I. OVERVIEW

A. THE ISSUES AT STAKE

1. This case presents the opportunity to resolve two constitutional questions of public importance that are central to extradition and criminal law. The first is the most intractable debate in the law of extradition: in examining a Record of the Case ("ROC"), does the *Charter* require a judge to review all the evidence to ensure that there is a plausible case on which it would be safe to convict, or is the judicial function limited to the narrow evaluation and exclusion of pieces of evidence if they are "manifestly unreliable", committing if any evidence remains on each element of the offence? Appellate courts are deeply divided on this question.

2. The second question engages perhaps the most difficult questions states must grapple with as they seek to reconcile the rule of law with the fight against terrorism, and which have not yet been directly addressed in *Ahmad*[1] or *Harkat*,[2]: can a criminal trial based in part on intelligence that cannot be meaningfully tested ever meet the requirement of a fair process?

B. FACTUAL OVERVIEW

3. The Applicant, a Canadian citizen, is sought by France in relation to the 1980 bombing of a Parisian synagogue. In support of its request, France filed a certified ROC[3] setting out its case as to why the Applicant was alleged to be the bomber known by the false identity "Alexander Panadriyu".

4. The Extradition Judge characterized the ROC as "unconventional",[4] in part because of its reliance on intelligence reports from the DST, the French domestic intelligence service. The intelligence was unsourced, and uncircumstanced. References were made to "[i]nformation obtained from intelligence or foreign security services"[5] without any further detail. The reports were terse and conclusory, sometimes asserting baldly that the Applicant was guilty.[6]

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[1] *R. v. Ahmad*, [2011] 1 S.C.R. 110 ["*Ahmad*"].
[2] *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37 ["*Harkat*"].
[3] Ultimately France filed both a ROC, **Tab 9**, and a Supplementary Record of the Case, **Tab 10**. The portions of the ROC and the SROC which are contained within black lines are the portions that the Applicant characterized as "intelligence" and which the Requesting State did not rely on in seeking committal: *The Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337 ["*Committal decision*"], at paras. 144-148, **Tab 2**.
[4] *Committal decision*, *supra* at paras. 75, 143, **Tab 2**.
[5] *ROC*, *supra* at 38, **Tab 9**.
[6] *ROC*, *supra* at 42, **Tab 9**.

5. The intelligence claims relied upon by France were also contradictory: for example initially France told Canadian authorities that their intelligence sources indicated that the persons responsible for the bombing entered France using their real passports, and then used false identity papers once inside the country.[7] Later, the French indicated that the intelligence was the opposite: the bombers had entered France using false passports.[8] This changed intelligence better fit an inculpatory view of Dr. Diab's passport, which bore no entry or exit stamps to or from France.

6. The Applicant objected to the use of intelligence in the ROC on the basis that the lack of information about where it came from or how it was acquired rendered it untestable. Prior to any ruling by the Extradition Judge, the Requesting State disavowed reliance on all of the intelligence portions of the ROC.[9] However, the intelligence remains in the French investigative file, and would form part of the case against the Applicant in a French trial.[10] The record in these proceedings also demonstrates that not only would the Applicant not be able to look behind the bald assertions from the intelligence, neither could the DST or even the French judges.[11]

7. In the absence of the intelligence, committal ultimately turned on one expert opinion that purported to link the Applicant to writing from Panadriyu: a false signature on a police statement[12] and five printed words on a card from the hotel where Panadriyu stayed prior to the bombing.[13]

8. The Requesting State initially filed reports by Mme. Marganne and Mme. Barbe-Prot, both of whom concluded that the Applicant was the author of the questioned writing.[14] France disavowed these reports when the Applicant adduced evidence from four of "the world's leading

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[7] International Letters Rogatory, dated January 7, 2008 ["*Letters Rogatory*"], at para. 13, **Tab 11**.
[8] *ROC, supra* at 49, **Tab 9**.
[9] *Committal decision, supra* at paras. 144-148, **Tab 2**.
[10] *Reasons for Surrender by the Minister of Justice*, dated April 5, 2012 ["*Surrender decision*"], at 14, **Tab 4**.
[11] UK Home Office, *Terrorist Investigations and the French Examining Magistrate System* (London: HMSO, 2007) (excerpt), **Tab 12**; *Letters Rogatory, supra* at para. 13, **Tab 11**; Jacqueline Hodgson, *The Investigation and Prosecution of Terrorist Suspects in France – An Independent Review Commissioned by the Home Office* (2006), at 42-43, **Tab 13**; Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France* (2008), at 39-40, **Tab 14**; Human Rights Watch, *No Questions Asked: Intelligence Cooperation with Countries that Torture* (2010), at 48-49, **Tab 15**; Stéphane Bonifassi, *The Use of Intelligence in Criminal Cases, and More Specifically in Terrorist Cases* (2011), at 3, **Tab 16**.
[12] Copy of Police Statement bearing false signature of "Alexander Panadriyu", **Tab 17** (the Panadriyu signature is to the right of the page).
[13] Copy of Card from the Hotel Celtic filled out by "Alexander Panadriyu", **Tab 18**.
[14] *Committal decision, supra* at para. 84, **Tab 2**.

experts in the field of handwriting analysis" showing that many of the comparison samples "matched" to the hotel card were not authored by the Applicant, but rather by his former wife.[15]

9. Many months later the Requesting State filed a new report by Mme. Bisotti.[16] Bisotti opined that there was a "strong presumption" that the Applicant authored the five words printed on the hotel card; a "weak presumption" that he authored a date written on the card; and a "presumption" that he authored the false signature on the police report.[17]

10. In response, the Applicant introduced evidence ("the rebuttal evidence") from three of the same experts that reviewed the Marganne and Barbe-Prot reports: Brian Lindblom, John Paul Osborne and Robert Radley.[18] Each conducted a technical review of the Bisotti Report, which examined whether she adopted a methodology that was capable of yielding reliable results. Their unanimous, unequivocal conclusion was that she had not. In their respective views, Mme. Bisotti violated nearly every core tenet of forensic document examination methodology, with the result that her opinion was "patently" and "wholly" unreliable, and "fatally flawed."[19] In the course of submissions, the Extradition Judge asked counsel for the Attorney General "What do I do with the evidence about methodology, that the methodology is flawed and that it doesn't meet with any standards known in the industry?" The Respondent convinced him that he could do little.[20]

11. During the course of submissions the Extradition Judge expressed doubt that he would allow the Bisotti opinion to go to a Canadian jury: "I don't know that I'd let this particular opinion go in front of a jury. It gets tested under Mohan/Abbey".[21] The Attorney General's response was that *Mohan*/*Abbey* had no role to play whatsoever in extradition cases, either in evaluating manifest unreliability or ultimate sufficiency.[22] The Attorney General went so far as to describe the Bisotti report as being clothed in a "bulletproof vest" that rendered expert evidence showing a total lack of methodological reliability to be completely irrelevant:

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[15] *Committal decision*, *supra* at paras. 85-87, **Tab 2**; *France v. Diab*, 2014 ONCA 374, 120 O.R. (3d) 174 ["*Appeal decision*"], at paras. 46-49, **Tab 6**.
[16] *Report of Anne Bisotti*, **Tab 19**.
[17] *Committal decision*, *supra* at paras. 90-91, **Tab 2**.
[18] The fourth expert, Dan Purdy, was unavailable to provide an opinion when the Bisotti Report was introduced, and so could not be retained again.
[19] See generally *Committal decision*, *supra* at paras. 93, 110, **Tab 2**. Note however, that the technical reviews were extensive and detailed, and that the committal judge cited only a limited number of the comments from the Applicant's experts.
[20] Transcript of Proceedings (Submissions), February 11, 2011, p. 51 ll. 12-20, **Tab 22**.
[21] Transcript of Proceedings (Submissions), December 2, 2010, p. 2449 ll. 6-26, **Tab 21**.
[22] Transcript of Proceedings (Submissions), February 11, 2011, p. 154 l. 16 – p. 157 l. 9, p. 183 ll. 13-28, **Tab 22**.

> Extradition law and procedure does create a bulletproof vest around committal evidence to the extent that evidence adduced by a person sought which seeks to impugn the presumptive threshold reliability of this evidence takes the form of competing evidence supporting of competing inferences because the extradition judge simply cannot venture down that road.[23]

The Extradition Judge was ultimately swayed by these submissions.

12. The Extradition Judge found the Applicant's rebuttal evidence to be "convincing" and "logical".[24] In light of this evidence, he found that the Bisotti Report was "based on some questionable methods and on an analysis that seems very problematic"[25] and that it was "convoluted, very confusing, with conclusions that are suspect."[26] He found it to be "highly susceptible to criticism and impeachment"[27] and that the rebuttal evidence had "largely served to substantially undermine the French report".[28] Notwithstanding these findings, the Extradition judge committed the Applicant on the basis of this report.

13. Due to the urging of the Attorney General and his own reading of jurisprudence from the Court of Appeal for Ontario, the Extradition Judge concluded that he was not permitted to entertain the rebuttal evidence as part of his sufficiency analysis. He accepted the Attorney General's argument that the evidence going to whether Mme. Bisotti had used a valid methodology in reaching her opinion did not go to the threshold question of "manifest unreliability" but rather merely offered competing inferences. To consider methodology evidence would, in his view, improperly be applying Canadian standards of admissibility to the certified opinion.[29] Evidence of invalid methodology was irrelevant to an assessment of "manifest unreliability" because, once an expert opinion was included in a ROC, threshold reliability "is a bridge that has already been crossed".[30]

14. With respect to the question of whether Bisotti had used a valid methodology, the Extradition Judge's only finding was that, while he found the Applicant's experts' description of proper methodology to be "convincing" and "the logical approach", he speculated that their

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[23] Transcript of Proceedings (Submissions), February 11, 2011, p. 170, ll. 23-32, **Tab 22**
[24] *Committal decision, supra* at para. 112, **Tab 2**.
[25] *Committal decision, supra* at para. 118, **Tab 2**.
[26] *Committal decision, supra* at para. 121, **Tab 2**.
[27] *Committal decision, supra* at para. 190, **Tab 2**.
[28] *Committal decision, supra* at para. 120, **Tab 2**.
[29] *Committal decision, supra* at paras. 94-101, **Tab 2**.
[30] *Ruling Re Application to Exclude Evidence*, February 18, 2011 ["*Oral Ruling*"], at paras. 9-10, **Tab 23**.

criticism of Bisotti might be because French document examiners used a different methodology unknown to them.[31] He said this notwithstanding that the Bisotti Report itself claimed to have followed "ENFHEX" methodology. The only evidence before the Extradition Judge was that ENFHEX methodology was the same as that used by all legitimate document examiners.[32]

15. In response to this speculation, the Applicant retained Professor Pierre Margot and Dr. Raymond Marquis, both of the University of Lausanne. These experts were familiar with document examination in France, and confirmed that there was no special French methodology, that the Bisotti report violated ENFHEX, and that as a consequence her opinion was unreliable.[33] Their report was not available to the Extradition Judge when he rendered his final decision; he denied the Applicant's adjournment request to obtain this report, as in his view, it could not affect his ruling.[34] The report was before the Minister of Justice when considering surrender.

16. On the ultimate question of committal, the Applicant urged the Extradition Judge to follow the *Graham* decision of the B.C. Court of Appeal, which mandated a review of the whole of the evidence presented at the extradition hearing to determine whether a conviction based upon it would be unreasonable or unsafe. Although the Extradition Judge felt that this approach had merit, he felt bound to follow a more restrictive test described by the Ontario Court of Appeal, which limited his task to determining whether, for each essential element of the offence, there was any evidence in the ROC that was not "manifestly unreliable".[35]

17. In light of his conclusion that he was not permitted to weigh the rebuttal evidence in assessing the Bisotti Report's methodology and its threshold reliability, and his speculation about a distinct French method, the Extradition Judge ordered the Applicant committed.

18. The Court of Appeal for Ontario disagreed with the Extradition Judge's core finding about the scope of permissible review of the Bisotti Report and the rebuttal evidence, yet nevertheless concluded that he had applied the correct test. While the Extradition Judge felt that the Court of Appeal's earlier decision in *Anderson* prohibited him from engaging in weighing

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[31] *Committal decision, supra* at paras. 111-112, **Tab 2**; *Oral Ruling, supra* at para. 14, **Tab 23**.
[32] See *Committal decision, supra* at paras. 91, 93, **Tab 2**; Transcript of Proceedings (Brian Lindbloom), December 17, 2010, p. 1663 l. 7 – p. 1668 l. 27, **Tab 20**; ENFHEX, "Appendix 3 – Overview Procedure for Handwriting Comparisons", **Tab 25**.
[33] *Appeal decision, supra* at paras. 82-83, **Tab 6**.
[34] *Ruling re Diab Application for Adjournment*, May 26, 2011, **Tab 24**.
[35] *Committal Decision, supra* at paras. 133-139, **Tab 2**.

competing inferences that arose between the various expert opinions, the Court of Appeal held that *Anderson* should not be read as precluding this.[36]

19. The Extradition Judge held that he could not utilize decisions such as *Mohan*[37] and *Abbey*[38] or observations from the *Goudge Inquiry*[39] in assessing the Bisotti Report, as this would impermissibly impose Canadian standards of admissibility onto the requesting state's case.[40] The Court of Appeal agreed that *Mohan* and *Abbey* were not the "test" to determine whether expert evidence in a ROC bore threshold reliability, but did suggest that the principles from those cases might "assist" the inquiry into whether expert evidence was "manifestly unreliable."[41]

20. The Extradition Judge indicated what, in his view, would be necessary in order to make a finding of manifest unreliability:

> If the only available conclusion derived from the ROC and the evidence from the three experts presented on behalf of the person sought was that the French expert was biased, unqualified, *and* used improper methodology *in every respect*, then a finding of manifest unreliability *would be possible*.[42]

The Court of Appeal found this too demanding a standard, but concluded that the Extradition Judge did not actually apply this test, but rather used a different, appropriate one.[43]

21. Following the committal decision, the Applicant made extensive submissions to the Minister of Justice, largely focused on whether surrender would violate s. 7 of the *Charter* or otherwise be unjust or oppressive. His core submission was that it would violate the principles of fundamental justice to surrender a person to be tried criminally on the basis of unsourced and uncircumstanced intelligence that was impenetrable to any meaningful review.

22. The Minister rejected these submissions. Conceding that the use of such materials would render a Canadian criminal trial unfair, he stated that he relied on assurances provided by the French that their system would provide the Applicant with a fair hearing.[44]

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[36] Compare *Committal decision, supra* at paras. 103, 191, **Tab 2** with *Appeal decision, supra* at para. 117, **Tab 6**.
[37] *R. v. Mohan*, [1994] 2 S.C.R. 9.
[38] *R. v. Abbey* (2009), 246 C.C.C. (3d) 301 (Ont. C.A.).
[39] The Honourable Stephen T. Goudge, Commissioner, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto, 2008).
[40] *Committal decision, supra* at paras. 99-101, **Tab 2**.
[41] *Appeal decision, supra* at paras. 102-107, **Tab 6**.
[42] *Committal decision, supra* at para. 124 [Emphasis added], **Tab 2**.
[43] *Appeal decision, supra* at paras. 121-126, **Tab 6**.
[44] *Surrender decision, supra* at 16-18, **Tab 4**.

23. On Appeal, the Court recognized the troubling issues inherent with using intelligence as evidence, accepting that the subject of such a proceeding "has no meaningful opportunity to challenge, test and refute the information" which "raises concerns" about questions of "fundamental justice, not the least of which is the right to a fair trial, including the right of a person in jeopardy to know the case he or she is facing and to respond effectively to it."[45]

24. However, the Court nevertheless upheld the Minister's decision as reasonable because, relying on *Charkaoui (No. 1)*[46] "the right to know the case to be met is not absolute" and that the Minister reasonably concluded that the French justice system afforded adequate protections to ensure a fair hearing.[47] This was based on the Minister's recital of the general protections provided by the French legal system, such as the presumption of innocence and the right to appeal adverse findings, and his statement that absent evidence of bad faith, the Minister was entitled to rely on French assurances that its anti-terror prosecutions were fair.[48]

25. The Court of Appeal did not address the Applicant's submissions as to why the legal protections identified by France and relied on by the Minister were logically unrelated to the particular unfairness imposed by the use of intelligence as evidence in a criminal trial.

II. QUESTIONS IN ISSUE

26. The Applicant submits that this application raises the following questions of public importance that justify granting leave to appeal:

a) Does *United States of America v. Ferras* require an extradition judge to refuse committal when, on a review of the sufficiency of the whole of the evidence she concludes that there is not a plausible case upon which a reasonable jury, properly instructed, could safely convict – as held by the British Columbia Court of Appeal – or is her function restricted to determining whether there is any evidence on each essential element of the offence that is not "manifestly unreliable" – as held by the Ontario Court of Appeal?

b) Does surrender to face a criminal trial based on intelligence reports – whose reliability is untestable because underlying sources of the information and circumstances of collection are unknown to *any* actor in the proceeding – violate s. 7 of the *Charter*?

III. STATEMENT OF ARGUMENT

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[45] *Appeal decision*, *supra* at paras. 205-206, **Tab 6**.
[46] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.
[47] *Appeal decision*, *supra* at paras. 212-215, **Tab 6**.
[48] *Appeal decision*, *supra* at paras. 217-220, **Tab 6**.

A. APPEAL AGAINST COMMITTAL ORDER

27. In *Ferras* this Court held that s. 7 of the *Charter* requires that a person sought for extradition receive a meaningful judicial process before being surrendered to a foreign state. Integral to this is a fair and meaningful hearing before an impartial judge or magistrate.[49] The committal test outlined in this Court's pre-*Charter Shephard* decision[50] – which required committal if there was any evidence adduced on each essential element of the corresponding Canadian offence – did not conform with this constitutional requirement. *Shephard* reduced the function of the committal judge to "rubber stamping" the foreign request, even if the judge concluded that it was "dangerous or unreasonable to commit on the evidence adduced."[51]

28. The *Extradition Act* was only upheld as constitutional because this Court concluded that it permitted "the extradition judge to provide the factual assessment and judicial process necessary to conform to the *Charter*."[52] The Court described the process to be followed this way:

> Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.[53]

i) There is a fundamental split between the provincial Courts of Appeal in the interpretation of *Ferras* and the function of Canadian extradition judges

29. Shortly after this Court rendered its decision in *Ferras* a fundamental split emerged between the Courts of Appeal for Ontario and British Columbia on what extradition judges must do to ensure the constitutional protections required for persons sought for extradition.

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[49] *United States of America v. Ferras; United States of America v.* Latty, [2006] 2 S.C.R. 77, at paras. 19-26 ["*Ferras*"].
[50] *United States of America v. Shephard*, [1977] 2 S.C.R. 1067.
[51] *Ferras, supra* at para. 34, 41, 49.
[52] *Ferras, supra* at para. 44.
[53] *Ferras, supra* at para. 54.

30. In *Thomlison*[54] and *Anderson*,[55] the Ontario Court of Appeal interpreted *Ferras* restrictively, focusing on the phrase "manifestly unreliable" as imposing a strict test. The Court held that the judges' obligation only extended to examining individual pieces of evidence to determine whether they were manifestly unreliable; if so, the piece would be discarded, and the *Shephard* test would be applied to what remained.[56] On the Court's interpretation, *Ferras* did not permit extradition judges to weigh inferences, evaluate the strength of the case put forward, or deny extradition where the judge felt the case to be weak or a conviction unsafe.[57]

31. Shortly thereafter, the British Columbia Court of Appeal held in *Graham* that, in addition to disregarding unreliable evidence, *Ferras* also required judges to conduct a global sufficiency review: a limited weighing of the whole of the evidence to determine "whether it is sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada."[58] The Court likened this form of review to the analysis for an unreasonable verdict or a directed verdict.[59]

32. In the seven years that have passed since Ontario and British Columbia diverged on the interpretation of the constitutional guarantee outlined in *Ferras*, their disagreement has both entrenched and broadened. Both Ontario[60] and British Columbia[61] have consistently re-affirmed their own approach. Each court has considered and expressly rejected the other's approach.[62]

33. Ontario and British Columbia are the largest centers for extradition practice in Canada. However, beyond these two provinces, the split in the interpretation of *Ferras* appears to be growing. The Quebec Court of Appeal has noted the Ontario jurisprudence with approval.[63] Alberta's approach has been more tentative: in the immediate aftermath of the Ontario-B.C. split,

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[54] *United States of America v. Thomlison* (2007), 216 C.C.C. (3d) 97 (Ont. C.A.) ["*Thomlison*"].
[55] *United States of America v. Anderson* (2007), 218 C.C.C. (3d) 225 (Ont. C.A.) ["*Anderson*"].
[56] *Thomlison*, *supra* at para. 45; *Anderson*, *supra* at paras. 35, 45-46.
[57] *Anderson*, *supra* at para. 28.
[58] *United States of America v. Graham* (2007), 222 C.C.C. (3d) 1 (B.C.C.A.), at paras. 25, 32 ["*Graham*"].
[59] *Graham*, *supra* at para. 31; *R. v. Biniaris*, [2000] 1 S.C.R. 381.
[60] See *United States of America v. Michaelov* (2010), 264 C.C.C. (3d) 480 (Ont. C.A.), at paras. 45-47 ["*Michalov*"]; *United States of America v. Aneja*, 2014 ONCA 423, at paras. 47-49 ["*Aneja*"].
[61] See *Italy (Republic) v. Seifert* (2007), 223 C.C.C. (3d) 301 (B.C.C.A.), at para. 39; *United States of America v. Scarpitti* (2007), 228 C.C.C. (3d) 262 (B.C.C.A.), at paras. 35-48; *United States of America v. Hislop* (2009), 242 C.C.C. (3d) 1 (B.C.C.A.), at paras. 18-19, 29; *United States of America v. Bennett*, 2014 BCCA 145, at para. 19; *United States of America v. Savein*, 2014 BCCA 290, at paras. 6-7.
[62] *Graham*, *supra* at para. 30; *Aneja*, *supra* at para. 60; *Appeal decision*, *supra* at para. 135, **Tab 6**.
[63] *United States of America v. M.M.*, 2012 QCCA 1142, at para. 17.

trial courts in that province avoided taking a side.[64] However, the recent chambers decision of O'Ferrall J.A. in *Sosa* suggests an approach more in line with British Columbia. In that decision O'Ferrall J.A. stressed the importance of a holistic review of the evidence in a Record of the Case and indicated that evidence related to the existence of an affirmative defense may be relevant to this assessment[65] – a position that is inconsistent with Ontario's approach.[66]

ii) Experience to Date has Demonstrated that Only This Court can Resolve the Split in the Interpretation of *Ferras*

34. Because the provincial appellate courts have declined to review their own approaches in order to achieve a uniform interpretation of the minimum constitutional protections required in a committal hearing, such a resolution can only be achieved through the intervention of this Court.

35. The Applicant is aware that in two recent cases before the Court of Appeal for Ontario requests were made to have that Court overturn *Thomlison* and *Anderson*. The Applicant in this case requested a 5-judge panel for his appeal to have *Thomlison* and *Anderson* reconsidered.[67] Shortly thereafter, counsel in *Aneja* made a similar request.[68] Both requests were denied.

36. In successfully opposing the Applicant's five-judge panel request, the Attorney General submitted that "[t]o the extent that there is a divergence of opinion between this Court and other provincial courts of appeal on the proper interpretation of *Ferras*, this is squarely an issue for the Supreme Court to resolve."[69] This statement appears to be correct. The only realistic way to resolve the critical issue presented in this case is for this Court to grant leave to appeal.

iii) The Proper Interpretation of *Ferras* is a Question of Public Importance Justifying granting Leave to Appeal

37. It is a matter of public importance that Canada's extradition regime operate in accordance with its international obligations,[70] but also that, in fulfilling this obligation, Canadian courts give full meaning to the rights guaranteed under the *Charter*.[71] On the current state of the law,

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[64] See, eg. *Germany v. Bushati*, 2007 ABQB 592, at paras. 23-26; *United States of America v. Francis*, 2009 ABQB 596, at paras. 17-22.
[65] *United States of America v. Sosa*, 2012 ABCA 242, at para. 13.
[66] *United States of America v. Pannell* (2007), 227 C.C.C. (3d) 336 (Ont. C.A.), at para. 8.
[67] Letter from Marlys A. Edwardh to Winkler C.J.O., dated February 1, 2013, **Tab 26**.
[68] *Aneja, supra* at para. 58, fn. 6.
[69] Letter from Jeffrey G. Johnston to Winkler C.J.O., dated February 11, 2013, **Tab 27**.
[70] *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at 551;
[71] *Canada (Justice) v. Fischbacher*, [2009] 3 S.C.R. 170, at para. 38.

neither of these interests are satisfactorily respected across Canada.

38. It should make no difference whether a person sought for extradition is apprehended in Ottawa or Vancouver; all others things being equal, the result of request for surrender should be the same. Yet given the divergence between the approaches in Ontario and Quebec, on the one hand, and British Columbia and potentially Alberta on the other, geography matters very much.

39. Regardless of whether *Thomlison/Anderson* or *Graham* represents the correct reading of *Ferras*, the current split in the law does a tremendous disservice to the public interest. If *Graham* is wrongly decided, then all surrender requests related to individuals in British Columbia are currently subject to an additional and unnecessary requirement that the ROC comprises a plausible case upon which a properly instructed jury could reasonably convict.

40. The reverse is more troubling: If *Thomlison* and *Anderson* are wrongly decided, then Canadian extradition judges in Ontario are currently failing to provide the meaningful judicial process that is demanded by the *Charter*. Such a state of affairs represents a situation that is inconsistent with constitutional supremacy and the Rule of Law.

41. As it stands, a significant proportion of Canadian extradition proceedings are either in contravention of principles of international comity, or principles of fundamental justice. There is a compelling interest in ensuring that committal decisions are made in conformity with *Charter* rights, while still respecting Canada's international obligations. Resolving this dispute is a matter that merits this Court granting leave.

iv) This Case Represents the Proper Vehicle to Resolve the Conflict

42. Although this Court has had the opportunity on a number of occasions to address the disagreement between Ontario and British Columbia about what s. 7 requires in the context of committal hearings[72] few cases have presented the appropriate vehicle to consider the question. In most cases where parties have litigated the proper reading of *Ferras* the case put forward by the requesting state would justify committal under either test.[73] In this case, given the Extradition Judge's findings about the Bisotti Report and the rebuttal evidence, the result would have been different depending on the test applied.

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[72] Leave to appeal was sought and denied in *Thomlison, Anderson, Graham, Seifert* and *Michaelov*.
[73] See, e.g. *Graham, supra* at paras. 34-38; *Aneja, supra* at paras. 52-54; *Bushati, supra* at paras. 23-26.

43. The Court in *Graham* agreed that discarding unreliable evidence is part of the post-*Ferras* task of an extradition judge,[74] so any ROC that would withstand review under the B.C. approach would also pass muster in Ontario. A case like *Walker*,[75] which involved a discharge under the B.C. approach but which would have likely resulted in committal in Ontario, would present a suitable factual matrix to decide the issue. However, leave to appeal was not sought. In the Ontario cases, few involve ROCs so questionable that they might have failed to pass muster under British Columbia's standard.

44. The Extradition Judge in this case held that, putting the Bisotti Report aside, the ROC did not disclose a sufficient case for committal under the *Thomlison/Anderson* standard. The entirety of the committal decision turned on the single handwriting opinion.[76] The Extradition Judge's own consideration of the Bisotti report demonstrated the serious misgivings that he felt towards it. Having reviewed the extensive evidence that clearly demonstrated that the Bisotti report violated the basic precepts of document examination, the Extradition Judge concluded that the Applicant had managed to "substantially undermine" the sole evidence on which the case for committal rested.[77] The Extradition Judge himself found as a fact that the Bisotti report was "convoluted, very confusing, with conclusions that are suspect."[78]

45. Read as a whole, the Extradition Judge's reasons indicate that had he engaged in a global review of the whole of the evidence, including limited weighing, he would have reached a different conclusion. Having examined the ROC as well as the evidence put forward by the Applicant with respect to the Bisotti report, the Extradition Judge stated:

> The fact that I was allowed to scrutinize the report to the degree that I did, together with the lack of other cogent evidence in the ROC, allows me to say that the case presented by the Republic of France against Mr. Diab is a weak case; *the prospects of conviction in the context of a fair trial, seem unlikely*.[79]

46. This is a remarkable statement to have made, and clearly evidences the profound misgivings that the Extradition Judge felt about France's request. There is a compelling case that, had the Extradition Judge applied the B.C. standard, he would not have committed.

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[74] *Graham, supra* at para. 32.
[75] *United States of America v. Walker* (2008), 234 C.C.C. (3d) 564 (B.C.C.A.).
[76] *Committal decision, supra* at paras. 187-189, **Tab 2**.
[77] *Committal decision, supra* at para. 120, **Tab 2**.
[78] *Committal decision, supra* at para. 121, **Tab 2**.
[79] *Committal decision, supra* at para. 191 [Emphasis added], **Tab 2**.

v) Even if *Thomlison* and *Anderson* were Correctly Decided, this Case Presents Important Questions on the Nature of the Meaningful Judicial Proceeding Mandated by *Ferras*

47. The Applicant submits that *Graham* more accurately reflects the spirit and substance of *Ferras*, and that *Thomlison* and *Anderson* unduly and unconstitutionally restrict the function of committal judges. However, even if this Court were to reject *Graham*, this case still presents issues related to the application of the "manifest unreliability" standard, and what it means to receive a meaningful judicial hearing in the extradition context.

48. The Court of Appeal in this case found error in the Extradition Judge's own understanding of the manifest unreliability analysis, yet it also concluded that he had conducted his analysis correctly. That the Court could hold these mutually contradictory views of the Extradition Judge's approach demonstrates that "manifest unreliability" is currently a troubled concept that does not meaningfully guide the work of extradition judges.

49. On the question of the extent to which an extradition judge can compare expert opinions, the Extradition Judge held, relying on a passage from *Anderson*, that he was prohibited from weighing competing inferences that arose from the opinions, and so the Applicant's experts' criticism of Bisotti's methodology were legally incapable of establishing manifest unreliability.[80] The Court of Appeal, referring to the exact same passage from *Anderson* concluded that judges could in fact conduct the analysis that the Judge below held that he could not.[81]

50. The Extradition Judge, having rejected that *Mohan*, *Abbey* and *Goudge* had application in assessing the reliability of expert evidence in a ROC, incongruously indicated that a finding of bias, lack of expertise *and* improper methodology *in every respect* could collectively ground a manifest unreliability finding.[82] This statement is problematic not only for how extreme a standard the Extradition Judge felt applied, but also because bias, expertise and methodology are the very core concepts from the cases that he had earlier found could not be relied upon.

51. While the Court of Appeal agreed with the Extradition Judge that the threshold reliability inquiry required by *Mohan* was different than the inquiry undertaken by an extradition judge, the Court of Appeal did vaguely suggest that the factors from *Mohan* and *Abbey* may nonetheless

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[80] *Committal decision, supra* at paras. 103, 106, **Tab 2**.
[81] *Appeal decision, supra* at para. 117, **Tab 6**.
[82] *Committal decision, supra* at paras. 99-101, 124, **Tab 2**.

"assist" extradition courts.[83] How these cases could "assist" without applying *per se* was not explained by the Court, and adds only confusion to this issue.

52. Neither the Court of Appeal's nor the Extradition Judge's conclusions can be comfortably reconciled with the findings that the Extradition Judge made with respect to the possibility of a distinct French method of handwriting analysis. If the importance of valid methods from *Mohan/Abbey/Goudge* was not relevant to the question of "manifest unreliability" as the Extradition Judge held, then the existence of a different French methodology would be irrelevant. If proper methodology was relevant to the manifest unreliability analysis, as the Court of Appeal suggested, then the conclusion of both Courts that the Margot and Marquis Report could not have affected the outcome of the hearing is unreasonable.

53. These problems will continue to plague extradition judges, as they hear requests based on expert scientific evidence. The confusion and logical difficulties of the Court of Appeal's reasons can be contrasted with the "sealed judgment", which was before the Court, but not commented on by them.[84] That decision, free from the difficulties of the *Thomlison/Anderson* "manifest unreliability" analysis that have since developed, provided a simple, straightforward analysis that was sensible, just, and fully in keeping with a meaningful judicial phase of extradition. Future cases dealing with expert opinions – and there inevitably will be more – will now be muddied by both the "manifest unreliability" standard and the Court of Appeal's reasons in this case.

54. Ultimately, the reasons of the Court of Appeal demonstrate that under the prevailing approach in Ontario, focused on the high threshold of "manifest unreliability", requested persons are in practice not being provided the meaningful judicial hearing mandated by *Ferras*. Surely the substantial undermining of the reliability of an expert opinion's methodology, reducing it to a document that is "illogical" and "very problematic" with "conclusions that are suspect" is the very rebuttal of threshold reliability contemplated by *Ferras*. Even on the terms of *Anderson*, the findings in this case demonstrate "fundamental inadequacies or frailties" in the opinion which serve to "substantially undermine" it. If the Bisotti report does not fail the review mandated by *Ferras*, then nothing will, and extradition judges will once again act as mere rubber stamps.

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[83] *Appeal decision*, *supra* at paras. 102-107, **Tab 6**.

[84] See the materials filed under seal as part of this leave application, particularly paras. 4-6, 30-41, 44-60. Due to the sensitive nature of that case, no details related to the sealed decision will be contained in this public memorandum. The Applicant submits that the document speaks for itself.

B. APPEAL AGAINST SURRENDER DECISION

55. The criminal defendant's right to confront his or her accuser is an ancient one, dating to the time of the Emperor Trajan,[85] and is central to contemporary conceptions of justice.[86] The interest of the state in protecting its sources of national security information also has deep roots.[87] The reconciliation of these competing norms is perhaps the most pressing issue facing the democratic world as it works to fight threats posed by terrorism.[88]

56. In the present case, the Minister of Justice concluded that it would not violate the *Charter* to surrender the Applicant to face a criminal trial in which the evidence against him would include unsourced and uncircumstanced intelligence. The Applicant would not be permitted to know where the information came from, and thus have no facilities to test its reliability. Neither would trial judges, as they too are forbidden from knowing the provenance of foreign intelligence. The Court of Appeal, in brief reasons,[89] found that the Minister's conclusion was reasonable.

57. This Court should grant leave to appeal to address two pressing but unanswered questions: can surrender to face a criminal prosecution based on secret intelligence ever be constitutionally acceptable? If it can be, what safeguards are adequate to ensure a sufficiently fair trial to render extradition constitutional?

i) The Issue of Intelligence in Criminal Trials is of Public Importance, but has Yet to be Directly Addressed by This Court

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[85] For an overview, see David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials* (2002), 24 Sydney L. Rev. 361.
[86] See, for example, *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), Art. 14(3)(e); *American Convention on Human Rights*, 1144 U.N.T.S. 123 (1978), Art. 8(2)(f); *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 U.N.T.S. 222 (1953), art. 6(3)(d).
[87] *Ahmad*, *supra* at para. 60.
[88] See, for example, Lord Diplock, *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland* (1972, Cmnd. 5185); John A.E. Vervaele, *Terrorism and Information Sharing Between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law?* (2005) 1 Utrecht L. Rev. 1; Christoph J.M. Safferling, *Terror and Law: German Responses to 9/11* (2006) 4 J. Int'l. Crim. J. 1152; International Commission of Jurists, *Addressing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009); Kent Roach, "The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations" in Nicola McGarrity, Andrew Lynch & George Williams, eds., *Counter-Terrorism and Beyond* (Abington: Routledge, 2010) 48; Miiko Kumar, *Secret Witnesses, Secret Information and Secret Evidence: Australia's Response to Terrorism* (2011) 80 Miss. L.J. 1371; Jason Mazzone and Tobias Fischer, "The Normalization of Anonymous Testimony" in David Cole, Federico Fabbrini & Arianna Vedaschi, eds., *Secrecy, National Security and the Vindication of Constitutional Law* (Northamptom: Edward Elgar Publishing Ltd., 2013) 195.
[89] *Appeal decision*, *supra* at paras. 205-221, **Tab 6**.

58. The issue of an individual's right to know the case against him or her and to meet it has merited this Court's consideration several times, particularly in the context of national security and the fight against terrorism. This Court has considered the constitutionality of the use of secret evidence against an individual in non-criminal proceedings, and the non-disclosure (and thus non-use) of sensitive materials in criminal proceedings. However, it has not yet considered what is by far the most difficult question that rests at the intersection of these issues: the reliance on, and *use* of secret intelligence in true criminal proceedings. That is the core issue that lies at the centre of this Application.

59. The decisions of this court on related issues do provide a proper legal context in which to consider the issues presented here. They also underscore the serious frailties in the decisions below. *Charkaoui (No. 1)* addressed the use of evidence not fully disclosed to a named person on the basis of national security. The situation in *Charkaoui* is similar to what the Applicant would face in France: under the former security certificate law, proceedings against the named person could be based on undisclosed information.[90] That regime was unconstitutional because of the inability of the subject to access even *some* of the evidence against him, coupled with the absence of a suitable substitute to represent his interests.[91]

60. The revised regime was considered in *Harkat*, in which this Court re-affirmed the importance of disclosure. The scheme was only upheld because of the mandatory use of special advocates who had access to secret evidence and the vigorous gatekeeping role played by the court.[92] The Court further held that the legislation's provisions respecting non-disclosure of sensitive information should not be interpreted as to permit non-disclosure of an irreducible core of information and evidence necessary to understand the state's case, and to give meaningful instruction to public counsel and special advocates.[93] Non-disclosure of the irreducible core necessitates a remedy to ensure a fair process.[94]

61. Both *Charkaoui* and *Harkat* emphasized the importance of context in determining whether anything short of full disclosure could be constitutional.[95] There are at least four

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[90] *Charkaoui*, *supra* at para. 5.
[91] *Charkaoui*, *supra* at paras. 23, 35, 54-55.
[92] *Harkat*, *supra* at paras. 34-35, 56.
[93] *Harkat*, *supra* at paras. 51-56.
[94] *Harkat*, *supra* at paras. 59-60.
[95] *Charkaoui*, *supra* at para. 59; *Harkat*, *supra* at para. 43.

important contextual differences between the regime upheld in *Harkat* and the situation facing the Applicant in France, all of which strongly reinforce the critical importance of full disclosure: First, *Charkaoui* and *Harkat* dealt with administrative proceedings, while this case deals with a true criminal prosecution; secondly, whereas a designated judge in a Canadian security certificate proceeding has access to all sensitive material, in France, not even the trial judge is permitted to look behind the intelligence reports; and thirdly, the French system has no equivalent to a special advocate. The question this case poses is whether the criminal law can ever accept a prosecution based on truly untestable intelligence?

62. Withholding sensitive information in the true criminal context was addressed in *Ahmad*, which considered the constitutionality of the s. 38 of the *Canada Evidence Act* regime. While this Court was not called upon then to consider the pressing issue of *reliance* on non-disclosed information as it is in this case, the judgment remains relevant to the issue presented in this case. Most significant was this Court's emphasis on the need of the trial judge to have access to the undisclosed information in order to ensure a fair proceeding,[96] a function that judges are incapable of discharging in France's terrorism trial system.

63. *Charkoui* and *Harkat* on the one hand, and *Ahmad* on the other hand address important issues that surround the question presented in this case: can a criminal prosecution based on bald conclusions that cannot be meaningfully challenged on the basis of national security considerations ever be a fair one? If not, as their reasoning would suggest, then surrender is not permissible since neither the *Extradition Act* nor the *Charter* can tolerate surrender to face an unfair process. If such a proceeding can be tolerated on the basis of adequate substitutes to disclosure, then these cases also assist in answering a further compelling question: what sorts of procedural protections could ever rationally remedy the vice of non-disclosure?

64. As it stands, the Court of Appeal's consideration of this topic is nearly non-existent, and the Minister's approach provided no meaningful consideration of the substance of the problem facing states as they struggle to reconcile their national security and human rights obligations. Rather, the judgments below merely provide blind deference in the name of comity. For issues of such significance to the entire liberal democratic world, more meaningful consideration is needed, and this Court ought to grant leave to appeal to address the issue head-on.

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[96] *Ahmad, supra* at paras. 27-34, 51.

ii) This Case Presents a Perfect Opportunity to Address these Crucial Issues

65. It was inevitable that the issue of using intelligence as evidence in the criminal sphere would arise in the extradition context. There are currently no legislative or common law provisions that would permit the use of a conclusory CSIS report as incriminating evidence in a criminal trial, nor does there appear to be a genuine case to be made that such a trial would be constitutionally compliant. Even the Minister in his surrender decision conceded this point.[97]

66. The Applicant recognizes that the extradition context introduces a confounding factor into the analysis, as it requires consideration of a foreign legal system. However, the record assembled by the Applicant in these proceedings is rich in detail about the operation of French terrorism trials generally, and the use of secret intelligence materials in particular. Few cases – if any – will provide as complete a record as this one does.

67. This evidence includes multiple reports from respected non-governmental organization Human Rights Watch[98]; Reports issued by both the UK Home Office[99] and the UK Parliament's Joint Committee on Human Rights[100]; Expert reports from the UK's leading scholar on the French criminal justice system, Professor Jacqueline Hodgson, commissioned by the UK government[101]; and a report by prominent French defence counsel Stéphane Bonifassi.[102]

68. The Applicant also adduced significant evidence related to the general issue of reliance on intelligence as evidence in judicial proceedings, including reports from NGOs JUSTICE and the International Commission of Jurists,[103] sections of the Arar and Iaccobucci Inquiries,[104] and opinions from leading scholars Kent Roach, Thomas Quiggin, and Wesley Wark.[105]

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[97] *Surrender decision, supra* at 16, **Tab 4**.
[98] Human Rights Watch, *In the Name of Prevention: Insufficient Safeguards in National Security Removals* (2007); Human Rights Watch, *Preempting Justice – Counterterrorism Laws and Procedures in France* (2008); Human Rights Watch, *"No Questions Asked": Intelligence Cooperation with Countries that Torture* (2010); Human Rights Watch, *Concerns and Recommendations on France* (2010).
[99] The Home Office, *Terrorist Investigations and the French Examining Magistrates System* (2007).
[100] House of Lords-House of Commons Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, 24th Report of Session 2005-2006.
[101] Jacqueline Hodgson, *The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office* (2006).
[102] Stéphane Bonifassi, *The Use of Intelligence in Criminal Cases, and More Specifically in Terrorist Cases* (2011).
[103] International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009); *Secret Evidence: a JUSTICE Report* (2009);
[104] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, David O'Connor, Commissioner, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006); The Hon. Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (2008).

69. Even the Republic of France itself provided information respecting its legal system, which included some of the relevant provisions of their Code of Criminal Procedure. Taken together, these materials provide more than a sufficient record to consider the question presented.

iii) The Important Issues Presented by this Case Were not Meaningfully Addressed in Any of the Proceedings Below

70. Compared with the gravity of the issue of the use of intelligence in criminal trials, the consideration given by the Minister and the Court of Appeal was limited, and did not directly confront the core of the problem. Comity and deference cannot be an excuse to avoid the difficult questions presented by the reliance on unsourced and uncirsumstanced intelligence, and this Court ought to take up the case to provide the meaningful consideration that is merited.

71. Having adduced the hundreds of pages of evidence outlined above, the Applicant's position before the Minister was that no trial, adversarial or inquisitorial, could ever be fair when the prosecution's case was comprised of intelligence reports like those contained in the French investigative file. The right to know the case cannot be satisfied when the "evidence" is a bald assertion from an unknown accuser that the accused is guilty. The right to meet the case cannot be satisfied where an accused has no facilities to know where or under what circumstances the intelligence comes from. Even if substantial substitutes could, in principle, remedy these problems in the criminal context, no such substitute exists where neither the investigating magistrate nor the trial court have any ability to look behind the intelligence either.[106]

72. The Minister's response was to refer to "clarification" provided by France about the nature of its legal system: French investigators seek the truth; intelligence reports cannot be the *sole* basis on which to convict; defendants can access the investigative file; accused persons may "raise concerns with respect to the evidence" and can appeal against judicial decisions; the Applicant would be presumed innocent and have a right to counsel; and accused persons can file documents, request investigative steps or call witnesses.[107] From these generic considerations, he

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[105] Kent Roach, *Proposed Evidence of Kent Roach*; Thomas Quiggan, *Intelligence as Evidence: Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab*; Wesley Wark, *Expert Witness Report: In the Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution*.
[106] See note 11, *supra*.
[107] *Surrender decision*, *supra* at pp. 14-15, **Tab 4**.

concluded that "their system, while very different from our own, has substantial checks and balances to ensure that Mr. Diab will be treated fairly and afforded due process".[108]

73. These reasons were unresponsive to the problems posed by the use of intelligence as evidence. The Applicant's submissions to the Court of Appeal focused on the total disconnect between the procedural protections relied on by the Minister and the actual problems inherent in the use of intelligence as evidence.[109]

74. There can be no debate that the concerns raised about the use of intelligence in terrorism trials are pressing ones demanding serious consideration. Neither the Minister nor the Court of Appeal answered this call. There is no reasoned discussion about how the procedural protections identified by the Minister could logically address the harm to the right to know the case and meet it. Perhaps there is some answer, but there is none to be found in the record of these proceedings. Instead, one gets the impression that the vice of secret evidence is a problem only for adversarial systems, rather than one of the most difficult questions facing all the legal systems of the world.

75. Canadians deserve that this issue be addressed head-on. There is no doubt that international comity and deferential judicial review must factor into any analysis, but not at the expense of retreating from a rich analysis like that found in *Charkaoui*, *Harkat* and *Ahmad* and the attendant risk of compromising *Charter* rights.

IV. SUBMISSIONS RESPECTING COSTS

76. The Applicant makes no submissions respecting costs.

V. ORDER SOUGHT

77. The Applicant requests an order granting leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Ottawa, this ___ day of August, 2014

Marlys A. Edwardh	Daniel Sheppard	Donald B. Bayne

Counsel for the Applicant, Hassan Diab

[108] *Surrender decision*, *supra* at p. 17, **Tab 4**.
[109] *Appeal decision*, *supra* at paras. 215-219, **Tab 6**.

VI. TABLE OF AUTHORITIES

Jason Mazzone and Tobias Fischer, "The Normalization of Anonymous Testimony" in David Cole, Federico Fabbrini & Arianna Vedaschi, eds., *Secrecy, National Security and the Vindication of Constitutional Law* (Northamptom: Edward Elgar Publishing Ltd., 2013) 195	55
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VII. LEGISLATION CITED

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI)

Art. 14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

…

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

American Convention on Human Rights, 1144 U.N.T.S. 123 (1978)

Art. 8. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

…

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1953)

Art. 6 (3): Everyone charged with a criminal offence has the following minimum rights:

…

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him