the extradition hearing. To be able to do so, the person resisting extradition needs access to the underlying material from which the inferences invited are drawn. While the extradition hearing does not require all the procedural safeguards of a trial, it must provide a fair hearing of the question whether there is sufficient case to put a person charged with an offence in the requesting country on trial. As McLachlin CJ remarked for the Supreme Court of

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75 *Dotcom* (CA), above n 4, at [108].
76 *Dotcom* (HC), above n 6, at [66].

Canada in *United States of America v Ferras*: "International comity does not require the extradition of a person on demand or surmise".[77]

[64] The judicial determination of eligibility for surrender is not a rubber stamp. It requires judgment as to whether the threshold for committal is met. That assessment includes the safety of the inferences to be drawn from circumstantial evidence and may require disclosure of contextual information which undermines the inference relied upon. The very right to a hearing itself entails the procedural safeguards necessary to enable the judicial function to be fulfilled. The extent of disclosure required is shaped by the nature of the proceedings.

[65] I have already indicated that care needs to be taken in applying authorities from jurisdictions with different statutory schemes for extradition. It is also necessary to be careful about older authorities which predate legislative recognition of human rights. Some of the older authorities cited in the reasons given by other members of this Court either, in the case of the United Kingdom, predate enactment of the Human Rights Act 1998 (UK)[78] or, in Canada, were decided before the Supreme Court of Canada in *Ferras* reassessed earlier case law as not complying with the Charter of Rights and Freedoms.[79]

[66] Because of the emphasis placed on more recent decisions in the United Kingdom,[80] it is also necessary to point out that they have largely arisen in respect of extradition sought by the United States. Since enactment of the Extradition Act 2003 in the United Kingdom, extradition to the United States has been according to a process comparable to the Part 4 procedure under the New Zealand Extradition Act. Demonstration of a prima facie case to the satisfaction of the court is not required in the case of designated countries. The United States is a designated country.[81] The

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77 *United States of America v Ferras*, above n 40, at [21].

78 See *R v Governor of Pentonville Prison ex parte Lee* [1993] 1 WLR 1294 (QB). Although *Wellington v Governor of Her Majesty's Prison Belmarsh*, above n 74, followed enactment of the Human Rights Act 1998 (UK), it adopted the reasoning in the earlier cases without reassessment.

79 *United States of America v Ferras*, above n 40, at [40]–[50] discussing *United States of America v Shephard* [1977] 2 SCR 1067. The cases of *Argentina v Mellino*, above n 72; *United States of America v Kwok*, above n 70; *United States of America v Dynar*, above n 67; and *Canada v Schmidt*, above n 59, relied on by McGrath J were decided before *Ferras*.

80 See judgment of McGrath J at [152] and [177]–[180] below.

81 Extradition Act 2003 (UK), s 84(7); Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (UK), cl 3.

more limited role of the court under such process explains the emphasis in the cases on candour and government to government inquiry (rather than judicially ordered disclosure), and the assertion of a residual judicial power to prevent abuse of process where it is shown. Such cases do not concern the powers of a court responsible for determining whether, on the evidence and at a hearing where the question is able to be challenged, the threshold for committal for trial according to the law of the requested state has been shown.

[67] More relevant when considering the New Zealand legislation in issue here is the decision of the Privy Council on appeal from the Bahamas in *Knowles*.[82] The case concerned determination of eligibility comparable to the determination in New Zealand under s 24. The Privy Council expressed reservations about an earlier High Court decision in which it had been suggested that the committing court was not required to observe fairness in connection with disclosure in extradition cases, saying "[t]here are many respects in which extradition proceedings must, to be lawful, be fairly conducted".[83] While the Board held that there was no "general duty of disclosure" under the statutory scheme in the Bahamas, it allowed for a "duty of candour and good faith" which required the requesting state to disclose evidence which severely undermined the evidence on which it relied and indicated that, had it been shown that the duty of candour had been breached, an order for disclosure might well have been appropriate.

[68] As has already been indicated,[84] *Knowles* was a case where it was asserted that the requesting state ought to have disclosed documents relevant to the reliability of three prosecution witnesses. The material sought to be disclosed therefore went beyond that relied upon by the requesting state to make out the case for committal or necessary to challenge it or the inferences to be drawn from it. The rejection of a general requirement of disclosure must be seen in that light. As is indicated at paragraph [79], I consider the result reached would have been the same in New Zealand on the approach I take because the disclosure sought was in the nature of general discovery and was not tailored to the function of the court in determining

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82 *Knowles v Government of the United States of America*, above n 70.
83 At [35].
84 Above at [58].

eligibility for surrender. Despite its rejection of the disclosure in the particular case (where indeed there was a finding of fact that no such information as was sought existed), it is important to note that the Privy Council in *Knowles* rejected suggestions that reasons of fairness could not require disclosure in an appropriate case if the extradition was to be lawfully conducted.

The regulation-making power in s 102

[69] Section 102 of the Extradition Act envisages that regulations may be made "prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including (without limitation), … the pre-hearing disclosure of information". The suggestion was made in the Court of Appeal[85] and is made in this Court[86] that in the absence of such regulation, the Court lacks power to order disclosure. That is I think to put matters the wrong way around. The regulation-making power may be used to modify and control the statutory and inherent powers of the court. That is not to say that the power does not exist in the absence of regulations.

[70] Absence of regulation simply means that the existing practices and procedures of the court in committal hearings continue to apply without modification to hearings to determine eligibility for surrender, as s 22 provides.[87]

The inherent and statutory powers of the court to order disclosure

[71] Before enactment of the Criminal Disclosure Act, pre-trial disclosure was provided in criminal matters in New Zealand through application of the Official Information Act 1982, following the ground-breaking 1988 decision of the Court of Appeal in *Commissioner of Police v Ombudsman*.[88] Although the Official Information Act provided the platform used by the Court of Appeal in that case, there can I think be little doubt that the inherent powers of the courts to ensure fair process would in time have been invoked to achieve disclosure, particularly following the

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85 *Dotcom* (CA), above n 4, at [95].

86 Judgment of McGrath J at [131] below.

87 The related view expressed by the Court of Appeal that the regulation-making power under s 102 could not "override" art 12 of the treaty with the United States is further indication of what I consider to be its erroneous understanding of the effect of the treaty, as already discussed at paragraph [36] above.

88 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

enactment of the New Zealand Bill of Rights Act in 1990, had it been necessary. That is what happened in the United Kingdom. In *Lundy v R* the Privy Council, rightly in my view, treated the United Kingdom authorities which establish rights of disclosure as a necessary incident of rights to natural justice and minimum standards of criminal justice as applicable in New Zealand.[89]

[72] If, as I think, the Summary Proceedings Act and the Criminal Disclosure Act now provide statutory powers to order disclosure, it would be a mistake to see those Acts as building on the pre-existing duty to disclose under the Official Information Act instead of the underlying and older concern for fair process which is likely itself to have prompted the Court of Appeal's recourse to the Official Information Act in pre-Bill of Rights Act times.

[73] Disclosure of material required to meet proceedings affecting rights is grounded on fundamental values in the New Zealand legal order and not simply on the principles of good government for New Zealand citizens which gives rise to disclosure of official information. Suggestions that the earlier Official Information Act justification means that disclosure where necessary in the interests of fair hearing is not inherent in a judicial determination of eligibility for surrender (or committal in domestic criminal cases) seems to me to be wrong.

[74] Section 27 of the New Zealand Bill of Rights Act undoubtedly applies to the eligibility determination (as it did to committal determinations). As has been indicated, I consider that the better view is that the criminal process rights referred to in ss 24 and 25 of the New Zealand Bill of Rights Act also apply to eligibility for surrender proceedings.[90] In those circumstances, and drawing on more ancient obligations of the courts to protect fair process, I think it inconceivable a New Zealand Court, at least following the enactment of the New Zealand Bill of Rights Act, would not by now have asserted a power at common law to order disclosure if it considered it necessary to secure a fair hearing, had the matter arisen.

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89 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [133], citing *R v Ward* (1993) 96 CR App Rep 1 and *R v Alibhai* [2004] EWCA Crim 681.

90 See [51] above.

[75] The inclusion of a power to make regulations under s 102 of the Extradition Act regulating the practice and procedure of the District Court in the matter of "the pre-hearing disclosure of information" assumes the existence of a power in the Court to make orders for such disclosure. It is difficult to see such powers as prompted by openness in government. Rather, they arise out of the inherent powers possessed by the court to ensure that hearings are conducted fairly and according to law.

[76] Against that background, I consider there is no proper basis to deny the statutory powers available to a committing court to a court considering eligibility for surrender (with "the same jurisdiction and powers" and "in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand"). Here, such statutory powers include both those under Part 5 of the Summary Proceedings Act (as far as applicable and with necessary modifications) and under the Criminal Disclosure Act (except as "expressly provided" in the Extradition Act or in regulations made under it).

The availability of disclosure is not excluded by s 25 where a record of the case is employed

[77] I have indicated at paragraph [48] why I consider that the Summary Proceedings Act Part 5 provisions of relevance to disclosure are applicable to determinations of eligibility for surrender and do not require modification. I have also explained why I consider that s 25, properly interpreted, does not affect the powers to ensure disclosure of exhibits (the disclosure that is sought here).

[78] There is an additional issue whether s 25 excludes disclosure in relation to material summarised under s 25(2)(a). It is arguable that s 25 of the Extradition Act is "expressly" inconsistent with a power to order disclosure relating to the evidence summarised under s 25(2)(a). It is also arguable that it is not. The benefit obtained by a requesting country is as to the manner of production of evidence to the court. Disclosure is concerned not with production of the material the requesting country chooses to rely on but with ensuring that the person affected understands the case and has fair opportunity to meet it. If in a particular case disclosure is relevant for those purposes, the terms of s 25 may not exclude it.

[79] It is important to note that the disclosure available under the Summary Proceedings Act and the Criminal Disclosure Act is not general discovery but disclosure of information identified in the statutes. Orders for disclosure also require the application of a discretionary power to the circumstances of the case. Such disclosure is not therefore comparable with a right to general discovery. It also depends on the relevance of the material sought to the issue for determination, the existence of a prima facie case.

[80] It is not necessary for me to decide whether disclosure of the information drawn on in a summary of evidence permitted under s 25(2)(a) is expressly excluded by the terms of the provision, because the disclosure obtained in the District Court orders did not seek, on the interpretation I prefer, disclosure of the material summarised but rather the documents relied on as evidencing the crimes alleged. If wrong in that interpretation, however, I do not see s 25 as a provision that excludes discovery of the material relied on by the requesting state to evidence commission of the offence to the prima facie standard provided.

The Criminal Disclosure Act 2008

[81] As has already been foreshadowed, I consider that the power to order disclosure under the Criminal Disclosure Act is available to a court determining eligibility for surrender, although its scope is limited by relevance to the issue of eligibility for surrender. In the present case the disclosure sought to date is limited to the documents relied upon by the requesting state to establish a prima facie case. It is therefore not necessary to consider further than that the wider disclosure that may be available under the Criminal Disclosure Act.

[82] In the Court of Appeal the view was taken that the Criminal Disclosure Act did not apply to extradition cases because it was not an Act listed in s 22(1)(b) of the Extradition Act.[91] As has already been indicated, I do not think the structure of s 22(1) suggests any significance in the omission of reference to the Criminal Disclosure Act in s 22(1)(b). The terms of s 22(1)(a) necessarily include the jurisdiction, powers and obligations imposed on all courts (and therefore on courts

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91 *Dotcom* (CA), above n 4, at [96].

conducting committal hearings) such as under the New Zealand Bill of Rights Act or the Evidence Act. A court conducting a committal hearing immediately before the Criminal Proceedings Act came into effect had powers under the Criminal Disclosure Act. The words of s 22(1)(a) do not suggest that the powers of the court under this Act are not available to a court determining eligibility for surrender. It is a statute of general application applying to those exercising jurisdiction in relation to criminal proceedings. The specific references to the Bail Act 2000, the Criminal Procedure (Mentally Impaired Persons) Act 2003 and the Summary Proceedings Act in s 22(1)(b) do not suggest exclusion of statutory powers of general application. Unlike such general provisions, application of the identified statutes required specific reference.

[83] It is however contended on behalf of the Minister that the Criminal Disclosure Act does not apply to the determination of eligibility for surrender because it applies only to "criminal proceedings". They are defined in the Act as "proceedings for an offence for which a conviction may be entered".[92] It is said that "an offence for which a conviction may be entered" means an offence against New Zealand law. I have already indicated at paragraph [47] that I consider this restriction cannot be derived from the language of s 22 and, far from creating absurdity, application of the Criminal Disclosure Act is proper provision for natural justice, equally applicable to determination of eligibility for surrender as it is in domestic matters. Its application accords with the direction in s 22(1) that the procedure for determination of eligibility for surrender is "as if" it were "a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand".

[84] A comparable argument was rejected by a unanimous House of Lords in *R v Governor of Brixton Prison, ex parte Levin*.[93] There, too, it was suggested that a statute of general application to "criminal proceedings" (the Police and Criminal Evidence Act 1984) could not be used in the context of extradition because extradition proceedings were said not to be "criminal proceedings". Lord Hoffmann, with whom all other members of the House of Lords concurred, considered the

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92 Criminal Disclosure Act, s 6(1), definition of "criminal proceedings".

93 *R v Governor of Brixton Prison ex parte Levin*, above n 68.

argument (which also suggested that printouts of computer generated documents were hearsay which was inadmissible unless within the Police and Criminal Evidence Act provisions governing admission) to be "wrong at every stage".[94] The documents were held to be "not hearsay".[95] And extradition proceedings were held to be "criminal proceedings".[96] Earlier authority made it quite clear that "the matter in respect of which the accused is in custody may be 'criminal' although he is not charged with a breach of our own criminal law".[97] And Lord Hoffman pointed out that the provisions of the Extradition Act 1989 (UK) which, in a manner similar to the New Zealand legislation, required extradition proceedings to be conducted "as nearly as may be" as if they were committal proceedings, "would make little sense if the metropolitan magistrate could not apply the normal rules of criminal evidence and procedure".[98] *Levin* was applied by the Divisional Court in *R (Government of the United States of America) v Bow Street Magistrates' Court*[99] which held that extradition proceedings are "criminal proceedings, albeit of a very special kind", in which "[t]he judge should apply the normal rules of criminal evidence and procedure to the extent that these are appropriate having regard to the specifics of the statutory schemes …".[100]

Disclosure was correctly ordered

[85] The powers of a committing court, applied by s 22 to the court deciding eligibility for surrender, include all general powers conferred by statute or inherent or implied in the function of the court. There is no basis for carving out an exception for disclosure in extradition cases. Indeed, in the present case the Court of Appeal accepted that the power to order disclosure existed although it thought its exercise would be limited to cases where necessary to correct abuse.

[86] A New Zealand court asked to determine the sufficiency of evidence to justify trial and having the jurisdiction and powers of a court conducting a committal

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94 At 746.
95 At 746.
96 At 746.
97 At 747, quoting *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 (HL) at 156 per Viscount Simon LC.
98 At 747.
99 *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157.
100 At [76].

hearing has the power to order disclosure of documents which are necessary for determination of the justification for trial. That is the approach accepted by the Supreme Court of Canada in *United States of America v Kwok*. It is I consider the approach required in application of the New Zealand legislation. The end to be kept in view is the determination the court must make. The statutory and inherent powers of the court may be used to order disclosure where necessary to ensure the observance of natural justice in that determination.

[87] Because the requirements of natural justice in respect of the eligibility hearing are shaped by that hearing, disclosure relevant not to the determination of eligibility but to matters in issue at trial may not be appropriate for pre-hearing disclosure. I also accept, too, that in establishing a prima facie case the requesting country is entitled to identify the evidence it relies on. I see the scope of disclosure as generally limited to that evidence and material which bears on its reliability. Just as the English decisions, however, have left open the possibility that in exceptional cases there may be scope for wider disclosure, I too would not foreclose argument that such disclosure may be required.

[88] For these reasons, if it had been necessary to do so (on the basis that the record of the case did not itself require the disclosure sought), I would have affirmed the orders made in the District Court. As discussed at paragraph [13], I consider they should be re-expressed and, if not in the minority on the point, would have sought further assistance from counsel as to their final form.

Schedule – Disclosure ordered by the District Court

1. Criminal breach of copyright

(a) A copyright ownership element

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

(b) Infringement element

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

- all records obtained or created in connection with the covert operations undertaken by agents involved in the investigations related to these proceedings in transacting and uploading/downloading data and files on the Megaupload site;
- all records or information and/or material provided to or obtained by the investigating and/or prosecuting agencies in this case from holders and/or owners of copyright interests evidencing alleged infringement of their copyright and/or complaining of such alleged infringement;
- all records and materials related to communications between relevant copyright holders and Megaupload and/or its employees regarding their copyright interest, the direct delete access provided by Megaupload to any such copyright owners, and any communications between the copyright owners and Megaupload and/or its staff regarding take-down notices;

(c) Commercial element

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

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

(d) Knowledge/wilfulness element

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

(ii) All documents evidencing communications between the applicant and all/any of the alleged co-conspirators demonstrating either knowledge or wilfulness on the part of the applicant, or the absence thereof in relation to the

deliberate and unlawful infringement of copyright including but not limited to:

- all emails passing between, exchanged, forwarded, copied (either directly or indirectly) between the applicant and all or any of the alleged co-conspirators; and
- all telephone and other forms of electronic communication (including Skype) intercepted in the course of the investigation, including both transcripts and electronic recordings of such communications.

2. Money laundering

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

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

3. Racketeering

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

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

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

4. Wire fraud

(a) All documents said to evidence that the applicant, by means of any of the specified mechanisms of transmission (see 18 U.S.C. § 1343) by which it is alleged that the applicant received a benefit or caused a loss as a result of false or fraudulent pretences.

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

McGRATH AND BLANCHARD JJ
(Delivered by McGrath J)

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Introduction

[89] This interlocutory appeal originates in a request by the government of the United States of America to extradite the appellants, Messrs Dotcom, Ortmann, Van der Kolk and Batato, to face criminal charges of copyright infringement, money laundering, racketeering and wire fraud. These arise out of the appellants' involvement in allegedly unlawful activities of companies that is convenient to refer to as the "Megaupload" group. The relevant business of Megaupload was the provision of internet based file storage facilities, through which users of Megaupload's services in a number of different countries have been able to share files. The appellants were arrested on provisional warrants and are now on bail.

[90] For the purpose of the extradition hearing, the United States government has availed itself of the record of case procedure for giving evidence under Part 3 of the Extradition Act 1999. In the record of the case and a supplementary record filed in the District Court, United States government prosecutors summarise the evidence they have acquired to support their request for surrender of the appellants. The request is based on circumstantial evidence and inferences that the United States says should be drawn from it. The summary includes extracts from a large number of emails found in accounts associated with the appellants, data stored on servers that supported the Megaupload websites, a network analysis of how those websites operated, an analysis of relevant financial transactions and the proposed testimony of investigators who undertook undercover activities as users of the websites. Also summarised in the records is proposed evidence from experts and a number of copyright owners and associations that much of the material located on the websites was subject to copyright.

[91] Although the Megaupload websites had the appearance of storage facilities, the United States government's case is that most users of the service they provided accessed the sites to view and download material subject to copyright, in particular music and movies. The government also alleges that the appellants knew that copyright was being infringed, failed to remove infringing material and attempted to conceal what was happening. Megaupload is also said to have structured its business to encourage certain users to upload infringing copies of copyright works, which the great majority of users, who have never uploaded material, would then download through accessing the service.

[92] The District Court is required to decide if the appellants are eligible for surrender under the Extradition Act. In that Court, the appellants sought disclosure by the United States of documentary information in relation to the intended criminal proceedings. A Judge ordered disclosure of relevant documents[101] and the High Court dismissed an application for judicial review of the District Court's decision.[102]

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[101] *Dotcom v United States of America* [2012] DCR 661 (Judge DJ Harvey). Although set out in an itemised manner, the orders are general in effect.

[102] *United States of America v Dotcom* [2012] NZHC 2076 (Winkelmann J) [*Dotcom* (HC)].

On appeal to the Court of Appeal the order for disclosure was set aside.[103] The appellants have appealed to this Court, with leave, against the Court of Appeal's judgment.[104] The issue before this Court is whether the Court of Appeal was correct to hold that the disclosure orders were wrongly made. It requires determination of two interrelated questions:

(a) What information is a person the subject of an extradition request entitled to have, and the requesting state required to provide, to enable the requested person to contest his or her eligibility for surrender?

(b) Does a District Court judge determining whether a requested person is eligible for surrender have a power to make orders for disclosure against a requesting state?

The extradition process

[93] These issues must be determined under the Extradition Act 1999 which governs the process for extradition from New Zealand. We confine our discussion of the statutory scheme to the provisions of the Extradition Act that are of relevance to this case. The procedure for extradition under Part 3 applies to certain countries with which New Zealand has an extradition treaty such as, in this case, the Treaty on Extradition between New Zealand and the United States of America (the Treaty).[105] Such treaties may stipulate terms on which a person who is the subject of a request for extradition ("a requested person") may be extradited from New Zealand.

[94] Under Part 3 of the Extradition Act, after a person who is subject to a request for surrender has been arrested, unless the Minister orders that the proceedings are discontinued,[106] the matter goes before the District Court. Section 24 then applies:

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103 *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 (Arnold, Ellen France and French JJ) [*Dotcom* (CA)].

104 *Dotcom v United States of America* [2013] NZSC 51.

105 Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970). The application of Part 3 is effected by Order in Council under s 15 of the Extradition Act 1999 or earlier legislation. See in particular the Extradition (United States of America) Order 1970. The terms of the Treaty are set out in Schedule 1 of that Order.

106 Under s 21(3) of the Extradition Act.

> **24 Determination of eligibility for surrender**
>
> (1) … if a person is brought before a court under this Part, the court must determine whether the person is eligible for surrender in relation to the offence or offences for which surrender is sought.
>
> (2) … the person is eligible for surrender in relation to an extradition offence for which surrender is sought if—
>
> …
>
> (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—
>
> (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
>
> …

[95] The standard for deciding whether a requested person is eligible for surrender under s 24(2)(d)(i) is the same standard that, prior to the coming into force of the Criminal Procedure Act 2011, a prosecutor had to satisfy before a defendant would be committed for trial for an indictable offence under the criminal procedural law of New Zealand. The Criminal Procedure Act abolished the committal hearing in domestic criminal proceedings, but the committal process, which was provided for in Parts 5 and 5A of the Summary Proceedings Act 1957, remains applicable to the extradition process.[107]

[96] Under the Summary Proceedings Act, before an accused was committed for trial, a preliminary hearing would take place, at which witnesses could be required to give oral or written deposition evidence. Following this, a judge would determine if there was sufficient evidence to put the defendant on trial. This required the Court to be satisfied that there was a prima facie case against the defendant. The current effect of s 24(2)(d)(i) is that, at an extradition hearing, the District Court must be so satisfied in relation to a requested person.

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[107] Extradition Act, s 22(4).

[97] In determining whether there is a prima facie case, the District Court has the same jurisdiction and powers that it would have if the extradition hearing were a committal hearing. Section 22 of the Extradition Act provides:

> **22 Powers of court**
>
> (1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—
>
> (a) the court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and
>
> (b) the following provisions apply to the proceedings, so far as applicable and with the necessary modifications:
>
> (i) Parts 5 and 5A and sections 203, 204, and 206 of the Summary Proceedings Act 1957:
>
> (ii) Parts 1 (except sections 9 to 12), 2, and 4 of the Bail Act 2000:
>
> (iii) the Criminal Procedure (Mentally Impaired Persons) Act 2003.
>
> …
>
> (4) The enactments (other than this Act, its provisions, Parts, and regulations made under it) specified in this section must be read as they read immediately before the commencement date as defined in section 394 of the Criminal Procedure Act 2011.

[98] Under Part 3 of the Extradition Act, a special procedure is available for a country recognised by Order in Council as an "exempted country" to establish a prima facie case at an extradition hearing. The United States is an exempted country[108] and has availed itself of this procedure. As already mentioned, an exempted country may present its evidence of a prima facie case through a "record of the case" rather than sworn evidence. Section 25 sets out the procedure:

> **25 Record of case may be submitted by exempted country at hearing**
>
> (1) For the purposes of any determination under section 24(2)(d)(i), a record of the case may be submitted by or on behalf of an exempted country.

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[108] Extradition (Exempted Country: United States of America) Order 1999.

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

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

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

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

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

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

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

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

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

(4) Nothing in this section—

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

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

[99] The requirement that the requesting state establish a prima facie case against the requested person is not the only prerequisite to surrender. The Extradition Act also contains other restrictions on surrender, which are protective of the rights of requested persons.[109] For example, a requested person will only be eligible for surrender under Part 3 of the Extradition Act if no mandatory restrictions on surrender apply. There are such mandatory restrictions where the offence for which extradition is sought is of a political character, where surrender is sought to prosecute or punish a person on account of race, ethnic origin or religion or other

[109] The conditions of eligibility for surrender under Part 3 of the Extradition Act are set out in s 24.

discriminatory reasons, or in circumstances involving double jeopardy of the requested person.[110] A court may also determine in some circumstances that a person is not eligible for surrender where a discretionary restriction applies, for example, where it would be unjust or oppressive to surrender the person because of the trivial nature of the offence, where the accusation was not made in good faith or because of the lapse of time since the offence was committed.[111] If the District Court determines that a requested person is eligible for surrender, the Minister must decide whether or not a person is to be surrendered to the requesting state.[112]

The role of the requesting state in extradition proceedings

[100] It is convenient at this point to resolve a preliminary issue in this appeal. The intituling of the present appeal suggests that the parties to the extradition proceedings are the United States of America, as the requesting state, and the appellants, as those whose extradition is sought. This intituling is in accordance with the usual practice in New Zealand and other common law jurisdictions in extradition proceedings in that the requesting state is cited as a party.[113] Conventional practice as to intituling and citation is, however, only suggestive of the status of a requesting state in extradition proceedings and not controlling.

[101] The starting point for a consideration of the status of the requesting state is the text of the Extradition Act and the extradition treaty and, in particular:

(a) Section 19 provides that, if an extradition country makes a request for surrender, "the Minister [of Justice] may, in writing, notify a District Court Judge that it has been made and request that the Judge issue a warrant for the arrest of the person". At this initial stage, it is the Minister, and not the requesting state, who takes that step.

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110 Extradition Act, ss 7 and 24(3)(a).
111 Sections 8 and 24(4).
112 Section 30.
113 This may not apply in situations where extradition is challenged by habeas corpus proceedings where the natural defendant is the official in charge of the institution in which the applicant is detained. Nor will it necessarily apply where extradition processes are challenged by judicial review of a particular decision-maker.

(b) Section 20 of the Extradition Act and art 11 of the Treaty also provide for the issue of a provisional warrant in advance of the making of a formal request for extradition, if a warrant for the person's arrest has been issued in the requesting country. Article 11 contemplates that such an application would be made directly by the United States.[114]

(c) Section 21 gives the Minister a power to order that proceedings initiated by a provisional warrant be discontinued.

(d) Section 25 states that a record of the case "may be submitted by or on behalf of an exempted country". This contemplates both that the requesting state may directly be before the court, presenting the record of the case, and that there may be a representative acting on behalf of the requesting state.

The provisions just referred to all appear in Part 3 of the Act, which governs the present case.

[102] The role of the requesting state has been addressed in a number of English cases, in which the courts have concluded that the Crown Prosecution Service (which has the carriage of extradition proceedings) acts on behalf of, and as solicitors for, the requesting state.[115] This conclusion has been reached in the particular context provided by the relevant United Kingdom legislation, which differs in some respects from our Extradition Act. But, despite these differences, the approach taken by the English courts seems to us to be both the most practical way of looking at the situation and, as well, to be consistent with the provisional arrest procedures and s 25 of the Extradition Act. If counsel from the Crown Law Office or the local Crown Solicitor appear, they do so as representatives acting on behalf of the requesting state.

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114 The text of art 11 is set out at [166] below.

115 See *R v Director of Public Prosecutions ex parte Thom* [1994] TLR 660 (QB); *Central Examining Court of the National Court of Madrid v City of Westminster Magistrates Court* [2007] EWHC 2059 (Admin); and *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836.

[103] Accordingly, and in disagreement with the Chief Justice,[116] we proceed on the basis that the United States of America is a party to the extradition proceedings and to this appeal.

New Zealand Bill of Rights Act 1990

[104] Returning to the two central questions in the present appeal, the New Zealand Bill of Rights Act 1990 is another element of statute law under which the issues in the appeal fall to be determined. The appellants say that they have rights to natural justice under s 27 and rights as persons charged with an offence under ss 24 and 25 of the Bill of Rights Act, which support their claimed right to pre-hearing disclosure. Under ss 5 and 6 of the Bill of Rights Act, they seek an interpretation of the legislative provisions that reflects those rights. To determine whether their submissions are well founded, we consider first the criminal process rights.

Criminal process rights

[105] The appellants submit that, to the extent that the text of the Extradition Act permits, requested persons have the rights of those who have been "charged with an offence" under ss 24 and 25 of the Bill of Rights Act. The qualification of their submission recognises that some of the particular rights specified in those sections (such as the right of trial by jury) can have no application to the extradition process. Sections 5 and 6 of the Bill of Rights Act are, however, invoked to support giving the rights under ss 24 and 25 full practicable force and effect in the extradition hearing process.

[106] Sections 24 and 25 of the Bill of Rights Act provide:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> (a) shall be informed promptly and in detail of the nature and cause of the charge; and
>
> (b) shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

[116] See [38] of the Chief Justice's reasons.

(c) shall have the right to consult and instruct a lawyer; and

(d) shall have the right to adequate time and facilities to prepare a defence; and

(e) shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and

(f) shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) the right to a fair and public hearing by an independent and impartial court:

(b) the right to be tried without undue delay:

(c) the right to be presumed innocent until proved guilty according to law:

(d) the right not to be compelled to be a witness or to confess guilt:

(e) the right to be present at the trial and to present a defence:

(f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

(h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

Overseas case law

[107] There is a strong line of authority in overseas jurisdictions against treating those facing a request for extradition as persons "charged with an offence".

[108] The view that extradition does not engage fair trial rights has been consistently taken by the European Commission and the European Court of Human Rights.[117] Article 6(1) of the European Convention on Human Rights[118] sets out the rights to which a person is entitled "[i]n the determination of his civil rights and obligations or of any criminal charge against him". Articles 6(2) and (3) set out the rights of "[e]veryone charged with a criminal offence".

[109] In *Kirkwood v United Kingdom*[119] the applicant, a United States citizen, was the subject of a request by the United States for his extradition from the United Kingdom. He claimed that the extradition hearing process infringed his rights, under arts 6(1) and 6(3), as a person charged with an offence, to cross-examine witnesses against him. The Commission rejected the argument that extradition involved determination of a criminal charge or entitled the person affected to the procedural guarantees afforded in the determination of a charge.[120] While an extradition hearing involved a limited examination of the issue to be decided at the trial, it did not constitute or form part of the process for determination of guilt or innocence. The European Court of Human Rights has also taken this view.[121]

[110] In *Pomiechowski v District Court of Legnica, Poland*,[122] the Supreme Court of the United Kingdom affirmed the European Commission's reasoning in *Kirkwood*. The Supreme Court's judgment involved three requests for extradition of Polish citizens, arrested on European arrest warrants, to Poland and one request for extradition of a United Kingdom citizen to the United States. Lord Mance SCJ, for the majority, while holding that extradition hearings do not determine a criminal case, drew a distinction between United Kingdom citizens and aliens in relation to civil rights. He accepted that in the case of the former the hearings involved a

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117 From 1954 until 1998, when Protocol 11 to the European Convention came into force, individuals did not have direct access to the European Court of Human Rights. It was necessary first for an individual to apply to the European Commission on Human Rights, which would examine the application. If friendly settlement was not reached, the Commission could bring a case before the Court.

118 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature on 4 November 1950, entered into force 3 September 1953).

119 *Kirkwood v United Kingdom* (1984) 37 DR 158.

120 At 191, affirming the European Commission's earlier decision in *H v Spain* (1983) 37 DR 272. See also *EGM v Luxembourg* (1994) 77 DR 144 at 148.

121 See, for example, *Maaouia v France* (2000) 33 EHRR 1037; and *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494.

122 *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604.

determination of a civil right at common law to remain in the United Kingdom jurisdiction. The applicant was accordingly entitled under art 6(1) of the European Convention on Human Rights to a fair hearing in the determination of that right, but not criminal process rights.[123] In the New Zealand context, the effect of this decision, by analogy, is that s 25 of the Bill of Rights Act would not apply but the right to justice under s 27 would. We consider s 27 further below.

[111] The Supreme Court of Canada has also rejected the application of criminal process rights to extradition cases. Section 11 of the Canadian Charter of Rights and Freedoms sets out the rights of persons "charged with an offence". In *Canada v Schmidt*[124] and *Argentina v Mellino*,[125] the Supreme Court of Canada decided that a person facing a request for extradition is not a person relevantly "charged with an offence" for the purpose of s 11. Similar reasons were expressed in both cases. The majority of the Court in *Schmidt* emphasised that criminal process rights under the Charter were intended to govern trials conducted by Canadian governments, not those conducted by a foreign government in a foreign country for offences under its laws.[126]

[112] As well, the majority judgment in *Schmidt*, pointed out the key difference between the processes of extradition and criminal trial.[127] An extradition hearing was not a trial; it was a hearing to determine whether there was sufficient evidence of an alleged extradition crime for a person to be surrendered for trial. Further, a number of criminal process rights under s 11 could have no application to criminal proceedings. The majority in *Schmidt* accordingly concluded that criminal process rights in this context would "restructure the extradition hearing … into a quite different proceeding to determine whether the foreign trial meets the standards of a trial conducted in [Canada]".[128] It saw no jurisdiction for doing that.

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123 At [31]–[33].
124 *Canada v Schmidt* [1987] 1 SCR 500.
125 *Argentina v Mellino* [1987] 1 SCR 536.
126 *Canada v Schmidt*, above n 124, at 518–520. See also *Argentina v Mellino*, above n 125, at 547.
127 *Canada v Schmidt*, above n 124, at 515.
128 At 519.

[113] The rationale for the form of the extradition hearing was further explained by the Supreme Court in *United States v Dynar*.[129] The hearing had a limited nature due to considerations of comity, reciprocity and respect for differences in the criminal processes of other jurisdictions.[130] In order to ensure prompt compliance with Canada's international obligations, a form of hearing was adopted that was likely to lead to the proceedings being less extensive and complex than criminal trials.[131]

[114] A different view of the scope of the words "charged with an offence" in ss 24 and 25 of the Bill of Rights Act was taken in 1999 by the High Court of New Zealand in *Poon v Commissioner of Police*.[132] In that case, Baragwanath J held that "to the extent that the language of the Bill of Rights can reasonably be applied to public sector conduct affecting a person in New Zealand it should be applied …".[133] He discussed *Schmidt*, preferring the dissenting view of Wilson J, which was that the fugitive had been "charged with an offence" for the purposes of the Charter, the offences being those he was charged with in the overseas jurisdiction.[134] Baragwanath J accepted, however, that some provisions of ss 24 and 25 were inapplicable to extradition cases.[135]

Conclusions on criminal process rights

[115] The predominant view, expressed in the overseas authorities discussed, is that the nature of extradition processes is not such as to attract criminal process rights. This view reflects the fundamental difference between a process that seeks to establish whether there is sufficient evidence for a person to face a trial as opposed to one which determines whether or not the person committed the offence. Sections 24 and 25 of the Bill of Rights Act are framed to protect the rights of persons who are to be the subject of the criminal trial process, not the extradition process, which has a different limited purpose. We see no sound basis in human rights jurisprudence or otherwise for an interpretation of the criminal process rights

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129 *United States of America v Dynar* [1997] 2 SCR 462.
130 At [129]–[130].
131 At [131].
132 *Poon v Commissioner of Police* [2000] NZAR 70 (HC).
133 At 76.
134 At 75–77. See *Canada v Schmidt*, above n 124, at 535.
135 *Poon v Commissioner of Police*, above n 132, at 77. Baragwanath J decided that s 24(b) of the New Zealand Bill of Rights Act 1990 was applicable and, although not at issue in *Poon*, he expressed the view that ss 25(b) and (c) would also apply to extradition cases.

protections in the Bill of Rights Act that would apply them to an extradition hearing. Their application would change the preliminary nature of the hearing and give it an altogether different character.

[116] For these reasons, which are reflected in the judgments of the Supreme Courts of Canada and the United Kingdom, and the European Commission and Court of Human Rights, we do not accept the appellants' submission that proceedings determining eligibility for surrender under s 24 of the Extradition Act engage rights under ss 24 and 25 of the Bill of Rights Act.

Right to justice

[117] The other provision in the Bill of Rights Act that the appellants say guarantees protection of the process at the extradition hearing is s 27(1):

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[118] The appellants are persons, lawfully in New Zealand, whose rights to remain will be substantially affected by the District Court's decision on their eligibility for surrender. More specifically, in the exercise of its functions under the Extradition Act, that court is a public authority determining the rights of persons such as the appellants to liberty and in respect of the rights to freedom of movement.[136] The appellants accordingly have the right to observance of principles of natural justice in the court's process under s 27(1). In 1997, Elias J (as she then was) pointed out, in an immigration case, that the principles affirmed by s 27 are those established, prior to enactment of the Bill of Rights Act, by the common law, adding:[137]

> Fundamental to the principles of natural justice is the requirement that where the circumstances of decision making require that someone affected by it be given an opportunity to be heard, that person must have reasonable opportunity to present his case and reasonable notice of the case he has to meet. The more significant the decision the higher the standards of disclosure and fair treatment. In cases involving immigration status, high

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136 Under s 18 of the New Zealand Bill of Rights Act.

137 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.

> standards of fairness are required by natural justice because of the profound implications for the lives of those affected.

The final point might equally be made of the extradition process.

[119] The starting point in any common law analysis of natural justice principles is the classic statement that:[138]

> … although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

[120] The content of the right to natural justice, however, is always contextual. The question is what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation.[139] We shall return to the requirements of natural justice later in this judgment. First, however, we consider the arguments advanced by the parties on ordinary principles of statutory interpretation with particular reference to the context of the Extradition Act.

Do criminal disclosure regimes apply to extradition?

[121] On this basis, we turn to consider what information a requested person is entitled to be given, and a requesting state required to provide, for the purpose of an extradition hearing.

[122] This issue is to be distinguished from that of the availability to requested persons of information held by New Zealand authorities. We accept that, in extradition cases, as in domestic criminal proceedings, information in the hands of public bodies may be accessible under the Official Information Act 1982 and under the principles stated in the Court of Appeal's judgment in *Commissioner of Police v Ombudsman*.[140] These avenues are available, however, only against New Zealand authorities that are subject to the Official Information Act and against the prosecution respectively. A person whose extradition is sought may seek disclosure

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138 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194, 143 ER 414 at 420 per Byles J. See also GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [13.08].

139 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141; and *Wyeth (NZ) Ltd v Ancare New Zealand Ltd* [2010] NZSC 46, [2010] 3 NZLR 569 at [40] .

140 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

from any New Zealand agencies involved in the process, including the Ministry of Justice. But neither the Official Information Act nor the common law entitles requested persons to disclosure of information that is held by a foreign state.

[123] As well, we agree with William Young J[141] that the requesting state is obliged to provide, in advance of the extradition hearing, the material upon which it relies to establish a prima facie case against the requested person.

[124] The remaining question to be resolved concerns the disclosure of information held by a requesting state but on which it does not intend to rely at the extradition hearing. In relation to such information, the appellants submit, in reliance on the Criminal Disclosure Act 2008 and the Extradition Act, that discovery of the kind applicable to domestic criminal proceedings is available at this stage of the extradition process. They say that they are entitled to full disclosure of information concerning the charges laid against them in the United States as if the charges were to be determined under the New Zealand criminal law process.

Criminal Disclosure Act

[125] The appellants first argue that the Criminal Disclosure Act applies to extradition hearings before the District Court. If that is so, it would appear to confer on the appellants an entitlement to disclosure of the same scope as that to which a defendant in domestic criminal proceedings is entitled.

[126] The Criminal Disclosure Act is expressed to apply to all "criminal proceedings" commenced after that Act came into force.[142] "[C]riminal proceedings" is relevantly defined to mean "proceedings for an offence for which a conviction may be entered …".[143] As a matter of ordinary meaning that refers to a conviction by a New Zealand court. On that meaning, the Criminal Disclosure Act does not directly apply to the extradition process. The application of particular provisions in the Summary Proceedings Act and the Bail Act 2000 to extradition hearings, by specific reference in s 22(1)(b), reinforces that view. In contrast, the

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141 See [232]–[236] and [242]–[244] of the reasons of William Young J.
142 Criminal Disclosure Act 2008, s 4(1).
143 Section 6(1), definition of "criminal proceedings".

Extradition Act does not stipulate that criminal disclosure provisions are part of the District Court extradition hearing process.

Section 102 of the Extradition Act

[127] The appellants also rely upon s 102 of the Extradition Act contending that, by necessary implication from that section, criminal discovery is available for the purposes of the extradition hearing. Sections 102(1)(b) and (e) empower the making of regulations addressing disclosure. We set out the relevant part of s 102:

> **102 Regulations**
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> (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
>
> …
>
> (b) prescribing additional matters to be included in the record of case under section 25:
>
> …
>
> (e) prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including (without limitation),—
>
> (i) the pre-hearing disclosure of information;
>
> (ii) 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;
>
> …

[128] On its terms, s 102 clearly indicates that Parliament contemplated that a pre-hearing disclosure regime might form part of the extradition hearing process. Mr Davison QC, for the appellants, however, submitted that it went further, indicating a legislative intent that pre-hearing disclosure was available for which "practice and procedure" could be provided by regulations.

[129] The final form of s 102 is the result of changes proposed by the Select Committee. One such change was the introduction of the provision that became s 102(1)(e), conferring on the Governor-General in Council power to make

regulations providing for pre-hearing disclosure of information. The Select Committee report gives no reasons for this additional provision, other than its general observation that the changes it proposed would "enable regulations to be made governing the practice and procedure of District Courts in proceedings under the Act".[144]

[130] Parliament clearly contemplated in enacting s 102 that the process for the judicial stage of the extradition process, which is expressed in general terms in the Extradition Act, could be modified by regulations. Section 102(1)(b) empowers prescription of additional matters that are to be included in the record of the case. There is also recognition of the appropriateness of further provision for pre-hearing disclosure implicit in ss 102(1)(e)(i) and (ii).

[131] We are satisfied, however, that Parliament did not intend that there would be an operating regime for disclosure of the kind available in domestic criminal proceedings, which would apply to extradition either generally or through orders made by New Zealand courts, until regulations providing for the practice and procedure of District Courts were promulgated. In 1999, when the Extradition Act was enacted, the state of the law was such that Parliament could not have assumed the existence of a criminal disclosure regime that could be applied to the extradition process to require a requesting state to disclose information beyond that on which it would rely at the extradition hearing. The Official Information Act and the principles in *Commissioner of Police v Ombudsman*,[145] which provided the scheme for criminal disclosure at that time, did not have extraterritorial effect. In that context, if Parliament had intended that there be a regime for such disclosure, it would have been explicitly provided for in the Extradition Act.

What must the record of the case include?

[132] The appellants also rely on s 25 of the Extradition Act to support their submission that they are entitled to have, and the United States is required to disclose, information not presently available to them. They say that s 25 requires production, as part of the record of the case, of copies of all relevant documents

144 Extradition Bill 1998 (146-2) (select committee report) at vii.
145 *Commissioner of Police v Ombudsman*, above n 140.

relied on by the requesting country and summarised in the record of the case. The appellants refer to the mandatory language in s 25(2), which stipulates that the record of the case "must" contain not only a summary of the evidence acquired by the requesting state to support its request for surrender, but also "other relevant documents, including photographs and copies of documents". They adopt the view expressed by Winkelmann J that s 25(2) requires that the record of the case append documents, referred to directly or indirectly in the summary of evidence, that support the request for surrender.[146]

[133] This reading of s 25 is not, however, consistent with its legislative history, which, as we shall explain, indicates that the purpose of the record of the case was to permit a requesting state to rely on a summary of the evidence, rather than its detail, as the basis for establishing a prima facie case. The legislative history also demonstrates recognition that, in this form, the record of case procedure would accommodate the differences between legal systems and the problems to which they had given rise in extradition proceedings. It is well established that the purpose of the extradition legislation, and the international obligations on which it is founded, call for contextual construction that accommodates these differences, rather than an interpretation that necessarily reflects New Zealand criminal procedural law.[147]

International context

[134] The Extradition Bill which became the Extradition Act 1999 was introduced to the House of Representatives in May 1998. At that time, the New Zealand law of extradition to non-Commonwealth countries was contained in the Extradition Act 1965, while that concerning extradition to Commonwealth countries was contained in the United Kingdom Fugitive Offenders Act 1881, which continued to apply in New Zealand and other Commonwealth states. The object of the Bill was to replace these enactments with a single New Zealand extradition statute. The Explanatory Note to the Bill said:[148]

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146 *Dotcom* (HC), above n 102, at [111].

147 *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZSC 121, [2013] 2 NZLR 589 at [42].

148 Extradition Bill 1998 (146-1) (explanatory note) at i.

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

[135] The Explanatory Note also referred to growing international pressure for states to adopt more uniform extradition laws and practices and the role which had been undertaken by the Commonwealth in response. In 1966, representatives from Commonwealth states reached agreement on a Commonwealth Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth.

[136] In 1990, the Commonwealth Scheme was modified "to provide more flexibility in respect of the type of evidence required to be produced to the requested state's court".[149] This flexibility was to be achieved through amending the Commonwealth Scheme to adopt the record of the case procedure, a concept that was developed by Canada in bilateral treaties and government policies.

[137] In Canada, as in other common law jurisdictions, the extradition hearing was directed at establishing whether there was a prima facie case against the requested person. By contrast, extradition hearings in civil jurisdictions focussed on ensuring there was conformity with the extradition treaty, and to that end scrutinising the formal validity of the request and whether there was proof of the fugitive's identity.[150] There are significant differences between the two approaches.

[138] The Canadian approach to extradition required that the evidence presented to the extradition court was admissible according to the law of the requested state. Concerns had arisen over the failure of extradition requests made to Canada and the deterrent effect on some states in making requests because of the difficulties that were being encountered by the application of admissibility rules. Civil law states were particularly troubled by the requirement to prove a prima facie case by sworn or documentary evidence without inadmissible hearsay, the use of which is permitted

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149 At ii–iii.

150 Anne Warner La Forest "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's LJ 95 at 107.

in civil law systems.[151] It was difficulties such as these that the record of case procedure was designed to overcome.

[139] During successive Commonwealth meetings, Canada proposed changes to the Commonwealth Scheme that would retain the requirement for a prima facie case, but allow requesting states to rely on a record of the case. This proposal, with some modifications, was incorporated into the Commonwealth Scheme by amendments that provided for member nations to be able to make bilateral arrangements having effect in place of requirements for formal evidence establishing a prima facie case.

[140] Under the amendments, a record of the case could be received by the extradition court. Its contents would include "a recital of the evidence acquired to support the request for rendition of the person sought".[152] The record of the case would be based on evidence admissible in the requesting state even where such evidence would be excluded in the requested state.[153] It would be accompanied by an affidavit from the investigating authority who had prepared the case and a certificate from the Attorney-General of the requesting party expressing the opinion that the record of the case showed the existence of evidence sufficient to justify the prosecution. A person could be extradited if the extradition court were satisfied that the contents of the record of the case, along with any other evidence admissible in the requested country, were sufficient to warrant trial for the charges.[154] States were not required to amend their extradition legislation in accordance with the amended Commonwealth Scheme,[155] but many have done so to a greater or lesser extent.[156]

[141] This international context concerning the development of the record of case procedure was influential in the form of the Extradition Bill introduced to Parliament. The Bill's provision for an exempted requesting state to present a record

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151 See *United States of America v Yang* (2001) 203 DLR (4th) 337 (ONCA) at [24]-[26].

152 Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990), Annex 3, cl 3(d) [Commonwealth Scheme].

153 La Forest, above n 150, at 136.

154 Commonwealth Scheme, Annex 3, cl 1(a).

155 See cl 19(2).

156 La Forest, above n 150, at 151–152.

of the case at an extradition hearing was explained in the Explanatory Note with reference to the Commonwealth Scheme:[157]

> Within this regime the Bill provides an additional option. For some countries with different criminal justice systems proof that a prima facie case exists can be problematic because of the nature of the evidence required. The Bill therefore allows an alternative method of compliance. This method, which is an option in the Commonwealth Scheme, involves countries being prescribed by Order in Council. The effect of prescription is to permit those countries to submit evidence to New Zealand courts that would ordinarily be inadmissible under New Zealand law. This should make providing evidence sufficient to satisfy the prima facie case test somewhat more straightforward for those countries.

[142] The Bill, like the amendments to the Commonwealth Scheme, reflected the view taken by nations that the sufficiency of the evidence proffered by the requesting country should be decided according to the law of the requested country. But the form of that evidence should be such as was admissible in the requesting country. Reliability of the evidence was to be the subject of certification by requesting states. A measure of trust would thus be placed in their investigating authorities during the process. But, importantly, the overall requirement that the country requested to surrender a person be satisfied that the available evidence establishes a prima facie case remained a central part of what the nations agreed should be a prerequisite for surrender. In most instances, a court would continue to be required to scrutinise the evidence for that purpose.

Select Committee consideration of the Extradition Bill

[143] It is also helpful in considering s 25(2) to refer to the report of the Foreign Affairs, Defence and Trade Select Committee to the House of Representatives on the Bill. As introduced to the House, the Bill stipulated what the record of the case was to contain in these terms:

> (a) A recital of the evidence acquired to support the request for the surrender of the person; and
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> (b) A certified copy, reproduction, or photograph of all exhibits, documentary evidence, and depositions of witnesses; and
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> (c) Any other matter required by regulations made under this Act.

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157 Extradition Bill (explanatory note) at iv.

[144] The Select Committee replaced this text with the two paragraphs now appearing in s 25(2) of the Act:

> (a) A summary of the evidence acquired to support the request for the surrender of the person; and
>
> (b) Other relevant documents, including photographs and copies of documents.

[145] The Select Committee gave no reason for making these changes but, by replacing "recital" with "summary" in para (a), the Committee made it clear that a requesting country availing itself of the record of case procedure could summarise the evidence available to it, precluding any suggestion that the detail of the evidence had to be replicated in the record of the case submitted to the New Zealand court. As well, the summary is of "the evidence acquired to support the request for surrender of the person". It need not be a summary of all evidence that will be used at trial. It is for the requesting state to decide what material to place before the extradition court. Its request stands or falls on that material alone.

[146] In relation to s 25(2)(b), the original specific requirements in respect of "all exhibits, documentary evidence and depositions" were reduced, the amended provision being less stringent in its prescription of what was required. Although it is possible to interpret "other relevant documents" as "all documents that are relevant" or "all documents that are relied on", neither interpretation is plausible in light of this legislative history. This context rather indicates that the reference to "other relevant documents" is to documents relied on by the requesting state but which it is not convenient or feasible to summarise in the record of the case. Overall, the legislative history indicates that the Select Committee wished, by its drafting changes, to streamline the requirements in respect of the material in the record of the case.

[147] In short, the legislative history of s 25 does not support the view that it is mandatory for the record of the case to include copies of all documents relevant to the requesting country's case. Such an approach would involve treating s 25 as if it imposed a disclosure regime, albeit one particular to proceedings in which the record of case procedure is invoked. An obligation to include all relevant documents would be so onerous in a case of any complexity that requesting state would be discouraged

from using the record of case procedure. By contrast, the very purpose of the record of case process was to simplify the presentation of evidence by the requesting state, as is evident from its origins and development as discussed above.

The duty of candour

[148] The appellants also referred in their submissions to decisions of English courts and the Privy Council establishing that a requesting state owes a common law duty of candour to the extradition court. In 1993, in *R v Governor of Pentonville Prison ex parte Lee*,[158] the Divisional Court held that the requesting state was to be the "sole arbiter" of the material that it may choose to place before the extradition court.[159] The requesting state had no general duty of disclosure, for that would be incompatible with the nature of extradition, which was a creature of statute.[160] Nor did the extradition court have any right or power to request further material from a requesting state.[161] The Court observed, however, that extradition legislation was based on the assumption that the requesting state was acting in good faith.[162]

[149] In *Wellington v Governor of HM Prison Belmarsh*,[163] the Divisional Court, comprising Mitting J with Lord Woolf CJ agreeing, reaffirmed that the requesting state is not under any general duty of disclosure akin to that imposed on the prosecution in domestic criminal proceedings.[164] Although the applicant was entitled to have the extradition hearing conducted fairly, that did not require the requesting state to provide additional evidential material beyond that on which it relied.[165] The Court, however, added that the requesting state owed a duty of candour to the extradition court, saying that, in fulfilment of its duty, the state had to disclose any evidence rendering worthless the evidence that it relied on.[166] Both *Lee* and *Wellington* were decided under provisions in the Extradition Act 1989 (UK), which

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158 *R v Governor of Pentonville Prison ex parte Lee* (1993) 1 WLR 1294 (QB).
159 At 1298.
160 At 1298–1300.
161 At 1298. See also *Norris v Government of the United States* [2008] UKHL 16, [2008] AC 920 at [107], quoted below at [174]. We consider the New Zealand position on this issue below at [154]–[169].
162 At 1300.
163 *Wellington v Governor of Her Majesty's Prison Belmarsh* [2004] EWHC 418 (Admin).
164 At [26].
165 At [22]–[24].
166 At [26].

required the requesting state to satisfy the extradition judge that there was a prima facie case, or a case to answer, against the requested person.[167]

[150] This "general duty on a requesting state to be candid about vitiating factors in its case" was also referred to by Sedley LJ, giving judgment for himself and Pitchers J in the Administrative Court in *Jenkins v Government of the United States of America*.[168] In 2006, in *Knowles v Government of the United States of America*,[169] Lord Bingham, on behalf of the Privy Council, summarised the principles which had emerged from the earlier cases:[170]

> There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith. While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or very seriously undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state.

Knowles was decided under Bahamas legislation requiring that the requesting state present evidence that would be sufficient to warrant the trial of the requested person for the offence if it had been committed in the Bahamas.[171]

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167 Extradition Act 1989 (UK), s 9. As originally enacted, s 9 required that the requesting state satisfy the extradition judge that "the evidence would be sufficient to warrant [the requested person's] trial if the extradition crime had taken place within the jurisdiction of the court". Section 9 was amended in 1994 to provide instead that the judge must be satisfied that "the evidence would be sufficient to make a case requiring an answer by that person if the proceedings were the summary trial of an information against him." *R v Governor of Pentonville Prison ex parte Lee*, above n 158, was decided under the former and *Wellington*, above n 163, under the latter provision.

168 *Jenkins v Government of the United States of America* [2005] EWHC 1051 (Admin) at [29]. *Jenkins* was decided under the Extradition Act 2003 (UK), which in s 84 requires a requesting country to satisfy the extradition judge that "there is evidence sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him". The 2003 Act provides, however, for certain states to be exempted, by order of the Secretary of State, from the requirement to satisfy the extradition judge that the evidence against the requested person would be sufficient to make a case to answer: see ss 69 and 84(7). The United States is such an exempted country, so that the case to answer requirement did not apply in *Jenkins*.

169 *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47.

170 At [35].

171 Extradition Act 1994 (Bahamas), s 10.

[151] Finally, the English courts have acknowledged the important duty owed by the Crown Prosecution Service to the court to ensure that the requesting state complies with its duty of candour.[172]

[152] The approach taken by the Privy Council in *Knowles* should be applied in New Zealand. The scheme of Part 3 of the Extradition Act is based on an assumption that requesting states that are exempted countries are in general to be taken on trust in relation to the contents of the record of the case that they submit. Requesting states, however, owe a duty of candour and good faith to the extradition court. They must disclose any evidence that would render worthless, undermine or seriously detract from the evidence upon which they rely, whether on its own or in combination with material that is in the requesting state's possession or is drawn to its attention by the requested persons or the Court. The record of the case process does not diminish that duty and requesting states must accordingly include any such material in the record of the case or a supplement. The New Zealand authorities or agencies that are assisting or acting on behalf of requesting states have a correlative duty to the court to use their own best endeavours to ensure that requesting states comply with their obligations in this respect.

Summary

[153] We briefly summarise the legal principles concerning disclosure so far identified. The requesting state has the right to decide what evidential material it wishes to rely on and put before the District Court in a record of the case against the requested person. The state is not required to put forward all information that it wishes to rely on at trial or to provide in the record of the case copies of all documents and exhibits summarised therein. Nor is a requesting state subject to a disclosure regime of the kind applicable in domestic criminal proceedings. The requesting state must, however, satisfy the Court that it has put forward sufficient evidence to meet the prima facie case standard and, in doing so, must comply with its obligations of candour to the extradition court.

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[172] *R (Raissi) v Secretary of State for the Home Department*, above n 115.

The powers of a judge determining eligibility for surrender

A power to order disclosure by the requesting state?

[154] We turn now to the question of whether a District Court judge determining whether a requested person is eligible for surrender has a power to make disclosure orders against a requesting state. The appellants submit that the judge does have power to require a requesting state to provide or disclose information. They rely primarily on s 22 of the Extradition Act.

[155] For convenience, we deal with s 22(1)(b) first. Section 22(1)(b) applies to extradition hearings certain provisions of particular enactments, namely the Summary Proceedings Act, the Bail Act and the Criminal Procedure (Mentally Impaired Persons) Act 2003. Those Acts are to be applied as they read immediately before the Criminal Procedure Act came into force.[173] None of the applicable provisions in those statutes confers on the committal judge power to order disclosure. Accordingly, s 22(1)(b) does not confer on an extradition judge a power to order a requesting state to disclose further information. As already pointed out, there is no reference to the Criminal Disclosure Act in s 22(1)(b).

[156] Section 22(1)(a) is of more general scope. It provides that an extradition court has the same jurisdiction and powers as if the extradition hearing were a committal hearing in domestic criminal proceedings. The broader language of para (a) indicates that an extradition court has powers beyond those conferred by the statutes listed in para (b). The appellants argue that it confers on an extradition judge both statutory and inherent or common law powers. The appellants submit that the extradition court has an inherent power to order disclosure as well as a specific statutory power under the Criminal Disclosure Act.

[157] The appellants support the conclusion reached by the High Court that the District Court has the inherent power to order disclosure of information by a requesting state as a necessary adjunct to the courts' function in the extradition process.

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[173] Extradition Act, s 22(4).

[158] At common law, prosecutors were subject to a duty of disclosure to ensure the fairness of criminal proceedings.[174] One effect of the enactment of the Official Information Act in 1982 together with the 1988 decision in *Commissioner of Police v Ombudsman*,[175] was substantially to enlarge the common law duty. As a result, New Zealand appellate courts have not been required to rule on whether there is an inherent power to order disclosure in criminal proceedings. Without these developments, the Bill of Rights Act may well have facilitated the development of a judicially defined disclosure regime based on the courts' inherent powers but, because of them, there has been neither need nor scope to develop an inherent power to do so.

[159] As the majority of this Court observed in *Siemer v Solicitor General*:[176]

> The courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. Their scope extends to preventing abuse of the courts' processes and protecting the fair trial rights of an accused.

[160] Whether or not the District Court has an inherent power to order disclosure either generally or in relation to specific material in the possession of a foreign state accordingly turns on whether it is necessary for the Court to have such power to act effectively to prevent abuse of the court's process and to protect the fairness of the extradition hearing.[177]

[161] It is helpful to consider whether, without disclosure, the present appellants are able to participate in a meaningful way in the extradition hearing. The case against them turns largely on the design and operation of the Megaupload business model and associated inferences. The appellants must be well aware of the detail of the business model and the way it operated. It was accepted that they have general access to their own email accounts and financial information. They have also been given a copy of the Megaupload server databases. Importantly, we were not advised of any specific respects in which they lack the information they need to contradict or challenge assertions made in the record of the case, or to advance innocent

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174 See Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CD3.01].
175 *Commissioner of Police v Ombudsman*, above n 140.
176 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].
177 At [114].

explanations for the circumstances allegations against them. They have thus failed to particularise any tangible disadvantages which they will face if denied disclosure. So, to the extent to which their personal circumstances may require consideration, the appellants have failed to establish that ordering disclosure is necessary to ensure that they have a fair extradition hearing. There is, accordingly, no basis on which the District Court in the present case could exercise any inherent power to order disclosure. In those circumstances, it is unnecessary to consider whether there is such a power in extradition proceedings.

[162] In relation to a statutory source of power to order disclosure, for reasons already given, the Criminal Disclosure Act does not directly apply to the extradition process.[178] Before the Criminal Procedure Act came into force, the Criminal Disclosure Act applied to committal proceedings and conferred on a judge the power to order disclosure of more information.[179] An issue accordingly arises as to whether this power was incorporated by reference in the Extradition Act by s 22(1)(a).

[163] The incorporation by reference of provisions in other statutes is much favoured by drafters of legislation but is a drafting method that requires considerable care.[180] Bennion says that incorporation by reference requires "necessary verbal adjustments" to be made in the incorporated statutory provisions.[181] Modern practice, however, is to "leave the reader to work out what is involved".[182] In the present case, the question is whether the necessary verbal adjustments to the statutory provisions concerning committal hearings that would enable a requesting state at an extradition hearing to be considered a "prosecutor" in "criminal proceedings" for the purposes of the Criminal Disclosure Act can be made so that a judge determining eligibility for surrender would be empowered to order disclosure from the requesting state.[183] For the reasons set out in the judgment of

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178 See above at [125]–[126].

179 Criminal Disclosure Act, s 30. There was also a power for disclosure orders to be made against non-parties but it applied only after committal: see s 24.

180 See the problems that arose in *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [120]–[130]; and *Down v R (on appeal from Wallace Corporation v Waikato Regional Council)* [2012] NZSC 21, [2012] 2 NZLR 585 at [23]–[24].

181 Francis Bennion *Bennion on Statutory Interpretation* (6th ed, Lexis Nexis, London, 2013) at 703.

182 At 703.

183 This is itself a question on which statutory interpretation principles must be brought to bear. See the approach taken in *Down v R*, above n 180, at [20].

William Young J,[184] we are of the view that this would involve a recasting of the statutory provisions beyond what Parliament would have contemplated as the scope of s 22(1)(a) within the Extradition Act.

[164] This conclusion is supported by s 11 of the Extradition Act. The Extradition Act gives effect to international obligations assumed by New Zealand. Section 11, which contains a direction as to its interpretation that gives some priority to extradition treaties, reinforces the importance of the international context:

> **11 Construction of extradition treaties**
>
> (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.
>
> (2) Despite subsection (1), no treaty may be construed to override—
>
> (a) section 7; or
>
> (b) section 24(2)(d) or section 45(5); or
>
> (c) subsection (2)(b) or subsection (3)(a) of section 30 (including where those provisions are applied under section 49); or
>
> (d) any provision conferring a particular function or power on the Minister or a court.

[165] Although not unqualified, as some provisions of the Extradition Act are excluded by s 11(2) from the general overriding effect of extradition treaties, s 11 is expressed in very strong terms:[185]

> The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its own internal law to justify its failure to perform a treaty …

[166] The provisions of the Treaty of relevance to this appeal are:

> **Article 1**
>
> Each Contracting party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with or convicted of any of the offences

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184 See [215]–[217] and [221]–[223] of the reasons of William Young J.

185 *Yuen Kwok-Fung v Hong Kong SAR* [2001] 3 NZLR 463 (CA) at [16].

mentioned in Article II of this Treaty committed within the territory of the other.

Article 4

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

Article 9

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

Article 11

In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought been convicted, in the territory of the requested Party.

On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.

A person arrested upon such an application shall be set at liberty upon the expiration of 45 days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

Article 12

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 …

[167] Section 11 of the Extradition Act requires that s 22 be given a meaning that would give effect to the Treaty. Article 12 of the Treaty permits New Zealand to approach the United States to seek additional evidence or information to enable New Zealand authorities to decide on the request for extradition. A government-to-government process is stipulated. It would, therefore, be inconsistent with art 12 to

read s 22 as empowering an extradition judge to order that such information be provided by a requesting country.

[168] For the same reason, and also because Parliament would not have contemplated at the time the Extradition Act was passed that there was an existing power to order disclosure,[186] the appellants' submission that the regulation making power in s 102(1)(e)(i)[187] presupposes a power to require disclosure must also fail.

[169] For these reasons, we are satisfied that a judge determining whether a requested person is eligible for surrender has no power under legislation to order disclosure of information by a requesting state. There are, however, other steps that a judge may take where concerns arise over the extent or nature of the information that has been placed before the court.

Power to request that further information be sought

[170] The English cases that developed the duty of candour also indicate the appropriate response by an extradition judge where he or she has insufficient information to determine an issue raised at the extradition hearing. These decisions refer to the power of the United Kingdom under its extradition treaty with the United States to ask the requesting state to provide further evidence to the committal court. That power is framed in closely similar terms to art 12 of the Treaty.[188]

[171] In *Wellington v Governor of HM Prison Belmarsh*, Mitting J said that, in the event that there was evidence that the process of the extradition court was being abused, the court would be entitled to ask the United Kingdom authorities to request the United States government to provide further evidence relevant to that question.[189] In a brief concurring judgment, Lord Woolf CJ said he was not persuaded that the applicable article in the treaty was intended to give a judge hearing the proceedings a discretion to require the authorities to obtain information from the requesting party.

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186 See above at [131]. The Criminal Disclosure Act was enacted after the Extradition Act.
187 Set out above at [127].
188 See *Wellington v Governor of Her Majesty's Prison Belmarsh*, above n 163, at [25].
189 At [25].

If such a power did exist, it should, in Lord Woolf's view, only be exercised in "the most exceptional cases".[190]

[172] In *Jenkins v Government of the United States of America*, Sedley LJ observed that the duty of candour on the part of a requesting state "is not a duty enforceable by inspection or interrogation".[191] The appropriate response was resort to the requesting procedures under the relevant extradition treaty:[192]

> The use of this power may well be appropriate where, for example, reference is made in a statement to a document without which the statement is not intelligible. It may also be appropriate to use it, as [counsel for the respondent] accepts, where there is before the court of the requested state sufficient evidence of an abuse of its process to call for more information before a decision is arrived at.

[173] The steps that may be taken by the extradition court where there is reason to believe an abuse of the court's process may have occurred were further considered in *R (Government of the United States of America) v Bow Street Magistrates' Court*.[193] Orders for further disclosure had been made by magistrates. The Divisional Court, comprising Lord Phillips CJ and Cresswell J, held that this had been inappropriate, as the rules for disclosure in domestic proceedings did not apply to extradition and the only way to enforce an order against a state, having foreign state immunity, would be to refuse the request for extradition.[194] The Court indicated, however, that a judge might make the request provided for by the treaty directly to the foreign authority or state, rather than by working through diplomatic channels.[195]

[174] To similar effect was the later unanimous judgment of the House of Lords presided over by Lord Bingham. In *Norris v Government of the United States*, the House of Lords said:[196]

> The system of extradition under Part 2 of the 2003 Act does not require the requesting state to provide details of the evidence (witnesses, documents etc) on which the prosecution would rely at trial. Nor does the district judge

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190 At [29].
191 *Jenkins v Government of the United States of America*, above n 168, at [29].
192 At [26].
193 *R (Government of the United States of America) v Bow Street Magistrates' Court* [2007] 1 WLR 1157.
194 At [85]–[86].
195 At [89].
196 *Norris v Government of the United States*, above n 161, at [107] (citations omitted).

> have any occasion to inquire into it. 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 v Governor of Belmarsh Prison* and *Jenkins v Government of the United States of America*. While the district judge has power to request further information from the requesting state, the same underlying considerations mean that such requests will be exceptional. In *R (Government of the United States of America) v Bow Street Magistrates' Court*, the Divisional Court indicated that such a request might be appropriate where the judge considered that an abuse of process might have occurred. But, again, such cases are likely to be exceptional.

[175] The House of Lords elaborated on its view that cases where requests for further information by the district judges were appropriate would be exceptional.[197] In *Norris*, the information was requested for the purpose of supporting the appellant's argument that there was a risk that, due to elapse of time, the appellant may not be able to have a fair trial. The judgment in *Norris* concluded that there was no basis on which the Judge could have properly requested further information for that purpose. The relevant period did not of itself justify the inference that there was a risk of prejudice at trial. The appellant had provided no specification of the proposed risk (on the basis that he needed the information to do so). The counts in the indictment provided sufficient information that, together with what the appellant himself knew, put him in a position to have inquiries into the matter made by lawyers and others. Despite this, nothing had been put forward to the court indicating that substantial prejudice had resulted from the lapse of time. The appellant had really relied on speculation. If, on further investigation, it turned out that there was reason to believe that the appellant could not have a fair trial, that matter could be addressed by the trial court in the United States.

[176] The more recent English cases addressing the government-to-government request procedure have been decided in a context where there is no legislative requirement that the requesting state establish a prima facie case against the requested person.[198] Decisions on when it is appropriate to invoke that procedure have rather been reached in circumstances in which further information has been sought by the requested person to support an allegation of abuse of process. We do

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197 At [108]–[109].

198 See nn 167 and 168 above. *Wellington v Governor of Her Majesty's Prison Belmarsh*, above n 163, is the exception to this general observation, having been decided under the Extradition Act 1989 (UK).

not, however, see that the different purpose for which the information is sought provides a basis for distinguishing the English decisions.

[177] We accept that there will be exceptional cases where an extradition judge might want further information to be sought from the requesting state. Such concerns will usually be resolved through dialogue between the Court and counsel. In cases where that does not meet the perceived need, we also accept the view expressed in *Norris* by Lord Bingham that where the relevant extradition treaty provides for government-to-government requests to be made for additional information or evidence, as art 12 of the Treaty does, that formal procedure may be availed of. The Court should inform counsel for the requesting party that the Court wishes to receive further information from the requesting state. Counsel must then bring the matter to the attention of the appropriate New Zealand Ministers so that a decision on whether to request the further information through diplomatic channels is made and given due effect.

[178] This course of action will only be warranted where the circumstances are sufficiently exceptional. In considering whether sufficiently exceptional circumstances exist, the Court must bear in mind certain principles identified in this judgment which are fundamental to the extradition hearing process. First, there is no obligation for a requesting state to put its whole case before the extradition court. Secondly, a requesting state has a duty of candour in relation to what it does put before the Court. Thirdly, the only decision ultimately to be made by the District Court is whether the requesting state has established that there is a prima facie case against the requested person and whether the requested person is otherwise eligible for surrender. Finally, the requested person has a right to challenge whether there is such a case, which is to be determined according to judicial principles.[199]

[179] On this basis, exceptional circumstances will arise where there is evidence of abuse of process of a nature that leads the judge to decide it is necessary to call for further information on an aspect of the application. This may be the case where, for example, there is some indication of a lack of candour on the part of the requesting

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[199] See below at [181].

state. We would not, however, regard that as the only possible situation where additional information may be needed by the District Court.

[180] The circumstances may also be sufficiently exceptional to warrant resort to the art 12 process where it would not be possible for requested persons effectively to contest the requesting country's case against them, or their eligibility for surrender in other respects, without particular further information. For reasons already given,[200] however, further information is not necessary in this proceeding for the appellants to effectively participate at the extradition hearing.

Refusal of extradition requests

[181] Finally, an extradition judge is, of course, entitled to decide that a person is not eligible for surrender if he or she is not satisfied that the pre-requisites for surrender, including a prima facie case against the requested person, are made out. Parliament has recognised, in the scheme of the Extradition Act, the critical importance to the extradition process of the decision on whether requested persons are eligible for surrender, by allocating that decision to a court and requiring the District Court to conduct the extradition hearing as if it were a committal hearing. The District Court must undertake a meaningful judicial assessment of whether the evidence is sufficient to meet the threshold of a prima facie case.[201] This inquiry is so significant a safeguard for the requested person in the extradition process that it is, in s 11(2), excluded from the overriding effect of extradition treaties.

[182] Although a requesting state is entitled, subject to its duty of candour, [202] to choose what information it will put before the extradition court, the requesting state must always satisfy the Court that the evidence it relies on amounts to a prima facie case against the requested person. If, without the information requested either informally, or by the formal government-to-government request process, a judge is not satisfied that a prima facie case is made out and the other requirements for eligibility for surrender are met, the judge will of course so find. Accordingly, if the

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200 See above at [161].

201 See the approach taken by the Supreme Court of Canada in *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77.

202 Subject also to admissibility requirements where the requesting state is not an exempted country entitled to make use of the record of case process.

requesting state furnishes inadequate evidence it takes the risk that the Court will decide a person is not eligible for surrender, with the result that the extradition request will be refused.[203]

The right to justice

[183] As already stated, the appellants' right to observance of the principles of natural justice under s 27 of the Bill of Rights Act is engaged by the extradition process we have discussed. Is this legal framework consistent with the right of requested persons to natural justice? Does it impose limitations on their rights under s 27 of the Bill of Rights Act?

[184] The determination of whether requested persons are eligible for surrender is made under a judicial process. The Extradition Act requires a hearing, meaningful judicial assessment of whether the evidence relied on by the requesting state demonstrates a prima facie case, and a judicial standard of process in making the decision. The Act also gives requested persons the right to contest fully their eligibility for surrender, including by calling evidence themselves and making submissions to challenge the sufficiency and reliability of the evidence against them. The record of case procedure does not limit requested persons' ability or right to do this.[204] The consequence is that an extradition hearing under the Extradition Act has the same adversarial character as a committal hearing. All these features reflect a high content of natural justice in the process.

[185] The more particular question that arises is: what information or degree of disclosure does natural justice require in the extradition process? The Supreme Court of Canada has addressed what amount of information a requested person is entitled to in accordance with the Canadian Charter of Rights and Freedoms. Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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[203] See *R v Governor of Pentonville Prison ex parte Lee*, above n 158, at 1298.
[204] Extradition Act, s 25(4).

The Supreme Court of Canada has held that s 7 applies to an extradition hearing because, even though it is not a trial, liberty and security interests are at stake. Extradition hearings must therefore be conducted fairly.[205]

[186] In *United States of America v Dynar*, the Supreme Court held that the right to fundamental justice did not entail "the highest possible level of disclosure",[206] principally because of the differences between the extradition hearing and criminal proceedings, which make different levels of procedural protection appropriate. The context and purpose of extradition hearings shape the available level of protection, making it inappropriate to transplant domestic disclosure requirements to extradition cases.[207] The defendant was entitled to know the case against him, but:[208]

> 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.

[187] A consistent approach was taken in *United States of America v Kwok*,[209] where the requested person sought disclosure of information held by Canadian authorities in order to establish unjustified violations of his Charter rights. The Supreme Court affirmed the decision in *Dynar* that a requested person is entitled to know the case against him, including the materials relied on by the requesting state.[210] Mr Kwok was not, however, entitled to the further information that he sought. It was not within the jurisdiction of the extradition judge to consider the Charter rights on which he sought to rely.[211] As well, the Supreme Court said:[212]

> Since the requesting state was not relying upon materials in the possession of Canadian authorities, and in the absence of any indication of bad faith or improper motives on the part of prosecuting authorities, there was no obligation to provide further disclosure of materials requested.

[188] In *Kwok*, the Supreme Court did, however, contemplate that an extradition judge might have power to order the production of materials relevant to issues

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205 *United States of America v Dynar*, above n 129; *United States of America v Kwok* [2001] SCR 532; and *Cobb v United States of America* [2001] 1 SCR 587.

206 *United States of America v Dynar*, above n 129, at [128].

207 At [128]–[129].

208 At [134].

209 *United States of America v Kwok*, above n 205.

210 At [98] and [101].

211 See [5]–[6], [57] and [85].

212 At [101].

properly raised at the committal stage where there is an "air of reality" to the allegations of a Charter violation,[213] or where there is evidence to indicate that extradition proceedings are an abuse of process.[214]

[189] The approach to disclosure taken in *Dynar* and *Kwok* continues to apply in Canada. Those authorities support the view that, in extradition cases, natural justice requires that the person who is the subject of an extradition request is informed of the case against him or her. This entitles the requested person to the information on which the requesting state seeks to rely, but not to information that is not relied upon. The Supreme Court of Canada has not, since the adoption of the record of case procedure, revisited the issue of what information a requested person is entitled to for the purpose of challenging the case against him or her.[215]

[190] A person the subject of extradition proceedings in New Zealand is not entitled to disclosure of the kind available in domestic criminal proceedings. The entitlement is no more than to receive, in advance of the extradition hearing, the material that the requesting state will rely on before the extradition court. Where a requesting country has exempted status, the case brought against a requested person may be presented through the record of case procedure. Where the record of case process is used, the evidence may be presented in summary form rather than fully recited and it is not mandatory to include all the documents and exhibits relied on by the requesting state. The certification provisions in s 25 mean that, in general, reliability of the evidence presented by the requesting state is presumed, although that is rebuttable.

[191] Although the features of the record of case process just discussed have some bearing on the detail of what accused persons learn is alleged against them, and how they answer what is alleged at the extradition hearing, the significance of that is affected by the context of the extradition process. Several other elements of the legal context must be taken in to account:

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213 At [100].

214 See *Cobb v United States of America*, above n 205; *Larosa v United States of America* (2002) 166 CCC (3d) 449 (ONCA); *United States of America v McAmmond* (2005) 192 CCC (3d) 149 (ONCA); and *United States of America v Gunn* 2007 MBCA 21, [2007] 4 WWR 707.

215 The role of the extradition Court was revisited by the Supreme Court of Canada in *United States of America v Ferras*, above n 201, without reference to principles of disclosure.

(a) First, the purpose of the District Court hearing is not to determine whether the requested persons are guilty of the alleged crimes; it is to decide if they are eligible for surrender to face trial in the country where they have been accused. Natural justice requirements reflect what is required in relation to that preliminary decision.

(b) Secondly, the record of case procedure reflects and accommodates the divergent practices in the legal systems of the many nations who are committed to protection of fundamental rights in the investigation, accusation and trial of those charged with committing serious crimes.

(c) Thirdly, although it is for the requesting state to decide what material it will include in the record of the case, that state owes a duty of candour to the extradition court.

(d) Fourth, although a judge determining eligibility for surrender has no power to order the requesting state to disclose further information, in exceptional cases he or she may request that further information is sought from the requesting state in accordance with the applicable extradition treaty.

(e) Fifth, and most importantly, the requesting state always has to satisfy the Court, acting on judicial principles, that there is a prime facie case against the requested person. If the Court is not so satisfied, it will refuse the extradition request.

[192] Finally, it is also important to remember that, where the record of the case procedure is available, New Zealand has already determined by Executive decision that the requesting country should be accorded the status of an exempted country that is able to present evidence through that procedure. In addition, the international context of extradition, including considerations of comity and reciprocity, requires that some features of an extradition hearing differ from those for a domestic law committal.

[193] Bearing all these factors in mind, we are satisfied that the process of Part 3 of the Extradition Act for determining eligibility for surrender, which includes receipt prior to the hearing of material to be relied on by the requesting state, a duty of candour on the part of the requested state and limited access to further information in exceptional circumstances, is consistent with the right to natural justice. Accordingly, no question of justified limitation of the s 27 right arises.

Conclusion

[194] Extradition is a procedure, founded on international agreements, for the return of requested persons to face trial in the places where they have been accused of committing a crime. The procedure provides for trial in that place and not the country where the requested persons are located. The decision to be taken in the jurisdiction receiving the request is only whether the requested persons should be surrendered to the requesting state to face trial. Both the Treaty and the Extradition Act recognise that requested persons have specific protections of their rights including the requirement under s 24 that the evidence produced by the requesting state would under New Zealand law justify the persons' trial if the conduct constituting the offence had occurred in New Zealand.

[195] Part 3 of the Extradition Act provides for the manner in which a requesting state that is an exempted country may present its evidence to the New Zealand court. A record of the case is admissible as evidence at the extradition hearing subject to requirements as to its availability and its sufficiency to justify a prosecution in the requesting country.[216] A record of the case must include a summary of the evidence relied on and, in this case, that has been provided. It does not have to summarise all evidential material that the state may rely on at a trial. Nor, subject to its duty of candour, is the state required to copy or summarise all material of an exculpatory nature.

[196] The Extradition Act does not confer on the extradition judge power to make an order against a requesting state requiring its disclosure of evidence or information. If there is an art 12 clause in the applicable treaty, the preferable course

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[216] Extradition Act, ss 25(3)(a) and (b).

of action, where formal steps are necessary and exceptional circumstances make it appropriate, is for a judge to formally request that the New Zealand authorities seek further information from the requesting state. Applying the Extradition Act in this way is consistent with the rights of requested persons protected by the Bill of Rights Act.

[197] On this basis, the orders made in the District Court, which were upheld by the High Court, were wrongly made. The District Court had no power to order the requesting country to disclose the information sought by the appellants. Nor has any material been put before this Court to suggest that exceptional circumstances exist that would warrant a formal request from the judge that further information should be sought from the United States through the mechanism provided for in art 12 of the Treaty. There is no indication of a lack of candour on the part of the United States, or any other abuse of process, and the appellants have not pointed to any reason why, without the requested information, they will be unable to meaningfully challenge the case against them.

[198] The case against the appellants is largely based on circumstantial evidence and the inferences that can be drawn from it. The appellants already have access to much of the information gathered as evidence by the United States investigators and summarised in the record of the case.[217] As well, whereas the United States relies on expert analysis and inference to identify the business structure and operations of Megaupload, the appellants have first-hand knowledge of Megaupload's purpose and business model. It cannot be said that the appellants will, without more information, be deprived of the opportunity to properly contest the case against them, as presented in the record of the case. The purpose of disclosure is not to save counsel for the requested persons work by requiring the requested state to identify, in material already available to the requested persons, the particular aspects on which the requesting state relies.

[199] For these reasons, in the present case, no basis in law has been shown for the appellants to seek further disclosure or information concerning the case against them. The appeal is accordingly dismissed.

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[217] See above at [161].

[200] Costs are reserved. If necessary, the parties may submit memoranda.

WILLIAM YOUNG J

Overview

[201] The case is primarily concerned with the orders made by Judge DJ Harvey in the District Court[218] and affirmed by Winkelmann J in the High Court.[219] By way of illustration of their scope, I set out what was required in respect of the charge of criminal breach of copyright:[220]

(a) A copyright ownership element

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

(b) Infringement element

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

- *all records obtained or created in connection with the covert operations* undertaken by agents involved in the investigations related to these proceedings in transacting and uploading/downloading data and files on the Megaupload site;
- *all records or information and/or material provided to or obtained by the investigating and/or prosecuting agencies* in this case from holders and/or owners of copyright interests evidencing alleged infringement of their copyright and/or complaining of such alleged infringement;
- *all records and materials related to communications between relevant copyright holders and Megaupload and/or its employees* regarding their copyright interest, the direct delete access provided by Megaupload to any such copyright owners, and any communications between the copyright owners and Megaupload and/or its staff regarding take-down notices.

(c) Commercial element

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218 *Dotcom v United States of America* [2012] DCR 661 (Judge DJ Harvey) [*Dotcom* (DC)].
219 *United States of America v Dotcom* [2012] NZHC 2076 (Winkelmann J) [*Dotcom* (HC)].
220 *Dotcom* (DC), above n 218, at "Appendix – Documents to be Disclosed" (emphasis added).

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

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

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

(d) Knowledge/wilfulness element

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

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

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

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

[202] In the course of his submissions, Mr Davison QC referred to the disclosure orders as "tailored" and "limited". Similar comments were made by Judge DJ Harvey[221] and Winkelmann J,[222] neither of whom claimed to be exercising a power to order general disclosure. It is true that the orders are structured around the elements of the offences. It is also true that to a very limited – indeed perhaps illusory[223] – extent, Judge DJ Harvey pared back the disclosure requirements

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221 At [251].

222 *Dotcom* (HC), above n 219, at [118].

223 This is certainly the position adopted by the United States authorities in affidavit evidence to which we were taken.

proposed by the appellants.[224] But despite these considerations, the orders are nonetheless general in character. I say this for four reasons:

(a) The justiciable issue for which disclosure was required was identified as "the existence of a prima facie case to answer" by Judge DJ Harvey[225] and the "s 24(2)(d)(i) question" (which is the same thing) by Winkelmann J.[226] Assuming there is no reliance on mandatory or discretionary restrictions on surrender, this will be the ultimate issue which the Court will have to address. It thus does not serve to limit what is required to be disclosed. After all, the courts could hardly order disclosure of material which is completely irrelevant.

(b) The definitions of the required documents are so broad as to make it difficult in practice for the United States authorities to be able to exclude confidently any documents in their possession as not being caught.

(c) There was no attempt to establish with any specificity that there are documents which the appellants do not have and which they need in order to advance particular arguments in relation to whether there is a prima facie case against them.

(d) Contrary to the view of the Chief Justice,[227] I consider that the orders go far beyond disclosure of the documents on which the United States authorities propose to rely. This is made clear by the parts of the disclosure order which I have emphasised.[228]

Orders of this breadth could only be justified if there is a power to compel a requesting state to provide general disclosure – that is, disclosure of the kind which

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224 See *Dotcom* (DC), above n 218, at [252].
225 At [243].
226 *Dotcom* (HC), above n 219, at [118].
227 See [9]–[13] of Elias CJ's judgment.
228 I will return in these reasons to discuss the material on which the United States does rely, see [245] below.

must be provided by the prosecutor in criminal proceedings. For the reasons that follow – which are largely in accord with those of McGrath and Blanchard JJ[229] – I am satisfied that there is no such power.

[203] On my appreciation of the arguments advanced in this Court, the appellants are not seeking particular disclosure. They have made no attempt to show that there is any particular respect in which they will be prejudiced if particular documents are not provided. So the question whether there is power to order particular disclosure does not directly arise. I will nonetheless address it.

[204] The other issue in the case – as to the interpretation of s 25(2)(b) of the Extradition Act 1999 – is entirely distinct and I will address it separately.

[205] To set the scene for my discussion of the issues just identified, I will address the application of the New Zealand Bill of Rights Act 1990 to extradition proceedings and discuss briefly the rules as to criminal disclosure.

[206] The balance of these reasons are accordingly structured as follows:

(a) The application of the New Zealand Bill of Rights Act to extradition proceedings;

(b) Criminal disclosure;

(c) A power to order general disclosure;

(d) The pre-hearing disclosure of particular information;

(e) The scope of s 25(2)(b).

[207] In the course of these reasons I will refer to the country seeking extradition (in this instance, the United States of America) as "the requesting state", the state from whom extradition is sought as "the requested state", the person whose extradition is sought as "the requested person", the court hearing the proceedings as

[229] Referred to hereafter as the reasons of McGrath J.

"the extradition court" and a court conducting committal proceedings as "a committal court".

The application of the New Zealand Bill of Rights Act to extradition proceedings

[208] The applicability of ss 24 and 25 of the New Zealand Bill of Rights Act depends on whether the appellants are "charged with an offence" and, in the case of s 25, whether the extradition proceedings involve the "determination" of the charges they face. Among the entitlements conferred by these sections is the right under s 24(e) to trial by jury – which is not obviously applicable to a charge which will not be determined in New Zealand. The inclusion of this right suggests to me that "charged with an offence" in s 24 refers only to charges which will be determined by a New Zealand court. More generally, it seems to me that when the two sections are read together as a whole, it is tolerably clear that they were not intended to apply to extradition proceedings.

[209] To construe the two sections so that they apply to extradition would require considerable modification of their language, involving:

(a) either limiting the effect of the s 24 rights to steps which occur in New Zealand, or refusing extradition unless those rights are guaranteed by the requesting state; and

(b) either adapting the language of the s 25 rights so that they apply to the extradition hearing (by blue pencilling or modifying them), or refusing extradition unless those rights are guaranteed by the requesting state.

[210] Some brief elaboration is appropriate. Section 24 confers rights on a person "charged with an offence". If a requested person is someone who is "charged with an offence", the language of the section (in particular, the repeated use of the word "shall") suggests that the full suite of stipulated rights would come into play. It would be possible for those rights to be provided despite the extradition context as the New Zealand government could make extradition conditional on the requesting

state guaranteeing to afford such rights post-extradition. Indeed, to my way of thinking, a logical corollary of a conclusion that s 24 applies to extradition is that the New Zealand government should impose conditions along those lines. This might be awkward as it would, for instance, preclude extradition to a requesting state which does not provide for trial by jury. Similar considerations might apply to the s 25 rights if the legal system of requesting state did not meet all the s 25 requirements.[230] Avoidance of the problematic consequences would require either a robust use of s 5 of the New Zealand Bill of Rights Act or a blue-pencilling or modification of those subsections which are not easily applied in the extradition context. These complexities support the view that ss 24 and 25 should be treated as confined to those who face charges which will be determined under our criminal law in a New Zealand court.

[211] Extradition operates as an adjunct to criminal proceedings, albeit in the requesting state. The processes of the domestic criminal law (for example, as to committal) are adopted and the local law of evidence also applies (subject, of course, to statutory modification). Unsurprisingly, there are cases in which extradition proceedings have been seen as being criminal in character. I do not, however, see such cases as material to whether the language of, and rights provided by ss 24 and 25 of the New Zealand Bill of Rights Act are engaged by the present case. Far more material to my way of thinking is the international jurisprudence (in particular from Europe, the United Kingdom and Canada), which is reviewed by McGrath J[231] and which directly addresses the applicability of rights corresponding to those provided for by ss 24 and 25 to extradition proceedings. These cases, along with the associated analysis of McGrath J, strongly support the view that ss 24 and 25 are not engaged by extradition proceedings.

[212] Although of the view that ss 24 and 25 are not applicable to the present case, I regard s 27 of the New Zealand Bill of Rights Act as undoubtedly applicable. Accordingly, the appellants are entitled to "the observance of the principles of natural justice" by the extradition court. An extradition court must therefore provide

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230 For instance, because it might provide in some circumstances for a reverse onus along the lines of that imposed under the Misuse of Drugs Act 1975.

231 See the authorities discussed by McGrath J at [107]–[114] above.

a person facing extradition with a fair opportunity to respond to the case presented by the requesting state.

Criminal disclosure

[213] For the reasons explained by McGrath J,[232] I am of the view that the United States, as the requesting state, and the appellants, as the requested persons are the parties to this litigation. It follows that the judgments of Judge DJ Harvey and Winkelmann J are premised on the assumption that an extradition court has a power to order disclosure against a foreign state.

[214] Prior to the Criminal Disclosure Act 2008, the law and practice as to disclosure in criminal cases was premised on the Official Information Act 1982, as applied in 1988 by the Court of Appeal in *Commissioner of Police v Ombudsman*.[233] The underlying theory was that information held by prosecuting agencies (most commonly the police) in relation to a current prosecution was covered by the Official Information Act and, subject to the exclusions provided for in that Act, there was thus a duty of disclosure. The innovative feature of the Court of Appeal judgment was the conclusion that this duty could be directly enforced by trial courts in the context of extant criminal proceedings.[234] What is important, however, for present purposes is that the function of the courts was to enforce an obligation of disclosure that existed independently under the Official Information Act.

[215] The Criminal Disclosure Act imposes disclosure obligations on prosecutors in respect of criminal proceedings. There are requirements for initial disclosure (under s 12) and full disclosure (under s 13). There is also a duty (under s 14) to comply with requests for further disclosure. The duties under these sections are subject to exclusions provided for by ss 16, 17 and 18. Section 30(1) provides that a defendant may apply for an order that particular information be disclosed. Such an order may be made where:

> (a) the defendant is entitled to the information under section 12, 13, or 14, as the case may be, and—

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232 See [100]–[103] of the reasons of McGrath J.
233 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).
234 At 397.

(i) the prosecutor failed to disclose the information; or

(ii) the prosecutor refused under section 14, 16, 17, or 18 to disclose the information, and—

(A) none of the reasons described in section 16, 17, or 18 for which information could be withheld applies to the information; or

(B) in the case of a refusal under section 17, the information ought to have been disclosed under section 17(3); or

(C) in the case of a refusal under section 18, the information ought to have been disclosed under section 18(2); or

(b) even though the information may be withheld under this Act, the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the public interest, to disclose the information.

[216] Leaving aside for the moment s 30(1)(b), the function of the court under the Criminal Disclosure Act is just to enforce obligations of disclosure imposed by the Act on prosecutors and the regime is thus broadly similar to that under the Official Information Act. Section 30(1)(b) might be thought to go further because it contemplates orders to disclose information which is not otherwise required to be disclosed under the Act. Obviously, however, its intended operation is in respect of information that would be subject to disclosure obligations under ss 12, 13 and 14 but for ss 16, 17 and 18. I see it, therefore, as providing a dispensing power in respect of those exclusions.

[217] The United States of America is plainly not subject to the Official Information Act[235] and the appellants do not seek to rely on it. The scope of the Criminal Disclosure Act is confined by a definition of "criminal proceedings".[236] In respectful disagreement with the view of the Chief Justice,[237] I do not accept that this definition encompasses extradition proceedings. Because extradition proceedings are not within the definition of "criminal proceedings", the United States (and anyone acting on its behalf) is not a "prosecutor" in terms of that Act.[238] It follows

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235 See the definition of "official information" in s 2 of the Official Information Act 1982.
236 Criminal Disclosure Act 2008, s 6(1), definition of "criminal proceedings".
237 See [47] and [83] of Elias CJ's judgment.
238 The s 6(1) definition of "prosecutor" is drafted solely by reference to "criminal proceedings".

that the Criminal Disclosure Act cannot have direct application to extradition proceedings. On the other hand, what the appellants can say is that, prior to the abolition of the committal procedure by the Criminal Procedure Act 2011, a committal court was entitled to require disclosure broadly along the lines of that ordered in the present case by Judge DJ Harvey.

A power to order general disclosure?

Possible sources of a power to order general disclosure

[218] As is apparent, I see the disclosure sought by the appellants as general in character. The appellants argue that the power to order such disclosure arises under, or by reason of, any one or more of the following:

(a) Section 22(1)(a) of the Extradition Act, which confers on the extradition court "the same jurisdiction and powers" as if the proceedings were a committal hearing.

(b) Section 102(1)(e)(i) of the Extradition Act, which provides for the making of regulations as to "the pre-hearing disclosure of information".

(c) An inherent power to order disclosure.

(d) The principles of natural justice and the New Zealand Bill of Rights Act 1990.

Section 22(1)(a)

[219] Section 22(1)(a) and (b) provide:

> (1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—
>
> (a) the court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and

> (b) the following provisions apply to the proceedings, so far as applicable and with the necessary modifications:
>
> (i) Parts 5 and 5A and sections 203, 204, and 206 of the Summary Proceedings Act 1957:
>
> (ii) Parts 1 (except sections 9 to 12), 2, and 4 of the Bail Act 2000:
>
> (iii) the Criminal Procedure (Mentally Impaired Persons) Act 2003.

[220] Section 22(1)(a) incorporates into the Extradition Act, by reference, the statutory (and other) powers available to a committal court prior to the coming into effect of the Criminal Procedure Act. As explained by McGrath J, s 22(1)(a) must be applied as if the committal provisions in the Summary Proceedings Act 1957 had not been replaced by the Criminal Procedure Act.[239] As McGrath J has also pointed out, the drafting technique of incorporation by reference can create difficulties.[240]

[221] If prosecuted in New Zealand for offences corresponding to those now alleged, the appellants would now be entitled to full disclosure under the Criminal Disclosure Act and would earlier have had a similar entitlement under the Official Information Act. And, as noted, if such disclosure had not been provided, they could have obtained orders broadly along the lines of those made by Judge DJ Harvey. I also accept that such orders could have been made in advance of committal, meaning that the hypothetical committal court we must envisage would have the power to make such orders against the prosecutor. On the other hand, this hypothetical committal court would be confined to the making of orders to enforce obligations of disclosure independently imposed by either the Official Information Act or the Criminal Disclosure Act, obligations to which the United States of America is not directly subject, as I have already explained.

[222] The argument for the appellant on this aspect of the case thus involves the proposition that we should equiparate the position of the requesting state with that of a prosecutor, by reading s 22(1)(a) as if it read:

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239 See [95] of the reasons of McGrath J.
240 See [163] of the reasons of McGrath J.

> [T]he court has the same jurisdiction and powers … as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand *and may exercise such powers against the requesting state as if it were a New Zealand prosecutor*.

This would be the equivalent of applying the Criminal Disclosure Act or the Official Information Act to extradition proceedings with the "necessary modifications"[241] that:

(a) the definition of "prosecutor" in the Criminal Disclosure Act[242] is expanded to encompass a requesting state; and/or

(b) the definition of "official information" in the Official Information Act[243] is expanded so as to include information held by the government of a requesting state.

[223] The approach just discussed is a possible way of construing the legislative scheme as a whole but, for a number of reasons, I do not see it as very plausible:

(a) The interpretation asserted by the appellants is far from obvious, both on the wording of the statute and in the context of McGrath J's survey of the international jurisprudence, which shows that courts in other jurisdictions have yet to impose general disclosure obligations on requesting states.[244]

(b) If the purpose of the legislature was to impose disclosure obligations on foreign states, this should have been provided for expressly (rather than very indirectly and doubtfully) and in a manner that paid particular attention to the differences between a prosecuting agency in respect of criminal proceedings in New Zealand and a requesting state in relation to extradition proceedings.

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241 The phrase which appears in 22(1)(b) of the Extradition Act 1999.
242 Criminal Disclosure Act, s 6(1), definition of "criminal proceedings".
243 Official Information Act, s 2(1).
244 See the judgment of McGrath J at [171]–[176] and [186]–[189] above.

(c) Fair trial considerations provide the primary justification for requiring disclosure and although, in practice, disclosure was required and could be obtained in advance of committal proceedings, the use of information so derived at the committal hearing was at most a very incidental purpose of requiring disclosure.

(d) To apply the Criminal Disclosure Act to the extradition process would not be particularly congruent with s 22(1)(b), which lists those statutes that apply to extraditions "with necessary modifications" and which does not include the Criminal Disclosure Act.

(e) To give the Official Information Act effect against the government of a foreign state would go beyond "modification" and drastically alter its scope and operation.

(f) A disclosure regime or power to order disclosure as contended for by the appellants would cut across the operation of art 12 of the Treaty on Extradition between New Zealand and the United States of America (the Treaty).[245]

[224] Accordingly, I agree with McGrath J that s 22(1)(a) of the Extradition Act neither entitles the appellants to – nor empowers an extradition court to order – disclosure from the requesting state on the basis of the obligations imposed on New Zealand authorities by the Official Information Act or on prosecutors by the Criminal Disclosure Act.

Section 102(1)(e)(i)

[225] Section 102(1) of the Extradition Act relevantly provides:

> **102 Regulations**
>
> (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

[245] Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970). See the judgment of McGrath J at [164]–[167].

…

> (b) Prescribing additional matters to be included in the record of the case under section 25:
>
> …
>
> (e) Prescribing the practice and procedure of District Courts in relation to proceedings under this Act, including (without limitation),—
>
> (i) The pre-hearing disclosure of information:
>
> (ii) 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: …

Defaults in the provision of such information could, in turn, be the subject of further regulation under s 102(1)(e)(ii).

[226] The appellants placed some reliance on s 102(1)(e)(i) as presupposing the existence of a power of an extradition court to require the pre-hearing disclosure of information. This is on the basis that a regulatory power to prescribe "practice and procedure" assumes a pre-existing power. I am inclined to accept that this is so, although I am at least open to the view that regulations prescribing such "practice and procedure" might serve to establish (or confirm) a power to order disclosure of information which may go beyond what has hitherto been recognised. But this acceptance does not advance the appellants' case because, as I will explain later, as at 1999 an extradition court did have power to require the pre-hearing disclosure of some information and s 102(1)(e)(i) is perfectly explicable on the basis of that power.[246] I certainly do not accept that s 102(1)(e)(i) assumes the existence of a power to order general disclosure against a requesting state.

An inherent power

[227] Whether there is an inherent power to require general disclosure turns on whether such a power is necessary to enable an extradition court to act effectively and fairly.[247]

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246 See [230]–[235] below.

247 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113]–[114]. See the judgment of McGrath J at [161] above.

[228] In approaching this question, it is a striking consideration that up until now, the power to order such disclosure has never been seen as necessary in extradition proceedings. While not controlling, this seems to me to be very telling. If it is necessary for the courts to have such a power, why has this never been recognised before? As well, it must be kept steadily in mind that an extradition court is not required to make a final determination of guilt or innocence (which is the judicial function to which criminal disclosure is primarily directed). Given the duty of candour owed by a requesting state, and for the reasons generally given by McGrath J,[248] I am not persuaded that a power to require general disclosure is necessary to the proper performance of the function of an extradition court.

The principles of natural justice and the pre-hearing disclosure of particular information

[229] As already indicated, an extradition court must provide a person facing extradition with a fair opportunity to respond to the case presented by the requesting state. And, as I will explain, the corollary of this obligation is that an extradition court has some powers in relation to the pre-hearing disclosure of information. But – and essentially for the reasons just given in relation to the inherent power – a power on the part of an extradition court to order general disclosure against a requesting state is not necessary to ensure a fair extradition hearing.[249]

The pre-hearing disclosure of particular information

[230] I consider that an extradition court can require pre-hearing disclosure of information in two respects:

(a) an extradition court may rely on the Official Information Act and s 22(1)(a) of the Extradition Act to require any New Zealand public agency to disclose information in its possession; and

(b) an extradition court is entitled to prescribe the timing for the provision of information that the requesting state is required to make available, pre-hearing, to the requested person.

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[248] See the judgment of McGrath J at [148]–[152], [160]–[161] and [184]–[193] above.

[249] I agree with the reasons given by McGrath J at [160]–[161] and [184]–[193] of his judgment.

Both points warrant some explanation.

[231] As to the first, a person whose extradition is sought may seek pre-hearing disclosure against any *New Zealand* agencies involved in the extradition process, including, and most particularly, the Minister of Justice. Such disclosure is available by reason of the Official Information Act. Except to the extent that its operation was displaced by the Criminal Disclosure Act, the Official Information Act is able to be directly enforced and it seems to me that the power of direct enforcement of a right to access personal information recognised in *Commissioner of Police v Ombudsman*[250] is therefore vested in an extradition court under s 22(1)(a).

[232] As to the second, immediately before the abolition of the committal process, pre-hearing disclosure of witness statements and exhibits was required of prosecutors under s 168 of the Summary Proceedings Act 1957 (as amended with effect from June 2009). The corresponding requirement is thus imposed on requesting states under s 22(1)(b) (which incorporates the relevant part of the Summary Proceedings Act as it stood at that time). I have no doubt, however, that even before pre-trial disclosure of witness statements and exhibits was required by statute, it was open to an extradition court to require the requesting state to provide pre-hearing disclosure of the case that was to be advanced.[251]

[233] This obligation requires a requesting state to make available to a requested person the material on which it will rely at the extradition hearing. Where the record of case process is not used, the requesting state must provide statements of the evidence and copies of any exhibits which will be relied on to establish eligibility for surrender at the hearing. Where the record of case procedure is utilised, the requesting state will be obliged to provide the record of the case that it will present to the extradition court, because that is the material on which it will rely at the extradition. Such a record should put the requested person adequately on notice of the case to be advanced by the requesting state.

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250 *Commissioner of Police v Ombudsman*, above n 233.

251 Compare the approach taken by the Supreme Court of Canada in *United States of America v Dynar* [1997] 2 SCR 462.

[234] A requesting state must also provide reasonable particulars of the charge in respect of which extradition is sought.[252] It follows that an extradition court is entitled to direct that further particulars be given if that is necessary to ensure a fair hearing. I think it is unlikely that such a direction will be required where there is a record of the case, as the summary of the evidence relied on should obviate any need for further particulars.

[235] The requesting state will not be able to secure an order for the surrender of the requested person until the evidence it relies on has been presented to the extradition court and the requested person has had an opportunity to respond. It is well within the powers of an extradition court to give directions as to when that evidence must be disclosed to the requested person, just as it is within the court's power to adjourn the extradition hearing until the requested person has received, and had sufficient time to consider, the information to which he or she is entitled. Broadly similar considerations apply to particulars in relation to the charge.

[236] The appellants did not rely on the principles which I have just been discussing, which rather suggests that the appellants are fully aware of the core allegations they face and the evidence on which the United States of America relies.

[237] As is apparent, I see a major difference between an extradition court:

(a) giving directions as to the timing of the disclosure of the material to be relied upon by a requesting state, with a view to ensuring that the requested person has a fair opportunity to respond; and

(b) ordering a requesting state to provide information that relates to the charge against the requested person but which is not to be relied on by the requesting state at the extradition hearing.

[238] For the reasons already given in relation to general disclosure, I see no obvious source of power to require disclosure of material which is not to be relied on

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252 See, for instance, *Franic v Wilson* [1993] 1 NZLR 318 (HC).

by the requesting state before the extradition court. As well, and more generally, I can see no necessity for such a power to be implied, given:

(a) the requesting state's duty of candour as discussed by McGrath J;[253]

(b) the ability to request additional information where the governing extradition treaty contains a clause along the lines of art 12 of the Treaty with the United States of America; and

(c) even in the absence of a clause such as art 12, the probability that a requesting state will comply with a reasonable request for documents made by a requested person particularly if such request is endorsed by the extradition court.

[239] While an extradition court has no power to order a requesting state to provide further information, such a court may draw factual inferences from what it perceives to be an unreasonable refusal to supply particular information of obvious potential cogency.[254] I also endorse the comments made by McGrath J as to the circumstances in which requests for additional information may be made by the extradition court.[255] I share his view that it would be more appropriate, at least where there is a treaty provision equivalent to art 12, for such requests to be made directly of the requesting state by the executive government, rather than by the extradition court.

The scope of s 25(2)(b)

[240] Section 25(2) of the Extradition Act provides:

> **25 Record of case may be submitted by exempted country at hearing**
>
> …
>
> (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain—

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253 See the reasons of McGrath J at [148]–[152] above.
254 See the reasons of McGrath J at [181]–[182].
255 See the reasons of McGrath J at [177]–[180] above.

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

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

…

[241] For the reasons given by McGrath J,[256] Glazebrook J[257] and by the Court of Appeal[258] on this aspect of the case, I consider that the phrase "other relevant documents" in s 25(2)(b) refers most naturally to documents "other" than those which are summarised in the "summary of the evidence". There are, however, some additional comments which I wish to make.

[242] The position of the Chief Justice is that the record of the case must include documents which otherwise (that is, at the hearing in which the record of the case procedure is not adopted) would be produced as exhibits.[259] In reaching this conclusion, she relies in part on s 168 of the Summary Proceedings Act, as amended with effect from June 2009. The requirement under that section was to disclose the exhibits referred to in the formal written statements which were to be relied on at the committal hearing. This procedure – producing witness statements in which reference is made to exhibits which will be produced as part of the evidence – was premised on the traditional way in which evidence is led – that is, by witnesses giving first person testimony and producing as exhibits documents to which they could speak. What documents can or must be produced in evidence in this way were in the past a function of the largely common law principles of admissibility, for instance as to hearsay and the so-called "best evidence rule". The current law is provided in ss 128 to 149 of the Evidence Act 2006.

[243] Introducing into s 25 the concept of "exhibits" would therefore have the effect of introducing, by a side door, New Zealand rules as to admissibility. I see this as inappropriate. The record of the case is to be prepared by "the investigating

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256 See the judgment of McGrath J at [132]–[147].

257 See the judgment of Glazebrook J at [252]–[256] below.

258 *Dotcom v United States of America* [2013] NZCA 38, [2013] 2 NZLR 139 (Arnold, Ellen France and French JJ) [*Dotcom* (CA)] at [87]–[89].

259 See the reasons of Elias CJ at [48] above.

authority or a prosecutor" in a requesting state who could hardly be expected to be fully familiar with the relevant New Zealand rules as to what documents:

(a) may be referred to by way of summary without being produced as exhibits; and

(b) must be produced as exhibits.

[244] A requirement that a record of the case must incorporate under s 25(2)(b) all documents in the latter category would be inconsistent with the reasons why the record of the case procedure was introduced, as explained by McGrath J and the Court of Appeal.[260] This is because it would require that a record of the case be prepared in accordance with New Zealand admissibility rules as to documentary evidence even though the primary purpose of the adoption of the procedure was the exclusion of domestic admissibility rules.

[245] In circumstances covered by s 168 of the Summary Proceedings Act, the exhibits in question will be part of the evidence and in this way will be relied on by the requesting state. The requested person's entitlement to fair notice of the case which is to be advanced justifies the requirement for such exhibits to be provided in advance of the hearing. In contradistinction, in the present case, the United States, as requesting state, is not relying on the documents which are summarised and/or referred to in the record of the case. Rather, it is relying on what appears in the record of the case. For this reason, the obligation to give the requested person fair notice of the case to be advanced is discharged by the record of the case.

[260] *Dotcom* (CA), above n 258, at [37]–[39].

GLAZEBROOK J

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Introduction

[246] The appellants are charged in the United States of America with various copyright and related offences. The United States seeks their extradition. This appeal relates to disclosure orders made by Judge DJ Harvey in the District Court[261] and largely upheld by Winkelmann J in the High Court.[262] The Court of Appeal quashed the orders[263] and the appellants appeal against that decision.

What is sought by the appellants?

[247] In this Court, it was argued that the United States should provide:

(a) copies of all documents referred to (apart from witness statements) in the record of the case and the supplementary record filed in the District Court;

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261 *Dotcom v United States of America* [2012] DCR 661 (Judge Harvey) [*Dotcom* (DC)].

262 *United States of America v Dotcom* [2012] NZHC 2076 (Winkelmann J) [*Dotcom* (HC)].

263 *Dotcom v United States of America* [2013] NZCA 38, [2013] 2 NZLR 139 (Arnold, Ellen France and French JJ) [*Dotcom* (CA)].

(b) copies of documents giving context to those referred to – in this case, the email chain surrounding emails referred to in the record;

(c) copies of all material that backs up the allegedly conclusory statements set out in the record of the case;

(d) all possibly exculpatory material in the possession of the United States authorities – in this case exculpatory emails; and

(e) copies of all other inculpatory material currently held by the United States authorities which is relevant to the charges.

[248] This amounts to the appellants seeking general disclosure. I agree with William Young J that this was effectively what was ordered in the District and High Courts.[264]

[249] I now comment on each of the categories of documents sought, with particular reference to s 25 of the Extradition Act 1999. This is because the United States in this case availed itself of the record of the case procedure provided for in that section. I then discuss other sections of the Extradition Act and the other legislation relied on by the appellants to support their disclosure request and identify the extent to which I agree with the reasons of McGrath and Blanchard JJ (delivered by McGrath J)[265] and of William Young J on these issues.

[250] For the purposes of these reasons, I adopt the description of the extradition process set out in the judgment of McGrath J.[266] He has set out the relevant parts of the sections. For convenience, however, I summarise the relevant parts of s 25 here.

[251] Section 25(2) provides that the record of the case "must contain", under s 25(2)(a), "a summary of the evidence acquired to support the request for the surrender of the person" and, under s 25(2)(b), "other relevant documents, including photographs and copies of documents." Section 25(4)(b) provides that nothing in

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264 See [201]–[202] of William Young J's reasons.

265 For convenience, from now on I refer to this judgment as the judgment of McGrath J.

266 At [93]–[99] of McGrath J's reasons. I also generally agree with the Chief Justice's description of the process at [14]–[16] of her reasons.

s 25 "limits the evidence that may be admitted at any hearing to determine whether a defendant is eligible for surrender."[267]

All documents referred to in the record of the case

[252] The appellants say that the record of the case should have included copies of all documents referred to or summarised therein. Winkelmann J, in the High Court, held that s 25(2)(b) requires all documents referred to directly or indirectly in the record of the case to be attached to the record.[268] The Chief Justice takes the same view.[269]

[253] I do not consider this to be the natural meaning of s 25(2)(b). That paragraph does refer to "copies of documents," but this phrase seems to me to be qualified by the opening phrase "other relevant documents". This suggests to me that the "other relevant documents" referred to in s 25(2)(b) are documents other than those summarised in the record of the case.

[254] This interpretation is supported by the legislative history. It is significant that, in the Extradition Bill as first introduced, the record of the case procedure required not only a "recital of the evidence acquired to support the request for the surrender of the person" but also a "certified copy, reproduction, or photograph of all exhibits, documentary evidence, and depositions of witnesses" as well as any other matter required by regulations.[270] The Select Committee recommended that the terms of s 25(2) be amended, resulting in its present form.

[255] While the Select Committee did not provide any reason for the change to the current wording,[271] the changes to the terms of s 25(2)(b) are instructive. The original wording made it clear that copies of all documents referred to in the summary (along with exhibits and depositions) would be required. If the Select Committee had intended to retain this requirement in respect of documents (but remove it in relation to exhibits and depositions), then the most natural way to

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267 Section 25 is set out in full at [98] of McGrath J's reasons.
268 *Dotcom* (HC), above n 262, at [111].
269 See [43] of the Chief Justice's reasons.
270 Extradition Bill 1998 (146-1), cl 25.
271 See McGrath J's reasons at [143]–[145].

have made this clear would have been merely to delete the reference to exhibits and depositions.[272]

[256] The change from "recital of evidence" to "summary of evidence" in s 25(2)(a) is also of some significance.[273] It makes it clear that only a summary is required, rather than a recital of the content of all documents. This suggests that the policy behind the changes made by the Select Committee was to make the record of case procedure a more convenient option for exempted countries to use, as well as providing the advantage of testing admissibility not by the laws of New Zealand but by those of the requesting state.[274] A requirement to provide copies of documents already summarised would not further this policy.[275]

Documents giving context

[257] One of the strands of evidence relied on in the record of the case is a number of emails between the alleged conspirators. It is submitted that, where any particular email is relied on, then at the least the email chain should be provided.

[258] This proposition is answered by the principle that it is up to the requesting state to decide what should be contained in the request for extradition, subject to the duty of candour discussed below.[276] If context is necessary to understand the particular document, then the requesting state would be wise to provide that context or risk having the document disregarded by the court. But there is no obligation to provide that context unless not to do so would breach the duty of candour.

[259] In any event, the affidavit filed on behalf of the United States said that the appellants would have access to their own email accounts.[277] It was accepted by the

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272 And to remove the word "certified": see at [27] of the Chief Justice's reasons.

273 The Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990), on which the record of case process in the Extradition Act is based, still retains the requirement that the record contain a "recital" of the evidence. The development of the record of the case process is explained at [134]–[142] of McGrath J's reasons.

274 See McGrath J's reasons at [134]–[138] and also the reasons of William Young J at [242]–[244].

275 The Court of Appeal made a similar point: see *Dotcom* (CA), above n 263, at [102].

276 *R v Governor of Pentonville Prison ex parte Lee* (1993) 1 WLR 1294 (QB) at 1298; *Wellington v Governor of Her Majesty's Prison Belmarsh* [2004] EWHC 418 (Admin) at [26]; *Jenkins v Government of the United States of America* [2005] EWHC 1051 (Admin) at [29]; and *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [35].

277 Affidavit of Jay V Prabhu in regard to Disclosure, 26 June 2012, at [14]. Mr Prabhu is Assistant

appellants that this was the case by and large. If the appellants wish to put the context of the emails relied on in the record of the case before the court, then they will be able to do so.

Material to back up conclusory statements

[260] It was submitted by Mr Davison QC that the record of the case was faulty because there were a number of conclusory statements, effectively submissions, in the record, especially related to the alleged existence of a conspiracy. He submits that the appellants are entitled to copies of the documents or other materials underlying those conclusory statements.

[261] I agree that there are some conclusory statements in the record of the case but the evidence relied on (or at least a selection of that evidence) is set out. Either that evidence supports the conclusions and inferences the United States wants to draw to support the existence of a prima facie case or it does not. As already indicated, it is for the requesting state to decide what information to put forward in support of those inferences and it takes the risk that, if insufficient material is provided, the extradition judge will not be satisfied that a prima facie case exists.

Exculpatory material

[262] The appellants submit that all material that could possibly be exculpatory that is held by the United States should be provided to them by way of disclosure. This submission was largely related to the provision of exculpatory emails.[278]

[263] This proposition has to be evaluated in the context of the decision to be made in the extradition hearing: whether, on the basis of the evidence put forward by the requesting state, there is a prima facie case.[279] The decision on guilt or innocence is

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United States Attorney in the Eastern District of Virginia and Chief of the Cybercrime Unit.

278 As noted above (and also as discussed later), the appellants have access to their email accounts.

279 The existence of a prima facie case is not the only requirement for eligibility for surrender. Section 24, the relevant part of which is set out at [94] of McGrath J's judgment, prescribes the eligibility criteria. For example, the extradition court must also be satisfied that there are no mandatory or discretionary restrictions on surrender: ss 22(3) and (4). The disclosure argument in this case does not concern these factors. It is only concerned with the prima facie case issue.

made later in other proceedings and in another jurisdiction, should the extradition request be granted.[280]

[264] The appellants' submission also has to be evaluated in the context of the principle that it is for the requesting state to decide what material it puts forward in support of its extradition request. This principle is, however, tempered by the duty of candour, discussed by McGrath J in his judgment.[281] I agree with his analysis of that duty. In particular, I endorse his comments as to the necessity for the New Zealand authorities assisting or acting on behalf of requesting states to stress the importance of that duty to requesting states and to use their best endeavours to see that it is complied with.[282]

[265] I return to the duty of candour later in the judgment[283] but note at this point that the duty of candour does not require the disclosure of all potentially exculpatory material. It only requires requesting states to disclose any evidence that would render worthless, undermine or seriously detract from the evidence upon which they rely, whether on its own or in combination with material that is in the requesting state's possession or is drawn to its attention by the requested person or the court.[284] The duty of candour requirements are set at the level they are because all the requesting state has to show at this stage of the proceedings is a prima facie case.[285]

Other inculpatory material relevant to the charges

[266] In addition to a requirement to provide copies of the documents summarised, Mr Davison would have us construe s 25(2)(b) as requiring a requesting state to provide copies of all documents relevant to the charges. In this regard, Mr Davison

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280 *Canada v Schmidt* [1987] 1 SCR 500 at 515–516 and 518. See also *United States of America v Dynar* [1997] 2 SCR 462 at [122] and [129]–[130]; *United States of America v Ferras* 2006 SCC 33 [2006] 2 SCR 77 at [46] and [54]; and *United States of America v Anekwu* 2009 SCC 41, [2009] 3 SCR 3 at [27]–[29]; *United States of America v Yang* (2001) 203 DLR (4th) 337 (ONCA) at [47]; *United States of America v McAmmond* (2005) 192 CCC (3d) 149 (ONCA) at [27]; and *United States of America v Anderson* 2007 ONCA 84 at [42].

281 At [148]–[152] of McGrath J's reasons.

282 At [152] of McGrath J's reasons.

283 See below at [293].

284 As explained at [152] of McGrath J's judgment.

285 As no issue in relation to the other s 24 criteria for eligibility for surrender is before this Court, I make no comment on the existence or content of any duty of candour relating to those matters.

points to the difference in wording of the Canadian provision, which says that the requesting state may, rather than must, provide other documents.[286]

[267] I do not accept that submission. It too takes no account of the principle that it is up to the requesting state to decide what it puts forward to show a prima facie case. There is therefore no obligation to put before the court all of the evidence held by the requesting state that will be relied on at trial.[287] Indeed, this was the same position in New Zealand when there was a committal process in domestic criminal proceedings.[288]

[268] This principle is reflected in s 25(2)(a) which requires a summary of the evidence acquired "to support the request for the surrender of the person". This paragraph does not refer to all evidence that will be used at trial. In light of this, the phrase "other relevant documents" in s 25(2)(b) must mean documents that are relevant and relied upon to support the request for surrender but that are not summarised in the record of the case.[289]

[269] I do not consider that s 25(2)(b) changes the analysis. It merely allows further evidence to be put before the court and, as far as the requesting state is concerned, reflects the principle that it is up to the requesting state to decide what material to put before the court.

[270] Indeed, it would be odd if the record of case procedure did not adhere to the principle that it is for a requesting state to decide what it puts up in extradition proceedings, subject to the duty of candour.[290] The idea of the record of case procedure in s 25 was to make things easier for states to comply, not to impose extra obligations on states that elected to use the s 25 procedure.[291]

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286 Extradition Act SC 1999 c 18, s 33(2). The Canadian provisions are set out at [72] of Winkelmann J's judgment in *Dotcom* (HC), above n 262. See also *Dotcom* (CA), above n 263, at [82].

287 This point was also made by the Court of Appeal: *Dotcom* (CA), above n 263, at [86](c).

288 See Criminal Law Reform Committee *Report on Discovery in Criminal Cases* (December 1986) at [38]; Law Commission *Criminal Procedure: Part One Disclosure and Committal* (NZLC R14, 1990) at [35] and [40]; and Ministry of Justice and Department for Courts *Consultation Paper Regarding Preliminary Hearings and Criminal Disclosure* (1997) at [38].

289 See [146] of the reasons of McGrath J.

290 I discuss the duty of candour at [265] above and [293] below.

291 The same point is made by McGrath J at [147] of his judgment. I do agree with the

[271] In light of this conclusion, there is no need to discuss the further submission of Mr Davison which arises out of the seizure of the appellants' computers. For completeness, however, I comment briefly. Mr Davison submitted that the provision of clones of the computer material seized would not suffice. The appellants are in his submission entitled to the United States government's selection of relevant material. The fact that a particular piece of information has been selected and considered relevant by the prosecutors would, in his submission, be a valuable piece of information.

[272] Even if general disclosure had been required, it was never the position in New Zealand that the prosecution was required to identify, in the material seized from the accused, those aspects of the material it considered most relevant to the charges faced. As was said by Fisher J in *Downey v District Court*,[292] the object of disclosure is not to save the defence work. He said:[293]

> The object of disclosure … goes no further than to fairly inform the defence as to facts and evidence which could logically be relevant to the conduct of the defence at the preliminary hearing. … Documents which merely summarise, collate, analyse, comment upon or express legal opinions about, facts and evidence disclosed elsewhere are not themselves discoverable because they do not add anything relevant to the information already provided. … Internal prosecution comments, summaries and collations might save the defence some work but that is not the object of disclosure.

Other provisions and legislation relied on by the appellants

[273] With the exception of the reliance on art 12 of the Treaty on Extradition between New Zealand and the United States of America (the Treaty),[294] I agree with the analysis in the judgments of McGrath and William Young JJ on the issue of the power to order general criminal disclosure on the basis of the Official Information

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Chief Justice, however, that s 25 does not affect the purpose and function of the eligibility hearing: see [24] of Elias CJ's reasons.

292 *Downey v District Court* HC AK M271/95, 29 June 1995.

293 At 6, quoted with approval by the Court of Appeal in *R v Taylor* CA 130-02, 17 December 2003 at [25].

294 Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970), discussed at [164]–[167] of McGrath J's reasons and [223](f) of the reasons of William Young J.

Act 1982, the Criminal Disclosure Act 2008, ss 22(1)(a) and 102(1)(e)(i) of the Extradition Act[295] or an inherent power of the District Court.[296]

[274] I also agree with McGrath J that the appellants would, under the principles stated in *Commissioner of Police v Ombudsman*,[297] have access to relevant information held by New Zealand authorities. As McGrath J notes, however, the Official Information Act does not apply to information held by a foreign state and the common law does not support general disclosure of all inculpatory material held by the foreign state for the purpose of the stage of the proceedings relating to extradition.[298]

[275] McGrath J also discusses s 25 of the Extradition Act.[299] It follows from my discussion to date that I agree with his analysis of that section. I also agree with his summary of the position on the issue of general disclosure.[300]

What is the effect of the above discussion?

[276] The above discussion is sufficient to dispose of the appeal, given that it was only general disclosure that was sought. However, in fairness to the appellants, I now discuss whether those facing extradition are entitled to more limited further information, even though they are not entitled to general disclosure. If they are, I discuss the possible content of that further material, whether it is necessary that it be provided in this case and whether an order to produce it can be made by the District Court. Before discussing those questions, I examine the role of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

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295 The relevant text of s 102 is set out in [127] of McGrath J's reasons. I do, however, agree with the Chief Justice that absence of regulation under s 102 does not mean that a disclosure power is unavailable absent regulation. It simply means that existing practices and procedures subsist: see [69]–[70] of the Chief Justice's judgment.

296 See [125]–[131] of McGrath J's reasons, and [214]–[229] of William Young J's judgment. McGrath J also discusses the Criminal Disclosure Act at [162]–[168]. In these paragraphs McGrath J concludes that the Criminal Disclosure Act is not incorporated by reference through s 22(1)(a) of the Act and that s 102(1)(e)(i) does not presuppose an existing power to order disclosure. I agree that this is the case but I do not agree that this conclusion is supported by s 11 of the Extradition Act and by art 12 of the Treaty.

297 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

298 See [122] of McGrath J's judgment. See also [231] of William Young J's judgment.

299 See [132]–[147] of McGrath J's judgment. Section 25 is set out in full at [98] of McGrath J's reasons.

300 At [153] of the judgment delivered by McGrath J.

Bill of Rights

[277] Sections 24 and 25 of the Bill of Rights apply to those who are charged with an offence.[301] In this case, the appellants have been charged in the United States with certain offences. It follows that these sections must apply to any actions or omissions taken by New Zealand actors who are covered by s 3 of the Bill of Rights (including the judiciary) in relation to those criminal charges, subject to any necessary modifications related to the nature of extradition proceedings.[302]

[278] This conclusion is in line with the view of Wilson J in the minority in the Canadian case of *Canada v Schmidt*[303] and of Baragwanath J in *Poon v Commissioner of Police*.[304] In *Schmidt*, Lamer J also considered that, as extradition proceedings are akin to a preliminary hearing, the same protection to a person resisting extradition should be afforded as in any domestic context.[305]

[279] The content of any rights under ss 24 and 25 of the Bill of Rights will depend on the nature of the role of the New Zealand actors in extradition proceedings.[306] A number of matters are relevant in the context of arguments about disclosure:

(a) At issue here is the role of the courts in determining eligibility for surrender under s 24 of the Extradition Act. In that regard, the court must be satisfied that the evidence produced or given at the hearing would reach the standards of a prima facie case and it must also decide whether there are mandatory or discretionary factors that mean extradition is not appropriate. Sections 24 and 25 will apply only to that role.

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301 Sections 24 and 25 of the Bill of Rights are set out at [106] of McGrath J's judgment.

302 On this point, I agree with the reasons given by the Chief Justice at [51] of her judgment. As to necessary modifications, as McGrath J points out at [105], the appellants, for example, accept that there is no right to a jury trial at this stage of the proceedings.

303 *Canada v Schmidt*, above n 280.

304 *Poon v Commissioner of Police* [2000] NZAR 70 (HC). It is also consistent with the cases discussed at [84] of the Chief Justice's judgment. See also *Schlaks v Gordon* HC Auckland M636/98, 15 May 1998; and *X v Refugee Status Appeal Authority* [2006] NZAR 533 (HC), discussed in *Dotcom* (HC), above n 262, at [49]–[52].

305 *Canada v Schmidt*, above n 280, at 530. See also Lamer J's views in *Argentina v Mellino* [1987] 1 SCR 536 at 559.

306 See also [120] of McGrath J's judgment.

(b) It is for the requesting state to decide what evidence it puts before the requested state, subject to the duty of good faith and candour.

(c) Extradition is an international procedure. This means that issues of comity and consistency throughout the international community arise. It also engages sovereign states in their capacity as states and as prosecuting authorities in their own territories.

(d) Subject to the demands of fairness, the extradition hearing is intended to be an expedited process in order both to ensure prompt compliance with New Zealand's international obligations and to avoid undue delay in the trial overseas of the requested person (if extradition is granted).[307]

[280] In light of those factors, I do not necessarily disagree with the result reached in the cases discussed by McGrath J.[308] I do, however, note that the Canadian cases referred to were decided before *United States of America v Ferras*[309] which held, contrary to the very limited test for extradition under the earlier decision of *United States of America v Shephard*,[310] that there must be a meaningful judicial process in extradition cases.[311] In *Ferras*, the Supreme Court said that, while the ultimate assessment of reliability is left for the trial, the extradition judge must look at the whole of the evidence and determine whether it discloses a case on which a jury could convict.[312] In this regard, if the evidence is so defective or apparently

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307 See *United States of America v Dynar*, above n 280, at [122]; and *United States of America v Kwok* 2001 SCC 18, [2001] 1 SCR 532 at [109]. On the right to be tried without undue delay see art 14(3)(c) of the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) and s 25(b) of the Bill of Rights.

308 At [109]–[113] and [185]–[189] of McGrath J's reasons.

309 *United States of America v Ferras*, above n 280.

310 *United States of America v Shephard* [1977] 2 SCR 1067. In *Shephard*, it was decided that it was beyond the role of an extradition judge to consider the credibility of the evidence put forward to establish a prima facie case. An extradition judge was not entitled to find that a prima facie case was not made out on the basis that, in his or her opinion, the evidence was "manifestly unreliable": at 1087.

311 *United States of America v Ferras*, above n 280, at [19]–[22]. These two decisions, and subsequent case law, are more fully explained in *Dotcom* (CA), above n 263, at [66]–[79].

312 At [46].

unreliable that the judge concludes it would be dangerous or unsafe to convict, then it would not be sufficient to meet the test for committal.[313]

[281] Finally on this topic, I comment that, in this case, it is unlikely that ss 24 and 25 add anything to the s 27 rights that both McGrath and William Young JJ accept apply to the extradition hearing.[314] I agree with their analysis of natural justice requirement and the applicability of s 27 and in particular with the discussion in McGrath J's judgment.[315] My disagreement with their judgments on the application of ss 24 and 25 therefore has little practical significance for the appellants. The application of ss 24 and 25 may, however, be of more relevance for other aspects of the extradition process.[316]

Entitlement to further information?

[282] While I have posed the question as being one of disclosure because that is the way it was argued before us, I prefer to see the appeal as concerning the requirements of the Extradition Act, interpreted in light of the Bill of Rights (to the extent that it is applicable), the common law and any related legislation referred to in the Extradition Act, such as the Summary Proceedings Act 1957.

[283] Under s 24(2)(d)(i) of the Extradition Act, the court must be satisfied that the evidence produced would justify the person's trial if the conduct constituting the offence had occurred in New Zealand.[317] This means that the court must be satisfied that there is a prima facie case against the appellants.[318] Section 22(1)(a) provides that, in making this determination, the court has the same jurisdiction and powers as if the proceedings were a committal hearing in criminal proceedings for an offence alleged to have been committed in New Zealand.[319] Section 22(1)(b) provides that certain provisions of other legislation applies to the proceedings.

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313 At [54].

314 See [118]–[120] of McGrath J's judgment, and [212] of William Young J's reasons. The relevant part of s 27 is set out at [117] of McGrath J's judgment.

315 See [118]–[120] of McGrath J's judgment. McGrath J discusses s 27 further at [183]–[193] of his judgment. I agree that no question of justified limitation of the s 27 right arises for the reasons he gives at [191]–[192].

316 See for example the matters discussed at [52] of the Chief Justice's reasons.

317 The relevant part of s 24 is set out at [94] in the judgment of McGrath J.

318 As explained by McGrath J in [95]–[96] of his reasons.

319 Section 22 is set out at [97] of McGrath J's reasons.

[284] These provisions, reinforced by the Bill of Rights, mean that a person facing extradition has the right to contest the existence of a prima facie case and that the court must make a meaningful judicial assessment in that regard.[320] It follows from this conclusion that the person is entitled to a fair hearing. If it is necessary for a person to have further information in order to contest the existence of a prima facie case, then the hearing could not be conducted fairly if that further information is not provided.

[285] This largely accords with the views expressed in McGrath J's judgment,[321] although the reasons for my conclusions differ from his. I rely on the provisions of the Extradition Act, informed by the Bill of Rights, rather than the English decisions referred to by McGrath J. I have already indicated that I disagree with his analysis of, and reliance on, art 12 of the Treaty. I would also prefer not to describe the circumstances where further information can be sought as "exceptional", although I agree that occasions where further information is necessary would not arise in most cases because of the factors discussed in the next section of this judgment.

[286] The conclusion that a person facing extradition should have access to all the information that is required to contest the prima facie case fairly is backed up by the policy behind the Extradition Act, as set out in the explanatory note to the Bill. In that explanatory note, it was stated that the modern law of extradition is founded on a number of principles:[322]

> - It is in the interests of all states that crimes acknowledged to be such do not go unpunished.
>
> - It is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.
>
> - It is also necessary to ensure that the basic human rights of the person sought are adequately protected. There is considerable hardship if an innocent person is sent to stand trial in another state, particularly when the requesting state is not that person's usual state of residence.

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320 As noted by McGrath J at [181] and [184] of his judgment.
321 At [177]–[179] of McGrath J's reasons.
322 Extradition Bill 1998 (146-1) (explanatory note) at ii.

[287] The Bill itself was designed to allow expeditious surrender but at the same time set the appropriate balance between the competing considerations in extradition cases. The explanatory note said:[323]

> While the Bill aims to ensure that alleged offenders can be surrendered expeditiously, it also sets a "bottom line" as to the circumstances in which extradition may occur. This helps to protect the alleged offender's basic human rights, given that the person is threatened with removal from the safety of a state where he or she has committed no offence.

[288] The explanatory note thus emphasises the purpose of the Extradition Act as being to ensure that foreign states are assisted in bringing those properly accused of crimes to trial but in a manner that protects the human rights of those facing extradition.

Content of any further information?

[289] Whether and what further information is required in order to ensure that a person facing extradition is able to participate fairly in the extradition hearing must be assessed with regard to the following matters. The first is the principle that, subject to the duty of candour and good faith, it is for the requesting state to decide what material it puts before the court. It is thus only the evidence put forward by the requesting state that the person must be able to challenge. It follows that the provision of further inculpatory material that may be relied on at a later stage of the process cannot be necessary for a challenge to be fairly made.[324]

[290] Second, where the record of the case procedure is used, as it is here, whether further information is necessary must also be assessed in light of s 25. I have already discussed the text, the policy behind and the legislative history of s 25 and concluded that there is no requirement under that section to provide copies of all of the documents summarised. Nor does the section require the general disclosure of all relevant documents.[325] The requesting state still retains a choice, subject to the duty of candour, as to the documents it tenders. I do, however, accept that there may be

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323 At iii.

324 This is consistent with my earlier conclusion in relation to the appellants' submission that they are entitled to disclosure of all material on which the requesting state may rely at trial: see [266]–[270] above.

325 See [266]–[270] above.

circumstances (likely to be rare), where a fair opportunity to challenge whether there is a prima facie case would not be accorded without the provision of copies of one or more of the documents summarised in the record of the case or in the absence of certain other documents or material held by the requesting state.

[291] Third, the purpose of the extradition hearing is relevant. In *Downey v District Court*, Fisher J held, in the domestic context, that there was power to order disclosure at the committal stage of the hearing, but only to the extent that this was required for a hearing to be fairly conducted. The existence of the power and its exercise depended on the purpose of preliminary hearings.[326] After discussing the purpose and extent of committal hearings, Fisher J concluded that the purpose of a preliminary hearing would be served by the disclosure of documents relevant to the creditableness of prosecution witnesses, potential defences and anything else that might make the likelihood of a guilty verdict so slight that the defendant should not be put on trial.[327]

[292] I do not wish to comment on Fisher J's analysis of the purpose of a preliminary hearing and the limited classes of documents that may be required to contest the existence of a prima facie case as the issue was not argued before us in that form, except to say that it follows from the reasoning in *Downey* that the narrow purpose of the extradition hearing necessarily limits the further information that might be required to enable the person facing extradition to participate fully and fairly in the extradition hearing. It must be borne in mind that the only decision to be made by the court is whether the requesting state has established a prima facie case and whether the person is otherwise eligible for surrender. Any further information sought must be necessary to enable a challenge to the existence of a prima facie case or otherwise directed to the decision the court has to make.[328]

[293] Finally, the requesting state is subject to the duty of candour and the New Zealand authorities assisting the requesting state are under a duty to make sure, as far

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326 *Downey v District Court*, above n 292, at 2.

327 At 4.

328 *United States of America v Dynar*, above n 280, at [128]–[129]; and *United States of America v Kwok*, above n 307, at [99]–[100]. See also *United States of America v Michaelov* 2010 ONCA 819.

as they can, that the duty of candour has been complied with. This would also limit the further information that may be needed to conduct the hearing fairly. The type of information outlined by Fisher J in *Downey*, for example, should already have been supplied by the requesting state under the duty of candour. There may, however, be circumstances where there has been a breach or misunderstanding of that duty where further documents may be needed to contest the extradition fairly.[329]

[294] In light of the above discussion, if further information is sought by a person facing extradition, one would expect there to be some particularity in any request and an identification of the reasons why further information is necessary in order for the person fairly to participate in the extradition hearing. For example, if a copy of a document summarised in a record of the case is sought, then one would expect an explanation of why the summary does not suffice to enable the person facing extradition to participate fairly in the hearing.

[295] There remains the question of whether there should be any threshold before further information can be requested. In the English cases discussed by McGrath J, relating to possible abuse of process by not complying with the duty of candour, it is said to be for the person seeking disclosure to point to evidence that there may have been a breach or misunderstanding of the duty.[330]

[296] In the Canadian cases, an "air of reality" is needed before further information can be sought in relation to an issue to be determined at an extradition hearing. The "air of reality" test was originally applied by the Supreme Court of Canada in the context of allegations of Charter violation,[331] but it has since been applied by intermediate appellate courts in relation to disclosure requests for the purpose of challenging the prima facie case put forward by the requesting state.[332] An "air of reality" exists where there is some realistic possibility that the allegations – of

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329 I do not necessarily rule out the possibility that there may be exceptional cases where the duty of candour, as expressed in this judgment, would nevertheless risk depriving a person facing extradition of the right to a fair hearing. If information over and above what is required under the duty of candour is necessary, then that should be provided.

330 At [170]–[175] of McGrath J's reasons.

331 *United States of America v Dynar*, above n 280, at [141]; and *United States of America v Kwok*, above n 307, at [99]–[100].

332 See *R v Larosa* (2002) 166 CCC (3d) 449 (ONCA); *Scarpitti v United States of America* 2007 BCCA 498; *United States of America v Rosenau* 2010 BCCA 461, where the developments in this area are described at [24]–[27]; and *United States of America v Michaelov*, above n 328.

unreliability or inaccuracy, for example – can be substantiated if the orders requested are made.[333]

[297] An example of the "air of reality" test in practice is *United States of America v Lopez-Turatiz*,[334] where the requested person sought disclosure of the notes, reports and qualifications of expert witnesses whose anticipated testimony had been included in the record of the case and supplementary record. The British Columbia Court of Appeal decided that the extradition judge was right to refuse disclosure. The requested person had not demonstrated any "air of reality" to his challenge to the accuracy and reliability of the expert witnesses, as would support the request for the additional material.[335]

[298] In another case, *United States of America v Michaelov*,[336] the requested person sought disclosure of thousands of tax forms in order to challenge the allegation that he had signed "most of" the forms, which underreported the sales of his business. Nine forms had already been provided and the requested person had acknowledged that his signature was on two of them. The only basis provided for the allegation that the requested person had not signed any of the other forms was his own affidavit evidence. The Ontario Court of Appeal decided that the extradition judge was entitled to conclude that the affidavits did not confer any air of reality on the claim for disclosure.[337]

[299] I accept that some threshold is required before further information may be considered necessary, so that irresponsible allegations cannot be used to initiate fishing expeditions that would compromise the expeditiousness of the extradition proceedings.[338] But, at the same time, the test should not be so restrictive that it is likely to result in the creation of the "catch 22" position that concerned Winkelmann J, whereby without disclosure the threshold is unlikely to be met.[339]

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333 *R v Larosa*, above n 332, at [78].
334 *United States of America v Lopez-Turatiz* 2014 BCCA 39.
335 At [18].
336 *United States of America v Michaelov*, above n 328.
337 At [59].
338 *R v Larosa*, above n 332, at [74] and [79].
339 *Dotcom* (HC), above n 262, at [117]. In Winkelmann J's view the Canadian cases showed that any evidentiary threshold was unlikely to be met. This view must, however, be evaluated in the context of her decision that general disclosure was required.

[300] I prefer the Canadian formulation of the requirement, which is less restrictive than the approach applied in the English cases, as suitably taking account of the comity of nations, the desirability of ensuring extradition proceedings are dealt with expeditiously and the nature of the extradition hearing but also the rights of the person facing extradition.[340]

[301] Finally, I note that there would be nothing to stop a judge concerned about a possible "catch 22" position from reminding counsel acting of the duty of candour and the requirement of New Zealand counsel to use their best endeavours to ensure that it is fulfilled.[341]

Is there a necessity for further information in this case?

[302] In this case, the request was for general disclosure. The appellants do assert that they will be unable to participate in the hearing fully, fairly and properly but this was argued at a level of principle, rather than by identifying the respects in which they would be affected by the lack of particular information. In particular, apart from assertions that the best way of summarising a document is to provide a copy of it, the appellants have not identified any prejudice arising from the fact that particular documents are summarised and that copies of the documents are not provided. Nor have they identified, with the exception of one matter discussed below, any other particular documents or classes of documents, the absence of which would inhibit their ability to participate in the hearing.

[303] Whether further information might be required to allow a fair hearing has to be evaluated against the background of the principles identified in the previous section and with regard to the circumstances of the particular case and the type of evidence involved. In this case, the allegations depend on an interpretation of the appellants' business model and the state of the appellants' alleged knowledge of and financial benefit from copyright infringement.[342] In this context, it is difficult to conceive of possible exculpatory evidence from third parties that could serve to

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340 The need to balance these principles was identified in the explanatory note to the Extradition Bill: see [286] above.

341 See [264] above.

342 See a brief description at [90] and [91] of McGrath J's judgment.

challenge the existence of a prima facie case. It was not in fact suggested by the appellants that there may be such evidence held by the United States authorities.

[304] Counsel for the appellants did suggest that there are exculpatory emails sent by the appellants that have not been referred to in the record of the case. It is true that the duty of candour would require the requesting state to put forward material to meet that duty, even if the evidence came from material seized from the accused. However, where the person facing extradition has full access to the material involved, that person would not be prejudiced in any hearing. In this instance, the appellants by and large have full access to their email accounts and so, if there are exculpatory emails, then they will be able to put these before the District Court.

[305] In any event, there were emails and communications outlined in the record of the case that could, on one interpretation, be considered exculpatory. The United States, however, maintains that such communications were effectively smokescreens. I make no comment on this assertion as it will no doubt be fully traversed in the context of the hearing as to whether there is a prima facie case.

[306] It follows that I agree with McGrath J, for the reasons he gives, that, because of the nature of the case against them and their possession of information on their own personal affairs, the appellants do not appear to be prejudiced in their conduct of the hearing by any lack of access to further information.[343]

Is there power to order further material to be provided?

[307] Given the conclusions reached above, it is not strictly necessary to deal with the issue of whether the District Court has the power to order that further information be provided in a case where that is necessary to ensure a fair hearing. I do so because I disagree with the views expressed in the judgments of McGrath and William Young JJ on this point.

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[343] At [161] and [198] of McGrath J's reasons.

[308] In this case, the United States is a party to the proceedings.[344] The principle usually is that, if a foreign government decides to litigate, then it is required to comply with the rules of court (and any legislation governing the proceedings) in the foreign jurisdiction.[345] There have been comments in the Canadian context suggesting that the position is different in relation to extradition cases because of issues of international comity.[346]

[309] Even if that is the case, however, concerns about international comity cannot override the need for the New Zealand courts to ensure that there is a fair hearing in New Zealand with regard to the matters with which New Zealand is concerned in the extradition hearing.[347] It seems to me to be axiomatic that the District Court must have the inherent power to ensure that there is a fair hearing.[348] Indeed, there is a statutory acknowledgment of that position in s 22(1)(a) of the Extradition Act, which gives the courts the same jurisdiction and powers as if the proceedings were a committal hearing.[349] It is also reinforced by the Bill of Rights and common law requirements for natural justice.

[310] Such inherent powers include the making of timetable orders in relation to disclosure to be provided,[350] but must also extend to the power to order a requesting state to disclose information where that is necessary in order to ensure the fairness of the extradition hearing, as determined according to the principles already explained.[351]

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344 I agree with the discussion in McGrath J's judgment at [100]–[103].

345 See *Guaranty Trust Co v United States* 304 US 126 (1938) at 134 where the Supreme Court, in regard to litigation by a foreign state, said: "By voluntarily appearing in the rôle of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought". An example of the application of this principle in the context of discovery is *Department of Economic Development v Arthur Andersen & Co* 139 FRD 295 (SD NY 1991) at 298.

346 See, for example, *Schreiber v Canada* 2002 SCC 62, [2002] 3 SCR 269 at [27].

347 Remembering that the only concern relevant to this appeal is whether or not there is a prima facie case.

348 I agree in this regard with the Chief Justice's discussion at [71]–[76] of her judgment.

349 The relevant part of s 22 is set out at [97] of McGrath J's reasons. It does not seem to be contested by the United States that it is obliged to provide the material required by the Extradition Act. It is merely said that the United States authorities are generally prohibited by ethical and procedural rules from providing information beyond that which is necessary for extradition: Affidavit of Jay V Prabhu in regard to Disclosure (26 June 2012) at [10].

350 In this regard I agree with [235]–[237] of William Young J's reasons. I also agree with [123] of McGrath J's reasons.

351 McGrath J at [181]–[182] and William Young J at [239] suggest that an extradition judge could request that further disclosure be provided where the tests for when further disclosure might be

[311] I do not consider that s 11 of the Extradition Act changes that position. Indeed, the terms of the relevant treaty in this case reinforce it. I refer in particular to arts 4 and 9, which make it clear that the determination of eligibility for surrender is determined in accordance with the law of the requested state, in this case New Zealand.[352] If New Zealand law requires further disclosure in any particular case, then it seems to me that arts 4 and 9 of the Treaty would require that it be provided.[353]

[312] The existence of art 12 is to me irrelevant.[354] That article does provide a route whereby further information can be obtained but there seems no reason why it would override New Zealand law and arts 4 and 9 of the Treaty. Further, it would be very odd if the position of a person facing extradition might be worse in cases where an equivalent of art 12 is not present in an extradition treaty or where there is no extradition treaty at all.

[313] I also note that, while the position in England and Wales is that there is no power to order disclosure, that is not the position in Canada in cases where there is an "air of reality" and disclosure is necessary in order for the extradition hearing to be conducted fairly (while recognising the relatively limited role of that hearing).[355]

[314] Again, I prefer the Canadian approach. Although the Canadian approach appears to be founded on a statutory power,[356] the power of a New Zealand District Court judge to order disclosure for the purpose of an extradition hearing also has a statutory basis in s 22(1)(a) of the Extradition Act and the Bill of Rights. Even were there no statutory basis, however, the right to a fair hearing is fundamental in

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necessary are made out. They then suggest that, if that further information is not provided, a prima facie case may not be made out and the extradition request may have to be refused. See at [182] of McGrath J's reasons and at [239] of William Young J's reasons. This would, however, be an extreme remedy and it is much simpler if orders for the provision of further information are able to be made. It also means that the courts have the ability to ensure that there is a fair hearing.

352 The text of these articles is set out at [166] of the reasons of McGrath J.

353 This conclusion accords with that of the Chief Justice and I agree with her analysis contained at [30]–[37] and [39]. I do not, however, agree that it is the Minister (a decision maker) that is the party. I, therefore, do not agree with [38] of her judgment. See above at [308].

354 In this respect, as I have indicated, I disagree with the reasons expressed by McGrath J at [164]–[167] of his judgment, and also with [223](f) of William Young J's reasons.

355 *United States of America v Kwok*, above n 307, at [100]; and *R v Larosa*, above n 332, at [74].

356 See *R v Larosa*, above n 332, at [74].

New Zealand and the courts must have all powers needed to ensure that fundamental right is accorded to persons facing extradition.

Conclusion

[315] In summary, I conclude that:

(a) there is no right of general disclosure in extradition proceedings;

(b) requesting states can, subject to the duty of candour, decide what material to put before the court deciding on eligibility to surrender;

(c) under the duty of candour, requesting states must disclose any evidence that would render worthless, undermine or seriously detract from the evidence upon which they rely, whether on its own or in combination with material that is in the requesting state's possession or is drawn to its attention by the requested person or the court;

(d) the New Zealand authorities assisting or acting on behalf of requesting states must stress the importance of that duty to requesting states and use their best endeavours to see that it is complied with;

(e) there is no need, where the record of case procedure is used, to provide copies of all documents summarised in the record;

(f) equally, s 25(2)(b) of the Extradition Act does not require the production of all documents or other material relevant to the trial that will be conducted in the requesting state, should the extradition request ultimately be granted;

(g) it may, however, be necessary for a person facing extradition to have particular further documents or material provided in order to contest the hearing fairly and fully;

(h) whether further documents or other material is necessary must be judged in light of:

(i) the narrow purpose and scope of the extradition hearing:

(ii) the existence of the duty of candour;

(iii) the function of the record of the case procedure (where that is used);

(iv) the principle that it is for the requesting state to decide (subject to the duty of candour) what it puts before the extradition court; and

(v) the facts and issues of the particular case.

(i) any application for the provision of further material must be made with some particularity and contain an explanation why the further documents or other material may be necessary to ensure a fair hearing;

(j) there must be an air of reality about any request for further documents or other material; and

(k) the courts have the power to order a requesting state to provide such further documents or other material as is necessary to ensure the fairness of the extradition hearing.

[316] In this case, nothing has been put forward to suggest that the present appellants need any further material provided to them in order to have a fair hearing. This means that I agree with McGrath, William Young and Blanchard JJ that the appeal should be dismissed. I also agree that costs should be reserved.

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