SUPREME COURT OF CANADA

CITATION: United States of America *v.* Ferras; United States of America *v.* Latty,
2006 SCC 33
[2006] S.C.J. No. 33

DATE: 20060721
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BETWEEN:

Shane Tyrone Ferras
Appellant
and
United States of America, Her Majesty the Queen and Irwin Cotler, Minister of Justice
Respondents

AND BETWEEN:

Leroy Latty and Lynval Wright
Appellants
and
United States of America, Minister of Justice and Attorney General of Canada
Respondents

CORAM: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 94) — McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

* Major J. took no part in the judgment.

united states of america *v.* ferras

Shane Tyrone Ferras *Appellant*

v.

United States of America, Her Majesty the Queen and Irwin Cotler, Minister of Justice *Respondents*

and

Leroy Latty and Lynval Wright *Appellants*

v.

United States of America, Minister of Justice and Attorney General of Canada *Respondents*

Indexed as: United States of America *v.* Ferras; United States of America *v.* Latty

Neutral citation: 2006 SCC 33.

File Nos.: 30211, 30295.

2005: October 17; 2006: July 21.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Liberty and security of the person — Fundamental Justice — Extradition — Committal hearings — Whether provisions of extradition legislation relating to admission of evidence at a committal hearing infringe principles of fundamental justice applicable to extradition — Canadian Charter of Rights and Freedoms, s. 7 — Extradition Act, S.C. 1999, c. 18, ss. 29(1), 32(1)(a), (b), 33.

Extradition — Committal hearings — Evidence — Powers of extradition judge — Whether extradition judge can weigh evidence and refuse to extradite if evidence unreliable or unavailable for trial — Sufficiency of evidence for extradition purposes — Canadian Charter of Rights and Freedoms, s. 7 — Extradition Act, S.C. 1999, c. 18, s. 29(1).

Constitutional law — Charter of Rights — Mobility — Right to remain in Canada — Extradition — Whether provisions of extradition legislation relating to evidence at committal hearings infringe right of Canadian citizens to remain in Canada — Canadian Charter of Rights and Freedoms, s. 6 — Extradition Act, S.C. 1999, c. 18, ss. 32(1)(a), 33(3).

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*Major J. took no part in the judgment.

Constitutional law — Charter of Rights — Fundamental justice — Extradition — Surrender — Whether surrender of accused to US, where they could receive sentences of 10 years to life without parole if convicted, "shocks conscience" of Canadians — Whether Minister of Justice's refusal to seek assurances for enhanced credit for time served in pre-trial custody offends fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

The US sought the extradition of the accused under the record of the case method provided for in ss. 32(1)(*a*) and 33 of the *Extradition Act*. The records of the case submitted at their committal hearings consist of unsworn statements from law enforcement agents summarizing the evidence expected to be presented at each trial. The US certified that the evidence is available for trial and is sufficient to justify prosecution under the law of the US. The accused alleged that ss. 32(1)(*a*) and 33 infringe s. 7 of the *Canadian Charter of Rights and Freedoms* because they allow for the possibility that a person might be extradited on inherently unreliable evidence. In both cases, the extradition judges rejected the constitutional objection and committed the accused for extradition. The Court of Appeal upheld the decisions.

Held: The appeals should be dismissed and the accused should be committed to extradition.

The provisions of the *Extradition Act* governing the admission of evidence at a committal hearing, are consistent with the guarantee in s. 7 of the *Charter* that no one may be deprived of liberty except in accordance with the principles of fundamental

justice. Section 7 does not guarantee a particular type of process for all situations where a person's liberty is affected; it guarantees a fair process, having regard to the nature of the proceedings. The principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition receive a meaningful judicial determination of whether the case for extradition prescribed in s. 29(1) of the Act has been established — that is, whether there is sufficient evidence to permit a properly instructed jury to convict. This requires a meaningful judicial hearing before an independent, impartial judge and a judicial decision based on an assessment of the evidence and the law. A person cannot be extradited upon demand, suspicion or surmise. Here, the *Extradition Act* offers two protections to the person whose liberty is at risk: first, admissibility provisions aimed at establishing threshold reliability; and second, a requirement that the judge determine the sufficiency of the evidence to establish the legal requirement for extradition. These dual protections, considered together, offer a fair process that conforms to the fundamental principles of justice. [1] [14] [17] [26] [34]

Under s. 29(1), the extradition judge is required to determine (1) what evidence is admissible under the Act, and whether the admissible evidence is sufficient to justify committal. The inquiry into admissibility of the evidence depends on the nature of the evidence. Under the record of the case method, the inquiry is whether the certification requirements of the Act have been met. Under the treaty method, the inquiry is whether the evidence meets the requirements of the relevant extradition treaty. The inquiry into the sufficiency of the evidence involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada. While pre-*Charter* jurisprudence held that an extradition judge may not refuse to order extradition where there is some evidence of every element of the parallel

Canadian crime, even if the judge believes that the evidence from the foreign state is unreliable or otherwise inadequate, a fair extradition hearing that accords with the *Charter* requires that the extradition judge must be able to decline to commit on evidence that is unavailable for trial or manifestly unreliable. Section 29(1) can be interpreted in such way that the extradition judge may provide the factual assessment and judicial process necessary to conform to the *Charter*. Section 29(1) requires the extradition judge to assess whether the admissible evidence shows the justice or rightness of committing a person to extradition. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty such that a case could go to trial in Canada. Because the requirements for committal of s. 29(1) grant the extradition judge a discretion to refuse to extradite on insufficient evidence, such as where the reliability of evidence is successfully impeached or where it is not shown that the evidence is available for trial, ss. 32(1)(*a*) and (*b*) and 33 of the *Extradition Act* do not violate s. 7 of the *Charter*. [36-46] [49-50]

Due to the principles of comity between Canada and the requesting state, certification under the record of the case method raises a presumption that the evidence is reliable. Pursuant to s. 32(1)(*c*), the person sought for extradition may challenge the sufficiency of the case. An extradition judge must look at the whole of the evidence and, if it fails to disclose a case on which a jury could convict or it is so defective that it would be dangerous or unsafe to convict, the test for committal is not met. Under the treaty method, showing that the evidence actually exists and is available for trial is fundamental to extradition. The judge cannot commit for extradition under s. 29(1) unless a *prima facie* case has been made out that evidence exists upon which the person may be tried. Accordingly, where, as in the companion appeals of *Ortega* and *Fiessel*, the requesting state does not certify or otherwise make out a *prima facie* case that the

evidence is available for trial, the case for committal is incomplete and should be dismissed. If the evidence is certified as available, that certification results in a presumption of availability for trial, and the person sought for extradition could challenge the presumption. Lastly, since the extradition judge has the discretion to give no weight to unavailable or unreliable evidence when determining whether committal is justified under s. 29(1), the person sought for extradition need not seek a remedy under s. 24(2) of the *Charter*. However, evidence may be excluded under s. 24(2) for reasons other than the availability and reliability concerns addressed by s. 29(1). [52-60]

The accused were properly committed for extradition. The records submitted by the US against the accused contained sufficient admissible evidence that a reasonable jury, properly instructed, could convict had the conduct occurred in Canada. The certifications by the US in compliance with s. 33(3) make the records presumptively reliable and no evidence discloses any reason to rebut the presumption of reliability. With respect to the surrender to the US, the possibility that two of the accused would receive sentences of 10 years to life without parole in the US does not shock the conscience of Canadians, nor does the Minister of Justice's refusal to seek assurances concerning enhanced credit for pre-sentence custody. [69-70] [75-79] [87] [90]

Section 6(1) of the *Charter* is not engaged at the committal stage of the extradition process, only at the surrender stage. Since the Minister is not required to base a surrender decision on evidence submitted at the committal hearing, s. 6(1) cannot be infringed by ss. 32(1)(*a*) and 33(3) of the Act. [82-83]

Cases Cited

Modified: *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; **referred to:** *United States of America v. Ortega*, 2006 SCC 34, rev'g (2005), 253 D.L.R. (4th) 237, 2005 BCCA 270; *United States of America v. Yang* (2001), 56 O.R. (3d) 52; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Glucksman v. Henkel*, 221 U.S. 508 (1911); *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42; *Bonham's Case* (1610), 8 Co. Rep. 113b, 77 E.R. 646; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *McVey (Re)*, [1992] 3 S.C.R. 475; *R. v. Arcuri*, [2001] 2 S.C.R. 828, 2001 SCC 54; *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19; *United States of America v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18; *United States of America v. Adam* (2003), 174 C.C.C. (3d) 445.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 6, 7, 24(2).

Constitution Act, 1982, s. 52.

Extradition Act, R.S.C. 1985, c. E-23, s. 13.

Extradition Act, S.C. 1999, c. 18, ss. 24(2), 29(1), 32, 33.

18 U.S.C. § 3585(b).

Treaties and Other International Instruments

Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, art. 10.

Magna Carta (1215), clause 39.

Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America, Can. T.S. 2003 No. 11.

Treaty of Extradition between the Government of Canada and the Government of the United Mexican States, Can. T.S. 1990 No. 35, art. VIII.

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Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "justify".

La Forest, Anne Warner. "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002), 28 *Queen's L.J.* 95.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman and Sharpe JJ.A. and McCombs J. (*ad hoc*)) (2004), 237 D.L.R. (4th) 645, 184 O.A.C. 306, 183 C.C.C. (3d) 119, 117 C.R.R. (2d) 183, [2004] O.J. No. 1089 (QL), affirming an order of committal and an order of surrender. Appeal dismissed.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman and Sharpe JJ.A. and McCombs J. (*ad hoc*)) (2004), 237 D.L.R. (4th) 652, 185 O.A.C. 1, 183 C.C.C. (3d) 126, 116 C.R.R. (2d) 368, [2004] O.J. No. 1076 (QL), affirming an order of committal and an order of surrender. Appeal dismissed.

Brian H. Greenspan, for the appellant Ferras.

Edward L. Greenspan, Q.C., and *Vanessa V. Christie*, for the appellants Latty and Wright.

Robert J. Frater and *Janet Henchey*, for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

1. Introduction

1 These appeals (the "*Ferras* appeals"), together with the appeals by Ortega, Shull, Shull and Fiessel (*United States of America v. Ortega*; *United States of America v. Fiessel*, 2006 SCC 34 (the "*Ortega* appeals")), raise the question of whether the provisions of the *Extradition Act*, S.C. 1999, c. 18, for the admission of evidence on a hearing for committal for extradition violate the guarantee in s. 7 of the *Canadian Charter of Rights and Freedoms* that no one may be deprived of liberty except in accordance with the

principles of fundamental justice. I conclude that, properly construed, the provisions of the Act are constitutional and that these appeals should be dismissed.

2 The appellants in the *Ferras* appeals have been ordered extradited to the United States to face charges relating to either alleged frauds (Ferras) or trafficking in cocaine (Latty and Wright). The extradition proceedings against them were brought by the "record of the case" method under ss. 32(1)(*a*) and 33 of the *Extradition Act.* The appellants in the *Ortega* appeals, by contrast, were ordered extradited for alleged fraud offences under the "treaty" method under s. 32(1)(*b*) of the Act, Ortega to Mexico and the Shulls and Fiessel to the United States.

3 The appellants in the *Ferras* appeals argue that the record of the case method does not pass constitutional muster because it allows for the possibility that a person might be extradited on inherently unreliable evidence. More specifically, they argue that the "safeguards" in s. 33 of the Act are inadequate to ensure threshold reliability of evidence in accordance with the principles of fundamental justice as stipulated by s. 7 of the *Charter*.

4 The appellants in the *Ortega* appeals argue that the treaty method does not pass constitutional muster because it does not contain even the safeguards of the "record of the case" method, in particular a requirement that the requesting state certify that the evidence is available for trial.

5 In the *Ferras* appeals, the extradition judges and the Ontario Court of Appeal ((2004), 237 D.L.R. (4^{th}) 645 and (2004), 237 D.L.R. (4^{th}) 652) rejected constitutional objections to ss. 32(1)(*a*), 32(1)(*c*) and 33 of the *Extradition Act*, relying on previous

decisions, most notably *United States of America v. Yang* (2001), 56 O.R. (3d) 52 (C.A.). In the *Ortega* appeals, the extradition judge presiding over Ortega's committal hearing accepted his constitutional objection to s. 32(1)(*b*) and Article VIII(1)(b)(iii) of the *Treaty of Extradition between the Government of Canada and the Government of the United Mexican States*, Can. T.S. 1990 No. 35 ((2004), 237 D.L.R. (4th) 281, 2004 BCSC 210). The extradition judge presiding over Fiessel and the Shulls' committal hearings applied the decision in *Ortega* to exclude evidence submitted by the United States. These decisions were reversed by the British Columbia Court of Appeal, Donald J.A. dissenting ((2005), 253 D.L.R. (4th) 237, 2005 BCCA 270). The appellants in both sets of cases have appealed to this Court, contending that the courts of appeal below erred in rejecting their constitutional challenges to ss. 32(1)(*a*), 32(1)(*b*) and 33.

2. Analysis

2.1 *The Issue*

6 The *Extradition Act* (Appendix A) provides a two-stage process for extradition of a person to face charges in a foreign country. We are not here concerned with extradition to serve a foreign sentence.

7 At the first stage, an extradition judge must examine the request for extradition and supporting material to determine whether sufficient evidence exists to justify committal for trial in Canada. If the extradition judge finds this test met, the case moves to the second stage, where the Minister, in the exercise of his or her discretion, decides whether to order extradition (see *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631). The first stage

is judicial, the second executive. These cases concern the first, judicial stage of the process.

8 Section 29(1) of the *Extradition Act* provides that a "judge shall order the committal of the person into custody to await surrender if ... there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada".

9 The extradition judge's role and the test for committal have been described in a variety of ways, including a "*prima facie*" case, a "sufficient" case, a "good" case, an "adequate" case, a case providing "reasonable grounds" for extradition, and a case "justifying" extradition. But the basic premise has remained constant. A judge cannot order extradition unless there is evidence of conduct that would justify committal for trial in Canada. In *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, this Court said the test for committal for extradition is the same as that employed by a trial judge in deciding whether to withdraw a case from the jury — "whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty" (p. 1080). If such evidence is shown, the person sought can be extradited to face prosecution elsewhere. If not, the judge must refuse extradition.

10 The appellants acknowledge this fundamental safeguard. However, they argue that it is undermined by the *Extradition Act*'s provisions for the admission of evidence on the record of the case and treaty methods, which in their view may require the extradition judge to order committal for extradition on the basis of unreliable or unavailable material. The appellants in the *Ferras* appeals emphasize the lack of guarantees of reliability in the record of the case method prescribed by s. 32(1)(*a*). The appellants in the *Ortega* appeals

focus on the lack of an assurance that the evidence will be available for trial under the treaty method prescribed by s. 32(1)(*b*) of the Act.

11 The argument of the appellants may be summarized as follows. Section 7 of the *Charter* guarantees the "life, liberty and security of the person" of every individual, and the right not to be deprived of them "except in accordance with the principles of fundamental justice". Extradition to face charges in another country constitutes a denial of liberty and security of the person. Therefore a person cannot be extradited except in accordance with the principles of fundamental justice. It is a fundamental principle of justice, they say, that judges must proceed on reliable and available evidence. They say the record of the case and treaty methods of adducing evidence before the extradition judge do not meet this requirement, and therefore violate s. 7 of the *Charter*. This violation, they argue, is not saved by s. 1 of the *Charter* because it is not "demonstrably justified in a free and democratic society".

12 The Crown accepts that extradition constitutes a serious denial of liberty and security of the person. A person is taken from Canada and forcibly removed to another country to stand trial according to that other country's rules. It follows that the principles of fundamental justice must be respected. The Crown takes issue, however, with the assertion that the principles of fundamental justice require that the extradition judge proceed on reliable evidence that is proven to be available for trial. The Crown also suggests that the claims of unreliability and unavailability are overblown and do not reflect the reality of extradition practice.

13 These arguments, at first glance, suggest that the basic issue that divides the parties is whether it is a principle of fundamental justice that only reliable evidence that is

available for trial be placed before the extradition judge. However, the matter is more complex.

14 Section 7 of the *Charter* does not guarantee a particular type of process for all situations where a person's liberty is affected: *R. v. Rodgers*, _2006_ 1 S.C.R. 554, 2006 SCC 15, at para. 47. It guarantees a fair process, having regard to the nature of the proceedings at issue. It follows that the evidentiary provisions of the *Extradition Act* cannot be considered in isolation but must be viewed in the context of the provisions for extradition as a whole. It also follows that the rules of evidence applicable to a criminal trial in Canada do not necessarily apply to the extradition process.

15 Thus, the real issue is whether the provisions of the *Extradition Act*, for the admission of evidence, render the extradition process unfair when considered together with the other provisions of the Act and the nature of extradition proceedings. In other words, do these provisions raise a real risk that a person may be committed for extradition where the evidence does not establish conduct which, had it occurred in Canada, would justify committal for trial: s. 29(1)?

2.2 *Reliability: a Two-Stage Concern*

16 This inquiry into the justification for committal raises two evidentiary concerns: the admissibility of evidence, and the evaluation of evidence to determine whether it establishes the case for committal. Theoretically, these are discrete steps, although in practice the extradition judge may consider them simultaneously. The theoretical distinction becomes important in this case because the appellants' complaints are grounded

in the *admissibility* of evidence, while the answer to their complaints is found in a judge's assessment of the *sufficiency* of evidence to justify committal.

17 In short, the *Extradition Act* offers two protections to the person whose liberty is at risk: first, admissibility provisions aimed at establishing threshold reliability; and second, a requirement that the judge determine the sufficiency of the evidence to establish the legal requirement for extradition. The question is whether these dual protections, considered together, offer a fair process that conforms to the fundamental principles of justice.

18 This brings us to the main inquiry: what constitutes fair process in the extradition context? Or to put it another way, what are the principles of fundamental justice for extradition?

2.3 *Fair Judicial Process in the Extradition Context*

19 Extradition law requires that the "basic demands of justice" be observed: *Canada v. Schmidt*, _1987_ 1 S.C.R. 500, at p. 503. The true principle that emerges from the history of extradition and the test for committal is that a person is not to be extradited without a fair process, having regard to the history, purposes and policies that underlie extradition: see *Kindler v. Canada (Minister of Justice)*, _1991_ 2 S.C.R. 779, at p. 848. Fair process in this context means the requesting state must establish that there are reasonable grounds to conclude that the person sought may have committed the offence. As stated in *Glucksman v. Henkel*, 221 U.S. 508 (1911), at p. 512:

> For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.

Here we find the basic requirements of justice in the extradition context. A person cannot be sent from the country on mere demand or surmise. The case for extradition need not be presented in a particular technical form. But it must be shown that there are reasonable grounds to send the person to trial. A *prima facie* case for conviction must be established through a meaningful judicial process. It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process. The idea is as old as the *Magna Carta* (1215), Clause 39 of which provided: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals, or by the law of the land."

20 It follows that before a person can be extradited, there must be a judicial determination that the requesting state has established a *prima facie* case that the person sought committed the crime alleged and should stand trial for it.

21 These propositions capture not only the history of extradition, but its dual purposes. The first purpose is to foster efficient extradition where such a case is made out, in accordance with Canada's international obligations. This requires a flexible, non-technical approach. The second purpose is to protect an individual in Canada from

deportation in the absence of at least a *prima facie* case that he or she committed the offence alleged, which must also be an offence in Canada: *Schmidt*. The two purposes are complementary. International comity does not require the extradition of a person on demand or surmise. Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes a case sufficient to put the person on trial.

22 The meaningful judicial process just described involves three related requirements: a separate and independent judicial phase; an impartial judge or magistrate; and a fair and meaningful hearing.

23 The need for a separate and independent judicial phase recognizes that extradition involves both executive and judicial acts. The judicial aspect of the process provides a check against state excess by protecting the integrity of the proceedings and the interests of the "named person" in relation to the state process (see *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, discussing the need for a separate and independent judicial role in relation to investigative procedures under the *Anti-terrorism Act*, S.C. 2001, c. 41, which permits compelled statements for investigative purposes under judicial supervision). The judicial and ministerial phases prescribed by the *Extradition Act* reflect this requirement. However, as emphasized in *Application under s. 83.28 of the Criminal Code (Re)*, the judicial phase must be independent both in appearance and in substance. This is also essential for extradition. The judicial phase must not play a supportive or subservient role to the executive. It must provide real protection against extradition in the absence of an adequate case against the person sought.

24 The need for an independent judicial hearing incorporates the right to have one's case heard by a neutral magistrate — a right first articulated by Sir Edward Coke, one of England's most famous lawyers and judges, in *Bonham's Case* (1610), 8 Co. Rep. 113b, 77 E.R. 646, at pp. 657-58. Section 7 of the *Charter*, almost four centuries later, incorporates that principle in stipulating the right not to be deprived of liberty except in accordance with the principles of fundamental justice. A neutral magistrate is an independent and impartial magistrate (see *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, *per* Le Dain J.). The essence of impartiality "lies in the requirement of [a] judge to approach [a] case to be adjudicated with an open mind" (see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45, at para. 58).

25 An independent judicial phase and an impartial judge are elements of the third and ultimate right — the right to a "hearing". The right to a hearing engages procedural guarantees appropriate to the context: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Substantially, it entails, at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law. A judge considers the respective rights of the litigants or parties and makes findings of fact on the basis of evidence and applies the law to those findings. Both facts and law must be considered for a true adjudication. Since *Bonham's Case*, the essence of a judicial hearing has been the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law. It follows that the extradition judge must judicially consider the facts and the law and be satisfied that they justify committal before ordering extradition. The judge must act as a judge, not a rubber stamp.

26 I conclude that the principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition must receive a meaningful judicial

determination of whether the case for extradition prescribed by s. 29(1) of the *Extradition Act* has been established — that is, whether there is sufficient evidence to permit a properly instructed jury to convict. This requires an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence and the law.

2.4 *Do the Provisions of the Extradition Act Comply with the Principles of Fundamental Justice?*

27 The question is whether s. 32(1)(*a*) and (*b*) and s. 33 of the *Extradition Act*, which permit the extradition judge to act on the record of the case or evidence adduced pursuant to a treaty, violate the appellants' constitutional right to a fair judicial hearing when considered together with the judge's duty to determine the case for extradition under s. 29(1).

28 The Act provides that evidence is admissible if it is either properly certified pursuant to s. 33(3) in the case of proceedings on the record of the case or in accordance with the treaty in proceedings under the treaty method of submitting evidence. The evidence may be hearsay, and under the treaties at issue in the *Ortega* appeals, the evidence need not include certification that it is available for trial.

29 The Act recognizes the requirement that evidence put before the extradition judge must possess indicia of threshold reliability. The former Act required either that the evidentiary provisions of the relevant extradition treaty be followed or, in the absence of provisions in a treaty, that the requesting country attest to the reliability and availability of its evidence by affidavits based on first-hand knowledge. The current Act grounds threshold reliability in conformity to treaty, or alternatively, certification by the requesting

state that the evidence either justifies prosecution in the requesting state or was gathered according to the law of that state: s. 33(3)(*a*).

30 "Certification" means the requesting state provides its good word that the evidence meets the requirements set out in s. 33(3). The Act requires that certifications under the record of the case method be made by "a judicial or prosecuting authority of the extradition partner" (s. 33(3)(*a*)). Under the treaty method of seeking extradition, admissibility of evidence is subject to extradition agreements, which also often provide indicia of reliability through some form of certification. The treaties here at issue do in fact provide for the admission of evidence pursuant to a certificate (see Appendix B).

31 The requesting state's certificate is intended to provide a threshold indicator of reliability by reference to the requesting state's standards. If the requesting state permits prosecution on evidence that would be considered unreliable in Canada, or if it does not but nevertheless permits gathering of unreliable evidence, the evidence is admissible in Canada on the extradition hearing. This deferral to the processes and rules of the requesting state is said to be justified by the principle of comity and the ability of Canada to determine who it will accept as extradition partners.

32 While certification may provide a general indication of reliability, given Canada's reliance on the good faith and diligence of its extradition partners, it only indicates that the rules in the requesting state have been complied with, and does not preclude the possibility of error or falsification. Moreover, in the case of extradition under the treaties at issue in the *Ortega* appeals, there is no requirement even to certify the availability of the evidence for trial.

33 The absence of particular indicia of reliability or availability of evidence in itself does not violate the principles of fundamental justice applicable to extradition hearings. No particular form or quality of evidence is required for extradition, which has historically proceeded flexibly and in a spirit of respect and comity for extradition partners. It is thus difficult to contend that the provisions of the Act for the admissibility of evidence, in and of themselves, violate the fundamental norms of justice applicable to extradition.

34 What fundamental justice does require is that the person sought for extradition be accorded an independent and impartial judicial determination on the facts and evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition. This basic requirement must always be respected; a person cannot be extradited upon demand, suspicion or surmise: *Glucksman.* If the combined provisions of the Act reduce the judicial function to "rubber stamping" the submission of the foreign state and forwarding it to the Minister for committal, then s. 7 is violated.

35 The *Extradition Act* states:

> **29.**(1) A judge shall order the committal of the person into custody to await surrender if
>
> > (*a*) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner ....

36 As noted above, this requires the judge to determine two matters: (1) what evidence is admissible under the Act; (2) whether the admissible evidence is sufficient to justify committal.

37 The inquiry into admissibility of the evidence depends on the nature of the evidence. In the *Ferras* appeals, the question is whether the "record of the case" meets the certification requirements of s. 33. If so, it is admissible. In the *Ortega* appeals, the inquiry is whether the evidence meets the requirements of the treaties. Again, if so, it is admissible. The Act is silent on whether the judge has a residual discretion to exclude evidence that is unreliable or dangerous.

38 The inquiry into sufficiency of the evidence to commit for extradition involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada: s. 29(1). Evidence that would justify committal in Canada requires at least some evidence on every element of the parallel Canadian crime — the double criminality requirement. The judge's inquiry is focused on "conduct" — whether the acts disclosed in the admissible evidence are criminal in Canada (see *McVey (Re)*, [1992] 3 S.C.R. 475, at p. 526).

39 On current jurisprudence, both inquiries appear to leave little or no room for the judge to evaluate the evidence from the foreign state and decline to extradite if the judge finds it unreliable or otherwise inadequate. This was the view taken by the majority of this Court in *Shephard*. At issue was whether an extradition judge could refuse to order committal for extradition where there was some evidence on every element of the offence, but the judge was nevertheless of the view that the evidence was so weak that reasonable grounds for extradition had not been made out and that it would be dangerous to commit for extradition. Ritchie J., for a five to four majority, stated that whether evidence is "manifestly unreliable" is not the test for removing evidence from a jury (p. 1087). Rejecting the test of the extradition judge and the dissenting minority, the majority in

Shephard held that an extradition judge has no discretion to reject evidence on the ground that it is so dubious as to be dangerous and must commit if there is any evidence on all the necessary elements of the offence. *Shephard* was decided before the *Charter*. It has never been overruled or altered, except to permit a judge to engage in limited weighing of circumstantial evidence to ensure that inferences from the evidence are reasonably supportable to establish some evidence on all the required elements of the offence (see *R. v. Arcuri*, [2001] 2 S.C.R. 828, 2001 SCC 54).

40 On this view of the law, the combined effect of the relevant provisions (ss. 29, 32 and 33 of the Act) may be to deprive the person sought of the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition. If the extradition judge possesses neither the ability to declare unreliable evidence inadmissible nor to weigh and consider the sufficiency of the evidence, committal for extradition could occur in circumstances where committal for trial in Canada would not be justified. I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1). Yet, under the current state of the law in *Shephard*, it appears that the judge is denied this possibility. Similarly, I take it as axiomatic that a person could not be committed to trial for an offence in Canada if the evidence put against the person is not available for trial. As Donald J.A., dissenting in *Ortega* (B.C.C.A.) stated, at para. 51:

> If evidence is not available for trial it should not be used as a basis for committal. The concern goes well beyond modalities and rules of evidence, it goes to the heart of the question for the judge: whether there is enough evidence to put the requested person on trial.

Yet on the majority view in *Shephard*, committal may be ordered in the absence of certification that the evidence is available for trial. This raises particular concerns in an extradition context because the committal becomes the final judicial determination that sends the subject out of the country.

41 This raises the possibility that, notwithstanding the efforts of Parliament and the Executive to provide guarantees of reliability in the *Extradition Act* and the treaties Canada enters into with other states, cases may arise where a judge would have no choice but to commit a person for extradition notwithstanding the judge's conclusion that it is dangerous or unreasonable to commit on the evidence adduced. Indeed, *Shephard* was just such a case. The combination of the ruling in *Shephard* that the judge possesses no residual discretion to decline to commit on dubious, yet admissible, evidence and the evidentiary provisions of the 1999 *Extradition Act*, which effectively removed much of an extradition judge's former discretion to not admit evidence, have led commentators to state that extradition judges have nothing left to do: see A. W. La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002), 28 *Queen's L.J.* 95, at p. 172; and G. Botting, *Extradition Between Canada and the United States* (2005), at p. 8. The judge becomes a rubber stamp. As we have seen, this violates the principles of fundamental justice applicable to extradition hearings and hence violates s. 7 of the *Charter*. For a person sought to receive a fair extradition hearing, the extradition judge must be able to evaluate the evidence, including its reliability, to determine whether the evidence establishes a sufficient case to commit.

42 This Court has repeatedly confirmed that extradition hearings are subject to the *Charter* and that an extradition judge — unlike a preliminary inquiry judge — has jurisdiction to apply the *Charter* and to grant *Charter* remedies relevant to the committal

stage of extradition (see *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19, *United States of America v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18, and *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21). So, the next question is whether the provisions of the *Extradition Act* allow an interpretation that avoids an unconstitutional result, insofar as this is possible. If s. 29(1) can be interpreted in a way that allows the extradition judge to weigh the evidence and refuse to extradite if the case as a whole is insufficient, then that interpretation should be adopted. If it cannot, then the Act is inconsistent with the *Charter* and is void to the extent of that inconsistency under s. 52 of the *Constitution Act, 1982*.

43 As discussed above, admissible evidence alone cannot be sufficient to justify committal in the extradition context. Admissibility is only one part of determining whether evidence exists upon which a reasonable jury, properly instructed, could return a verdict of guilty. Justifying a committal depends on a combination of admissibility, double criminality, basic fairness and constitutional guarantees that, together, inform an extradition judge about whether to order committal. Most fundamentally, it depends on a judicial process conducted by a judge who has the discretion to refuse to commit the subject for extradition on insufficient evidence.

44 In my view, the provisions of the 1999 Act can be read to accommodate these requirements — requirements inherent in the right to a hearing by a neutral magistrate. Section 29(1) of the Act requires the extradition judge to determine whether evidence would "justify committal" for trial. This may be read as permitting the extradition judge to provide the factual assessment and judicial process necessary to conform to the *Charter*.

45 To "justify" something means to show the justice or rightness of that thing: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 737. In criminal or tort law, a "justification" describes "actions we consider rightful, not wrongful" because they were taken in circumstances that reveal their rightness, for example, "[t]he police officer who shoots the hostage-taker, the innocent object of an assault who [u]sed force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital ..." (*Perka v. The Queen*, [1984] 2 S.C.R. 232, p. 246 (emphasis deleted)).

46 Section 29(1)'s direction to an extradition judge to determine whether there is admissible evidence that would "justify committal" requires a judge to assess whether admissible evidence *shows the justice or rightness* in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot "justify committal". The evidence need not convince an extradition judge that a person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that *could go to trial* in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.

47 Section 29(1) of the *Extradition Act*, as discussed, requires the extradition judge to be satisfied that the evidence would justify committal for trial in Canada, had the offence occurred here. Canadian courts in recent decades have adopted the practice of leaving a case or defence to the jury where there is any evidence to support it, and have discouraged

trial judges from weighing the evidence and refusing to put a matter to the jury on the basis that the evidence is not sufficiently reliable or persuasive: see *Arcuri*, at para. 30; and *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at pp. 454-55. This may explain the conclusion in *Shephard* that the extradition judge has no discretion to refuse to extradite if there is any evidence, however scant or suspect, supporting each of the elements of the offence alleged. This narrow approach to judicial discretion should not be applied in extradition matters, in my opinion. The decision to remove a trial judge's discretion reflects confidence that, given the strict rules of admissibility of evidence on criminal trials, a properly instructed jury is capable of performing the task of assessing the reliability of the evidence and weighing its sufficiency without the assistance of the judge. The accused is not denied the protection of the trier of fact reviewing and weighing the evidence. The effect of applying this test in extradition proceedings, by contrast, is to deprive the subject of any review of the reliability or sufficiency of the evidence. Put another way, the limited judicial discretion to keep evidence from a Canadian jury does not have the same negative constitutional implications as the removal of an extradition judge's discretion to decline to commit for extradition. In the latter case, removal of the discretion may deprive the subject of his or her constitutional right to a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty.

48 It is important as well to note the differences between extradition hearings and domestic preliminary inquiries. Both are pre-trial screening devices and both use the same test of sufficiency of evidence for committal: whether evidence exists upon which a reasonable jury, properly instructed, could return a verdict of guilty: *Shephard*. Previously, the *Extradition Act* cemented the analogy between the two proceedings by directing that an extradition judge "hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in

Canada": *Extradition Act*, R.S.C. 1985, c. E-23, s. 13. The new Act, however, does not maintain this close parallel in proceedings. Section 24(2) of the Act states: "For the purposes of the hearing, the judge has, subject to this Act, the powers of a justice under Part XVIII of the *Criminal Code*, with any modifications that the circumstances require." This grants the extradition judge the same powers as a preliminary inquiry judge, but requires the judge to exercise those powers in a manner appropriate to the extradition context. The judge no longer follows "as nearly as may be" the procedure of a preliminary inquiry. A second difference comes from the different rules for admitting evidence. Evidence is admitted on a preliminary inquiry according to domestic rules of evidence, with all the inherent guarantees of threshold reliability that those rules entail. In contrast, evidence adduced on extradition may lack the threshold guarantees of reliability afforded by Canadian rules of evidence. A third difference comes from the ability of extradition judges to grant *Charter* remedies. These differences make it inappropriate to equate the task of the extradition judge with the task of a judge on a preliminary inquiry.

49 I conclude that to deny an extradition judge's discretion to refuse committal for reasons of insufficient evidence would violate a person's right to a judicial hearing by an independent and impartial magistrate — a right implicit in s. 7 of the *Charter* where liberty is at stake. It would deprive the judge of the power to conduct an independent and impartial judicial review of the facts in relation to the law, destroy the judicial nature of the hearing, and turn the extradition judge into an administrative arm of the executive. The process of assessing whether all the boxes are ticked and then ordering committal is not an adjudication, but merely a formal validation. Insofar as the majority view in the pre-*Charter* case of *Shephard* suggests a contrary view, it should be modified to conform to the requirements of the *Charter*.

50 I conclude that s. 32(1)(*a*) and (*b*) and s. 33 of the 1999 Act do not violate the right of a person sought under s. 7 of the *Charter*, because the requirements for committal of s. 29(1), properly construed, grant the extradition judge discretion to refuse to extradite on insufficient evidence such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial.

2.5 *Evaluating the Sufficiency of Evidence — Procedural Issues*

51 Having described the proper role of the extradition judge under s. 29(1) of the *Extradition Act*, I turn to the more concrete procedural question of how the judge should discharge this role where the case for extradition consists of a record or summary certified by the requesting state. Specifically, I use the examples from the cases at bar: how and when do concerns about reliability or availability of evidence render evidence insufficient for the purposes of committal?

52 Certification of evidence as set out in s. 33(3)(*a*) raises a presumption that the evidence in a record of the case is reliable. This follows from the principles of comity between Canada and the requesting state. Certification, as discussed above, is the indicium of reliability that Parliament has prescribed for evidence in these circumstances. Unless challenged, certification establishes reliability.

53 The person sought for extradition may challenge the sufficiency of the case including the reliability of certified evidence. Section 32(1)(*c*) of the Act permits the person sought to submit evidence "if the judge considers it reliable". This does not require an actual determination that the evidence presented by the person sought is in fact reliable.

The issue is threshold reliability. In other words, the question is whether the evidence tendered possesses sufficient indicia of reliability to make it worth consideration by the judge at the hearing. Once it is admitted, its reliability for the purposes of extradition is determined in light of all the evidence presented at the hearing. When viewed in this way, s. 32(1)(*c*) in effect presents no greater evidentiary hurdle to the person sought than s. 32(1)(*a*) or (*b*) presents to the requesting state.

54 Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

55 The absence of certification that evidence is available for trial, raised in the *Ortega* appeals, presents a different issue. Here the complaint is not that certification may in some cases be an insufficient indication of reliability to permit extradition, but that there is no evidence at all. A showing that the evidence actually exists and is available for trial is fundamental to extradition. The whole purpose of the extradition is to send the person sought to the requesting country for trial. To send the person there to languish in prison without trial is antithetical to the principles upon which extradition and the comity that supports it are based. It follows that the extradition judge cannot properly commit a person

for extradition under s. 29(1) unless a *prima facie* case has been made out that evidence exists upon which the person may be tried. Some treaties may not require that availability of evidence be certified. But that does not change the requirements of s. 29(1) of the Act that the extradition judge be satisfied that committal for extradition is justified.

56 The Crown in the *Ortega* appeals contends that availability of evidence should be presumed to reflect comity and the fact that Canada, through negotiating a treaty, has already considered whether a treaty partner is likely to give a person sought a fair trial. However, the concern of the extradition judge is to provide a fair extradition hearing in Canada: *Cobb* and *Kwok*. If availability of evidence for trial is a crucial factor in determining whether the test for committal is established (and indeed, on my interpretation of s. 29(1), it is), neither the executive's appraisal of a country's trial practices nor a presumption of the requesting state's good-faith are sufficient to meet the sought person's right to an assessment by a neutral magistrate prior to extradition.

57 The record of the case provisions, as well as modern treaties such as the *Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can. T.S. 2003 No. 11, signed on January 12, 2001, recognize the basic requirement of "available" evidence. They do so by requiring the requesting state to certify the availability of evidence. Even where a treaty does not expressly require the availability of evidence to be certified, it remains a fundamental element to be established to meet the test for committal. Where the requesting state does not certify or otherwise make out a *prima facie* case that the evidence exists and is available for trial, the case for committal is incomplete and should be dismissed.

58 This is not an onerous burden. Indeed, where actual first-hand evidence (e.g., documentary evidence or first-hand affidavits) is put before an extradition judge, the evidence's existence is self-evident and its availability for trial will be presumed. Similarly, where evidence is certified as available by a requesting state, that certification results in a presumption of availability for trial. However, cases might arise where a person sought could cogently challenge the presumption of availability of evidence for trial. For example, where a person sought can show that a requesting state relies on evidence of a witness who, prior to the extradition hearing, retracted his or her statement, the availability of that evidence for trial may be brought into doubt. Another example is where a state makes only a bare assertion that evidence exists without providing any description whatsoever of its content or form. In such a case, the availability of the evidence may be in doubt. Furthermore, an extradition judge does not make a prediction about the future state of the evidence. He or she makes a common sense determination about whether the evidence exists and is available for trial — *at the time of the extradition hearing* — based on the evidence itself, any circumstantial guarantees of availability (such as certification) and any evidence tendered to dispute the presumption of availability for trial.

59 A further procedural question is whether a person challenging the actual reliability or availability of evidence adduced at a committal hearing must seek a remedy under s. 24 of the *Charter*. In my view, this is not necessary. Section 29(1) of the Act, properly construed, conforms to both *Charter* values and the comity, reciprocity and respect for differences that underlie extradition. Therefore, no constitutional conflicts arise from the exercise of an extradition judge's discretion to order committal. Simply put, the extradition judge has the discretion to give no weight to unavailable or unreliable evidence when determining whether committal is justified under s. 29(1). Thus, the person sought does not need to seek a constitutional remedy.

60 Nevertheless, s. 24(2) of the *Charter* remains an avenue through which evidence may be excluded from consideration at an extradition hearing for reasons of fairness other than the availability and reliability concerns addressed in these cases. For example, in *Cobb*, where an American prosecutor had made public comments subjecting the persons sought to threats and intimidation, the persons sought could not have a fair extradition hearing in light of the possibility that they were intimidated and encouraged by the U.S. prosecutor's actions to not pursue their legal rights as vigorously as they were entitled to. An extradition judge may also exclude evidence under s. 24(2) of the *Charter* if, for example, it was gathered by the foreign authorities in such an abusive manner that its admission to the committal hearing would be unfair under s. 7 of the *Charter* (see discussion in *Shulman*, at para. 56).

3. Application to the Cases at Bar

3.1 *Ferras v. United States of America*

61 The United States seeks the appellant Ferras for extradition on charges of conspiracy to commit securities fraud, securities fraud, and money laundering. The extradition judge received evidence in three parts: a record of the case and two supplemental records (collectively the "records"). Each of these documents bore a certification, sworn before a notary public by Assistant United States Attorney Tanya Y. Hill, that "the evidence summarized [or contained] in the attached Record of the Case is available for trial and is sufficient under the law of the United States to justify prosecution" (A.R., at pp. 601, 620 and 630).

62 The record of the case and the first supplement were prepared by IRS Special Agent Joseph Jordan. The second supplement was prepared by FBI Special Agent Vincent Gerardi. The records were written in affidavit format — in the first person and based on the knowledge of these investigating officers. They were signed by the officers, but not sworn. The records describe the evidence expected to be led at the trial of Mr. Ferras, including that of various witnesses who were either interviewed personally by these officers or whose interview summaries were reviewed by the officers before preparing the records. The records also describe documentary evidence reviewed by the officers and available to the prosecution.

63 According to the records, Mr. Ferras' former co-workers and customers from the brokerage firm HGI will testify that Mr. Ferras engaged in fraudulent "boiler room" sales practices in order to sell HGI house stocks to customers, that he trained other brokers to use these fraudulent tactics (which were company policy), and that he reaped financial benefits of over $800,000 from these fraudulent sales through commissions and profit from his 2 percent ownership of HGI. Documentary evidence including trading reports, payroll documents and banking records will, according to the records, corroborate the testimony of the witnesses.

64 In the extradition hearing, Mr. Ferras conceded that, if admissible, sufficient evidence existed to commit him for extradition. I understand this concession to mean that there are no issues of double criminality or identity of the person sought. However, as described above, Mr. Ferras challenged the admissibility of the records on reliability grounds. Since his concession on sufficiency of the case was likely predicated on the erroneous assumption that his concerns were ones of threshold reliability for the admission of evidence, it would seem unfair to hold Mr. Ferras to that concession.

65 Accordingly, we must ask whether the records disclose sufficient evidence upon which a reasonable jury, properly instructed, could convict. As discussed, to answer this question in the affirmative, the extradition judge must consider whether the evidence tendered possesses sufficient indicia of reliability to justify committal. To put it negatively, the judge should not commit if, viewing the evidence as a whole, it would be dangerous or unsafe to do so.

66 Certification by the United States, an extradition partner of Canada, makes the records presumptively reliable. The Court has been presented with the good word of an extradition partner that the evidence meets the standards necessary for trial in the United States. Canada has already evaluated the likelihood that prosecution in the United States would proceed on reliable evidence. Unless rebutted, this presumption of reliability will stand and the case will be deemed sufficient to commit for extradition.

67 The appellant Ferras attempts to rebut the presumption of reliability by pointing out that the evidence given in the records is mostly hearsay and that some of the hearsay is about the expected testimony of co-conspirators, one of whom has been convicted of perjury.

68 Would this evidence justify committal to trial in Canada if the conduct described had occurred here? The records themselves provide only secondary evidence of the evidence available for trial. However, the issue is not whether the information in the record is actually true. The extradition judge does not determine the guilt or innocence of the person sought. The only issue is whether evidence exists upon which a reasonable jury, properly instructed, could convict.

69 The evidence adduced in *Ferras* supports the conclusion that the United States has sufficient evidence to justify committal. To begin with, the records are presumptively reliable due to the requesting state's certification in compliance with s. 33(3) of the Act. There is no evidence to suggest that the investigating officers were incompetent to prepare the records. On the contrary, they had the ability to observe, record and communicate the evidence that the United States has collected against Mr. Ferras. The records were submitted under the seal of the United States and signed by the investigating officers. The records assert that witnesses will testify under oath and that actual documents will be shown to the trier of fact. Although some of the witnesses are alleged co-conspirators, many are not. Some are Mr. Ferras' former clients; one is an attorney with the Securities and Exchange Commission; and one is an investigator from the National Association of Securities Dealers. There is nothing in evidence to impugn the reliability of these witnesses nor the documentary evidence described in the records.

70 Mr. Ferras had the opportunity to present evidence to the extradition judge. He chose not to do so. As it stands, the record does not disclose any reason to rebut the presumption of reliability of the evidence to meet the test of committal. Instead, the evidence seems to support the presumption that the evidence presented at trial will indeed exhibit the level of reliability expected of evidence put to a jury in Canada. This is not a case where, on the record, it would be unsafe to commit the person sought for extradition.

71 Accordingly, I would dismiss this appeal.

3.2 *Latty and Wright v. United States of America*

72 The United States seeks the appellants Latty and Wright for extradition on charges of conspiracy to traffic in cocaine and conspiracy to possess for the purposes of trafficking in cocaine. The records of the case were certified by Assistant United States Attorney Kevin P. Dooley that "the evidence summarized or contained in the attached documents is available for trial and is sufficient under the laws of the United States to justify prosecution" (A.R., at pp. 153 and 228). Unlike in *Ferras*, the certifications were not sworn statements, though they were signed by Mr. Dooley.

73 The records were prepared by Lawrence R. Marsili, an investigator with the New York State Police. As in *Ferras*, the records were in affidavit format and signed by the investigator, but not sworn. The records describe the evidence expected to be led at the trial of the appellants – both witness testimony and documents.

74 According to the records, Latty and Wright, who were known respectively by their aliases "Scabby" and "Frankie", coordinated a cocaine smuggling operation which involved transporting cocaine from the United States to England with the assistance of American Airlines' flight attendants who flew between New York and London. Witnesses include several co-conspirators including the flight attendants (Henry and Gary), and persons involved in the pick-up and delivery of cocaine. Witnesses also include police officers from the United States, Canada and England. Documentary evidence includes credit bureau papers and incorporation papers linking both appellants to a Toronto-based company called Universal Sports Wear, the telephone number for which members of the drug ring would call to reach "Scabby" and "Frankie" to make plans for moving cocaine. Other documentary evidence includes phone records, telephone subscriber information and vehicle registration information. The records contain detailed descriptions of police surveillance of the appellants' meeting with Henry at the Toronto airport and detailed

records of phone conversations between Henry and the appellants. As well, the records describe the evidence of several witnesses identifying the appellants by both voice and photo as Scabby and Frankie, the coordinators of the smuggling operation.

75 At the extradition hearing, the appellants conceded that the records of the case provided sufficient evidence to warrant their committal. They challenged the admissibility of the evidence on constitutional grounds. Their concerns about threshold reliability of the evidence for admission to the extradition hearing cannot succeed. The more pertinent question — whether the evidence possesses sufficient indicia of reliability to justify committal — must be answered positively.

76 Again, the United States' certifications raise a presumption of reliability. The appellants raise concerns about the use of hearsay evidence and the fact that the certifications of the records were not "sworn". However, these concerns do not suffice to rebut the presumption of reliability.

77 As in *Ferras*, the use of hearsay evidence does not detract from the reliability of the evidence to meet the test for committal. The extradition judge must be satisfied that there is evidence upon which a reasonable jury could convict. The records adequately demonstrate that the United States does indeed have sufficient evidence to put the case before a jury. The records were prepared by an investigator who had intimate knowledge — through his participation in the case — of the evidence available. The investigator signed the records, which were certified by the Assistant District Attorney and then authenticated by the Secretary of State. There is nothing in evidence to impugn the competence of the investigator who prepared the record, nor the reliability of the witnesses

expected to testify at trial, nor the reliability of the documentary evidence described in the records.

78 Unlike the certifications of the records in *Ferras*, the certifications here were not sworn by the Assistant United States District Attorney, merely signed by him. However, the certifications do conform to the requirements of s. 33(3) of the Act. The American official cannot be faulted for not providing a sworn certification when the Act does not require one.

79 In the absence of any evidence submitted by the appellants Latty and Wright, the record of the case supports the presumption that the evidence presented at trial will exhibit the level of reliability expected of evidence put to a jury in Canada. Nothing in the record indicates that it would be unsafe to commit the appellants for extradition on this evidence.

80 Accordingly, I would dismiss these appeals.

4. Other Issues

81 Two further issues concerning the *Ferras* appeals require brief comment.

4.1 *Section 6 of the Charter*

82 The appellant Ferras, who is a Canadian citizen, challenges the constitutionality of ss. 32(1)(*a*) and 33(3) under s. 6 of the *Charter*. Extradition to another country infringes the right of a Canadian citizen under s. 6(1) of the *Charter* to remain in Canada: *United*

States of America v. Cotroni, [1989] 1 S.C.R. 1469. However, s. 6 is not engaged at the committal stage of the extradition process, only at the surrender stage: *Cobbs*, *Kwok* and *Shulman*.

83 Although a surrender order has been made in relation to Mr. Ferras, the alleged *Charter* violation concerns statutory provisions that apply to extradition hearings, at the committal stage, not the surrender stage of the extradition process. Once an extradition judge has determined that a *prima facie* case for extradition exists, the Minister's surrender decision is of a "political and/or diplomatic nature": *Kwok*, at para. 63. In exercising ministerial discretion, the Minister has "an obligation flowing from s. 6(1) to assure [himself] that prosecution in Canada is not a realistic option": *Cotroni*, at p. 1498. However, the Minister is not required to base the surrender decision on evidence submitted at the committal hearing. Thus, s. 6(1) of the *Charter* cannot be infringed by the impugned provisions.

4.2 *The Surrender Order Pertaining to Latty and Wright*

84 The appellants Latty and Wright raise two issues on judicial review of the Minister's order to surrender them to the United States. They say that their surrender to the United States, where they could receive sentences if convicted of 10 years to life without parole, would "shock the conscience" of Canadians and thus run afoul of fundamental justice. They also say that the Minister's refusal to seek assurances for enhanced credit for time served in pre-trial custody would offend fundamental justice.

85 This Court has adopted a balancing approach to determine whether potential sentences in a requesting state would "shock the conscience" of Canadians. While

affirming this approach in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, the Court said, at para. 67, that "the phrase 'shocks the conscience' and equivalent expressions are not to be taken out of context or equated to opinion polls. The words were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases."

86 As in *Burns*, at para. 72, several factors favour surrendering the appellants Latty and Wright to the United States: bringing the appellants to trial to determine the truth of the charges; the principle that justice is best served by a trial in the jurisdiction where the alleged crime occurred; the principle that Canadians must generally accept the laws and procedures of the countries they visit; and comity, reciprocity and respect for differences among states. The factors militating against surrender include: the harsher sentences that the appellants might receive if convicted in the United States; and the possibility that evidence used in the United States might include wiretap evidence that would not be admissible in Canada.

87 In my view, the Minister correctly decided that "[s]urrender to an extradition partner whose criminal justice system does not have all the procedural safeguards of the Canadian criminal justice system would not, in itself, violate the principles of fundamental justice". The appellants offer no evidence or case law to back up their assertions that the possible sentences would shock the conscience of Canadians. Furthermore, the factors favouring surrender in this circumstance far outweigh those that do not.

88 Concerning credit for pre-surrender custody, the appellants say that the conditions of pre-surrender custody are particularly harsh (because the persons are held in maximum security facilities) and therefore deserving of enhanced credit. They say that in

these circumstances the Minister's refusal to seek assurances "shocks the conscience" of reasonably informed members of the public.

89 Section 3585(b) of Title 18 of the United States Code states: "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The appellants are concerned that while Title 18 gives credit for pre-trial time, it does not require *enhanced* credit nor does it take into account the conditions under which any pre-surrender custody is served.

90 While this Court has approved of the practice of two for one credit for pre-trial custody (see *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, at para. 45), it made clear that it was not entrenching the practice, preferring to leave the matter to judicial discretion. The Minister's refusal to seek assurances of enhanced credit for pre-surrender custody is not improper, "[g]iven that we do not guarantee enhanced credit ourselves": *United States of America v. Adam* (2003), 174 C.C.C. (3d) 445 (Ont. C.A.), at para. 34.

91 In addition to the factors militating in favour of surrender, sentencing is best conducted after trial when all the facts have been aired. The only factor in favour of the Minister seeking assurances is that the Minister may be well placed to inform the requesting state about the onerous conditions of pre-surrender custody in Canada. However, these are issues that the appellants can themselves raise at sentencing if they are convicted of a crime in the United States.

92 The Minister correctly determined that his refusal to seek assurances did not violate the principles of fundamental justice.

5. Conclusion

93 I would dismiss the appeals of Ferras, Latty and Wright.

94 The constitutional questions are answered as follows.

1. Do ss. 32(1)(*a*) and 33 of the *Extradition Act*, S.C. 1999, c. 18, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

3. Do ss. 32(1)(*a*) and 33 of the *Extradition Act*, S.C. 1999, c. 18, infringe the rights and freedoms guaranteed by s. 6 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

Appendix A

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

32. (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(*a*) the contents of the documents contained in the record of the case certified under subsection 33(3);
(*b*) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
(*c*) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

33. (1) The record of the case must include
(*a*) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and
(*b*) in the case of a person sought for the imposition or enforcement of a sentence,
(i) a copy of the document that records the conviction of the person, and
(ii) a document describing the conduct for which the person was convicted.

. . .

(3) A record of the case may not be admitted unless
(*a*) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and
(i) is sufficient under the law of the extradition partner to justify prosecution, or
(ii) was gathered according to the law of the extradition partner; or

Appendix B

Treaty of Extradition between the Government of Canada and the Government of the United Mexican States, Can. T.S. 1990 No. 35

ARTICLE VIII

Documents to be Submitted

1. The following documents shall be submitted in support of a request for extradition:

(a) in all cases:
  (i) information about the description, identity, location and nationality of the person sought;
  (ii) a statement prepared by a judicial or public official of the conduct constituting the offence for which the extradition is requested indicating the place and time of its commission, the nature of the offence and the legal provisions describing the offence and the applicable punishment. This statement shall also indicate that these legal provisions, a copy of which shall be appended, were in force both at the time of the commission of the offence and at the time of the extradition request.

(b) in the case of a person charged with an offence:
  (i) the original or a certified true copy of the arrest warrant issued by the Requesting Party;
  (ii) in the event that the law of the Requested Party so requires, evidence that would justify committal for trial of the person sought, including evidence to establish identity;
  (iii) for the purpose of paragraph 1(b)(ii) of this Article, originals of certified true copies of exhibits, statements, depositions, minutes, reports, appendices or any other document received, gathered or obtained by the Requesting Party shall be admitted in evidence in the courts of the Requested Party as proof of the facts contained therein, provided that a competent judicial authority of the Requesting Party has determined that they were obtained in accordance with the law of the Requesting Party.

. . .

2. All documents submitted in support of a request for extradition and appearing to have been certified, issued or reviewed by a judicial authority of the Requesting Party or made under its authority, shall be admitted in evidence in the courts of the Requested Party without having to be taken under oath or solemn affirmation and without proof of the signature or of the official character of the person appearing to have signed them.

3. No authentication or further certification of documents submitted in support of the request for extradition shall be required.

4. Any translation of documents submitted in support of a request for extradition by the Requesting Party shall be admissible for all purposes in extradition proceedings.

Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3

ARTICLE 10

. . .

(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition

when, in the case of a request emanating from Canada, they are authenticated by an officer of the Department of Justice of Canada and are certified by the principal diplomatic or consular officer of the United States in Canada, or when, in the case of a request emanating from the United States, they are authenticated by an officer of the Department of State of the United States and are certified by the principal diplomatic or consular officer of Canada in the United States.

Appeals dismissed.

Solicitors for the appellant Ferras: Greenspan Humphrey Lavine, Toronto.

Solicitors for the appellants Latty and Wright: Greenspan White, Toronto.

Solicitor for the respondents: Attorney General of Canada, Ottawa.