Canada's Extradition Law: The Least Fair Act on Earth

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Canada's *Extradition Act* (S.C. 1999 c. 18) is perhaps the least fair statute ever to be passed into Canadian law.[1] As Anne Warner LaForest bluntly stated shortly after the statute was adopted, no other country on earth has found it necessary to forsake all of the procedural safeguards of criminal justice that have evolved in common law countries over the centuries while blithely sending its own citizens to face trial in foreign regimes.[2]

The *Act* allows for the deportation of persons accused of criminal offences in other countries – including the *de facto* exile of Canadians – solely on the strength of a note from a foreign prosecutor "certifying" in a single sentence that the evidence summarized in an attached "record of the case" is available and (in the opinion of the prosecutor) sufficient to warrant prosecution under the laws of the requesting country.[3] On the basis of this certification, the record of the case is said to be "presumptively reliable" – even though the record of the case does not come close to meeting Canadian standards of evidence and is by definition "hearsay".[4]

But there is a catch. Courts across the land have ruled that evidence cannot be tendered by the person being extradited unless it would render the record of the case "manifestly *un*reliable."[5] That is a test almost impossible to meet, given the presumption by the judiciary from the outset that the record of the case is *presumptively reliable* However skimpy the *prima facie* evidence, Canada sends its nationals to the requesting country to face their fate in a foreign, indeed hostile, judicial climate where chances are the person sought has already been branded a fugitive.

Despite the fact that Canada regularly coughs up and spits out its citizens to face whatever form of Napoleonic justice the "extradition partner" has in store, civil law countries such as France are forbidden to extradite their nationals by constitutional fiat. France does not extradite its nationals because it recognizes that sovereignty extends to citizens, and citizens have the right to be protected from the clutches of foreign prosecutors with an axe to grind – and prosecuted at home for alleged criminal acts committed abroad. The requesting nation must be prepared to supply all the evidence to France so that the trial of its own citizen can proceed.

Compare the ruling of Mr. Justice Maranger in *Canada (Attorney General) v. Diab* on "Admissibility"[6] with his later ruling on "Application to Exclude Evidence."[7] In the first ruling, Maranger allowed Hassan Diab, a sociology professor alleged to be connected to a terrorist bombing in France, to introduce the evidence of two of four handwriting experts to challenge the opinion handwriting evidence tendered by France. He would not have allowed himself to hear such evidence unless the defence summary of the proposed evidence went to the heart of the issue of the reliability of the record of the case.

Having heard the evidence in an unusually protracted hearing, Justice Maranger noted that the methodology used by the French "expert" related to a "pseudoscience," and found that the French report was "very problematic, very confusing, with conclusions that are suspect."[8] Nonetheless, he felt compelled to dismiss Diab's application for exclusion of the handwriting opinion tendered by France, since the evidence of the three witnesses tendered by Diab's counsel "fell short of a finding of manifest unreliability contemplated by *Ferras*" – the central Supreme Court of Canada ruling on evidence at extradition hearings.

This would seem to be the very situation where *Ferras* invited the weighing of evidence by an extradition judge acting judicially. Chief Justice McLachlin had noted that extradition judges should be circumspect *before* the individual is sent out of the country and loses his *Charter* rights. However, Justice Maranger refused to engage in the weighing exercise: "[T]o find bias I have to weigh evidence, I have to draw conclusions from words in the report that are subject to interpretation."[9] Accordingly, the suspect but pivotal handwriting evidence was not excluded.[10] Had it been excluded, there is little doubt there would have been no justification for him to order committal.

committal.

Given that the Minister only rarely decides of his own initiative *not* to surrender, some judges have become skeptical if not cynical about the Minister's track record for fairness. For example, Berger J.A. stated in his dissent in *Trinidad and Tobago (Republic) v. Davis*: "I disagree with the majority's suggestion that comfort may be sought in those provisions of the *Act* that confer a discretion upon the Minister following committal."[11] Noting that courts of appeal only rarely interfere with a Minister's surrender decision, he added: "It follows that the role of the courts at the committal stage is critical."[12]

Unfortunately, Justice Maranger did not see it that way. In ordering the "committal for surrender" of Mr. Diab, he did the safe thing and passed the buck back to the Minister of Justice. In the sense that he had "heard the other side" with respect to the handwriting evidence, Justice Maranger did more than most extradition judges. But ultimately it came down to the same lame excuse: My hands are tied. As Anne LaForest presciently observed, it is difficult to understand why the *Extradition Act* preserved the role of extradition judges at all, they have so little to do.[13]

As usual, the extradition hearing proved once again to be a charade, the cruelest kind of judicial fiction.

In the self-serving vernacular of the International Assistance Group – the coterie of lawyers which runs the extradition section of the Department of Justice – the Minister of "Justice" will make his "surrender decision" after reviewing the submissions of Mr. Diab's counsel as to the risks, political and otherwise, of sending Mr. Diab to France. Unfortunately, the Supreme Court of Canada has directed the various courts of appeal to show great deference to the Minister's surrender decisions. It is a matter of Father Knows Best.

The biggest risks to be considered by the Minister of Justice in the *Diab* case is that the French authorities have already prejudged the case. Indeed, in the Catch-22 extradition system endorsed by "Canada Justice," we have the situation where Canada's judges are compelled to give the nod to French allegations. This allows the French judges to say, "We *knew* it! They too have found the fugitive 'guilty'! Can the Canadian judges and Minister of Justice be wrong?"

Canada gives deference to its naively conceived "international obligations" rather than to individual rights. Our courts and the Minister of Justice feel obliged to accept that our "extradition partners" have an equitable and just judicial system simply by virtue of the existence of a *signed* extradition treaty. Signed, but not ratified, by the way – *none* of Canada's extradition treaties has ever been ratified by Parliament.

Under the inquisitorial (rather than adversarial) system of justice practiced in France, the chance of Hassan Diab receiving a fair trial is practically nil. It behooves the Minister of Justice to recognize that fact – and stop the extradition juggernaut before he foments an injustice that cannot be undone.

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[1] See Chris Cobb, "Diab hearing breaking new ground," *Ottawa Citizen*, 8 January 2011.

[2] Anne Warner LaForest, "The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings," 28 Queen`s L.J. 95 (2002), p. 172.

[3] Section 32(1)(c) of the Act.

[4] *United States of America v. Ferras*, [2006] S.C.J. No. 33, 2006 SCC 33, at para. 53, 66.

[5] *United States v. Edwards*, [2011] B.C.J. No. 374, 2011 BCCA 100 at para. 31-35 (B.C.C.A.); *United States of America v. Anderson*, [2007] O.J. No. 449, 218 C.C.C. (3d) 225, 153 C.R.R. (2d) 20 (Ont. C.A.); *United States of America v. Graziani*, [2007] B.C.J. No. 231, 2007 BCSC 178, 72 W.C.B. (2d) 279 (B.C.S.C.); *United States of America v. Multani*, 13 November 2007 Vancouver 23818 (B.C.S.C.); *United States of America v. Mach*, [2006] O.J. No. 3204 (Ont. S.C.J.) at para. 16.

[6] At [2010] O.J. No. 298, 2010 ONSC 401.

[7] 18 February 2011, Ont. S.C.J. No. 12838.

[8] At para. 14.

[9] At para. 15.

[10] This did not, of course, preclude the judge from finding, after assessing all of the evidence holistically, that the suspect report should carry little or no weight.

[11] *Trinidad and Tobago (Republic) v. Davis*, [2008] A.J. No. 829, 2008 ABCA 275, at para. 34 (Alta. C.A.).

[12] *Ibid.*, at para. 34.

[13] Anne Warner LaForest, “The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings,” 28 Queen`s L.J. 95 (2002), p. 172.