



SUPREME COURT OF CANADA

CITATION: United States of America v. Anekwu, 2009 SCC 41

DATE: 20090924

DOCKET: 32646

BETWEEN:

**United States of America
and Canada (Minister of Justice)**

Appellants

v.

Henry Anekwu

Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 35)

Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Rothstein and Cromwell JJ. concurring)

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U.S.A. v. ANEKWU

United States of America and Canada (Minister of Justice)

Appellants

v.

Henry Anekwu

Respondent

Indexed as: United States of America v. Anekwu

Neutral citation: 2009 SCC 41.

File No.: 32646.

2009: February 10; 2009: September 24.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Extradition — Committal hearings — Evidence — Hearsay — Admissibility — Extradition Act providing that evidence gathered in Canada must satisfy rules of evidence under Canadian law in order to be admitted — Whether summary of Canadian-gathered evidence

admissible in extradition proceedings — Extradition Act, S.C. 1999, c. 18, ss. 32, 33.

In 2005, the US sought the extradition of A to be prosecuted for 13 counts of mail fraud and 7 counts of wire fraud. In support of the application for committal, the Attorney General of Canada submitted a certified record of the case prepared by the requesting state, which contained, as required under s. 33(1) of the *Extradition Act*, “a document summarizing the evidence available to the extradition partner for use in the prosecution”. The summary described evidence gathered in both the US and Canada. The US evidence consisted mainly of individual statements from 11 representative victims of the allegedly fraudulent telemarketing scheme. The Canadian evidence included corporate records, mailbox records, bank records, police surveillance and an immigration photograph of A. The records themselves were not filed, but their contents were described in the summary. The extradition judge rejected preliminary objections to the admissibility of the Canadian-gathered evidence contained in the record of the case on the ground that it was hearsay, finding that the summary form satisfied “the rules of evidence under Canadian law” as required under s. 32(2). She also rejected A’s argument that the onus should be on the requesting state to prove that the Canadian-gathered evidence was justifiably before the court and dismissed his claim that the evidence had been obtained in violation of the *Canadian Charter of Rights and Freedoms*. Finding the evidence both admissible and sufficient under the *Extradition Act*, she issued a committal order. The Minister of Justice subsequently issued an order of surrender. A majority of the Court of Appeal set aside the committal and surrender orders and ordered a new extradition hearing. The majority held that evidence gathered in Canada must comply with the hearsay rule, as traditionally applied in domestic proceedings. In its view, the summary form of the Canadian-gathered evidence contained in the record of the case constituted inadmissible hearsay.

The dissenting judge was of the opinion that ss. 32(2) and 33(1), read together, called for a modified approach to the hearsay rule in the extradition context.

Held: The appeal should be allowed and the committal and surrender orders restored.

Section 32(2) of the *Extradition Act* mandates compliance with the domestic rules of evidence in respect of evidence gathered on Canadian soil. While s. 32(1) seems to exempt the contents of the record of the case from compliance with the Canadian rules of evidence, the entirety of s. 32(1) is subject to the specific provision contained in s. 32(2). The common law hearsay rule is one of the rules of evidence under Canadian law, but it can be modified or displaced by statute. Here, ss. 32(2) and 33(1), read together, provide for a modified approach to the hearsay rule unique to the extradition context. Parliament did not restrict the type of evidence that could be presented under s. 33(1) to *foreign*-gathered evidence, but required rather the requesting state to summarize “*the evidence available for use in the prosecution*”. Also, under s. 33(3), the requesting state is then required to certify that the evidence summarized or contained in the record of the case is available for trial. Had Parliament intended to confine the record of the case to evidence gathered outside of Canada, it would have said so in clear terms. Section 33, therefore, clearly contemplates the inclusion of evidence gathered in Canada in summary form in the record of the case. The evidentiary regime under the *Extradition Act* requires a two-step approach with respect to Canadian-gathered evidence. The evidence may be presented in summary form, in accordance with s. 33 and, as such, it is presumptively admissible under s. 32(1). Section 32(2) then requires the court to scrutinize the Canadian-gathered evidence for compliance with Canadian rules of evidence, which include the *Charter* as it is the supreme law of the land. The evidence may then be relied on

by the extradition judge if, in substance, it would be admissible in a Canadian court. This approach accords with a combined reading of ss. 32 and 33 and achieves a proper balance between the liberty interests of the person sought and the international principle of comity. In extradition proceedings, which should not be equated with the criminal process, adherence to the strictures of the hearsay rule would result in expensive, time-consuming hearings that would disable Canada from complying with its international obligations in a prompt and efficient manner, and should be avoided. A flexible approach that does not insist that evidence take a particular form, but that still ensures that the person sought may challenge the admissibility of evidence under the *Charter*, or its content according to Canadian evidentiary rules, is more consistent with the purpose of the extradition hearing. Since compliance with Canadian law is mandatory in respect of Canadian-gathered evidence, it follows that the record of the case should contain sufficient information to enable the person sought and the extradition judge to ascertain whether any item of evidence has been gathered in Canada and, when that is the case, some information should also be provided on how it was obtained. However, there is no reason to reverse the usual rule that puts the onus of proving a *Charter* breach on the person who claims it. [13] [15-17] [19] [23-27] [29-30]

In the present case, the extradition judge was correct in admitting the Canadian-gathered evidence in summary form since the contents of the evidence would be admissible if the actual records were filed or the evidence adduced by *viva voce* evidence in the usual course of a criminal proceeding. She also properly found that there was no need to entertain any *Charter* application as A's claim lacked an air of reality. Having admitted the evidence, the extradition judge correctly concluded that it was sufficient to support a committal order. [32-34]

Cases Cited

Referred to: *United States of America v. McDowell* (2004), 183 C.C.C. (3d) 149; *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77; *Wacjman v. United States of America* (2002), 171 C.C.C. (3d) 134; *United States of America v. Vallée*, 2006 QCCA 229, 213 C.C.C. (3d) 553; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Re United States of America and Smith* (1984), 44 O.R. (2d) 705; *United States of America v. Earles*, 2003 BCCA 20, 171 C.C.C. (3d) 116.

Statutes and Regulations Cited

18 U.S.C.

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Competition Act, R.S.C. 1985, c. C-34, s. 52.1.

Criminal Code, R.S.C. 1985, c. C-46, ss. 380, 465(1)(c), 540(9).

Extradition Act, S.C. 1999, c. 18, ss. 15, 16, 24(2), 29, 32, 33.

Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.).

APPEAL from a judgment of the British Columbia Court of Appeal (Prowse, Smith and Chiasson JJ.A.), 2008 BCCA 138, 79 B.C.L.R. (4th) 323, 254 B.C.A.C. 30, 426 W.A.C. 30, 232 C.C.C. (3d) 130, [2008] 6 W.W.R. 195, [2008] B.C.J. No. 536

(QL), 2008 CarswellBC 621, setting aside the committal order issued by Morrison J., 2006 BCSC 1363, [2006] B.C.J. No. 2057 (QL), 2006 CarswellBC 2257, and the surrender order issued by the Minister of Justice. Appeal allowed.

Janet Henchey and Jeffrey G. Johnston, for the appellants.

Sean Hern and Tim Dickson, for the respondent.

The judgment of the Court was delivered by

CHARRON J. —

1. Introduction

[1] The United States of America has requested the extradition of Henry Anekwu to stand trial in California on numerous telemarketing fraud charges. It is alleged that Mr. Anekwu participated in fraudulent telemarketing activities conducted in Canada but targeting elderly American residents. The Minister of Justice authorized the request to proceed and, ultimately, orders for the committal and the surrender of Mr. Anekwu ensued. Mr. Anekwu appealed the order for committal and sought judicial review of the Minister's order for surrender. The validity of the orders, as the issue is now framed before this Court, turns on whether the Canadian-gathered evidence filed in support of the extradition request satisfies "the rules of evidence under Canadian law", as required under s. 32(2) of the *Extradition Act*, S.C. 1999, c. 18 (the "Act"). The Attorney

General of Canada concedes that without this evidence, the committal and surrender orders cannot stand. On the other hand, if the evidence is admissible, there is no basis to interfere with either of the orders.

[2] For the reasons that follow, it is my view that the Canadian-gathered evidence was rightly admitted and, together with the foreign-gathered evidence, provided ample support for the extradition request. I would therefore allow the appeal and restore the committal and surrender orders.

2. The Proceedings Below

[3] In a diplomatic note dated September 22, 2005, the United States of America sought the extradition of Mr. Anekwu to be prosecuted for 13 counts of mail fraud and 7 counts of wire fraud under Title 18 of the *United States Code*. Soon thereafter, the Minister of Justice of Canada issued an Authority to Proceed pursuant to s. 15 of the Act, identifying the corresponding Canadian offences as those listed under ss. 380 (fraud) and 465(1)(c) (conspiracy to commit fraud) of the *Criminal Code*, R.S.C. 1985, c. C-46, and s. 52.1 (unlawful telemarketing) of the *Competition Act*, R.S.C. 1985, c. C-34. Mr. Anekwu was subsequently arrested pursuant to a warrant issued under s. 16 of the Act.

[4] In accordance with the procedure set out in the Act, the Attorney General of Canada, on behalf of the United States and the Minister of Justice, sought an order of committal from the Supreme Court of British Columbia. In support of the application for committal, the Attorney

General submitted a record of the case prepared by the requesting state. As required under s. 33(1) of the Act, the record of the case contained “a document summarizing the evidence available to the extradition partner for use in the prosecution” and was duly certified. The summary described evidence gathered in both the United States and in Canada. The evidence gathered in the United States consisted mainly of individual statements from 11 representative victims of the fraudulent telemarketing scheme, all of whom reside in the United States. The evidence allegedly linking Mr. Anekwu to the scheme was located and gathered in Canada, in part under the authority of the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.). The Canadian-gathered evidence included corporate records, mailbox records, bank records, police surveillance and an immigration photograph of Mr. Anekwu. The records themselves were not filed, but their contents were described in the summary. In addition to the record of the case, the Attorney General relied on the *viva voce* testimony of Corporal Peter Bailey of the Royal Canadian Mounted Police in relation to his arrest of Mr. Anekwu in Canada.

[5] Mr. Anekwu objected to the admissibility of the Canadian-gathered evidence contained in the record of the case on the basis that it was presented in summary form and, as such, constituted inadmissible hearsay. He also alleged that some of the evidence was obtained by means of warrantless searches of private communications in contravention of s. 8 of the *Canadian Charter of Rights and Freedoms*, and argued that the onus was on the Attorney General to show that such evidence was justifiably before the court. Finally, he submitted that even if the entire record of the case was admitted, the evidence did not meet the sufficiency test for committal under s. 29 of the Act.

[6] The extradition judge, Morrison J., rejected Mr. Anekwu's preliminary objections to the admissibility of the evidence on the ground that it was hearsay (2006 BCSC 1363, [2006] B.C.J. No. 2057 (QL)). She was satisfied that the Canadian-gathered evidence contained in the record of the case met the requirements of s. 32(2) of the Act, as interpreted by the Court of Appeal for Ontario in *United States of America v. McDowell* (2004), 183 C.C.C. (3d) 149. The extradition judge also concluded that the onus was on Mr. Anekwu to establish a *Charter* breach and that there was no air of reality to his allegations in that regard. Finally, she was of the view that the evidence was sufficient to justify committal on the offences identified in the Authority to Proceed. Consequently, she issued a committal order.

[7] The Minister of Justice subsequently issued an order of surrender for the foreign offences, as requested in the requesting state's diplomatic note.

[8] Mr. Anekwu appealed from the committal order to the British Columbia Court of Appeal, on the grounds that the extradition judge erred in admitting and relying upon hearsay evidence gathered in Canada and in failing to consider the sufficiency of the evidence in accordance with the test set out in *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77. He also brought an application for judicial review of the Minister's order for surrender, submitting that the Minister erred in framing the surrender order more broadly than the committal order by including the foreign charges of aiding and abetting mail and wire fraud when those offences were not identified as Canadian equivalent offences in the Authority to Proceed.

[9] On the appeal from the committal order, the court was divided on the hearsay issue

(2008 BCCA 138, 79 B.C.L.R. (4th) 323). Prowse J.A. rejected the argument that the Act provided for a modified approach to the rule of hearsay with respect to Canadian-gathered evidence contained in the record of the case. In her view, the requirement under s. 32(2) that evidence gathered in Canada satisfy “the rules of evidence under Canadian law in order to be admitted” included compliance with the hearsay rule, “as traditionally applied” in domestic proceedings (para. 44). She therefore concluded that the summary form of the Canadian-gathered evidence contained in the record of the case constituted inadmissible hearsay.

[10] Smith J.A. agreed that Canadian-gathered evidence must comply with the hearsay rule, as traditionally applied, adding in concurring reasons that the legislative history of the Act “demonstrates ... the correctness” of that interpretation (para. 48). He first noted that, under earlier extradition schemes, all evidence had to satisfy the Canadian rules of evidence, including the requirement that all testimony be given *viva voce* upon oath or affirmation. The only exception was that foreign states were permitted to rely on first-person depositions and statements taken on oath or affirmation, provided they were certified by an appropriate official. This exception, he stated, “was granted to relieve our extradition partners of the difficulty and expense of bringing foreign witnesses to Canada to testify” (para. 52). Turning to the current statute, Smith J.A. noted that “one of the purposes of the new *Act* was to create an expedited summary extradition procedure since our evidentiary requirements made it difficult if not impossible for many foreign states to prepare a proper extradition request” (para. 55). Therefore, whereas under the former statute requesting states were permitted to rely on “certified first-person depositions and statements of witnesses taken in the foreign jurisdiction”, the current Act provides further relief by permitting requesting states to rely “on summaries of such evidence” (para. 56). In Smith J.A.’s view, however, this further

accommodation only applied to foreign-gathered evidence. Canadian-gathered evidence still had to be presented in the traditional form.

[11] In light of its conclusion on the hearsay issue, the majority found it unnecessary to deal with Mr. Anekwu's argument with respect to the sufficiency of the evidence, or with his application for judicial review. The committal and surrender orders were set aside and a new extradition hearing ordered.

[12] Chiasson J.A. disagreed with his colleagues. In his view, the fact that an extradition judge is informed of the existence of Canadian-gathered evidence in summary form, presented as part of the record of the case, does not make the evidence inadmissible as offending the rule against hearsay. "To exclude such evidence from the record because it is presented as mandated by s. 33(1), that is, in a hearsay summary, is to defeat the clear objective of the legislation by imposing a traditional analysis in unique circumstances" (para. 87). Section 32(2) must be read, rather, in context and in accordance with the principles set out by this Court in *Ferras*. In his view, the evidentiary provisions of the Act call for a two-step approach. First, s. 32(1)(a) provides for the introduction of the evidence in summary form, as it is required to be part of the record of the case. Second, "[t]he content of the evidence that is summarized then is subject to the scrutiny of the extradition judge, including the conformity of Canadian-gathered evidence with the rules of evidence under Canadian law" (para. 89). "In this case, if the content of the Canadian-gathered evidence were adduced in a Canadian proceeding, it would be direct evidence, not hearsay" (para. 80). Therefore, the summarized evidence satisfied the Canadian rules of evidence within the meaning of s. 32(2). In light of the order for a new hearing, Chiasson J.A. did not consider it

appropriate to elaborate regarding Mr. Anekwu’s additional arguments. He added only that, in his view, the evidence met the test for sufficiency. He also rejected the ground of attack against the surrender order.

3. Analysis

[13] The division in the courts below reflects two opposing views on the proper interpretation of s. 32(2) of the Act as it applies to the hearsay summaries of Canadian-gathered evidence contained in the record of the case. The starting point for analyzing any question of statutory interpretation is, of course, the words of the provision. Section 32(2) reads as follows.

32. ...

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

32. ...

(2) Les éléments de preuve obtenus au Canada sont admis en conformité avec le droit canadien.

The language of the provision itself reveals no ambiguity. It mandates compliance with domestic rules of evidence in respect of evidence gathered on Canadian soil and, as Prowse J.A. put it, the hearsay rule is indeed one of the “rules of evidence under Canadian law”. However, the common law hearsay rule can be modified or displaced by statute. The question here is whether Parliament intended to preserve the common law rule, or to provide for a modified approach in the extradition context.

[14] I start by considering s. 32(2) in the context of the related evidentiary provisions

in the Act. They read as follows:

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

32. (1) Sont admis comme faisant preuve au cours de l'audition de la demande, sous réserve du paragraphe (2), les éléments de preuve admissibles en vertu du droit canadien ainsi que les éléments de preuve suivants même si le droit canadien ne prévoit pas par ailleurs leur admissibilité :

a) le contenu des documents qui font partie du dossier d'extradition certifié en conformité avec le paragraphe 33(3);

b) le contenu des documents présentés en conformité avec un accord;

c) les éléments de preuve présentés par l'intéressé qui sont pertinents pour l'application du paragraphe 29(1) et que le juge estime dignes de foi.

(2) Les éléments de preuve obtenus au Canada sont admis en conformité avec le droit canadien.

33. (1) Le dossier d'extradition comporte obligatoirement :

a) dans le cas d'une

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.

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(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

extradition en vue d'un procès, un résumé des éléments de preuve dont dispose le partenaire aux fins de poursuite;

b) dans le cas d'une extradition en vue d'infliger une peine à l'intéressé ou de la lui faire purger, les éléments suivants :

(i) une copie de la déclaration de culpabilité,

(ii) la description des actes qui ont donné lieu à la déclaration de culpabilité.

(2) Le dossier peut aussi comprendre des documents établissant l'identité de l'intéressé et tout autre document pertinent.

(3) Le dossier n'est admissible en preuve que si :

a) dans le cas d'une extradition en vue d'un procès, une autorité judiciaire ou un poursuivant du partenaire certifie, d'une part, que les éléments de preuve résumés au dossier ou contenus dans celui-ci sont disponibles pour le procès et, d'autre part,

the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) For the purposes of this section, a record of the case includes any supplement added to it.

soit que la preuve est suffisante pour justifier la poursuite en vertu du droit du partenaire, soit qu'elle a été recueillie conformément à ce droit;

b) dans le cas d'une extradition en vue d'infliger une peine à l'intéressé ou de la lui faire purger, l'autorité judiciaire, un fonctionnaire du système correctionnel ou un poursuivant du partenaire certifie que les documents au dossier sont exacts.

(4) Sauf disposition contraire d'un accord, les documents n'ont pas à être authentifiés.

(5) Font partie du dossier les documents qui y sont ajoutés par la suite.

As one can readily discern, when s. 32(2) is considered in the context of its related provisions, its meaning is not entirely clear or straightforward and, indeed, has been the subject of discussion in a number of court decisions.

[15] The first question raised in the case law is whether s. 32(2) applies *at all* to Canadian-gathered evidence presented in summary form as part of the record of the case.

The question arises because some of the language in s. 32(1) seems to exempt the contents of the record of the case from compliance with Canadian rules of evidence under s. 32(2). It has been argued that the underlying rationale for this interpretation would be that evidence contained in the record of the case already meets the requisite threshold of reliability, as it has undergone the mandatory certification process under s. 33(3). As described at some length by this Court in *Ferras*, the certification process raises a rebuttable presumption that the evidence summarized in the record of the case has met the requisite threshold of reliability for admission.

[16] The argument that s. 32(2) does not apply to Canadian-gathered evidence contained in the record of the case was rejected by the Court of Appeal below and has also been rejected by other appellate courts that have considered the issue: *McDowell*, at para. 15; *Wacjman v. United States of America* (2002), 171 C.C.C. (3d) 134 (Que. C.A.), at para. 89; *United States of America v. Vallée*, 2006 QCCA 229, 213 C.C.C. (3d) 553, at para. 66. The Attorney General concedes in this Court that s. 32(2) applies to all Canadian-gathered evidence, whether it forms part of the record of the case or not. In my view, this concession is well founded. Suffice it to say that, for our purposes in this appeal, I agree with the interpretation adopted by these appellate courts on this point, and find it more consistent with basic principles of statutory interpretation to conclude that the entirety of s. 32(1) is subject to the specific provision contained in s. 32(2).

[17] That s. 32(2) applies to Canadian-gathered evidence contained in the record of the case does not, however, provide guidance on exactly what a requesting state must do to

comply with the “rules of evidence under Canadian law” in respect of evidence gathered in Canada. More particularly, the question that occupies us in this appeal is the following: how is the summary form of the evidence provided for under s. 33(1) to be reconciled with the strictures of the hearsay rule? Does s. 32(2) require traditional adherence to the hearsay rule as it is applied in domestic criminal courts, as found by the majority in the Court of Appeal below? Or do ss. 32(2) and 33(1), read together, provide for a modified approach to the hearsay rule unique to the extradition context, as found by the dissent? As I will explain, it is my view that the latter is the correct interpretation of the evidentiary provisions of the Act.

[18] If we follow the reasoning of the majority in the Court of Appeal below, any summary of Canadian-gathered evidence contained in the record of the case would be inadmissible, as it inherently constitutes hearsay. Thus, if a witness is interviewed in Canada and his or her expected trial testimony is summarized in a properly certified record of the case, the evidence will be inadmissible in this form. The witness would have to be called to give *viva voce* evidence in every case, unless some other method of presenting the evidence fell within one of the traditional exceptions to the hearsay rule, or met the exigencies of the principled exception to the hearsay rule. Likewise, actual records and other exhibits gathered in Canada would have to be filed rather than their contents simply summarized in the record of the case.

[19] It was open to Parliament to restrict the type of evidence that could be presented in summary form in the record of the case to *foreign*-gathered evidence, as the majority in

the court of appeal below has effectively ruled. The main difficulty with this interpretation, however, is that s. 33(1) imposes no such limitation. It requires rather that the requesting state summarize “the evidence available ... for use in the prosecution”. The requesting state is then required under s. 33(3) to certify that “the evidence summarized or contained in the record of the case is available for trial”, and that this evidence is either sufficient to justify prosecution under its law, or that it was gathered according to its law. The words “summarized or contained” in s. 33(3) would seem to contemplate the situation where some of the evidence in the record of the case may not be in summary form. For example, documentary evidence could be filed and would therefore be “contained” (and not “summarized”) in the record of the case; however, it can hardly be said that *viva voce* testimony could be “contained” in the record of the case. I therefore conclude that s. 33 of the Act clearly contemplates the inclusion of evidence gathered in Canada in summary form in the record of the case. Had Parliament intended to confine the record of the case to evidence gathered outside of Canada, it would have said so in clear terms.

[20] In my view, the interpretation adopted by Chiasson J.A. in dissent is not only more consistent with the combined wording of ss. 32 and 33, it better accords with general principles of extradition law. I will explain.

[21] As stated earlier, according to Chiasson J.A., the new evidentiary regime requires a two-step approach with respect to Canadian-gathered evidence. The evidence may first be presented to the extradition judge as part of the record of the case, in the form required under s. 33. As such, it is presumptively admissible in summary form under s. 32(1). Section 32(2) then requires the court to scrutinize Canadian-gathered evidence for

compliance with Canadian law. It is therefore insufficient for the requesting state to certify that the Canadian-gathered evidence is available for the prosecution and would be admissible in its own jurisdiction. If gathered in Canada, the evidence must also “satisfy the rules of evidence under Canadian law to be admitted”. Canadian rules respecting the admissibility of evidence necessarily include the *Charter*, as the *Charter* is the supreme law of the land. Consequently, s. 32(2) must also be read as contemplating the potential exclusion of otherwise admissible evidence under s. 24(2) of the *Charter* when it has been obtained in a manner that contravenes the *Charter*. In short, the Act requires that our extradition partners comply with Canadian law when gathering evidence in Canada.

[22] While Chiasson J.A. states that his approach differs from that of Moldaver J.A. in *McDowell*, I agree with the Attorney General that, “on close analysis there is little difference in either the reasoning or the result. Both conclude that hearsay evidence is admissible in a record of the case when it is Canadian gathered, as long as it would be *otherwise admissible under Canadian law*” (A.F., at para. 52 (emphasis in original)). Except for the majority decision in the court below, the approach set out in *McDowell* has been followed consistently by many courts, including the extradition judge in this case. Starting with *McDowell*, I will briefly outline the factual underpinnings of some of these cases as they exemplify how s. 32(2) will play out at an extradition hearing.

[23] In *McDowell*, the person sought argued that the first-hand observations of U.S. investigator Detective Hernandez made at the time of his arrest in Canada were not admissible in the form of a summary contained in the record of the case. It was not disputed

that the officer could give this evidence if called as a witness in a Canadian trial; nor was there any suggestion that the evidence was unlawfully gathered. However, Mr. McDowell argued that Detective Hernandez had to be called as a witness to give *viva voce* evidence at the extradition hearing. Moldaver J.A., writing for a unanimous court, rejected that argument. In his view, s. 32(2) is concerned with substance over form. In other words, the evidence may be presented in summary *form*, in accordance with s. 33 of the Act, and can be relied on by the extradition judge if, in *substance*, it would be admissible in a Canadian court. Accordingly, the first-hand evidence of Detective Hernandez was not required to be presented by *viva voce* testimony.

[24] In its factum, the Attorney General describes, at para. 51, how the following types of Canadian-gathered evidence have been admitted in summary form in accordance with this two-step approach:

- (a) A summary of corporate records, banking records and postal records gathered in Canada without requiring the documents themselves where there was no basis to believe that any of the documents were gathered unlawfully and where these types of records were otherwise admissible as business records under s. 30 of the *Canada Evidence Act*: *United States of America v. Budd*, [2005] O.J. No. 2067 (S.C.J.) at paras. 11-15, affirmed (2006), 210 C.C.C. (3d)189 (Ont. C.A.) at paras. 5 & 17-19.
- (b) A summary of witness evidence gathered in Canada that was otherwise admissible under Canadian law without requiring the witness to provide *viva voce* testimony: *États-Unis d'Amérique v. Vallée* (2006), 213 C.C.C. (3d) 553 (Que. C.A) at paras. 66-67, application for leave to appeal dismissed, [2006] C.S.C.R. no 165; *United States of America v. Anderson*, [2006] Q.J. No. 7516 (S.C.) at paras. 67-70; and *United States of America v. Ritter*, [2005] A.J. No. 817 (Q.B.) at paras. 20-24.
- (c) A copy of a booking-photograph taken incidental to a lawful arrest in Canada: *United States of America v. Graham*, [2005] B.C.J. No. 716 (S.C.)

at paras. 15-26.

- (d) A summary of statements made by a person sought following their arrest in Canada confirming their name and date of birth and the results of a fingerprint comparison between fingerprints taken incidental to arrest in Canada and fingerprints taken in the requesting state, where there was nothing to suggest that any evidence gathered in Canada was obtained otherwise than in accordance with domestic law: *United States of America v. Pannell*, [2005] O.J. No. 5957 (S.C.J.) at paras. 13, 29 & 65-68, affirmed (2007), 227 C.C.C. (3d) 336 (Ont. C.A.).

[25] In my view, the approach adopted in these decisions not only accords with a combined reading of ss. 32 and 33 of the Act as I have explained above, it achieves a proper balance between the liberty interests of the person sought and the international principle of comity. It is a well-established principle of statutory interpretation that in interpreting domestic legislation, courts should strive to arrive at a construction which conforms with Canada's treaty obligations: see e.g. *R. v. Hape*, 2007 SCC 26, [2007] S.C.R. 292, at para. 53. In the extradition context, the requirement that Canadian-gathered evidence comply with Canadian rules of evidence is unlikely to give rise to particular difficulties with respect to most evidentiary rules, including privilege, the expert opinion rule, or the rule against bad character evidence. The same cannot be said, however, of the hearsay rule.

[26] Adherence to the strictures of the hearsay rule in the extradition context would require, as a general rule, that witnesses be called to give *viva voce* evidence resulting in inevitable delays, increased expenses, and potentially lengthy cross-examinations in a hearing that is neither intended as a vehicle for disclosure nor as a forum to adjudicate on the merits of the foreign prosecution. Traditional adherence to the rule could occasion protracted *voir dire*s to determine whether evidence presented in hearsay form falls into one

of the recognized exceptions to the rule or meets the twin criteria of necessity and reliability. In my view, Moldaver J.A. rightly concluded in *McDowell* that traditional adherence to the hearsay rule “would be to allow form to triumph over substance and lead to expensive, time-consuming hearings that would disable Canada from complying with its international obligations in a prompt and efficient manner: see *U.S.A. v. Dynar*, [1997] 2 S.C.R. 462, at para. 122” (para. 17). Hence, such an interpretation should be avoided.

[27] The opposing view — namely, that Parliament intended in the Act to provide a modified approach to the hearsay rule unique to the extradition context — can hardly be considered a novel or startling proposition. Indeed, as a starting point, it is wrong to equate extradition proceedings with the criminal trial process. As stated by McLachlin J., as she then was, in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 844-45:

While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.

...

Thus this Court, *per* La Forest J., recognized in *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at pp. 522-23, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without, for example, the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.

[28] Along similar lines, in upholding the constitutionality of the evidentiary provisions contained in the current Act, this Court in *Ferras* held that “the rules of evidence applicable to a criminal trial in Canada do not necessarily apply to the extradition process” (para. 14) and that basic fairness to the person sought for extradition does not require “all the procedural safeguards of a trial” (para. 21). The Court noted further: “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” (para. 33).

[29] Likewise, because extradition proceedings are not concerned with issues of guilt or innocence, the court’s jurisdiction to grant *Charter* remedies, conferred by s. 25 of the *Extradition Act*, is limited to those “breaches that pertain directly to the circumscribed issues relevant at the committal stage of the extradition process”: *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, at para. 57. A *Charter* breach, allegedly committed in the gathering of evidence in Canada, is obviously one of those issues. Thus, the extradition judge has the jurisdiction to entertain an application under s. 24(2) of the *Charter* for the exclusion of evidence obtained in contravention of the *Charter*. Mr. Anekwu argues that, because of the limited scope of disclosure in an extradition proceeding (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 130; *Kwok*, at para. 100), the onus should be on the requesting state to prove that the evidence is justifiably before the court. Otherwise, he submits, this would leave both the person sought and the extradition judge without any meaningful ability to inquire into the manner in which the evidence is gathered in Canada. I see no reason for reversing the usual rule which puts the onus of proving a *Charter* breach on the person who claims it. Since compliance with Canadian rules of

evidence is mandatory in respect of Canadian-gathered evidence, it follows that the record of the case should contain sufficient information to enable the person sought and the extradition judge to ascertain whether any item of evidence has been gathered in Canada and, when that is the case, some information should also be provided on how it was obtained. As in any *Charter* application, the requisite evidentiary basis may then be found in the evidence filed by the requesting state, or the applicant may present his or her own evidence. In addition, the extradition judge may order the production of materials relevant to any issue properly raised at the committal stage of the process where there is an air of reality to the *Charter* claim: *Kwok*, at para. 100.

[30] In short, I conclude that a flexible approach that does not insist that evidence take a particular form, but that still ensures that the person sought may challenge the admissibility of evidence under the *Charter*, or its content according to Canadian evidentiary rules, is more consistent with the purpose of the extradition hearing. As Moldaver J.A. succinctly put it in *McDowell* (at paras. 22-23):

... there is good reason for Canada to insist that evidence gathered in Canada conform substantively with our rules of evidence. Such a rule does not place an onerous burden on the requesting partner. It does, however, preserve the integrity of our justice system by affording fugitives the protection of our laws and values while they remain in Canada. In that way, the Act provides a front-line check on the methods used by both foreign and domestic law enforcement agencies to collect evidence in Canada.

Insisting that evidence gathered in Canada comply substantively with our rules of evidence is one thing; insisting that it take a certain form is quite another. The latter does nothing to preserve or protect the integrity of our justice system and it creates a barrier to the prompt and efficient discharge of our international obligations.

[31] I would add that, in an appropriate case, the extradition judge may require the attendance of any witness for examination or cross-examination. Section 24(2) of the Act gives the extradition judge the same powers as a preliminary inquiry judge in a domestic proceeding. It reads as follows:

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.

As the Court noted in *Ferras*, the current Act does not maintain the close parallel between the extradition hearing and the domestic preliminary hearing that existed under the previous statute. Section 24(2), rather, “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” (*Ferras*, at para. 48). There is no question that the preliminary inquiry judge has the power to compel the attendance of a witness for cross-examination in an appropriate case. See, for example, s. 540(9) of the *Criminal Code*. Thus the extradition judge may, in his or her discretion, require any person to appear for examination or cross-examination in respect of the Canadian-gathered evidence tendered in summary form in the record of the case. For example, this may be appropriate if it is unclear whether the evidence substantively conforms with the rules of evidence. Likewise, where there is an “air of reality” to a *Charter* claim, the extradition judge may well find it appropriate in exceptional circumstances to require the attendance of any witness. Of course, the court in exercising its discretion must be mindful that, contrary to the preliminary hearing, there is no general right to cross-examine witnesses in the extradition context: *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 521; *Re United States of America and Smith* (1984), 44 O.R. (2d)

705 (C.A.), at pp. 719-20; *United States of America v. Earles*, 2003 BCCA 20, 171 C.C.C. (3d) 116, at para. 31; *Wacjman*, at para. 81.

4. Disposition

[32] In this case, Mr. Anekwu argues that the Canadian-gathered evidence is not admissible in summary *form*. He has not argued that the *content* of any particular item of Canadian-gathered evidence would be inadmissible if adduced in the context of a Canadian proceeding and, in my view, rightly so. As stated earlier, the impugned evidence is comprised of corporate records, mailbox records, bank records, first-hand police surveillance evidence and an immigration photograph of Mr. Anekwu, all of which would be admissible if the actual records were filed or the evidence adduced by *viva voce* evidence in the usual course of a criminal proceeding. The extradition judge was therefore correct to admit this evidence under the approach set out above.

[33] Mr. Anekwu also alleged at the extradition hearing that the same records, surveillance evidence and immigration photograph were obtained without warrants and therefore in contravention of s. 8 of the *Charter*. As stated earlier, he further contended that the onus was on the requesting state to show that the evidence was justifiably before the court. The Attorney General argued that the onus was on Mr. Anekwu, rather, to prove any alleged *Charter* breach. Further, there was no air of reality to his claim that the evidence was illegally obtained because none of the evidence required the issuance of a search warrant. Rather, the records and other evidence in question could be adduced by four

persons named in subpoenas placed before the court. The extradition judge acceded to the Attorney General's argument, noting that Mr. Anekwu took no issue with the subpoenas being properly served or the evidence being admissible orally (2006 BCSC 731, [2006] B.C.J. No. 1029 (QL), at para. 20). In my view, the extradition judge rightly concluded that there was no need to entertain any *Charter* application as Mr. Anekwu's claim lacked an air of reality: *Dynar*, at para. 141.

[34] Finally, having admitted the evidence, the extradition judge correctly concluded that it was sufficient to support a committal order.

[35] In the result, I conclude that the Court of Appeal erred in its interpretation and application of s. 32(2) of the Act. I would therefore allow the appeal and restore the committal and surrender orders.

Appeal allowed.

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

Solicitors for the respondent: Farris, Vaughan, Wills & Murphy, Vancouver.