Op-Ed: Bring Canada’s extradition law into this century

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The Ontario Court of Appeal has upheld a decision to extradite Hassan Diab to France. Unlike criminal law, which has undergone significant transformations in the past few decades, Canadian extradition law is antiquated and completely inadequate to what is required today for a fair and just hearing.

In criminal law, the courts require full disclosure of all evidence in possession of the Crown, and have established rules to weed out unreliable testimony or faulty eye witness identification and discredited forensic evidence. None of this applies in extradition law, which can result in serious miscarriages of justice and violation of the fundamental rights of Canadians.

Extradition is the process through which a Canadian citizen is sent to face trial in another country. Defendants facing extradition, who find themselves accused by a foreign government, have none of the safeguards that the courts have repeatedly recognized as essential for a fair hearing. This is despite the fact that persons being extradited often confront situations even more challenging than a person facing criminal charges in Canada. These include being uprooted and sent away from family and community supports. In some cases they are extradited to countries where they are not familiar with the languages or legal systems and where they are very likely to be denied bail and face lengthy pre-trial detention.

All that is required in a request for extradition is a certified note from a foreign prosecutor or examining magistrate summarizing the case against the defendant. There is no requirement to provide evidence in the form of court testimonies or affidavits. While police officers and other witnesses in Canadian cases are required to testify in court and are vigorously cross-examined, there is no possibility to cross-examine anyone in extradition cases, even if the judge believes that the evidence provided by the requesting country is suspect.

In short, the foreign state that is requesting the extradition of a Canadian citizen need not disclose its evidence, including any exculpatory evidence which may point to the defendant’s innocence. Defendants at the extradition hearing itself are also barred from introducing independent evidence that points to their innocence. In criminal cases in Canada the burden is on the Crown to show the reliability of the evidence against the defendants. However, in extradition cases any evidence

submitted by a foreign state is presumed reliable; evidence that is inadmissible in Canadian courts is allowed and Canadian rules of evidence do not apply in extradition cases.

A 2006 ruling of the Supreme Court of Canada opened the door very slightly by making it possible for the defendants to challenge the evidence against them, but this is nearly impossible in the overwhelming majority of cases, given that defendants have no right to see the evidence against them in the first place. Furthermore they cannot cross-examine witnesses or introduce exculpatory evidence and they bear the burden of proving that the evidence against them is "manifestly unreliable", which as defined by various courts is a very high threshold that is almost impossible to meet.

Canada's extradition law has been designed to make it as easy as possible to extradite citizens to other countries with little if any regard to individual rights. It allows the foreign country to restart the extradition proceeding again (and again) if it fails the first time. Some of the countries with which Canada has extradition treaties do not reciprocate by extraditing their own citizens. It is not surprising that about 99 per cent of extradition requests are approved. Canada's extradition law does away with procedural safe guards that are essential for a fair process. It is time to bring this law into the twenty-first century.

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