Court of Queen's Bench of Alberta

Citation: France v BM, 2020 ABQB 186

Date: 20200316
Docket: 190867754X1
Registry: Edmonton

Between:

The Attorney General of Canada (On Behalf of the Republic of France)

Applicant

- and -

BM

Respondent

Judgment
of the
Honourable Madam Justice A. Loparco

I. Introduction

[1] This decision relates to a preliminary application on behalf of the Attorney General of Canada ("Canada") representing the Republic of France (the "Requesting State") to dismiss BM's Notice of Application filed December 18, 2019 ("Application").

[2] The Application seeks an order staying or dismissing the Requesting State's extradition proceeding as a result of an abuse of process and pursuant to ss 7 and 24 (1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[3] The grounds for making the Application are based on BM's affidavit, which deposes that her ex-husband, CB, sexually abused her two young children and that the French police and courts failed to protect them.

[4] BM further deposes that she was advised by the children's family doctor to remove the children from school. She therefore left France and moved the children to Alberta on June 27, 2017. She states that she received CB's verbal and written consent to do so.

[5] A Family Court in France issued judgments on August 2, 2017 and December 6, 2017 awarding CB unsupervised visits and then ultimately full custody of the children. BM was not present for the hearing that resulted in the latter judgment.

[6] The Requesting State now seeks BM's extradition for alleged conduct amounting to the Canadian offence of abduction, contrary to s 283 of the *Criminal Code*, R.S.C., 1985, c. C-46.

[7] BM contends that the outcome sought by the Requesting State in the extradition hearing violate her rights under s 7 of the *Charter* and/or constitute an abuse of process and that as a result, the Court ought to order a stay of proceedings.

[8] Canada's position is that this Court should summarily dismiss BM's Application for the following reasons:

a. the matters raised by BM, while serious, fall outside the limited jurisdiction of an extradition judge;

b. there is no nexus between the issues raised in the *Charter*/abuse of process Application and those to be determined by this Court on committal;

c. the proper forum to raise her objections are pursuant to s 44(1)(a) of the *Extradition Act* ("*Act*") before the Minister of Justice if this Court orders committal; and

d. the consequences of BM's extradition on her children are unrelated to the issues to be determined by the committal judge.

II. Background

[9] The relevant chronology of events that led to the Authority to Proceed ("ATP") issued on behalf of the Minister of Justice pursuant to s 15 of the *Act* is as follows:

A. Family Proceedings

- BM and CB were married on March 31, 2007. Their daughter was born on June 30, 2008 and their son on August 10, 2010. The family resided in France.
- On October 16, 2015, CB initiated divorce proceedings in France
- On November 25, 2015, sexual abuse allegations were made against CB.
- On December 15, 2015, a Court in France issued a interim order specifying that parental authority over the children was to be jointly exercised by both parents, the children would reside with their mother and that CB had a right of supervised access in a neutral location twice per month at the location of a named association ("Association"). In addition, an expert psychological report of the parties and their children was ordered. The Association was to prepare a report within six months.
- The psychologist report was filed with the court on June 17, 2016. The Association provided reports of the supervised visits with CB over a period of two years.
- The criminal investigation of the sexual abuse allegations was closed on January 18, 2017.
- Following a hearing held on June 20, 2017, which was attended by BM and CB, a further court order dated August 2, 2017 specified that the parents were to exercise joint parental authority over the children, that the residence of the children was to be with the mother and that the father was to have increased visitation rights in relation to the children, with exchanges to take place within the premises of the Association or at the mother's home. It also specified that each parent was to be informed of any change of residence, particularly relocation, insofar as it modified the exercise of parental authority.
- The French Family Court issued a divorce judgment dated December 6, 2017 following a hearing on October 4, 2017, which proceeded in BM's absence. The Court noted that BM disappeared with the children and was noncompliant with the previous order granting access to the father. The Court granted sole parental authority and custody of the children to CB. The father was granted residential care and the mother was given supervised access rights. The order was provisional.

B. Extradition Proceeding

[10] There are four phases in the extradition process: ***United States of America v. Khadr***, 2011 ONCA 358 at paras 36-39 [***Khadr***]. Section 15 of the *Act* gives the Minister of Justice authority to issue an ATP authorizing the Attorney General to seek, on behalf of the extradition partner- in this case, France- an order of a court for the committal into custody of a person sought to await surrender.

[11] The second phase, pursuant to s 29 of the *Act,* is judicial. The judge is charged with determining whether there is sufficient evidence of the alleged conduct that, had it occurred in Canada, would justfy committal for trial on the offence in question.

[12] The third phase engages ministerial executive discretion. Pursuant to s 40 of the *Act*, the Minister may order surrender to the extradition partner, or pursuant to s 44(1)(a), refuse surrender if it would be "unjust or oppressive having regard to all the relevant circumstances".

[13] The final phase may involve possible appeals. The individual sought by the extradition partner may appeal the decision of the extradition judge and/or apply for judicial review of the Minister's decision.

[14] The relevant events in the extradition proceeding to date are as follows:

- On June 27, 2017, BM left France with her children and relocated to Alberta.
- On September 6, 2017, CB informed police officers in France that the children were taken abroad and did not return to their school at the start of the school year.
- On February 6, 2018, a judicial investigation was commenced and on February 16, 2018, a French Court in the region where the parties resided granted a warrant for BM's arrest.
- The warrant was sent to the Public Prosecutor's Office in France on April 9, 2018 and a European arrest warrant with international dissemination on May 3, 2018.
- On October 18, 2018, as a result of a request made by the Republic of France to the Government of Canada for the extradition of BM, an ATP pursuant to s 15 of the *Act* was issued by the Minister of Justice of Canada.
- A warrant for BM's arrest was obtained pursuant to s 16 of the *Act* on July 10, 2019.
- BM was arrested on July 11, 2019 and subsequently granted judicial interim release.

III. Summary Dismissal of *Charter* and Abuse of Process Application

A. Do the matters raised by BM fall outside the jurisdiction of a committal judge?

[15] The jurisdiction of the court is limited to those matters specifically assigned to the committal judge under the *Act*. Section 29(1) of the *Act* sets out the functions of the committal judge:

> 29 (1) A judge shall order the committal of the person into custody to await surrender if
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> (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; and
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> (b) in the case of a person sought for the imposition or enforcement of a sentence, the judge is satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted.

[16] The extradition process aims to ensure prompt compliance with Canada's international obligations and the protection of the rights of the person sought: per Cromwell J at para 1 of ***MM v United States of America***, [2015] 3 SCR 973, 2015 SCC 62 [***MM***].

[17] During the judicial committal phase of the extradition process, the extradition judge's role is "carefully circumscribed". The Court in ***MM*** cautioned that the extradition judge is not to become "embroiled in questions about possible defences or the likelihood of conviction" or admit evidence at the extradition hearing that would be exculpatory as it does not "affect the reliability of the requesting state's evidence" (para 84).

[18] If the person seeks to challenge the reliability of the Requesting State's evidence, the test for an initial showing of proof is (***MM*** at para 77):

> ... Before the extradition judge embarks on a hearing evidence from the person whose object is to challenge the reliability of the evidence presented by the requesting state, the judge may, and I would suggest generally should, require an initial showing that the proposed evidence is realistically capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability of the requesting state's evidence. This showing may be based on summaries or will-say statements or similar offers of proof. If the judge concludes that the proposed evidence, taken at its highest, is not realistically capable of meeting the standard, it ought not to be received.... (emphasis added).

[19] Although in ***MM*** the Court dealt with challenges to the reliability of evidence from the requesting state, the same general principles apply to the analysis of whether a *Charter* or abuse of process application ought to be heard.

[20] With respect to her standing to advance *Charter* rights based on potential harm to her children, BM refers to ***New Brunswick (Minister of Health & Community Services) v G(J)***. [1999] 3 SCR 46, in which the Supreme Court held that a parent's section 7 *Charter* rights were engaged when legal proceedings implicated the custody of children. BM similarly argues that the extradition process violates her *Charter* right to security of the person as the result affects her custodial rights, which will harm her children whether she leaves them in Canada or returns them to France.

[21] The court's jurisdiction to consider *Charter* violations derives from s 25 of the *Act*:

> For the purposes of the Constitution Act, 1982, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge.

[22] That jurisdiction is restricted to granting *Charter* remedies that "pertain directly to the circumscribed issues relevant at the committal stage of the extradition process": ***United States of America v Kwok***, [2001] 1 SCR 532, 2001 SCC 18 at para57) [***Kwok***].

[23] The judicial power may apply to any conduct that undermines the integrity of the judicial system, but it cannot be used to remedy the actions of foreign states outside of Canada's borders, nor can it be invoked in respect of any perceived unfairness of the ultimate trial to be held in the foreign state: ***USA v Cobb***, [2001] 1 SCR 587, 2001 SCC 19 at paras 21-40 [***Cobb***].

[24] The SCC has also cautioned that "judicial intervention must be limited to cases of real substance" since failing to do so might place Canada in a position of violating its international obligations: ***United States of America v Dynar***, 1997 CanLII 359 at para 125, [1997] 2 SCR 462.

[25] In order for a *Charter* application to proceed, the applicant must satisfy the threshold requirement and present grounds that disclose a basis upon which the committal judge can grant the remedy sought: ***United States v Freiuth***, 2004 BCSC 154 at para 13.

[26] BM submits that her Application is primarily grounded in the abuse of process doctrine and that this Court may proceed on that basis alone, even though her *Charter* rights are also implicated.

[27] Canada urges this court to conduct a preliminary examination of the proposed evidence in support of BM's *Charter*/abuse of process application, which it argues, is incapable of meeting the evidentiary threshold to entertain the remedy sought. A court may summarily dismiss an application for *Charter* relief within an extradition proceeding if it lacks an "air of reality": ***Wacjman v United States of America***, 2002 CanLII 38007 at para 54, 171 CCC (3d) 134 (QCCA); ***United States of America v Anekwu***, 2009 SCC 41 at paras 6, 33, [2009] 3 SCR 3; ***R v Larosa,*** (2002) 166 CCC (3d) 449 at paras 76, 78, 84 (OntCA); ***USA v Ranga***, 2012 BCCA 81 at paras 14 to 16.

[28] There appear to only be three reported cases in Canada that deal with summary dismissal of *Charter* or abuse applications in the context of an extradition proceeding.

[29] In ***Japan v He***, 2012 ONSC 5024 at para 31, aff'd on other grounds, 2013 ONCA 575, the Court allowed Mr. He's applications to proceed because it was not convinced that they were "doomed to fail".

[30] In ***United States v Hibbert***, 2018 ONSC 7400, the Attorney General brought a motion under the Ontario Criminal Rules to dismiss Mr. Hibbert's *Charter* application on the grounds that it was frivolous or vexatious. The Court allowed the application to proceed because the allegations had an "air of reality".

[31] Most recently, in ***Korea v Jung***, 2019 BCSC 1962 [***Jung***], the Court summarized the relevant principles as it considered its jurisdiction to hear the abuse of process and *Charter* applications and stated (at paras 13-17):

> While a committal judge has the power to decide constitutional questions, this jurisdiction extends only so far as is necessary for the judge to perform his or her function under s. 29(1) of the ***Extradition Act: United States of America v. Romano***, 2016 BCCA 444 at para. 13.
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> The committal judge may only grant *Charter* remedies that pertain directly to the circumscribed issues relevant to the committal stage of the extradition process, that is, the determination of whether there is a *prima facie* case of a Canadian crime: *United States of America v. Kwok*, 2001 SCC 18 at para. 57. The jurisdiction of the committal judge to address challenges to legislative provisions are only engaged in the context of this determination.
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> The court's *Charter* jurisdiction does permit it to grant a stay of proceedings on the basis of an abuse of the court's process. In addition, the court maintains an "inherent and residual discretion at common law to control [its] own process and prevent its abuse": *United States of America v. Cobb*, 2001 SCC 19 at para. 37. In this context, there is no substantial difference between the common law and *Charter* doctrines (*Cobb* at para. 36).

> The jurisdiction in this regard may be exercised in two circumstances. Firstly, "if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse of process"; and secondly, where "proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice … no matter how fairly that proceeding might be conducted"; *United States of America v. Khadr*, 2011 ONCA 358 at para. 47.
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> However, in either case, the person sought must demonstrate a nexus between the conduct alleged to constitute an abuse of process and the committal hearing itself: *Khadr* at para. 45.

[32] The Court in ***Jung*** dismissed the *Charter* concerns, but considered whether to dismiss an abuse of process claim according to the following applicable test for an initial showing of proof (at paras 34-5):

> Where the Requesting State has engaged in conduct that threatens the integrity of the committal process, comity gives way to the inherent jurisdiction of the court to prevent the abuse of its process. In seeking extradition, the Requesting State "must come before the courts in Canada to show that it has a case against the fugitive that entitles it to proceed to request a surrender order from the Minister". In doing so, it is "governed by the rules of fundamental justice that prevail when liberty interests are at stake, and by the doctrine of abuse of process that governs the conduct of all litigants before the Canadian Courts": *Cobb* at para. 45.
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> However, where the integrity of the committal process is not at stake, the committal judge has no jurisdiction to consider allegations of misconduct on the part of the Requesting State. The committal judge only has power over the process she or he actually oversees: that is, the committal process itself. It is only where the Requesting State engages in conduct that "reaches into and infects or otherwise prejudices the fairness of an ongoing Canadian proceeding" that the committal judge has the power to intervene: *Rogan* at para. 38; *United States of America v. Tollman* 2006 CanLII 31732 (O.N. S.C.) at para. 18.

[33] As stated, the Court found that it had jurisdiction to consider the Applicant's abuse of process claim. Ultimately, the Court accepted the claim that the requesting state was using the extradition process to pressure an individual into paying a civil debt thus "making the extradition process itself …the instrument of abuse" (para 45).

[34] BM's position is that the abuse of process was caused by the French police and courts in failing to protect her children against sexual abuse, which forced her to leave France. CB then initiated the complaint to the same police who had failed to protect her children, resulting in the criminal charges. Finally, she argues that the extradition process itself furthers the abusive process as it is being used to force her into a *Sophie's choice*, i.e., leave her children behind in Canada or return them to the hands of a sexual predator.

[35] A stay of proceedings is a possible remedy for a breach of *Charter* rights or an abuse of process. It ensures our courts are not enlisted in a process to reward intolerable conduct or unacceptable consequences. This remedy is supported by the language in the *Act* - a judge is to determine whether there is evidence admissible of conduct that, had it occurred in Canada, would

justify committal. Since ***Cobb*** in 2001, the courts have authority to use a stay to prevent the extradition process from being abused in such a way.

[36] At this juncture, the evidence of an abuse of process or *Charter* violation has not been fully explored; the question for this Court is whether the evidence, if proven, could undermine the Court's integrity. Thus, at this stage, I do not need to rule out either an abuse of process or *Charter* violation.

[37] The test for an initial showing of proof that would allow a full hearing of the Application is whether the alleged conduct raises a question of integrity of the extradition court's own processes that could not be remedied by the Minister: ***Jung***, at paras 44-50.

[38] In criminal matters, a stay is an option even in the absence of any nexus between the alleged misconduct and the guilt or innocence of the accused or the evidence obtained. Since ***R v Weaver***, 2005 ABCA 105 at para 11, the infringement no longer has to be exculpatory of the issues raised by the indictment or information.

[39] Although an extradition hearing is not a criminal trial, it does engage criminal foreign proceedings and inexorably, an individual's liberty rights. There is an expectation that individuals subject to such a process will be guaranteed basic human rights and fundamental justice. Thus, an extradition court has the authority to stay the proceedings where there has been or will be a clear violation of its own notion of fundamental justice. That question remains to be determined at the hearing of the Application.

[40] I conclude that the issues raised by BM fall within the jurisdiction of this Court.

B. Is there a nexus between the issues raised in the *Charter*/abuse of process Application and those to be determined by this Court on committal?

[41] Canada's second argument is that the conduct of the Requesting State is entirely unrelated to the committal hearing and does not implicate the fairness of the hearing; thus, it argues, absent a nexus between the impugned conduct and the narrowly circumscribed committal hearing, the Application must fail: ***Khadr*** at para 45; ***United States v Lane***, 2014 ONCA at para 57; ***Kwok*** at para 57.

[42] Canada submits that the alleged violations do not impugn the fairness of the extradition hearing, unlike in the ***Khadr***, ***Cobb*** and ***United States of America v Tollman*** (2006), 212 CCC (3d) 511 (OntSCJ) [***Tollman***], wherein the requesting state misconduct was at the heart of the issue.

[43] ***MM*** is a case in which a person was sought for similar conduct, namely, abduction in contravention of a custody order. The extradition judge refused committal after hearing evidence of necessity: that the child abduction was necessary to prevent physical and mental abuse by their father. The Supreme Court of Canada held considering the defence was in error as it relied on evidence that could establish a defence or an exculpatory account of events, which is generally inadmissible at the committal stage since it does not affect the reliability of the requesting state's evidence: per Cromwell J, at para 84.

[44] BM argues that since ***MM*** did not specifically deal with a *Charter* or abuse of process application, the Court must rely on additional principles from ***Cobb***, ***Larosa***; and, ***Khadr***. In doing so, the Court is urged to accept a broader interpretation of the nexus prerequisite, which does not require that the fairness of the extradition hearing be impaired or that the conduct

impugned interfere in the Court's assessment of the nature or sufficiency of the committal evidence.

[45] In ***Cobb***, the alleged abusive conduct included comments from an American judge assigned to their trial who stated that the fugitives who contested their extradition would get the "absolute maximum jail sentence" and from the prosecutor who hinted that they would be subject to sexual violence in prison. The SCC found that these statements were an attempt to influence the unfolding of Canadian judicial proceedings by putting undue pressure on the accused to end their objections to the extradition request. The SCC concluded that, aside from the intimidation itself, a committal order obtained in those circumstances would clearly not be consistent with the principles of fundamental justice, and it warranted a stay of the extradition proceedings.

[46] ***Larosa*** and ***Khadr***, which interpreted ***Cobb***, reject the narrow interpretation of a nexus requirement and clarify that a stay of proceedings could be imposed under a "residual category"; in other words, it may be warranted even if the misconduct in question does not compromise the fairness of the proceedings. In ***Larosa***, Doherty JA wrote:

> The extradition judge may also stay committal proceedings if, in the circumstances, proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice. *Cobb* and *Shulman* are examples of situations in which proceeding with a committal hearing amounted to an abuse of process and a breach of s. 7 no matter how fairly that proceeding might be conducted (at para 52).

[47] A stay of proceedings was granted under the residual category in ***Khadr***. The person sought was illegally abducted, beaten and held for 14 months in Pakistan by local authorities in exchange for a bounty paid by the CIA. Canada argued in that case that the state misconduct had no effect upon the fairness of the extradition hearing or the sufficiency of evidence. Sharpe JA rejected the narrow view in ***Cobb*** and held that a stay is also available where proceeding with the committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice regardless of how fairly the proceeding would be conducted.

[48] Subsequent extradition cases have applied the residual category and held that a stay is available even if the conduct does not compromise the fairness of the extradition hearing or sufficiency of the evidence: ***Czech Republic v Zajicek***, 2012 ONCA 99, leave to appeal granted, 2012 CanLII 36253 (SCC), but quashed as moot, [2012] SCCA No 172; ***United States of America v Licht***, 2002 BCSC 1151; ***Tollman***; and ***United Kingdom of Great Britain and Northern Ireland v Tarantino***, 2003 BCSC 1134. In those cases, allegations of serious abuse could result in a stay only in the "clearest of cases".

[49] BM also relies on ***R v O'Connor***, [1995] 4 S.C.R. 411 at para 73, which was applied in the extradition cases of ***Cobb*** and ***Khadr***, for the proposition that the residual category of conduct does not relate to trial unfairness or impairment of procedural rights, but rather situations in which a "prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process". Further, as stated in ***Khadr*** at para 32 "...it is aimed at vindicating the court's integrity and the public's confidence in the legal process in the face of improper state conduct".

[50] I conclude, as in ***USA v US***, 2012 BCSC 766 at para 55, aff'd 2013 BCCA 483, leave to appeal ref'd 2014 CanLII 34276 (SCC), that there are two potential bases for granting a stay: i) it may be appropriate where something has occurred which renders the committal hearing fundamentally unfair; or ii) it may be warranted on the basis of the "residual category" which does not go to the fairness of the proceeding *per se* but, instead, addresses situations in which a proceeding is conducted in such a manner as to connote unfairness of such a degree that it contravenes fundamental notions of justice or offends the community's sense of fair play and thereby undermines the integrity of the judicial process.

[51] Finally, Canada raises the argument that an abuse of process cannot be based on the actions of a private actor, which in this case, is CB.

[52] Although an abuse of process rooted in the conduct of a private party has not been considered in the context of an extradition case, it has arisen in criminal cases. BM relies on criminal cases in which an abuse of process was founded upon the conduct of a private party, resulting in tainted prosecution. In ***R v Neil***, 2002 SCC 70, Binnie J held at para 43:

> ... At common law, the doctrine of abuse of process was rooted in objectionable conduct by private litigants, for example using the courts for an improper purpose. Although s. 7 of the *Charter* incorporates the abuse of process doctrine, it does not extinguish the common law doctrine under which the courts have an inherent and residual discretion to control their own processes and prevent their abuse: *Cobb*, *supra*, at para. 37. Even in *Charter* terms, there is much to be said for the view of Powell J. of the United States Supreme Court who observed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that, if defence counsel is incompetent or otherwise violates his or her duties in such a way as to adversely affect the representation of an accused, "a serious risk of injustice infects the trial itself. . . . When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty" (p. 343)....

[53] In this case, while it is CB's alleged sexual abuse that is what BM seeks to be protected from, her charges and the extradition process are predicated on state conduct, namely, the failure of the French police and courts to protect her children from the abuse despite her complaints and the children's own disclosure. In my view, this opens the door to a possible abuse of process claim.

[54] BM's rights are allegedly implicated in three separate ways: CB's use of the state action via extradition; the French Court's decision to grant CB parental authority in her absence and in light of the allegations in her absence; and, the failure of the French police to lay charges in light of the children's own testimony.

[55] I have reviewed BM's affidavit as well as the full transcript of the police interview of the children. The disclosure, on its face, could amount to sexual abuse. Taken at its highest, the evidence reveals that the French police may have failed to prosecute a crime. Further, it may show that despite the French Court having received concerns about the father's care and the children's well-being, it ultimately ordered full custody to the father in BM's absence.

[56] At this preliminary stage, I caution that one cannot leap to the conclusion that there was an abuse of process or a *Charter* violation, I simply find that a sufficient nexus exists between the impugned conduct and the integrity of the committal hearing. BM should be afforded the

right to fully explain her evidence so that the Court can determine whether it reaches the degree of unfairness or vexatiousness that might contravene fundamental notions of justice and undermine the integrity of the judicial process.

[57] I conclude BM has met the test for an initial showing such that the proposed evidence, taken at its highest, is realistically capable of meeting the standard. Her evidence should be fully explored to determine whether there was misconduct by the French police or Courts leading to the extradition process that could result in serious injustice if the committal hearing were to proceed.

C. Should BM's claims be raised pursuant to s 44(1)(a) of the *Extradition Act* before the Minister of Justice if this Court orders committal?

[58] Canada further opposes this Court hearing BM's Application on the basis that it would exceed this Court's jurisdiction and usurp the Minister of Justice's exclusive jurisdiction under s 44(1)(a) of the *Act* to refuse surrender if it would be "unjust or oppressive having regard to all the relevant circumstances".

[59] It further argues that an extradition judge is prohibited from considering issues that fall within the Minister's domain and expertise in international obligations and foreign affairs: ***India v Badesha***, 2017 SCC 44 at para 39, [2017] 2 SCR 127; ***Lake v Canada (Minister of Justice),*** 2008 SCC 23 at para 37, [2008] 1 SCR 761. Such roles are distinct, independent and do not overlap: ***MM*** at paras 19-26; ***Canada (Minister of Justice) v Narayan,*** 2008 BCCA 280 at para 14; ***Whyte*** at para 57.

[60] BM argues that an additional consideration in the abuse of process analysis is the lack of the defence to the charge of criminal abduction in France of protecting her child from danger of imminent harm, or escaping the danger of imminent harm, which would be available in Canada pursuant to section 285 of the *Criminal Code*.[1]

[61] Canada is correct in that the lack of a comparable defence to the criminal charge of abduction that would be available in Canada is a matter for the Minister to consider in the overall fairness assessment of the surrender request. The defences unavailable to BM in France may be a reason for her to seek the Minister's refusal to surrender her after a committal hearing for reasons that are unjust or oppressive.

[62] However, the Minister's authority to refuse surrender pursuant to s 44(1)(a) of the *Act* does not abrogate a superior court's intrinsic jurisdiction to prevent its process from abuse for the reasons previously stated in this decision: ***Cobb*** at para 48; ***MacMillan Bloedel Ltd v Simpson***, [1995] 4 SCR 725.

[63] Apart from the argument that there is no comparable defence in France to the charge, this Court may consider it repugnant to permit the committal hearing to take place in the first place if it is found that other evidence demonstrates a serious and clear case of an abuse of process.

[64] In ***Khadr*** at para 37, Sharpe JA differentiated between the judicial and executive roles and stated: "The judicial phase in the extradition process is not subservient to the executive

[1] In ***MM***, the Supreme Court held that it was an error to permit the person sought to lead evidence at the extradition hearing of the defence contained in s 285 of the *Criminal Code* as the extradition hearing is not a trial and the court has no jurisdiction to assess the merits of a defence.

phases that precede and follow". Rather, he held that it provides a check that protects the integrity and fairness of the proceeding.

[65] Sharpe JA also examined the distinction between the roles and cited Arbour J in ***Cobb***, at paras 44 and 48 for the proposition that: "...the existence of potential remedies at the executive stage does not oust the jurisdiction of the courts to control their own process in cases such as here, where the courts are required to preserve the integrity of their own proceedings".

[66] In ***Khadr***, in response to the Attorney General's contention that the Court could not usurp the Minister's role, Sharpe JA concluded at para 51:

> The jurisdiction to stay proceedings on the grounds of abuse of process lies at the heart of the courts' integrity and the independence of the judicial process. That core jurisdiction should not be hobbled by the narrow interpretation urged upon us by the Attorney General. To accept that interpretation would not unduly weaken judicial authority, but would undermine the integrity of the extradition process itself by subverting the courts' capacity to ensure the necessary element of scrutiny by an independent judiciary.

[67] I find that hearing BM's Application would not usurp the Minister's exclusive jurisdiction under the *Act*.

D. Are the consequences of BM's extradition on her children related to the issues to be determined by the committal judge?

[68] Finally, in a somewhat related argument, Canada argues that potential violations of a person's rights are premature and that such issues should be considered by the Minister of Justice at the time of surrender: ***Kwok*** at paras 83-85. Therefore, it argues that the issues related to the impact on BM's children and any hardship caused and her personal circumstances, ought to be considered only at the final phase of the extradition process.

[69] In my view, while the future consequences that may result after surrender are considered by the Minister in applying s 44(1)(a), it does not preclude a committal judge from assessing the overall effect of the alleged abuse of process.

[70] Moreover, the potential harm to the psychological or physical wellbeing of children elevates the seriousness of the concerns raised. In this context, I refer to the guiding principles in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (adopted by the United Nations General Assembly, November 20, 1989, ratified by Canada on December 13, 1991) and other international instruments regarding the rights of children, which should be considered when decisions are made that affect their future: ***MM*** at paras 148, per Cromwell J, and 223, per Abella J, dissenting***; R v KJM,*** 2019 SCC 55 at para 137.

[71] The consequence of BM's committal proceeding are part and parcel of the net effect of surrender as in ***Cobb***. As in ***Cobb***, the consequence, i.e., the threat of future violence, was the impugned act. Although not in an extradition context, BM relies on the decision of Rooke AC., dismissing an application to return children to France pursuant to the *International Child Abduction Act*, RSA 2000, c I-4, because the French police and courts had failed to protect the children from abuse: ***DR v AAK***, 2006 ABQB 286.

[72] If the allegations made by BM are substantiated at the extradition hearing, this Court will have to consider whether the consequences of her extradition would cause harm to the children

in a way that the Canadian courts would find reprehensible. Once again, I find against Canada's objection.

IV. Conclusion

[73] Although the role of the committal judge is narrowly defined – i.e., to determine whether the evidence against the person sought is sufficient to establish a *prima facie* case against them, the judge is also responsible to ensure the process accords with principles of fundamental justice.

[74] Since there is an air of reality to the allegations that the process was predicated on an abusive foundation, it implicates the integrity of the committal process. In the result, this Court must ensure the allegations can be fully heard before determining whether the committal process will proceed.

[75] The Crown's preliminary application to dismiss BM's Application seeking a stay of proceedings is dismissed.

Heard on the 03rd day of February, 2020.
Dated at the City of Edmonton, Alberta this 16th day of March, 2020.

A. Loparco
J.C.Q.B.A.

Appearances:

Cameron Regehr
Justice Canada
for the Applicant

Nathan J. Whitling
Aloneissi O'Neill Hurley O'Keeffe Millsap
for the Respondent