

Canada's extradition law: A legal conundrum



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Canada's little known 1999 Extradition Act has been called a "backwater" of the country's legal system — a law that critics say offers little protection to Canadian citizens when foreign countries come knocking. In the wake of Ottawa academic Hassan Diab's extradition on Friday, here's a look at a law that is Canada's legal oddity.

Canadians will likely never know why the Supreme Court of Canada decided to cut Hassan Diab's last legal lifeline when they refused to hear his appeal against extradition to France.

As is normal, the justices don't give reasons in such matters.

Statistically, it wasn't surprising: The country's top court gets about a dozen applications a year to hear extradition appeals and has only agreed to hear one in the past three years.

Legally, it appears to be: Diab's lawyers, who had plenty of ammunition in terms of the French evidence against him, based their pitch to the top court on the confused state of Canada's 1999 Extradition Act and the lack of adherence to a key 2006 Supreme Court ruling.

That ruling, known in the Canadian extradition world as 'Ferras,' essentially told provincial courts to stop rubber-stamping extradition requests and start weighing evidence from countries requesting the extradition of Canadian citizens. If the evidence isn't unreliable, then it's OK to turn down the request.

British Columbia lawyer and author Garry Botting, one of Canada's foremost authorities on extradition, says that provincial courts are disregarding the Ferras ruling and continue to do their own thing. Instead of the more balanced national standard of fairness and justice the Supreme Court was striving for, there is inconsistency across the country.

If the Supreme Court had agreed to hear the 60-year-old academic's appeal, said Botting this week, it could have been a "game changer.

"There has rarely been a case that is so clearly unfair," he said. "We are constantly bending over backwards to accommodate whatever international request is made. It's not a question of 'will we?' but how high would you like us to jump to accommodate you.

"The Supreme Court could have changed that by revisiting Ferras and saying (to lower courts): 'You're still rubber stamping; you're doing what we said you couldn't do.'"

Diab's case was the first solid opportunity since Ferras in 2006 to "really make a difference and bring common sense and fairness to bear in extradition cases. Right now it is not fair, not just and has precious little common sense.

"Canadians get the short end of the stick every time," he added. "Their own government has sold them down the river."

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How extensive is the extradition of Canadians to foreign countries?

There are about 100 a year and about 1,500 since the law was revised in 1999 as a much-needed replacement of antiquated 1877 legislation. According to Botting, only five extradition requests have been rejected since 1999.

The fundamental issue critics have of the law is that it replaced a process akin to a criminal preliminary hearing, where the person "sought" could present evidence and have it weighed fairly, with a process that significantly lowered the threshold for countries seeking to extradite Canadians from Canada. In other words, the evidence offered by a foreign country no longer needed to meet Canadian standards.

Famous in the legal world was an article written in the 2002 Queen's University Law Journal by Anne Warner La Forest, a highly-regarded legal academic now with the University of New Brunswick.

Changes to the law, she argued, "unnecessarily sacrifice the fugitive's right to a hearing in accordance with fundamental justice in favour of the state's interest in expediency and comity."

La Forest's extensive paper raised eyebrows because it was her father, former Supreme Court justice and senior Justice Department official Gerard La Forest, who is credited

with crafting the legislation.

Canada has bilateral treaties with about 50 countries but at least 90 per cent of Canadian extradition cases involve the dispatching of Canadian citizens to the United States. Although often problematic, they get little or no attention.

What's problematic about them?

Botting, who has more experience in battling the extradition system than any other Canadian lawyer, says most extradition judges “rubber stamp requests and don't give five minutes thought” to the Canadian trying to prove his or her innocence.

“Right now lawyers throw up their hands in extradition cases and tell clients to negotiate even when it's clear the individual is innocent.”

Negotiating can reduce the seriousness of charges a Canadian might face – typically in the United States – where crimes considered relatively minor in Canada can carry hefty prison sentences.

Botting is currently representing a British Columbia man who sold marijuana to another person who then sold and sent it to the U.S.

The U.S. has asked for both men to be extradited even though Botting's client says he wasn't aware the man he sold it to intended to re-sell it across the border – and any crime Botting's client committed was committed in Canada.

“So (if extradited) he is going to be prosecuted in the United States rather than in Canada even through he is a Canadian citizen,” said Botting.

Canadian extradition legislation was “rubber stamped” by Parliament with little debate and since then has evolved into a system of “rubber stamping and buck passing.”

And federal ministers of Justice (of all parties), who have the power to overrule courts, have become “the worst rubber stampers of all,” he said.

What's so special about the Diab case?

Diab's case is unusual, if not unique. He was sent Friday to a country that does not extradite its own citizens, an accommodation made by Canada in its extradition treaty with France and other countries. He hasn't been charged and isn't facing trial – typically the two conditions that must be in place before extradition.

Diab was arrested on Thursday Nov. 13, 2008 by a heavily armed police SWAT team and driven in a convoy to RCMP headquarters. They told him he was wanted by the French for the October 1980 bombing of a Paris synagogue and was facing four murder charges and dozens of attempted murder charges. It was a brutal attack that left four passersby dead, and dozens more physically and mentally damaged.

Diab, a Lebanon-born Canadian, said then – and still says – that he wasn't in Paris the day of the bombing and is the victim of mistaken identity. He offered to take a lie detector test and be interrogated, in Ottawa, by French police. He got no response and spent the next 140 days in jail before being released on bail.

During the extradition hearing, Canadian federal prosecutors acting for France emphasized that it wasn't a trial being conducted – that was for the French to handle – but a legal process where the requesting country's evidence must be presumed reliable.

But they were forced to withdraw intelligence evidence sent by France because nobody – apparently including the French – knew where it came from or how it was obtained. They could not prove it wasn't gleaned through torture.

Which left handwriting: Five words written in a hotel register in capital letters. Two French handwriting experts compared those words with samples of Diab's handwriting and decided it matched. Except the handwriting sample wasn't Diab's, it was his wife's. A third French handwriting analyst hired by French authorities decided that Diab's actual handwriting was a match – a decision that five handwriting experts from Canada, the U.S. and Europe condemned as wrong and based on incompetent methodology.

The purpose of a Canadian extradition hearing is not to determine guilt or innocence

but to decide whether the written evidence is enough to form a prime facie case against the suspect.

In his judgment, Ontario Superior Court of Justice Robert Maranger criticized the French analysis.

“I found the French expert report convoluted, very confusing with conclusions that are suspect,” he said. “That said, I cannot say that it is evidence that should be completely rejected as manifestly unreliable.”

The French evidence was weak, he said.

“However, it matters not that I hold this view,” he added, summing up his legal dilemma. “There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.”

Lawyer Botting is scathing about handwriting analysis from either side of the argument.

“It’s basically hocus pocus – pseudo science of the worst kind,” he said. “There are so many variables, especially with such a small sample.

“If the person signing in was the bomber he is going to be nervous. His handwriting won’t be reflected properly and likely he’s trying to disguise it. How can you give any credence to anything that’s one sentence long and hang a guy with it?”

France is a western democracy with a well-established legal system. So what’s the big deal about Diab going there and proving his innocence?

His lawyer Donald Bayne says the French prosecutors will use the unsourced intelligence and the handwriting analysis against him and Diab won’t be able to defend himself against it.

Botting says the “distressingly weak evidence” from France undermines Diab’s Charter rights as a Canadian citizen.

“The federal Department of Justice is not interested in protecting the interests of Canadian citizens,” he said. “They are more interested in currying favour with France, the United States or whichever country is making the request.

“Diab should not be going to a country that automatically regards him as a fugitive and has him pegged as a murderer – a terrorist,” he said. “And God knows, in this climate, you don’t want that label.”

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