Extradition Case of Dr. Hassan Diab:
Highlights of the Abuse of Process Factum
October 2010

On October 15, 2010, Dr. Hassan Diab's lawyer, Mr. Donald Bayne, submitted a 94-page factum (legal brief) and supporting documents to the Ontario Superior Court exposing a host of serious misrepresentations, inaccuracies, contradictions, and omissions in the case against Dr. Diab. Included below are some highlights of the factum.

> *Both the intelligence assertions and the alleged "confirmatory" material set out in the certified Record of the Case are "replete"… with misrepresentations, overstatements, misstatements, omissions, inaccuracies and editing that create a misleading, incomplete, unreliable and unfair Record of the Case. Cogent evidence emanating from the Requesting State itself proves a deeply troubling pattern of serious contradiction, inaccuracy and misrepresentation throughout the Record of the Case that demonstrates at the very least a complete failure of due diligence by the certifying authority and at the most a deliberate attempt to manipulate the material to create a false and prejudicial impression. This pattern of misleading assertions strikes at the very heart of the Canadian extradition process, which, as the Supreme Court of Canada has repeatedly stated…, must be scrupulously fair.* (Factum, p. 2)

Mr. Bayne points out that the abuses in the case against Hassan amount to "the clearest case of abuse of process in the extradition context". French investigators have breached their duty of fairness and good faith, thus justifying a stay of the extradition proceedings.

> *This breach not only prejudices a fair extradition hearing for Hassan Diab, thereby justifying a stay, but also strikes at the fundamental principles that underlie the Canadian community's sense of fair play and decency. The misleading and unfair Record also undermines the integrity of the Canadian court system and its extradition process…* (Factum, p.2)

> *This is the clearest case of abuse of process in the extradition context and certification process and demonstrably worse than the cases (Thomlison, Tarantino, Tollman, Almrei, Cobb, Shulman) in which the courts have upheld a finding of abuse (and, in most, a stay). The Requesting State has disentitled itself due to its abusive conduct from pursuing its extradition application before the Canadian Court.* (Factum, p. 3).

> *The lack of diligence in the Diab case is far more egregious [than other cases in which the Court found an abuse of process]…; the misrepresentations go beyond availability of a witness (because in many or most cases no witness is named or even known) to misrepresentations about the content of the "evidence" itself; there was in the case at bar not merely a failure to act diligently to correct the misrepresentations, contradictions and inaccuracies when later the Requesting State became aware of them – here, the Requesting State knew from the outset (i.e. did not <u>subsequently</u> become "aware") that these were not accurate, complete, candid assertions of fact. The documents that prove the many*

> *misrepresentations, contradictions, inaccuracies and misleading editing are those of the Requesting State itself, not defence counsel or some external or third party. These highly relevant Requesting State documents antedate the certification of the Record of the Case. They have not arisen subsequently or to the surprise of the Requesting State. It is therefore by extreme lack of due diligence at the least or deliberate design (manipulation) at the worst that the misrepresentations were made and persist now, uncorrected, just short of two years later.* (Factum, pp. 22-23)

Describing Hassan's case as "utterly unlike any prior Canadian extradition case," Mr. Bayne indicates that the French investigators themselves admit that they do not know the sources and the reliability of the intelligence they are using against Hassan. The intelligence may also be the product of torture, given France's documented reliance on intelligence coming from countries with poor records on human rights.

> *Utterly unlike any prior Canadian extradition case disclosed in the jurisprudence (but like the Maher Arar "rendition" case), this extradition case and the Record of the Case upon which it relies is founded on "secret", unsourced, uncircumstanced "intelligence" assertions, bald, conclusory and anonymous allegations of individual and group responsibility for a criminal act some three decades ago.* (Factum, p. 1)

> *If ever there was a question about proper sourcing of this "unacceptable" intelligence, that question is conclusively answered in the Letters Rogatory [dated June 2008]… [A]s for reasons of confidentiality and security of the sources, the <u>Examining magistrate and different parties to the proceedings have not to know the origin of the information</u>… (emphasis added). The intelligence sources remain unknown and anonymous, just as the intelligence itself is uncircumstanced (what were the circumstances of the production of this "information"?; was torture or mistreatment involved?; is it sheer opinion of an anonymous analyst?). Even the French Judges don't know. The "unacceptability" of this material at the heart of Canadian extradition proceedings protected by Charter guarantees of fundamental justice, is manifest.* (Factum, p. 85)

> *On the gravely troubling issue of whether torture may have been involved in the production of unsourced, uncircumstanced intelligence, Human Rights Watch, the respected international organization, on March 11, 2010, submitted its concerns about French use of intelligence as if it was evidence to the U.N. Committee Against Torture: "Human Rights Watch is concerned that French criminal procedures in terrorism cases lack sufficient safeguards to ensure that evidence obtained under torture or prohibited ill-treatment is not used at any stage of proceedings in France. Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations. Our research indicates that there is insufficient judicial verification of intelligence material in terrorism investigations."* (Factum, p. 86)

Not only is the intelligence against Hassan of unknown sources and reliability, but Mr. Bayne also exposes how even such unsourced intelligence along with the alleged "confirmatory" material have been manipulated to create a misleading, incomplete, unreliable and unfair Record of the Case.

As will be set out in detail below, in respect of each of these alleged "corroborating" factors, the certified Record of the Case has falsely, inaccurately and (at least) carelessly misrepresented the evidence by misstatement, by important tactical or grossly careless omission, by prejudicial overstatement and sheer argument, revealing a pattern of significant misrepresentation that individually and cumulatively amounts to a complete failure of due diligence or, worse, to a deliberate attempt to manipulate the material in the Record of the Case to create a falsely inculpatory impression. The same is true of the unsourced, uncircumstanced, bald and conclusory intelligence assertions of Hassan Diab's alleged criminal responsibility: glaring contradictions abound that cast the non-evidentiary "intelligence" into further disrepute and unreliability. This is no isolated or insignificant misstatement in the Certified Record of the Case. Instead, a pattern of careless or deliberate misrepresentation emerges that infects the entire Record of the Case. (Factum, p. 8)

MAJOR MISREPRESENTATIONS, CONTRADICTIONS, INACCURACIES AND OMISSIONS: COGENT EVIDENCE OF UNFAIRNESS, FAILURE OF GOOD FAITH, FAILURE OF DUE DILIGENCE

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 1:

The French investigators claim in the Record of the Case dated December 11, 2008, that Hassan used a false passport to enter France in 1980. However, in sworn affidavits submitted to the Court one day before Hassan's arrest [on November 12, 2008], the French investigators claim that – based on the 1999 intelligence – the suspects used their real passports to enter and subsequently leave France. Objective exculpatory evidence (Hassan's 1980 passport) that proves that Hassan was not in France at the time of the bombing was turned into incriminating evidence by making the passport evidence "fit" the "new" version of the intelligence.

The intelligence claim [regarding the use of false passports to enter France] is essential to the French case because without the false passport claim Hassan Diab's passport would prove he was in an entirely different country when the crime occurred; the passport and its stamps would otherwise be objective exculpatory evidence. (Factum, p. 36)

This intelligence claim "fits" evidence of passport stamps and makes them appear inculpatory. It gives the stamps inculpatory meaning when on their own they would be exculpatory in nature. It makes the passport stamps conveniently "corroborative" of the unsourced intelligence. (Factum, p. 38)

The glaring and serious ("modus operandi") contradiction between the important assertions offered as true in the Record of the Case and the Application of the Requesting State, both assertions made by the same official and both allegedly based on the identical "very specific" source, are manifest when they are juxtaposed. (Factum, p. 41)

These flatly contradictory assertions of fact are classic examples of things that speak for themselves: they cannot both be true and cannot be mere mistakes or typographical errors – both contain detail rationalizing the respective and contradictory claims. Both identify as the basis for the assertion the identical "very specific" 1999 DST information that had been in French hands for over eight years. Both were offered by the Requesting State as true and reliable assertions of fact to the Ontario Superior Court twenty-nine days apart in 2008. At least one of these claims is untrue, seriously untrue. It is not the duty of the extradition judge to resolve serious and unexplained contradiction by the Requesting State of its own Record of the Case. It is the responsibility of the Requesting State, in its versions of the very same matters, to be reliable and consistent, not to tell two very different, very inconsistent stories. Such circumstances reasonably and gravely call into question the reliability of this crucial assertion in the Record of the Case. Given the assertions in the Appendix to the November 12 Application, the key "false-passport-to-enter-France" claim and the related corroboration claims in the Record of the Case cannot be true. (Factum, p. 42)

Unsourced intelligence is, unfortunately, open to malleability and manipulation. That is one of the reasons it is "unacceptable" in Canadian criminal proceedings. It is "secret" and sources remain anonymous, circumstances undisclosed (even torture). One can make all sorts of claims about what intelligence reveals or is, and thus the duty of "fairness and good faith", the duty of "utmost diligence and care" for accuracy and truthfulness must be rigorously enforced by the courts, in defence of their own integrity and the fairness of their proceedings. France's own cogent documents prove a major and revealing contradiction on a central assertion of fact that goes to the heart of the Record of the Case. (Factum, p. 43)

The International Letters Rogatory set out in Appendix B of the November 12, 2008, ex parte Application to the Superior Court by the Requesting State <u>antedate</u> the Record of the Case. They are asserted to be wholly true. But these 'truthful' assertions do not "fit" the objective passport evidence in an inculpatory way. Mr. Trevidic's assertion that "<u>Hassan Diab entered France with his real passport, left in the same way</u>, and used the false passport in the name of Panadriyu to operate on French territory" is clear. It means that, to have been involved in the crime as the bomber/motorcycle buyer/hotel registrant, <u>Hassan Diab's passport</u>, because "border controls were particularly tightened" at the time, <u>would have to have a stamp of his entry to France and another of exit</u>. The passport does not have such stamps, flatly disproving Mr. Trevidic's Letters Rogatory factual assertion of Hassan Diab's involvement, proving in fact the innocence of Hassan Diab: the real bomber entered France with his real passport and Hassan Diab did not – he was in an entirely different country at the time. To overcome this serious problem that real and objective evidence (the passport) disproved the intelligence claim, the Record of the Case simply changed the intelligence claim to make it "fit". In only twenty-nine days the claim (asserted to be true) that Hassan Diab entered France with his "real passport" became Hassan Diab entered France with a "false document". This expedient resolved the problem of exculpatory evidence and created corroboration out of exculpation. There is no other <u>reasonable</u> explanation available on the French material before this Honourable Court. And France has offered no explanation. France "stands mute". (Factum, p. 44)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 2:

The Record of the Case claims a "clear link" or "analogy" between the Rue Copernic bombing and the Antwerp bombing, allegedly corroborating the assertion of Hassan's involvement in the 1980 Paris bombing. However, the Record of the Case suppresses and edits out material facts that flatly contradict the above assertions.

The report of "the French Examining Magistrate in charge of the Copernic case" (referred to at page 35 of the certified Record as "D" documents D2328 – D2331) is cited as the documentary basis for the Antwerp assertions. D2328 – D2331 is the October 28, 1981, report of Guy Joly, one of Mr. Trevidic's predecessors as examining magistrate of the Copernic bombing who attended in Belgium to gather information from Belgian officials about the Antwerp bombing. This is, again, the Requesting State's own document and cogent evidence concerning the actual information in French possession concerning the Antwerp bombing, from its own investigating judge. The following information is disclosed in the report.

(i) The French investigating judge states that Belgian investigative authorities (the Belgian Prosecutor, the judge in charge of the investigation, the Belgian police) believe that Antwerp may well not be an anti-Semitic bombing but rather an anti-capitalist attack – the bombing was outside the Antwerp "diamond distribution group computer terminal" building. The synagogue in the area was infrequently attended and was under police surveillance, i.e. not a likely target. "Furthermore, the diamond distribution centre computer could have been an objective for extremists focusing on attacking one of the symbols of capitalism."

(ii) The bombing "suspects" who stayed in the hotel are known to police and named [none of them is named Hassan Diab]… All three were in the hotel since October 16, 1981 (four days before the bombing) and left the hotel "quickly" only an hour before the bombing October 20th…

(iii) The explosive in Antwerp was 50 kilograms that could be a mixture of TNT and HMX, this latter an American explosive imported by a Belgian firm. Unlike Copernic, there is no suggestion of the use of penthrite as described in Appendix 4, the report of Henri Viellard, to the Record of the Case: the Copernic explosive "weighed a minimum of ten kilograms" and was composed of "the presence of penthrite in significant quantity and a small quantity of a second nitric ester that could be nitroglycerine or a degradation product of penthrite" (p. 19 Record). "Palestinian terrorists" use "Czechoslovak-made Semtex, a penthrite-based explosive" (p. 38 Record).

(iv) *Two claims of responsibility were made for the Antwerp bombing: the terrorist group Black September (famous for the Munich Olympic massacre) and the*

terrorist group Action Direct (Belgian chapter) both claimed to have executed this bombing. (Factum, pp. 49-51)

Actual information in the possession of the Requesting State contradicts the assertions of "clear links" between the Copernic and Antwerp bombings. More seriously, this information has been suppressed from the Record certified by Mr. Trevidic. These "material facts" have been "buried" to facilitate a similar fact, mutually corroborative picture of the two bombings when none exists. Antwerp actually appears on the information available to have been an anti-capitalist bombing perpetrated by known, named suspects (not Hassan Diab) with terrorist ties, using a much different and larger explosive than Copernic and for which, unlike Copernic, two major terrorist groups have claimed responsibility. In order to create an inculpatory picture, the Requesting State has edited out all this highly relevant and material information (adverse, obviously, to its interest in portraying similarities between the bombings) in favour instead of misleading and self-serving "suppositions". (Factum, pp. 51-52)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 3:

French investigators claim that, based on intelligence received from a "reliable source", a person who belonged to PFLP-SO performed reconnaissance in Paris in 1979 in advance of the 1980 bombing. This is despite the fact that the documents from the DST (French intelligence service) itself discredit the reliability of this intelligence because the person in question was actually undergoing lengthy convalescence in hospital during the time period in question.

The Record certified by Mr. Trevidic on behalf of the Requesting State asserts (p. 50), based on a DST (unsourced intelligence) report dated April 20, 2001, that …"a former PFLP-SO member" had, "'according to a reliable source of the service' carried out reconnaissance in Paris in 1979" for the bombing in 1980 (emphasis added). This claim purports to connect PFLP-SO to the Paris bombing and [the person named above] to Hassan Diab... (Factum, p. 52)

D4052 stated, a year and a half before the Record was certified, that in fact [the person in question] was hospitalized "four or five months in Prague before returning by car to Iraq at the end of 1979." Therefore, the DST Commander noted, the claim that she came to Paris to conduct surveillance on prospective targets in fact "seems erroneous". The DST concluded "Therefore, it is difficult to put her in Paris on the same date." (Factum, p. 53)

The very hospitalization for an extensive period in 1979 that indicated the 1979 surveillance claim was "erroneous" is referred to in the certified Record by Mr. Trevidic ("After a long hospitalization she returned to Baghdad in late 1979": p. 51) but edits out the statement that the surveillance assertion appears to be an error. Instead, the certifying authority (Mr. Trevidic) asserts in the Record that the surveillance claim is "reliable". The statement about the lengthy hospitalization and return to Iraq comes directly from D4052/6 but is edited to give it an inculpatory meaning instead of its true exculpatory meaning. This is exactly the type of misrepresentation by editing decried in Thomlison, Almrei, Tarantino

and Tollman. It demonstrates yet again at the least the complete failure of the duty of "utmost diligence and care" for accuracy in this Record and the "careless, cavalier approach by the certifying prosecutor to the process of certification." It reflects misleading by "burying" inconvenient (adverse) information. Precisely as in Thomlison, this demonstrates that the certifying authority "knew or ought to have known" that the … surveillance assertion "was not portrayed in a full, frank and fair manner" and that this rendered its representation "misleading", constituting an abuse of process. At the worst, this demonstrates a pattern of misleading manipulation of the Record to make the French case look (falsely) more inculpatory in order to justify extradition. In either case – complete failure of due diligence or pattern of manipulation – it is the most serious of abuses and the clearest case for a stay. (Factum, pp. 53-54)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 4:

Among the information sources claimed in the Record of the Case are "particularly well-informed newspaper articles". One of these newspaper articles is based on information allegedly emanating from the archives of the Israeli intelligence service. The article claims that the three men responsible for the Copernic attack – none of whom is Lebanese – took off in a rented car and returned to Beirut via Germany. This information that flatly contradicts other intelligence assertions was edited out of the Record of the Case.

The Record of the Case repeatedly asserts that information received states that the Copernic bombers came to France by train from Spain and returned to Spain from France the same way (pp. 42, 48, 49, 53, 64, 71). This is an essential intelligence claim given the reliance (set out above in paragraph 29) on the 1980 passport stamps as "corroboration". (Factum, pp. 54-55)

Among the information sources claimed in the Record certified by Mr. Trevidic are "particularly well informed newspaper articles" such as the October 3, 1984, article in Libération authored by Anette Levy Willard. The Record asserts that this article, "Israel solves the Copernic mystery" was "much more specific about the ones who were responsible for the Copernic attack." The certified Record attributes both importance and reliability to this "specific" and "well informed" source as it emanated, allegedly, from "prominent Israelis" and "archives in Tel-Aviv" and "solved the bombing 'mystery'". (Factum, p. 55)

D2950 actually states that Israel has "identified the perpetrators of the murderous attack" and has "the entire history of the attack in their archives". The perpetrators and the operational history of the attack are set out explicitly: "three Palestinians" committed the Copernic bombing using "a booby-trapped motorcycle" and afterward, "the three men took off in a rented car and returned to Beirut via Germany" (emphasis added). D2950 is cogent, indeed verbatim, evidence of the "particularly well informed" article. Mr. Trevidic, the certifying authority, was careful to assert in the Record the reliability of what he called "well informed" information that was "much more specific" about who committed Copernic and how. He was, however, careless in the extreme in omitting or editing out or

"burying" the key particulars of the article that three Palestinians perpetrated the attack and then fled in a rented car, travelling via Germany to Beirut. This was clearly information of which he was aware (since he referred specifically to the article) and that he knew came purportedly both from authoritative ("prominent") Israelis and Israeli archives. He knew, when certifying the Record, that this "particularly well informed" information source included this highly material information (surely in the Israeli "solution", this is the key information – who and how). The Libération article is a short one, one-page in length. Yet he omitted this critically relevant information when certifying the Record. Of course, the information he "buried" was extremely unhelpful (to the Requesting State) when, in December, 2008, he certified the case: by that point the case was that the bombers included a Lebanese (not a "Palestinian") named Hassan Diab who came from and returned to Spain via train and false passport. Fully and fairly disclosing that the "well informed" source actually revealed that the bombers fled France by rented car to Germany would destroy the unsourced, uncircumstanced Spain-to-France-and-back-by train-with-a false-passport intelligence case that the certified Record would assert. This "well informed", key information would not "fit" the intelligence case assembled in the Record. And so, like the 'real-passports-used-by-the bombers' information referred to in paragraphs 29 – 31, the inconvenient information was edited out. A false and misleading picture results of this "well informed" article: key exculpatory material has, by omission, been turned into information consistent with the Record's inculpatory claim. (Factum, pp. 56-57)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 5:

In an attempt to give some reliability to the 1999 intelligence, the Record of the Case claims that Hassan was "already known" to the DST as a member "of the PFLP-SO assigned to cells to take on the task of preparing and carrying out attacks". However, in sworn affidavits submitted to the Court one day before Hassan's arrest [on November 12, 2008], the French investigators assert that when the DST received the 1999 intelligence, Hassan Diab was not known to be a member of any terrorist group.

Referring to the "very specific" April 19, 1999, intelligence that allegedly revealed "the very identities of the perpetrators of the attack", and that purports to attribute group and personal responsibility to the PFLP-SO and Hassan Diab, respectively, the Record of the Case certified by Mr. Trevidic asserts (p. 42) that Hassan Diab "was known, according to this information, as being a 'Lebanese national and a member of PFLP-SO in Beirut in 1980.'" This assertion is followed by the following statement: "Regarding the information obtained [about who did Copernic and how], the DST had the following comment: 'The information seems likely, to the extent that all the names cited (with the exception of one … Comment added by the writer of this brief [Mr. Trevidic] and does not appear in the DST document: We are not able to indicate the name cited at this place by the DST with the ongoing investigation but it is not Hassan Diab) were already known to our service as definite members of the PFLP-SO assigned to cells to take on the task of preparing and carrying out attacks'" (emphasis added) (p. 43). The Record certified by Mr. Trevidic is clearly asserting that the 1999 intelligence "seems likely" (i.e. is corroborated) because

Hassan Diab was "already known" in 1999 when the intelligence was received as a "definite member of the PFLP-SO assigned to cells" to carry out terrorist attacks. There is not only no evidence of this, but cogent evidence to the contrary. (Factum, pp. 58-59)

The International Letters Rogatory dated June 5, 2008, from the "Legal Office of Mr. Marc Trevidic" and co-authored by him (Appendix B to the Requesting State's ex parte Application to the Ontario Superior Court of November 12, 2008) state: "In 1999 when the DST obtained the names of the persons presumed to have participated in some capacity or another in the Rue Copernic and, for certain among them, in the Antwerp attack, Hassan Diab was not known to be part of a Palestinian terrorist group… (Factum, p. 59)

The International Letters Rogatory make plain that in 1999, when the DST obtained its anonymous information assigning personal and group responsibility for the Copernic bombing, Hassan Diab was not known to be part of any Palestinian terrorist group (like the PFLP-SO). Indeed his name had only surfaced "incidentally" in the questioning of [a certain person] and his spouse on another case. Mr. Trevidic has not merely "buried" this fact in certifying the Record, he has changed it completely (just like the 'real-passports-used-by-the-bombers' information). In the Record he certifies the opposite, namely that in 1999 when the intelligence was received, Hassan Diab was "already known" as a "definite member of the PFLP-SO assigned to cells" to carry out terrorist attacks. This was an important assertion to make because it purportedly demonstrated "corroboration" of the unsourced, uncircumstanced, anonymous 1999 intelligence. As the cogent evidence of Mr. Trevidic's own International Letters Rogatory demonstrates, this important Record certification is untrue; indeed the opposite is the case. (Factum, pp. 59-60)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 6:

The Record of the Case relies on the testimony of a French journalist who allegedly met one of the persons implicated in the 1980 attack who claimed that Palestinians are responsible for it. However, the Record of the Case deliberately omits very relevant parts of the journalist's testimony which clears Hassan.

D2927, cited in the Record (p. 40) as documentary authority for the Europe 1 information certified, is the February 18, 1983, report of Principal Inspector Richard Villibord that records the actual information received. It is cogent evidence of the document that the Record purports to summarize and certify. D2927 actually states: "For Copernic, there were five subjects, five men who were partially identified, in particular, Alexander Panadriyu, the man on the motorcycle, who had left 10 kg of explosive in saddlebags on the vehicle. This man, also known by the name of Abdullah, had a Jordanian passport. Another man, first name Ahmed, was Lebanese" (emphasis added). (Factum, p. 62)

The information in D2927, coming from someone allegedly directly involved, was that the bomber and motorcycle buyer was a Palestinian named Abdullah, travelling on a Jordanian passport – not "a Lebanese named Hassan codename Ahmeer". The accomplice was a Lebanese named "Ahmed" (not Hassan). Although D2927 is explicitly cited as the

informational source for the Record's assertions, the key or "material elements" of the document, the names of the men involved and their roles, was omitted, edited out, "buried". It is clear that this information was adverse to the Record's certified assertion that information received named "a Lebanese named Hassan" as the motorcycle buyer/bomber Alexander Panadriyu. Information received in D2927 actually named the bomber Panadriyu as a Jordanian named Abdallah. But this would not "fit" the case portrayed by the Record and so was simply excised by omission. The certified Record misrepresents in asserting that information received named Hassan (a Lebanese) as the bomber/motorcycle buyer when D2927, cited explicitly in the Record as a documentary information source, in truth named Abdallah (a Jordanian) as that man. Once again the inconvenient information is "buried", edited out, conveying a false picture of information received as to the identity of the bomber. The bomber's identity and purportedly reliable information about that is not a minor matter in a bombing case. It is a significant misrepresentation to misstate (by active assertion and by omission) information received on this critical fact. (Factum, p. 63)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 7:

The Record of the Case is written to give the false impression that Hassan's ex-wife was hiding the fact she has an uncle who is a terrorist leader. However, Hassan's ex-wife not only does not have such an uncle, but she also gave the French investigators the full names (including surnames) of her aunts and uncles. None of these names even match the name of the terrorist leader in question. In a move that defies logic, the French investigators manufactured a supposed relationship between Hassan's ex-wife and the terrorist leader in question by combining the first name of an uncle on one side of the family (father's side) with the surname from the other side of the family (mother's side). The French investigators seem to be quite sure of the alleged relationship despite evidence before them showing absolutely no relation whatsoever between Hassan's ex-wife and the terrorist leader in question.

These subtle but important manipulations of the actual evidence are part of the continuing and deeply offensive pattern of misrepresentations that make for the clearest case for a stay. They are flagrant and repeated breaches of the fairness, good faith and frankness duties set out in Thomlison, Tarantino, McVey, Tollman and Almrei. (Factum, p. 67)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 8:

Some stamps on Hassan's 1980 lost passport that were illegible from 1999 through February 2008 miraculously and conveniently became legible when the Record of the Case was certified in December 2008.

Document D3978 is cited explicitly by the Record as the documentary authority for the Record's assertion that the passport bore a Beirut exit stamp dated October 8, 1981. D3978 is the February 15, 2008, report of Philippe Chicheil, Commander, DST that deals with "Additional Information on other Lebanese passports Hassan Naim Diab used or

that were in his possession." It is cogent evidence of the actual content of the documentary source cited by the Record. D3978 is an investigative report pursuant to rogatory commissions seeking information on the Copernic bombing. Those rogatory commissions were being conducted on February 15, 2008, at Mr. Trevidic's office: "We specify that those two rogatory commissions are being conduced today at the office of Marc Trevidic, Vice-President, Trials, Tribunal de Grand Instance, Paris." D3978 actually states as follows:

> *"Page 60: five stamps, three of which were illegible and two of which were Directorate General of Security of Lebanon exit stamps dated illegible 22, 1980 and illegible 8, 1981 (cf D3207)" (emphasis added).*

What was "illegible" on February 15, 2008, some eight and one-half years after French authorities came into possession of the May, 1980, passport of Hassan Diab (it was received August 31, 1999; see p. 44, Record), has become "October" only ten months later in the Record certified by Mr. Trevidic. D3978 is cogent evidence that the Record misrepresents this important fact. In what has already been demonstrated to be a deeply troubling pattern of misrepresentation of significant matters in the Record, this important misrepresentation further taints the Record. In what has already been demonstrated to constitute at best a complete failure of due diligence and at worst manipulation, this is yet another abusive element. How very much worse than the two misrepresentations in Tarantino and the misstatement of one witness in Thomlison is this pattern of multiple serious misrepresentations. (Factum, pp. 68-70)

Misrepresentation (Contradiction, Inaccuracy, Omission) Number 9:

The French Record relies on statements from two persons that were supposedly "heard as witnesses" in 1988. However, France's own reports regarding the "hearing" of these two persons tell a different story. Those "witnesses" were actually held incommunicado and interrogated for three days under hostile, coercive and aggressive investigative detention (garde à vue). Moreover, the interrogation reports show that one of the "witnesses" was subjected to ten interrogations for 19 ¾ hours over four days, day and night. The notion of voluntary witness statements is belied by such "garde à vue" detention and interrogation.

Moreover, the French investigators assert that one of the supposed "witnesses" (who was a university friend of Hassan) is a former member of the PFLP-SO. Such an assertion is an attempt to link Hassan to the PFLP-SO through his university friend (i.e. guilt by association). However, this characterization is false and is not founded on any evidence at all.

The Record also asserts that the 1988 interrogations of the above two persons "centred on Hassan Diab and other individuals of that type". However, this is not true and is a clear misrepresentation of the evidence.

> *[France's] Letters Rogatory state that in the 1988 [interrogations of the above two persons] Hassan Diab's name "appeared incidentally" (emphasis added). The …*

interrogations set out in D3933 to D3951 make plain that Hassan Diab's name only came up because it was one of many (the "A's" through the "Z's") that appeared in [the address book of one of the "witnesses" who also worked with Hassan] at the Bank of Lebanon. The 1988 interrogations were in no way "centred on Hassan Diab" and this is a clear and important misrepresentation, calculated to paint Hassan Diab as a major prior suspect. The pejorative addition of the words certified "and other individuals of that type" is calculated to paint Hassan Diab with the same brush as the PFLP-SO leaders named in the 1988 … interrogations. This is either grossly negligent or deliberate misrepresentation. There is no evidentiary connection between Hassan Diab and the PFLP-SO or its leaders. (Factum, p. 73)

The Record asserts (p. 72) that "<u>in Hassan Diab's circle</u> … were several persons of the dissident group led by Salim Abu Salem, i.e. the PFLP-SO" (emphasis added). This is demonstrably false: there is no evidence whatsoever that a single person "in Hassan Diab's circle" was a PFLP-SO member. There is not only no evidence that [one of the above two "witnesses"] was such a member, the only evidence (D3933 – D3951) is that he wasn't even a member of the non-dissident PFLP, let alone the dissident PFLP-SO. (Factum, pp. 73-74)

<u>Additional Misrepresentations by Omission:</u>

Significant evidence that exonerates Hassan was either buried in attachments or was hidden from the Court in Canada.

The Record of the Case (pp. 32, 42) explicitly asserts that in 1980, shortly after the bomb blast (i.e. 30 years ago), the Requesting State obtained "one useable palm print" from the "inner side of the window of the right rear door" of the car France alleges was used to store the Copernic explosive(s). Fingerprints, unlike unsourced intelligence, unlike handwriting opinion, are objectively verifiable scientific evidence. This "useable palm print" is therefore important evidence directly connected to the Copernic bombing. It is reasonably inconceivable that the Requesting State did not compare this print with the fingerprints and palm print of Hassan Diab, the man they have targeted with accusation and an extradition request. It is reasonably inconceivable that the Requesting State does not know the results of that comparison. It is reasonably inconceivable that Hassan Diab is connected to that crucial print, for the Record would surely have included any inculpatory comparison result. The Requesting State knows the result of the print comparison, knows that the palm print on the bombing storage car is not Hassan Diab's yet significantly omits that important scientific evidence because it is adverse to its case and extradition request. (Factum, pp. 74-75)

In fact, Appendix 11 to the Record of the Case reveals that the prints of Hassan Diab were forwarded by U.S. Immigration authorities in 2007 to the Requesting State (a year before the Record was certified). (Factum, p. 75)

Even more telling is the RCMP Disclosed Task Report on Project 2007-5009 dated November 21, 2008 (almost three weeks before the Record was certified). This Report is cogent evidence that the palm print lifted from the bombing car is not Hassan Diab's and that the Requesting State knows this. The Report reads:

> *The second point is that the palm prints that were taken from Diab did not match those provided to the RCMP by the DST (DCRI)" (emphasis added).* (Factum, pp. 75-76)

The Record of the Case certified December 11, 2008, and the Supplemental Record certified May 30, 2010, both omit mention of this important evidence. Highly relevant, material evidence (scientific evidence) is "buried", abusively, as in Tollman, Tarantino and Thomlison. (Factum, p. 76)

In addition, during the Canadian extradition proceedings (in November, 2009), the learned extradition Judge received an ex parte request from the Requesting State for an order requiring Hassan Diab to provide "distal fingerprints" to be compared with the print left on the statement of "Alexander Panadriyu", the shoplifter at the INNO store in Paris who gave a statement to Paris police September 27, 1980 (pp. 27 – 29 Record). An unidentified distal fingerprint had been found on the page of the statement where "Alexander Panadriyu" had affixed his signature. This is crucially important because the Requesting State alleges that the "INNO Alexander Panadriyu" is the same "Alexander Panadriyu" who purchased the motorcycle and who rented a room at the Hotel Celtic. A legitimate positive comparison of the distal fingerprint on the Panadriyu statement with the fingerprint of Hassan Diab would scientifically connect the latter to the three Alexander Panadriyu's and the crime, creating a prima facie case for extradition. The Requesting State explicitly regarded this comparison evidence as important to obtain. Indeed the Requesting State's ex parte Application asserts that "Information Will Be Obtained" from this distal fingerprint comparison and that will be "in the best interest of the administration of justice". Such information about the results of the distal fingerprint comparison between Hassan Diab and the unidentified distal print on "Alexander Panadriyu's" signature page was obviously important. It is reasonably inconceivable that the Requesting State, having come to the Canadian court, ex parte, seeking this important information, has not done the comparison that was the purpose of the order made by the extradition Judge. The Requesting State told the Canadian court that was why the distal fingerprint of Hassan Diab was sought – to be compared with the print on the Panadriyu statement. The only reasonable conclusion is that the distal fingerprint comparison with Hassan Diab was negative, that the print on the Panadriyu statement is not his. This is objective, scientific evidence helpful to Hassan Diab and not helpful to the interest of the Requesting State. The Requesting State, having come to the Superior Court for this relief, has failed to report back the result of the comparison and failed to include in the certified Supplemental Record any information about the comparison. Once again, the pattern of "burying" evidence unhelpful to the Requesting State is revealed, even evidence the Requesting State said to this Honourable Court it was important to obtain. (Factum, pp. 76-77)

The Requesting State has had sketches done purporting to represent a composite picture of the motorcycle purchaser, the INNO shoplifter and the car renter. The motorcycle purchaser and shoplifter presented themselves as Alexander Panadriyu, but so did the man who registered at the Hotel Celtic. Sketches were prepared of key men but not of the hotel registrant that the Requesting State says is the same Alexander Panadriyu who bought the motorcycle and shoplifted the pliers. This is an important omission where reliance is purported to be placed on composite sketches. The only reasonable explanation for this omission is that a sketch of a 40 – 45 year old man of medium build with short brown hair, no glasses and no moustache would not match that of a very thin 25 –30 year old with long blond hair and a thin moustache that went around his mouth to his chin. Such a visual distinction of the "Alexander Panadriyu's" would not be helpful to the assertion of the Requesting State that they were all one and the same man. That there would have been such a graphic distinction is proved by the evidence of Calabri, the prostitute, who viewed all composite sketches and excluded the "Panadriyu" sketches (the motorcycle buyer and shoplifter) as being the man at the hotel (p. 34 Record): only the Mathias (car renter) sketch bore a resemblance but even with that she noted differences. The Requesting State has thus conveniently omitted to have a sketch prepared of the important hotel occupant, yet purports to rely on sketches and the common identity of all three "Panadriyu's". (Factum, p. 78)

These are, individually and cumulatively, significant additional omissions from the certified Record that compound and exacerbate the abusive pattern of misrepresentation that permeates the Record in the case at bar. They represent omission of material scientific identification evidence results that prove that, of all the people in the world who left the print in the bombing car and on "Alexander Panadriyu's" police statement, it was not Hassan Diab. This relevant and material evidence, helpful to Hassan Diab but not helpful to the Requesting State, has been edited out or "buried", contrary to the "full, frank and fair" picture that Thomlison requires. Additional relevant identification evidence has been omitted from this Record, a Record that expressly relies on sketches, alleged common identify and a purported identification procedure. Through negligence (lack of due diligence) or design (manipulation), the Record evinces a pattern markedly lacking in the candour demanded of a Requesting State. (Factum, p. 80)

Handwriting: A Checkered History:

Mr. Bayne reviews the checkered history of the handwriting "evidence" submitted by France.. Reports from two French handwriting analysts were withdrawn after Hassan's defence showed their "appalling" unreliability. The reports were replaced by a new one, causing delays in the extradition hearing.

The Record of the Case (pp. 55-56, Appendices 12 and 13) explicitly asserted that it was "preferable" to obtain "two analyses", "rather than carrying out a single analysis…". The Record claimed that "the quality of experts" had been ensured. The Record stated that "specimens of his [Hassan Diab's] 'spontaneous handwriting'" had been obtained and given to two "quality" experts who opined, respectively, that Hassan Diab had

probably and conclusively printed the hotel registration card. This handwriting opinion evidence was certified and offered as reliable from December 11, 2008, until May, 2010, when it was withdrawn entirely in the face of admissible defence evidence detailing the "appalling" unreliability of the French opinion evidence [at least 50% of the "spontaneous handwriting' samples were proven by defense expert to have been written by someone else i.e. not Hassan]. In its place (and at the last minute, causing the collapse of the scheduled June extradition hearing) was substituted a single opinion of a third French "expert", now offered as reliable just as were the two predecessors. There was no obligation on the Requesting State to withdraw the first two opinions – the third opinion could have been offered as a supplement to the existing opinions. The complete withdrawal of the opinion evidence of the first two "experts" can only be interpreted reasonably as an acknowledgement by the Requesting State of manifest unreliability of opinion evidence it had offered as reliable for a year and a half. (Factum, pp. 88-89)

Conclusion: Relief Sought

After detailing the numerous abuses, contraditions, and misrepresentations in the case against Dr. Diab, Mr.Bayne points out that this is the clearest case for a stay of the extradition proceedings. A stay is the only fair and just remedy.

Hassan Diab applies to this Honourable Court for a stay of proceedings owing to serious, multiple and flagrant breaches of fundamental justice and abuses of process. The remedy sought is directly connected to the breaches/abuses, to their seriousness and multiplicity, to their compromising a fair extradition hearing and to their constituting an assault on the integrity of the court's extradition process. The multiple cumulative breaches and abuses violate those principles of fundamental justice underlying the community's sense of fair play and decency and disentitle the Requesting State from pursuing extradition based on the abusive Record. (Factum, p. 90)

This is an exceptional case in which the Record of the Case is quite unlike any previously seen in Canadian extradition jurisprudence. Founded on unsourced, uncircumstanced intelligence and replete with multiple material misrepresentations we well as improper and self-serving argument, the Record is an affront to the duties, recognized repeatedly by Canadian judges, of "fairness and good faith", of "utmost diligence and care" for accuracy, of not "misleading" and/or "burying" relevant information, of "full, frank and fair" presentation of the evidence. The Record certified by the Requesting State makes a mockery of the "foundation document" status the Extradition Act confers on it and the presumption of threshold reliability – based on trust and good faith – accorded it. Cogent evidence emanating directly from the Requesting State itself proves that this trust and good faith is misplaced in respect of this Record. It should be "the fibre with which the safety net of assurances" as to accuracy and availability is woven". Instead it is a frayed quilt of misrepresentations, inaccuracies, omissions, "buried" facts, unacceptable intelligence and improper, self-serving argument that strikes at the heart of the integrity of the Canadian "certified Record" extradition process and the critical good faith on which it crucially depends to work as intended. "One of the most important fundamental

purposes of extradition proceedings" is "the protection of the liberty of the individual". That liberty, and its protection, are here at the mercy of a fatally flawed, misrepresentative, manifestly unfair Record. (Factum, p. 91)

This is the clearest case for a stay. Mere excision of parts of the Record will not suffice because so very much of the Record is tainted. This is not a case like Thomlison where the isolated evidence of one witness only was misrepresented. This is not even a case like Tarantino (where a stay was ordered) based on "two examples of serious misinformation" in the Record of the Case. The significant misrepresentations in the case at bar are far more numerous than in any of the decided cases and they are not isolated to affect only one witness or matter. Rather, the misrepresentations are, to use Justice Rosenberg's word, "replete" throughout the Record, affecting many highly material areas and witnesses. (Factum, p. 92)

The breaches of the good faith, fairness and candour duties are so profound and repeated, they cumulatively constitute such a pattern, as to represent a complete failure of due diligence at least or abusive manipulation at worst. In either case, the result is an unfair Record, an unfair extradition hearing, an affront to the integrity of Canadian extradition process, serious prejudice to the Court's ability to conduct a just and meaningful committal inquiry as directed by Ferras, the disentitlement of the Requesting State to rely on this abusive Record to pursue extradition and the denial of liberty of a Canadian citizen. This Honourable Court is fully and unquestionably empowered to order a stay to prevent these serious abuses and to protect the integrity of the Court and its process, and this is the clearest case in which to do so. (Factum, p. 94)