Court File No. 35889

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HASSAN NAIM DIAB

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA (ON BEHALF OF THE REPUBLIC OF FRANCE) and THE MINISTER OF JUSTICE OF CANADA

Respondents

REPLY OF THE APPLICANT

(Rule 28 of the *Rules of the Supreme Court of Canada*)

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INDEX

		Page No.
Applicant's Reply Submissions On Leave To Appeal		1
A.	Ontario and British Columbia's Approaches to *Ferras* are Different	1
B.	Ontario's Approach Erodes the Judicial Function and Undermines *Ferras's* Constitutional Guarantee	3
C.	The Question Presented by the Judicial Review is of Great Public Importance; The Minister's Failure to Address the Issues Embodies the Unreasonableness of His Decision-Making Process	4
D.	The Applicant Has Not Raised a Disclosure Issue on this Application	5
Authorities Cited		6
Excerpt from Appellant's Court of Appeal Factum		7

APPLICANT'S REPLY SUBMISSIONS ON LEAVE TO APPEAL

A. ONTARIO AND BRITISH COLUMBIA'S APPROACHES TO *FERRAS* ARE DIFFERENT

1. The Respondent submits that there is no true disagreement between Ontario and British Columbia as to the interpretation of *Ferras*, and thus to the test for committal under the *Extradition Act*.[1] This submission is belied by reasoning of the Extradition Judge in this very case; by the reasons of the provincial appellate courts; by the views of foreign courts; and by scholarly comment. These sources confirm the existence of persistent disagreement and uncertainty and over what *Ferras* means in terms of both the test for committal, and the extent of s. 7 *Charter* protection for those sought for extradition. Leave should be granted to provide clarity and certainty to this important area of law.

2. After concluding that an analysis of methodology informed by *Mohan*, *Abbey* and the *Goudge Report* could not lead to a finding that the Bisotti Report was "manifestly unreliable" the Extradition Judge continued to consider whether the test for committal was met. The Court stated that "The parties could not agree on the appropriate test for committal or the role of the judge in applying that test" and outlined the two distinct approaches advocated for by each side; the Applicant urged the *Graham* approach, the Respondent relied on *Thomlison/Anderson*.[2] Both the Extradition Judge and the parties understood these approaches as substantially different, and litigated the relative merits of each approach forcefully.

3. The Appellate Courts in Ontario and British Columbia view their own lines of authority as substantially different. Donald J.A. in *Graham* found himself in "respectful disagreement" with the limited review powers described in *Anderson*[3] and outlined an undeniably broader approach involving principles derived from the law related to unreasonable verdicts. The Court of Appeal in this case devoted a significant portion of its analysis on the committal appeal to criticizing and rejecting *Graham*.[4] Shortly thereafter, Doherty J.A. in *Aneja* explicitly described the *Graham* approach as going beyond *Thomlison/Anderson*, and again rejected it.[5] It would be remarkable if the Courts had so misunderstood their own cases so as to repeatedly analyze, critique and reject interpretations of *Ferras* that were, in fact, identical to their own.

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[1] Memorandum of Argument of the Respondent, at paras. 41-49.
[2] *Committal decision*, at paras. 129-138, **AR, Vol. I, Tab 2, pp. 64-69.**
[3] *United States of America v. Graham* (2007), 222 C.C.C. (3d) 1 (B.C.C.A.), at para. 30.
[4] *Appeal decision*, at paras. 135-140, **AR, Vol. 1, Tab 6, pp. 175-178.**
[5] *United States of America v. Aneja*, 2014 ONCA 423, at paras. 51, 60.

4. The Respondent's attempt to present a picture of agreement on the meaning of *Ferras*'s constitutional guarantees rests on a highly abstracted view of an extradition judge's mandate. The Respondent argues that under *Ferras* surrender may be denied where there is evidence "that, although available and reliable, is not evidence upon which a reasonable jury, properly instructed could convict"[6] and suggests that there is no disagreement between the Courts about *this* principle. But in stating the principle at such a high level, the Respondent glosses over the deep disagreement over how it should be applied. Ontario believes that this is merely an application of the *Shephard* 'some evidence' test, with evidence removed from the "some evidence basket" based on manifest unreliability.[7] British Columbia disagrees: "a sufficient case is not made out by relevant and available evidence on each element of the offence."[8]

5. Further, to state that the Applicant always accepted that, if the Bisotti report was not found "manifestly unreliable" then a reasonable jury properly instructed could find that the Applicant was Panadriyu,[9] simply cannot be reconciled with the record. The Appellant's factum at the Court of Appeal could not be more clear:

> Even if this Court concludes that the Bisotti report cannot be entirely discarded from consideration, Justice Maranger erred in holding that the test for committal was met on the evidence in the ROC. The Appellant submits that a properly instructed jury could not reasonably convict on the evidence in the ROC.[10]

The entire thrust of the Applicant's merits argument is that, beyond any manifest unreliability test, *Ferras* demands a holistic review of all of the evidence in a ROC to determine sufficiency, and that this review is more probing than the *Shephard* test. The limited weighting of evidence that *Ferras* expressly permits[11] is relevant not only to an atomistic manifest unreliability test, but also to the global sufficiency review that is at the core of the *Graham* approach to *Ferras*.

6. The clear disagreement over what *Ferras* held goes beyond Canadian courts. *Ferras* featured predominantly in the High Court of New Zealand's *Dotcom* case. There, Winkelmann J. rejected the proposition – clearly inspired by *Thomlison* and *Anderson* – that *Ferras* meant that extradition could only be refused "where the person sought establishes that the ROC contains no

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[6] Memorandum of Argument of the Respondent, at para. 37.
[7] *United States of America v. Thomlison* (2007), 216 C.C.C. (3d) 97 (Ont. C.A.), at paras. 4, 45-48.
[8] *Graham, supra* at paras. 17-19, 27-33.
[9] Memorandum of Argument of the Respondent, at para. 40.
[10] Factum of the Appellant/Applicant in the Ontario Court of Appeal, File No. C53812/C55441, at para. 146.
[11] *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77, at para. 116.

evidence on a necessary element of the charged offence or where the ROC contains manifestly unreliable evidence." In the court's view "the role the Supreme Court [of Canada] defines for the extradition Court in *Ferras* is broader than that."[12] Similarly, in one of the first academic commentaries on *Ferras*, Gary Botting read this Court's reasons as representing "a radical departure… from standard Canadian extradition law practice",[13] not an inherently "limited" expansion suggested by the Ontario Court of Appeal.[14]

7. If the Courts and commentators agree on anything, it is that "the proper interpretation of *Ferras* is open to legitimate debate."[15] Extradition judges play a crucial role in the protection of the *Charter* rights of persons sought for surrender. The debate over what their function actually entails is one that merits this Court granting leave in order to provide a definitive answer.

B. ONTARIO'S APPROACH ERODES THE JUDICIAL FUNCTION AND UNDERMINES *FERRAS'S* CONSTITUTIONAL GUARANTEE

8. Aside from resolving the significant debate over the extent of an extradition judge's obligation to determine sufficiency, this case also raises important questions about the nature of the "manifest unreliability" review. If this court ultimately were to agree with the Respondent that Ontario's approach properly captures the meaning of *Ferras*, this case still presents critical questions about how manifest unreliability is to be applied by extradition judges.

9. The Respondent submits that the Applicant's bid to have the Bisotti Report found manifestly unreliable properly failed because the defence expert evidence on methodology could only go to ultimate reliability of the Report.[16] The Respondent arrives at this conclusion on the basis that certification of the ROC itself ends the inquiry into threshold reliability and all subsequent attacks on the evidence went to ultimate reliability. But this begs the question: does the methodology used to arrive at an expert opinion go to threshold reliability; if not, what does?

10. The answers from the Courts below provide no useful guidance: The Extradition Judge held that such opinions are matters of ultimate reliability, and so could not be considered; the Court of Appeal held that methodology issues could potentially lead to manifest unreliability (so

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[12] *United States of America v. Dotcom*, [2012] NZHC 2076, at para. 80, rev'd on other grounds [2014] NZSC 24.
[13] Gary Botting, "The Supreme Court Decodes the Extradition Act: Reading down the Law in *Ferras* and *Ortega*" (2007) 32 Queen's L.J. 446, at 484.
[14] *Thomlison, supra* at para. 45. While the Botting article was published after the release of *Thomlison*, it appears to have been written prior to the decision's release.
[15] *Aneja, supra* at para. 60.
[16] Memorandum of Argument of the Respondent, at para. 39.

must a matter of threshold reliability), but held that the Extradition Judge's finding that he could *not* consider them did not deprive the Applicant of the meaningful hearing demanded by s. 7.[17]

11. The sole issue identified by the Extradition Judge in his rejection of the defence expert evidence on its merits was his speculation – now conclusively discredited – that France might follow its own unique methodology.[18] Even in the absence of the Margot & Marquis report, which definitively disproved this hypothesis, the Extradition Judge's reasoning on this issue was not merely unsupported by the evidence before him; it was directly contradicted by it.

12. With the Court of Appeal's approval of the Extradition Judge's approach, under Ontario's conception of manifest unreliability even a speculative theory, ungrounded in any evidence, that offers any support to what is otherwise fatally flawed ROC materials is now enough to establish sufficiency. This is judicial rubber-stamping at its worst, and so cannot be what *Ferras* envisions. This constitutionally deficient reading should not be permitted to stand.

C. THE QUESTION PRESENTED BY THE JUDICIAL REVIEW IS OF GREAT PUBLIC IMPORTANCE; THE MINISTER'S FAILURE TO ADDRESS THE ISSUES EMBODIES THE UNREASONABLENESS OF HIS DECISION-MAKING PROCESS

13. The Respondent suggests that the Minister's surrender decision reflects established law, and on that basis argues that there is no basis upon which to grant leave.[19] Yet the legal principles identified by the Respondent – the presumption of trial fairness and the right of the Minister to rely on representations from the Requesting State – miss the mark. The real issue in this Appeal is not the test for establishing bad faith on the part of a requesting state; it is the certain[20] use of unchallengeable intelligence to try a Canadian on serious criminal charges.

14. The Minister's failure to even consider the difficult questions presented by the troubling use of intelligence under France's special criminal procedures for conducting terrorism trials is attributable to three mistaken steps in his reasoning process: (1) The Minister found a conflict in the evidence between the French and the Applicant's experts as to the applicable procedures under French law, when no such conflicts actually existed; (2) as a result, he applied the "evidence of bad faith" standard from *Schmidt* for rejecting information provided by an

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[17] *Ferras, supra* at paras. 22, 26.
[18] *Committal decision*, paras. 110-112, **AR, Vol. I, Tab 2, pp. 58-59.**
[19] Memorandum of Argument of the Respondent, at paras. 50, 64.
[20] The Respondent incorrectly states that the issue is the "possible" use of intelligence: Respondent's Memorandum of Argument, para. 21. The Minister acknowledges that the intelligence in fact form part of the case *dossier* collected by the Investigating Magistrate in this matter: *Reasons for Surrender,* at 14, **AR, Vol. I, Tab 4, p. 103.**

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extradition partner as a basis to not consider the defence evidence at all; and (3) consequently failed to consider relevant factors, namely, the uncontradicted defence evidence that brought to the forefront the issues inherent in convicting a person criminally on the basis of secret evidence.

15. The Minister's first error is shown by way of example: France indicated that the Applicant could request that a French trial court call the author of an intelligence report as a witness. He found defence evidence to conflict with this assertion when it *agreed* with this statement, but went on to note that authors of such intelligence reports cannot be compelled to answer questions respecting sources or circumstances once called.[21] France's representations did not indicate otherwise. On multiple occasions the Minister took as 'conflicting evidence' situations where the defence evidence was consistent with the French representations, but went into greater detail on key subjects that France's representations never addressed.

16. By finding conflict when there was none, the Minister was able to dismiss defence evidence by invoking the absence of evidence of bad faith, rather than examine the whole body of relevant evidence before him. Doing so avoided addressing the very real constitutional issue raised here: does s. 7 of the *Charter* permit surrender to face trial on the basis of unsourced and uncircumstanced intelligence that cannot be meaningfully challenged? A defendant's right to know the case against them is the core of s. 7; even on a "shock the conscience" standard (which is met on *any* s. 7 violation), a criminal prosecution that proceeds along these lines cannot be accepted. The issue presented by this case cannot be ignored as it was by the Minister.

D. THE APPLICANT HAS NOT RAISED A DISCLOSURE ISSUE ON THIS APPLICATION

17. The Respondent incorrectly suggests the Applicant raises an issue respecting disclosure in the extradition proceedings. The Applicant's arguments respecting disclosure relate solely to the ability to access information respecting sources and circumstances about intelligence reports in the French *dossier* within the context of a French trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Done at the City of Ottawa, this 22nd day of September, 2014

Marlys A. Edwardh	Daniel Sheppard	Donald B. Bayne

[21] Jacqueline Hodgson, *The Investigation and Prosecution of Terrorist Suspects in France – An Independent Review Commissioned by the Home Office* (2006), at 42-43, **AR, Vol. II, Tab 13, pp. 111-112.**

AUTHORITIES CITED

	Para.
United States of America v. Aneja, 2014 ONCA 423	3, 7
United States of America v. Dotcom, [2012] NZHC 2076	6
United States of America v. Dotcom, [2014] NZSC 24	6
United States of America v. Ferras; United States of America v. Latty, [2006] 2 S.C.R. 77	5, 10
United States of America v. Graham (2007), 222 C.C.C. (3d) 1 (B.C.C.A.)	3, 4
United States of America v. Thomlison (2007), 216 C.C.C. (3d) 97 (Ont. C.A.)	4, 6
Gary Botting, "The Supreme Court Decodes the Extradition Act: Reading down the Law in *Ferras* and *Ortega*" (2007) 32 Queen's L.J. 446	6

the entire case turned on the report.[217] If this Court accepts the Appellant's arguments that the Bisotti report is manifestly unreliable, then the committal must be quashed.

ii) The 'unsafe or dangerous to convict' approach to *Ferras*

146. Even if this Court concludes that the Bisotti report cannot be entirely discarded from consideration, Justice Maranger erred in holding that the test for committal was met on the evidence in the ROC. The Appellant submits that a properly instructed jury could not reasonably convict on the evidence in the ROC. It is not merely a matter of the evidence forming a "weak" case. In the context of all of the evidence in the ROC before Justice Maranger, it would be "dangerous or unsafe to convict", to use the words of Moldaver J.A. in *Thomlison.*[218]

147. Justice Maranger interpreted the decisions of this Honourable Court in *Thomlison*, *Anderson,* and *Michaelov* as holding that "our Court of Appeal does not contemplate the extradition judge analyzing or weighing the evidence that remains in the ROC to determine whether or not it would be dangerous to convict upon that evidence".[219]

148. Justice Maranger interpreted this Court's decisions as imposing a more restrictive interpretation of *Ferras* than that expounded by the British Columbia Court of Appeal in *Graham.*[220] The Appellant submits that nothing in *Thomlison*, *Anderson*, and *Michaelov* detracts from the holding in *Ferras* that the evidence will be insufficient to support committal if it would be unsafe to rest a verdict upon it.[221]

149. Whatever the difference in approach between Ontario and British Columbia, this Court's decisions do not stand for the proposition that committal must be ordered even where it would be

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[217] Submissions of Mr. Johnston, **ABJR, Vol. 1, Tab 6-C, p. 234 ll. 11-22**; Submissions of Mr. Johnston, dated March 4, 2011, **ABJR, Vol. 1, Tab 6-D, p. 235, ll. 13-20.**
[218] *Thomlison, supra*, **App. Auth., Tab 5, para. 45.**
[219] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 142.**
[220] See generally Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 129-142.**
[221] In this regard, the Court may wish to consider the discussion in *United v. Francis*, 2009 ABQB 596, **App. Auth., Tab 12, para. 21** to the effect that the differences between the British Columbia Court of Appeal and this Court regarding the interpretation of *Ferras* are "distinctions without a difference".