Court File No.: 12838

SUPERIOR COURT OF JUSTICE
(East Region)

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA
ON BEHALF OF
THE REPUBLIC OF FRANCE

Respondent

– and –

HASSAN NAIM DIAB

Applicant

FACTUM OF THE APPLICANT / WRITTEN ARGUMENT

I. NATURE OF THE APPLICATION

1. This is an Application brought by Hassan Naim Diab pursuant to the Common Law doctrine of Abuse of Process and the *Canadian Charter of Rights and Freedoms* (sections 7 and 24) for an order in the residual discretion of the presiding extradition hearing Judge staying the proceedings as an abuse of process and/or breach of fundamental justice.

II. OVERVIEW

2. This is an exceptional extradition case, with a truly exceptional Record of the Case at its core. Utterly unlike any prior Canadian extradition case disclosed in the jurisprudence (but like the Maher Arar "rendition" case), this extradition case and the Record of the Case upon which it relies is founded on "secret", unsourced, uncircumstanced "intelligence" assertions, bald, conclusory and anonymous allegations of individual and group responsibility for a criminal act some three decades ago. An effort is made to "confirm" or corroborate" these intelligence assertions (which are not evidence) at the

core of the case with, for example, other material such as passport evidence or purported similar fact (Antwerp) evidence. Both the intelligence assertions and the alleged "confirmatory" material set out in the certified Record of the Case are "replete" (to use the word of Rosenberg, J.A.) with misrepresentations, overstatements, misstatements, omissions, inaccuracies and editing that create a misleading, incomplete, unreliable and unfair Record of the Case. Cogent evidence emanating from the Requesting State itself proves a deeply troubling pattern of serious contradiction, inaccuracy and misrepresentation throughout the Record of the Case that demonstrates at the very least a complete failure of due diligence by the certifying authority and at the most a deliberate attempt to manipulate the material to create a false and prejudicial impression. This pattern of misleading assertions strikes at the very heart of the Canadian extradition process, which, as the Supreme Court of Canada has repeatedly stated (in *Cobb, Kwok, Shulman*, and *Ferras*), must be scrupulously fair. The advantages of the certification process to a Requesting State (no need for witness affidavits, a threshold presumption of reliability by sheer certification) attract a corresponding "high" duty of diligence in accuracy and candour, in fairness and good faith, a duty flagrantly and demonstrably breached by the numerous and serious misrepresentations, inaccuracies and contradictions throughout the Record of the Case. This breach not only prejudices a fair extradition hearing for Hassan Diab, thereby justifying a stay, but also strikes at the fundamental principles that underlie the Canadian community's sense of fair play and decency. The misleading and unfair Record also undermines the integrity of the Canadian court system and its extradition process, founded on the certified Record of the Case. This integrity the Court can and must itself defend. This is not a case of an

isolated, solitary or minor misstatement. The remedy of a stay is the only remedy appropriate in the circumstances of the pattern of multiple serious misrepresentations, of "unacceptable" material at the heart of the Record, of sheer polemical argument and self-serving editorial comment substituting for required evidence, all creating a seriously abusive Record of the Case: the remedy is directly connected to the significant abuse of the certification process and to a committal sought with the aid of multiple serious misrepresentations that infect the entire Record. This is the clearest case of abuse of process in the extradition context and certification process and demonstrably worse than the cases (*Thomlison*, *Tarantino*, *Tollman*, *Almrei*, *Cobb*, *Shulman*) in which the courts have upheld a finding of abuse (and, in most, a stay). The Requesting State has disentitled itself due to its abusive conduct from pursuing its extradition application before the Canadian Court.

U.S. v. Pannell [2007] O.J. No. 4438; (2007) 227 C.C.C.(3d) 336 at para 22

U.S. v. Cobb [2001] S.C.J. No. 20 at paras 26, 33-40, 43-45, 52

U.S. v. Kwok [2001] S.C.J. No. 19, para 86

U.S. v. Shulman [2001] S.C.J. No. 18, paras 25, 46, 50, 53

U.S. v. Ferras [2006] S.C.J. No. 33, paras 11, 12, 14, 25, 40, 41, 43, 45, 46, 56, 60

U.S. v. Thomlison [2007] O.J. No. 246, paras 18-21, 28-32

U.K. v. Tarantino [2003] B.C.J. No. 1696, paras 34-59

U.S. v. Tollman [2006] O.J. No. 3672, paras 10, 36, 140, 145, 149

Re Almrei [2009] F.C.J. No. 1579, paras 154-164, 303, 307, 413-438, 496, 480-503

III. THE FACTS

3. The Republic of France seeks extradition, via the "Certification of the Record of the Case" process provided in Sections 32 and 33 of *The Extradition Act*. The Requesting State seeks the extradition from Canada to France of Hassan Naim Diab, a 56 year old Canadian Muslim university professor with no criminal record and with strong community, university and spousal support.

Extradition Act, 1999, c. 18, ss. 32 & 33

4. On November 12, 2008, the Requesting State applied to the Ontario Superior Court (Maranger, J.) in an "*Ex Parte* Application" for obtaining search warrants and sealing orders respecting the residence(s) of Hassan Diab and his spouse, their places of work at Carleton University and the University of Ottawa as well as their vehicles. In support of its *ex parte* application to the Superior Court in Canada, the Requesting State relied upon and provided numerous Appendices to the supporting Affidavit of RCMP Corporal Tran, that the Requesting State represented to the Ontario Superior Court (to Maranger, J.) as being truthful and reliable "Statements of Fact" on which the Honourable Canadian Judge could and should rely in granting the Requesting State the judicial relief and orders sought. These Appendices, mostly in the form of "International Letters Rogatory" emanating from the "Legal Offices of Mr. Marc Trevidic" and under seal from the Ministry of Justice, Republique Française, set out in their "Statements of Facts" the Requesting State's alleged case against Hassan Diab, the evidence on which the Canadian Judge was to rely. This is "cogent evidence" emanating directly from the Requesting State itself and offered to the Canadian Court as honest, accurate and wholly reliable. Indeed, Maranger, J. did rely upon it to grant the *ex parte* relief sought.

Application Record, Tab 1, November 12, 2008, *ex parte* Application, Affidavit, Appendices

5. Pursuant to Appendix I of the Tran Affidavit in support of the Requesting State's *ex parte* application to the Ontario Superior Court of November 12, 2008, the Requesting State explicitly made this Application in contemplation of seeking the arrest of Hassan Diab and an extradition application: "we have made the decision to issue on this date [November 5, 2008] an international arrest warrant against him, which will be followed by a request for extradition." The "Statements of Fact" provided by the Requesting State as part of their November 12th Application and as purportedly truthful evidentiary submissions to the Canadian Superior Court Judge (Maranger, J.) were directly connected (in time and substance) to the planned extradition request.

Application Record, Tab 1, supra, Appendix I

6. Based on France's asserted case against him, on November 13, 2008, Hassan Diab was arrested and detained in custody until March 31st, 2009, when he was released on very strict and costly bail conditions that remain in place over a year and a half later.

Application Record, Tab 2, Recognizance of Bail

7. On December 11, 2008, twenty-nine days after making the November 12, 2008, *ex parte* Application (and factual/evidentiary assertions in the Appendices) referenced above, the Requesting State certified the Record of the Case that purported to set out the Requesting State's case against Hassan Diab and "the evidence" (per s. 33(1)(a) of *The Extradition Act*) in support of the request for extradition. The "Certification of the Record of the Case" states that "I, the undersigned, Marc Trevidic … hereby certify that evidence summarized in the attached record or contained therein is available for trial …". Marc Trevidic, the French certifying authority, is the same person (the same "Vice President of

Investigation") who co-authored the "Statements of Fact" appended to and forming the asserted evidentiary basis for the November 12th Application.

(a) The Record of the Case certified by Mr. Trevidic is unusual in the extreme. Unlike Records of the Case described in Canadian extradition jurisprudence, this Record of the Case relies, for the crucial attribution of individual and group responsibility for the October 3, 1980, crime, on unsourced, uncircumstanced, bald and conclusory assertions ("intelligence") from "foreign sources", on "confidential information coming from German authorities", on "informants" to a "foreign police force", on "information from an official Israeli source", on "Confidential Defence" and "secret" documents, on "information obtained from intelligence or foreign security services", on "particularly well-informed newspaper articles", on a DST (Direction de la Surveillance du Territoire) "report dated April 19, 1999" containing bald, anonymous assertions from an unknown source or sources in utterly unknown circumstances. All of these unknown sources (bits of intelligence) purport to attribute responsibility for the criminal bombing to a radical breakaway group called PFLP-SO and to Hassan Diab – they baldly assert, in effect, that the PFLP-SO did it and Hassan Diab was part of the team (the motorcycle buyer and bomb-maker). There is in the Record no actual evidence whatsoever that Hassan Diab knows anything about how to make a bomb or has

any experience with explosives, only bald unsourced and conclusory intelligence assertions.

Application Record, Tab 3, Record of the Case, pp. 36 - 43

(b) The Record of the Case certified December 11, 2008, by the Requesting State (Mr. Trevidic) then purports to "confirm" or "corroborate" these unsourced and uncircumstanced intelligence assertions of responsibility for the crime by reference to other material included in the Record. In particular, the Requesting State asserts that the following items represent key "corroboration" of the unsourced intelligence:

- Spanish entry and exit stamps in Hassan Diab's May 10, 1980, passport (found in the possession of one Ahmed Ben Mohamed in Rome October 8, 1981);
- a bombing in Antwerp, Belgium, October 20, 1981;
- information from and about Souhaila Sayeh, a convicted terrorist airplane hijacker said by the Record of the Case to have done the surveillance for the 1980 Paris bombing;
- handwriting opinion evidence;
- the statements of Youcef El Khalil and Sana Salhab;
- Nawal Copty's November 24, 2008, U.S. interview;
- a purported October 8, 1981, Lebanese departure stamp in Hassan Diab's 1980 passport.

> As will be set out in detail below, in respect of each of these alleged "corroborating" factors, the certified Record of the Case has falsely, inaccurately and (at least) carelessly misrepresented the evidence by misstatement, by important tactical or grossly careless omission, by prejudicial overstatement and sheer argument, revealing a pattern of significant misrepresentation that individually and cumulatively amounts to a complete failure of due diligence or, worse, to a deliberate attempt to manipulate the material in the Record of the Case to create a falsely inculpatory impression. The same is true of the unsourced, uncircumstanced, bald and conclusory intelligence assertions of Hassan Diab's alleged criminal responsibility: glaring contradictions abound that cast the non-evidentiary "intelligence" into further disrepute and unreliability. This is no isolated or insignificant misstatement in the Certified Record of the Case. Instead, a pattern of careless or deliberate misrepresentation emerges that infects the entire Record of the Case.
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> Application Record, Tab 3, Record of the Case and Appendices

8. Throughout both the certified Record of the Case and the November 12th *ex parte* Application materials, the Requesting State explicitly refers in its assertion of facts/evidence to numbered "D" documents as the documentary basis for the respective assertions(s) made. Many of the "D" documents so referenced were provided by the agent for the Requesting State (the Attorney General of Canada) to counsel for Hassan

Diab (in the context of related Mutual Legal Assistance proceedings, seeking seizure of property, not in the extradition proceeding itself). The "D" documents are Requesting State documents, offered as the authoritative bases or reference sources for the assertions made in both the *Ex Parte* Application and Record of the Case. These "D" documents are "cogent evidence" emanating directly from the Requesting State itself and represented by the Requesting State to the Canadian court as authoratative bases for what is alleged by the Requesting State.

Application Record, Tabs 1, 3 & 4 (D documents)

9. After the collapse of two lengthy extradition hearing dates (January, 2010; June, 2010) occasioned at the request of or due to the conduct of the Requesting State, and after the withdrawal in its entirety of the Requesting State's expert handwriting (2 witnesses; 2 reports) opinion evidence in the face of defence expert evidence of the "appalling" unreliability of that handwriting evidence, and after its last-minute replacement by a solitary handwriting opinion report, the extradition hearing is now scheduled to commence November 8, 2010. The Requesting State offers to the Canadian court and relies upon the Record of the Case certified by its official December 11, 2008, and the Supplemental Record certified May 31, 2010, as justifying its extradition request.

IV. THE LAW

10. A Superior Court Judge presiding over an extradition hearing has jurisdiction as part of his/her "residual discretion" to stay the proceedings as an abuse of process and/or violation of the principles of fundamental justice.

U.S. v. Cobb, supra, para 26

U.S. v. Kwok, supra, para 5

U.S. v. Shulman, supra, para 21

U.K. v. Tarantino, supra, paras 47 - 52

R. v. Larosa [2002] O.J. No. 3219, paras 50 - 52

U.S. v. Tollman, supra, paras 14-22, 145, 149

R. v. Young [1984] O.J. No. 3229, paras 88, 93, 100

R. v. Jewitt [1985] S.C.J. No. 53, paras 25, 56

R. v. Keyowski [1988] S.C.J. No. 28, paras 2 - 3

R. v. Conway [1989] S.C.J. No. 70, paras 7 - 11

R. v. O'Connor [1995] S.C.J. No. 98, paras 58 – 63, 78

U.S. v. Ferras, supra, at paras 11, 12, 60

11. While a stay of proceedings is to be reserved for the "clearest of cases", such a "clearest case" will be made out where the Requesting State is shown, on a balance of probabilities, by "cogent evidence", to have conducted itself (a) so as to prejudice a fair extradition hearing, or (b) in violation of those fundamental principles of justice underlying the community's sense of fair play and decency.

U.S. v. Cobb, supra, at paras 33, 35-38, 43-44, 49, 52

U.S. v. Shulman, supra, at paras 45-46, 50, 53, 61

R. v. Young, supra, at paras 88, 93, 100

R. v. Jewitt, supra, at paras 25, 56

R. v. Keyowski, supra, at paras 2, 3

R. v. Conway, supra, at paras 7-11

R. v. O'Connor, supra, at paras 58-63, 78

R. v. Larosa, supra, at paras 52, 62

U.K. v. Tarantino, supra, at paras 47-59

U.S. v. Tollman, supra, at paras 145, 149

12. The "clearest case" for a stay of proceedings will be made out in the specific extradition context where the Record of the Case certified by the Requesting State and offered as justification for its extradition request is shown to be "replete with inaccuracies" (per Rosenberg, J.A.), where there are "examples of serious misinformation on critical assertions" in the Record of the Case (per Stromberg-Stein, J.), where the "material filed in support" of the request is "misleading in many respects and many material facts were either not disclosed or were buried in attachments" (per Molloy, J.), where the "conduct by the Requesting State … interferes or attempts to interfere" with a fair extradition hearing in Canada – "the focus of the fairness issue is thus the hearing in Canada" (per Arbour, J.).

U.S. v. Pannell, supra, at paras 21, 22

U.K. v. Tarantino, supra, at paras 18-29, 34-42, 55-57

U.S. v. Tollman, supra, at paras 10, 140

U.S. v. Cobb, supra, at para 33

France v. Diab, September 1, 2010, Ont. Superior Ct. at paras 13, 14, 15

13. In the extradition context, the Record of the Case and its accuracy are of crucial importance. Parliament has enacted an extradition process in which the Record of the Case certified by the Requesting State is the "foundation document" for the entire process (by virtue of sections 32 and 33 of the *Extradition Act*, it is the statutory centrepiece of the process). The Record of the Case is thus neither a casually informal nor a peripheral

document in this process, a process in which liberty is at stake. Prior to 1999, Canadian extradition process required sworn affidavits from each and every witness whose evidence was relied upon by the Requesting State (a very far cry from the unsourced, uncircumstanced, bald and conclusory, anonymous and secret intelligence assertions at the heart of this case). Sworn affidavits vouched for the high degree of accuracy required of the Requesting State where the liberty of the individual hung in the balance. The Record of the Case certified by the Requesting State replaces this affidavit assurance of accuracy, and therefore the Record of the Case must not be or be seen as "perfunctory, *pro forma*, expedient", it must not be "misleading in many respects" with "material facts either not disclosed or … buried in attachments." Rather, the Record of the Case must be scrupulously accurate and candid; the "utmost diligence and care" must be taken to ensure accuracy of the assertions therein, assertions that may lead to a loss of liberty. Scrupulously diligent accuracy ensures fair process and the protection of the liberty of the individual. These principles have more eloquently and comprehensively been stated by a Superior Court Judge as follows:

> "34. Prior to the enactment of the current Extradition Act in 1999, extradition proceedings were conducted largely on affidavit evidence. The rationale was that affidavits and other sworn documents provided the level of accuracy as to the assertions of a requesting state which would satisfy one of the most important fundamental purposes of extradition proceedings, the protection of the liberty of the individual.
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> 35. … Section 33(3)(a) of the Act provides for certification by signature of a prosecuting authority of the extradition partner to be sufficient in substitution for affidavit material required under the former Act.
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> 36. Section 32(1)(a) of the Act provides that evidence in a record of the case is admissible at the extradition hearing if it is certified in accordance with s. 33(3)(a) of the Act. The introduction of the record of the case, provided for in these sections as the foundation document in place of affidavits and

other perceived roadblocks to efficiency, is clearly one of the most significant features of the new Extradition Act.

37. The record of the case is now the primary method for introducing evidence. It is afforded a broad and powerful presumption of accuracy founded upon the act of certification by a responsible official in the requesting state.

38. The Supreme Court of Canada has commented that, for the validity of the certification, Canada relies on "the fairness and good faith" of the requesting state: U.S.A. v. McVey, [1992] 3 S.C.R. 475 at para. 58. Certification is of critical importance. It has been held to be the fibre with which the safety net of assurances as to available evidence is woven. With that safety net and the trust statutorily placed in it, foreign states are afforded extraordinary credence in their locally untested assertions based on the certification. This places a high level of responsibility on, and power in, the certifying authority who, by the Act, is granted the jurisdiction to legitimize the record of the case as worthy of acceptance by the Canadian court. What is certified is accepted by statute to be true and the liberty of a Canadian citizen is fundamentally compromised when a court relies upon the certification to send a Canadian citizen to a foreign country. If the certification authority is not exercised with utmost diligence and care, the Canadian court is without a proper foundation upon which to deprive a Canadian citizen of liberty. The person sought is without any realistic opportunity for judicial intervention since there is no ability to cross-examine or conduct independent investigation of the accuracy of the certified assertions.

39. Section 33(3) imposes an obligation on the certifying authority to ensure that, prior to submitting to a Canadian court a certified record of the case, the evidence certified is, in fact, available for trial. The certification process presumes and requires a reasonable degree of diligence and accuracy to ensure people are not extradited upon evidence which does not exist, and that court proceedings are not conducted and judgments reached on the basis of important assertions which have not been diligently examined and which are simply not accurate. This is not an unattainable goal for a certifying authority to achieve and reasonable diligence commensurate with the power is not too much to ask. It will be, one expects and hopes, a rare case where it is shown that a particular prosecuting official or authority has demonstrated, in their certification process, a lack of diligence and care resulting in proven important inaccurate assertions in successive records of the case."

U.K. v. Tarantino, supra, at paras 34 – 39;
U.S. v. Tollman, supra, at para 10

(a) As may be seen from the judgment of Stromberg-Stein, J., above, the Record of the Case is the foundation document for Canadian extradition process. Its accuracy is crucial for that accuracy protects liberty. Certification of a Record of a Case affords the Requesting State evidentiary advantages, including the opportunity to state in a summary what witnesses used to have to swear directly and also including the presumption of reliability of the material certified. With those evidentiary short cuts and advantages comes "a high level of responsibility" on the Requesting State to be scrupulously accurate in its certified assertions, to use "utmost diligence and care" to be accurate and not to mislead, either by neglect or design. Because certification of the Record of the Case "is of critical importance" and "has been held to be the fibre with which the safety net of assurances as to available evidence is woven", the Requesting State must "ensure" that "important assertions" are "diligently examined" for accuracy. Cogent evidence of a "lack of diligence and care resulting in proven important inaccurate assertions" strikes at the foundation of Canadian extradition process, at the integrity of Canadian extradition proceedings founded on such a Record, at the fairness of such proceedings intended to protect liberty, at the just and "meaningful" hearing the extradition judge had been mandated by the unanimous Supreme Court to conduct.

U.K. v. Tarantino, supra, paras 34-39; 44-46

U.S. v. Ferras, supra, paras 25 - 26

(b) Indeed, "cogent evidence" of a number of important inaccurate assertions in a certified Record of a Case has been held to be the "clearest case" of an abuse of

process and violation of the principles of fundamental justice underlying fair play and decency, justifying a stay of the extradition proceedings.

U.K. v. Tarantino, supra, paras 55 – 57

U.S. v. Tollman, supra, paras 10, 140, 145, 147, 149

14. In the extradition context, the Supreme Court of Canada has repeatedly confirmed that "the Requesting State is governed by the rules of fundamental justice that prevail when liberty interests are at stake, and by the doctrine of abuse of process that governs the conduct of all litigants before Canadian courts." Furthermore that court has stated that "The Minister is not the guardian of the integrity of the courts. It is for the courts themselves to guard and preserve their integrity". Mme. Justice Arbour, speaking for a unanimous bench has stated, "The Requesting State is a party to judicial proceedings before a Canadian court and is subject to the application of rules and remedies that serve to control the conduct of parties who turn to the courts for assistance. Even aside from any claim of *Charter* protection, litigants are protected from unfair, abusive proceedings through the doctrine of abuse of process …". As set out above in paragraphs 11, 12 and 13, such abuse occurs when the Requesting State relies on a certified Record of the Case in which there are multiple proven important inaccurate assertions, and such protection results from a stay.

U.S. v. Cobb, supra, at paras 35, 44, 45

U.S. v. Shulman, supra, at paras 25, 45-56, 50, 61

U.S. v. Kwok, supra, at paras 54, 57, 85-86

U.S. v. Ferras, supra, at paras 11, 12, 26, 42, 60

15. In *Kwok*, *Cobb* and *Shulman*, Mme. Justice Arbour added a caveat to the jurisdiction of the extradition judge to exercise *Charter* and/or abuse of process jurisdiction to stay extradition proceedings: so long as the abuse of process and/or breach of the principles of fundamental justice "pertains directly to the circumscribed issues relevant to the committal stage of the extradition process", the extradition judge has jurisdiction to stay. The Record of the Case is the "foundation document" for Canadian extradition process and the basis upon which any committal order would be based. No document could "pertain" more "directly" to the circumscribed issues (accuracy, reliability, sufficiency) relevant to an extradition judge and the parties at the committal stage. Clearly a pattern of misrepresentation, of inaccuracy through neglect or design in a certified Record of the Case put before an extradition judge is an "issue relevant at the committal stage of the extradition hearing". Superior Court Judges in Canada have consistently held so.

U.S. v. Kwok, supra, at paras 5, 54, 57, 85

U.S. v. Cobb, supra, at paras 23 and 26

U.S. v. Shulman, supra, at para 21

U.K. v. Tarantino, supra, at paras 36, 47-59

U.S. v. Tollman, supra, at paras 10, 140, 145, 149

16. Furthermore, the Supreme Court itself unanimously stated that actions of the Requesting State that compromise the fairness of the extradition hearing are within the *Charter*/abuse jurisdiction of the extradition judge to enter a stay as an abuse: "This Court's decision in *Cobb*, supra, released concurrently, illustrates the extradition court's competence to grant the *Charter* remedy deemed just and appropriate in circumstances where the fairness of the extradition hearing itself is compromised through the actions of the Requesting

State." As set out above in paragraphs 11 to 13, a certified Record in which a pattern of important misrepresentations and inaccuracies has been demonstrated, compromises the fairness of the hearing, the fairness of the process and the integrity of the system. In such circumstances, as stated by Arbour, J., "the foreign State has disentitled itself from pursuing its recourse before the courts and attempting to show why extradition should legally proceed."

U.S. v. Kwok, supra, at para 86

U.S. v. Cobb, supra, at para 52

U.K. v. Tarantino, supra, at paras 36, 47-59

U.S. v. Tollman, supra, at paras 10, 140, 145, 149

17. In *Cobb*, the Supreme Court unanimously upheld as appropriate a stay for abuse of process/*Charter* breach where the conduct of the official of the Requesting State interfered or attempted to interfere with the "real issue", that issue being "a fair extradition hearing". As set out above, a pattern of significant misrepresentation and inaccuracy in a certified Record of the Case strikes at the very foundation of a fair extradition hearing.

U.S. v. Cobb, supra, at para 33

18. In *Shulman* the Supreme Court again unanimously upheld a stay in an extradition case for abuse/*Charter* breach, the court itself ordering the stay at the appellate stage, even after the appellant had received "a fair committal hearing" because "the Requesting State, as a party to this litigation, disentitled itself from the assistance of the Canadian courts by permitting its officials to behave as they did in this case." As set out above, a pattern of important inaccuracy and misrepresentation in a Record of the Case compromises a fair

extradition hearing and on that basis justifies a stay. In addition, however, the conduct of the certifying authority in carelessly or deliberately certifying inaccuracies and misrepresentations disentitles the Requesting State from pursuing the extradition request.

U.S. v. Shulman, supra, at paras 25 & 46

19. In both the Supreme Court of Canada and Ontario Court of Appeal it has been established that the residual discretion to stay as an abuse of process and/or a *Charter* breach of fundamental justice does not require a showing of bad faith, ulterior motive or prosecutorial misconduct. Certainly a showing of bad faith will constitute an abuse, but sheer "neglect" will, in circumstances where it leads to unfairness or violation of fundamental principles underlying the sense of fair play and decency, constitute the clearest case of abuse leading to a stay.

(a) (per Dubin, J.A., as he then was, citing both Robins, J.A., and Laskin, C.J.C.): "'Fundamental justice', like 'natural justice' or 'fair play' is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure." "…There must always be a residual discretion to prevent anything which savours of abuse of process." "I do not attribute any ulterior motive to either the investigating constable or the various Crown counsel who were consulted about laying the charge, <u>but as a result of their neglect</u> … I think this is a case where it is appropriate for the Court, by the control of its process, to prevent such unfairness." (emphasis added). (The Ontario Court of Appeal upheld a stay).

R. v. Young, supra, at paras 70, 84, 100, 105

(b) (per Dickson, C.J.C.) "The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits … is required to justify a stay."

R. v. Jewitt, supra, at para 56

(c) (per Wilson, J., for a unanimous Supreme Court): "To define 'oppressive' as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine" [of abuse of process].

R. v. Keyowski, supra, at para 3

(d) (per L'Heureux-Dubé, J.): "Stays for abuse of process are not limited to cases where there is evidence of prosecutorial misconduct. In delivering the reasons of the Court in *R. v. Keyowski*, Wilson, J., made it clear that all relevant factors including, but not restricted to, bad faith on the part of the Crown are to be considered."

R. v. Conway, supra, at para 9

20. The majority of the Supreme Court in *O'Connor*, commenting on the overlap between abuse of process and violations of *Charter* fundamental justice, said the following about the double prejudice (to the integrity of the system and to the individual's right to fair process) thereby caused and to the right of an individual to seek relief from such prejudice: "… conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's

liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction" (emphasis added).

R. v. O'Connor, supra, at paras 63, 66, 70, 71

21. Doherty, J.A. (for a unanimous Ontario Court of Appeal) re-asserted in *Larosa* the principles enunciated by Arbour, J. (for a unanimous Supreme Court) in *Cobb* concerning the authority of an extradition judge to stay proceedings for abuse and/or *Charter* breach:

> "Arbour, J., concluded that conduct by the requesting state, or presumably by Canadian authorities on behalf of or in concert with the requesting state, could result in a breach of s. 7 of the *Charter* at the committal stage of the extradition process if that conduct rendered the committal hearing unfair or compelled the conclusion that committal for extradition would violate the principles of fundamental justice." (emphasis added)
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> "Arbour, J., went on to hold that, apart from the Charter, the extradition judge, like any other court, had an inherent and residual discretion to prevent abuses of the court's processes by those who were before the court. In her view, the common law abuse of process doctrine applied to the committal phase of the extradition process and empowered the extradition judge to direct a stay of proceedings if to proceed further with the extradition would offend the fundamental principles underlying the community's sense of fair play and decency."
>
> "If I understand Cobb correctly, an extradition judge has the authority to stay proceedings under s. 25 of the Extradition Act or under the common law abuse of process doctrine in two related but somewhat different situations. He or she may stay the proceedings if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse process. Unfairness is considered in the context of the purpose of the committal hearing, which is to determine whether a questioned state has established a prima facie case. The extradition judge may also stay committal proceedings if, in the circumstances, proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice.

> Cobb and Shulman are examples of situations in which proceeding with a committal hearing amounted to an abuse of process and a breach of s. 7 no matter how fairly that proceeding might be conducted." (emphasis added).

R. v. Larosa, supra, at paras 50 – 52

(a) As will be argued more fully below, the Diab case fits both of Justice Doherty's alternative stay scenarios: important and numerous misrepresentations in the Requesting State's Record of the Case by neglect or design render the committal hearing and process unfair (unfairness in seeking to establish a *prima facie* case for committal through a key "foundation" document replete with material misrepresentations) and merely proceeding further with an inaccurate and unreliable Record of the Case violates the principles of fundamental justice underlying the community's sense of fair play and decency, and constitutes an assault on the integrity of the extradition process and system, disentitling the Requesting State from pursuing a committal order.

(b) *Larosa* was an unusual case in which *Cobb* was decided after the *Larosa* extradition hearing, a hearing in which the extradition judge erroneously ruled he had no authority to entertain an abuse/*Charter* application. Thus it was only in the exceptional circumstance of a *de novo* stay application at the appellate level, an application that also sought to compel the production of documents and witnesses at the appellate level, that Doherty, J.A.'s comments about "air of reality" were made.

R. v. Larosa, supra, at paras 75 – 83

(c) Doherty, J.A., strongly suggests an abuse of process will be made out if there is evidence of "manipulation" of the material or process (although, as set out in

> paragraph 19 above, the Supreme Court and Ontario Court of Appeal do not require bad faith, sheer "neglect" sufficing) or if there is a failure of "due diligence". These are precisely the failures submitted in the case at bar: the pattern of misstatement, overstatement, editing out, contradiction, inaccuracy and sheer polemical argument throughout the Record of the Case herein is at the least an extreme and complete failure of due diligence, at most manipulation by design.
>
> *R. v. Larosa*, supra, at para 62

22. In *Tarantino* the learned extradition judge applied the Supreme Court decision in *Cobb* to stay extradition proceedings as an abuse/violation of s. 7 of the *Charter*. The evidence of inaccurate assertions in the Record of the Case was held explicitly to clear any "air of reality" argument and was filed on the abuse/*Charter* application. The "proven important inaccurate assertions" in the certified Record(s) of the Case related to the availability of three witnesses, one who had apparently absconded, one who had died, one who at the time of certification had not been confirmed to be available (although he subsequently confirmed "he was willing to testify"). In finding that the "lack of diligence and the careless, cavalier approach by the certifying authority to the process of certification" amounted to the clearest case for a stay, the learned extradition judge stated "In this case, there is demonstrated proof that the relevant certifying official has not been diligent. There are two examples of serious misinformation on critical assertions in records of the case and evidence of a failure to act diligently to correct the situation once aware the certified evidence was not available" (emphasis added). As will be set out more fully below, the lack of diligence in the Diab case is far more egregious – many more than two serious misrepresentations have taken place and remain; the misrepresentations go

beyond availability of a witness (because in many or most cases no witness is named or even known) to misrepresentations about the content of the "evidence" itself; there was in the case at bar not merely a failure to act diligently to correct the misrepresentations, contradictions and inaccuracies when later the Requesting State became aware of them – here, the Requesting State knew from the outset (i.e. did not subsequently become "aware") that these were not accurate, complete, candid assertions of fact. The documents that prove the many misrepresentations, contradictions, inaccuracies and misleading editing are those of the Requesting State itself, not defence counsel or some external or third party. These highly relevant Requesting State documents antedate the certification of the Record of the Case. They have not arisen subsequently or to the surprise of the Requesting State. It is therefore by extreme lack of due diligence at the least or deliberate design (manipulation) at the worst that the misrepresentations were made and persist now, uncorrected, just short of two years later. The reasoning and language of the learned extradition judge in *Tarantino* applies even more forcefully to the Diab case: "The certification process is the single most important protection of liberty of a Canadian citizen in extradition proceedings and, unchecked, is meaningless and opens the door to potential injustice and abuse. The trust given foreign officials by s. 33(3) must be exercised responsibly and diligently. A stay of proceedings precludes the resolution of issues on the merits. It is the most drastic of remedies to which the courts should resort only in the clearest of cases: *U.S.A. v. Cobb*. Here, there is cogent evidence that the diligence and care exercised by the requesting state falls far below the standard inherently demanded by the Extradition Act, such that the presumption of accuracy cannot reasonably be made. … I find the progression of inaccurate

certifications to be an abuse of process of this court and a violation of s. 7 of the Charter, justifying a stay of these proceedings." The situation in the case at bar is even more abusive than that held to justify a stay in *Tarantino*.

> *R. v. Tarantino*, supra, at paras 6, 10, 13–30; 34–39; 44–46, 55–57

23. The decision of the Ontario Superior Court September 14, 2006, in *Tollman* is helpful and instructive in dealing with an application for a stay of extradition proceedings as an abuse of process/*Charter* breach based upon misleading Requesting State material. The U.S. sought Mr. Tollman, an American citizen but permanent resident of the U.K., on tax evasion charges. Learning that Mr. Tollman would be travelling to Toronto, the Assistant U.S. Attorney sought to enlist the aid of Canadian immigration officials to arrest and deliver Mr. Tollman to U.S. authorities. Tollman was arrested, detained but then ordered released by the Immigration Review Board (IRB). At this point, the U.S. sought a provisional arrest warrant under the *Extradition Act* in anticipation of an extradition request. The material put before the Superior Court Judge in support of the extradition arrest warrant "<u>was misleading in many respects and many material facts were either not disclosed or were buried in attachments and not referred to in the main affidavit</u>" (emphasis added). This is precisely the situation that has occurred in respect of the Record of the Case in the Diab case: the Requesting State has knowingly or grossly negligently and cavalierly misstated "many material facts" and has "buried" other relevant facts in other documents of its own (the Appendices to the November 12, 2008, *ex parte* application; the D documents) but not referred to or candidly revealed these material facts in the Record of the Case. Molloy, J., the extradition judge found that the Requesting State in *Tollman* had been "less than forthright" in the materials supporting

the extradition arrest. This was, in effect, the finding made by the learned extradition judge in *Tarantino* as well, although the misrepresentations in *Tarantino* occurred, as in Diab, not in preliminary documents but in the Record of the Case, the "foundation" document itself. Molloy, J., made plain that the misleading and misstatements of material facts were a factor in ordering a stay of the extradition proceedings as offending "this community's sense of fair play and decency" and constituting "an abuse of process".

U.S. *v. Tollman*, supra, at paras 1-10, 13, 145, 149

(a) It is important to note that Molloy, J., also found it highly probative that the Requesting State had failed to explain its conduct even in the face of notice of Tollman's allegations: "The United States stands mute in the face of Mr. Tollman's allegations." In the case at bar, the Requesting State has had notice since early December, 2009, approximately ten and one-half months ago when counsel for Mr. Diab put on the record important contradictions of fact between the Record of the Case and the November 12, 2008, Application materials. Again on May 7, 2010, counsel for Mr. Diab put the Requesting State on written notice concerning, *inter alia*, the Appendices and D documents on which it would seek to rely. The Requesting State has neither corrected any of its misrepresentations in the Record of the Case nor explained any contradictions and inaccuracies. As in *Tollman*, the Requesting State "stands mute" in the face of clear misstatements, contradictions, inaccuracies, omissions that mislead by design or neglect and that persist throughout important parts of the Record of the Case.

U.S. v. Tollman, supra, at para 36

Directions Sought Respecting Further Proposed Evidence on Behalf of the Respondent, May 7, 2010, Application Record, Tab 5

(b) The concluding words of Molloy, J., fit the Diab case and the position of Dr. Diab, a university professor, facing an unfair and misleading Record of the Case:

> "In addition to the personal impact on Mr. Tollman, the conduct here must be condemned as contrary to the fundamental principles upon which our justice system is based. The justice system must be fair for all who become enmeshed in it, regardless of intellect, wealth or station in life. Mr. Tollman was able to insist on his rights, albeit at considerable personal and financial cost. However he was armed with intelligence, stamina, a social position of power and prestige, and enormous personal wealth. Very few people would have been able to do what he has done. If the system went awry for him, what hope is there for the weak, the poor and those less powerful? The answer must be in the vigilance of the justice system itself. Misconduct of this sort cannot ever be tolerated, for to do so is to condone, perhaps even to invite, similar conduct in the future. This is the kind of conduct that offends this community's sense of fair play and decency. Having conducted itself in this manner, the requesting state is disentitled to any relief from this court. Accordingly, this extradition proceeding is permanently stayed."

U.S. *v. Tollman*, supra, at para 149

24. In the recent decision (December 14, 2009) in *Almrei*, Mr. Justice Mosley of the Federal Court had occasion to deal with highly analogous circumstances to the case at bar: "bald" intelligence assertions; intelligence offered by allegedly reliable human sources; contradictions in factual claims; "selective use of misleading information"; the duty of utmost candour on governmental authorities – the duty of "fairly presenting the information in their possession"; reliance on newspaper articles.

Re Almrei, supra, at paras 154 – 164; 306; 344, 414; 421

(a) *Almrei* was a "Security Certificate" case in which the Minister relied upon the "Security Intelligence Report (SIR)" and "the Statement Summarizing the Information (the Public Summary)" much as the Requesting State relies upon the Record of the Case in extradition proceedings. These documents are the

"foundation documents" in, respectively, Security Certificate and extradition proceedings.

Re Almrei, supra, at paras 1; 122

(b) Justice Mosley ruled, *inter alia*, that intelligence will be inadmissible in criminal proceedings (which extradition proceedings are) unless sourced: "The information about Almerabh and the passport was intelligence that could not have been introduced as evidence in a criminal proceedings without compromising the sources." The Diab Record of the Case is replete with references to such unsourced, uncircumstanced intelligence – bald and conclusory intelligence assertions occur throughout the Record of the Case, not simply in an isolated reference or two, and glaring contradictions and misstatements in this material will be demonstrated by the "D" documents and Appendices to the November 12th Application.

Re Almrei, supra, at para 496

(c) Justice Mosley found that the "duty of utmost good faith" applies to government authorities relying upon summary documents in *ex parte* proceedings (exactly the duty recognized by the Supreme Court of Canada in McVey and the Superior Court in *Tarantino* of "fairness and good faith" and "utmost diligence and care" to be accurate and fair in Records of the Case in extradition proceedings). Justice Mosley explained this "good faith" duty as requiring that the governmental party presenting the document must not withhold relevant information and thereby present a misleading or incomplete picture: "<u>The evidence presented must be complete and thorough and no relevant information adverse to the interest of that</u>

party may be withheld" (emphasis added). As we will see below, there has been significant withholding of information adverse to the interest of the Requesting State in the case at bar, withholding that results in an unfair misrepresentation of the actual evidence/intelligence.

Re Almrei, supra, at para 498

(d) Throughout the Diab case, counsel for the Requesting State have argued that the Requesting State is under no duty to present information unfavourable to its case (i.e. contradictory information or exculpatory information). Apart from the fact that there is absolutely no Canadian authority that supports this position in the extradition context, and apart from the fact that the decisions in *McVey*, *Tarantino*, *Tollman* and *Thomlison* stand for exactly the opposite, Mosley, J., emphatically and eloquently rejected this proposition:

> "500 The duties of utmost good faith and candour imply that the party relying upon the presentation of *ex parte* evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case. That was not done in this instance. The 2008 SIR was assembled with information that could only be construed as unfavourable to Almrei without any serious attempt to include information to the contrary, or to update their assessment. As Mr. Young observed, in an unguarded moment, they thought that they had done their job in 2001 and there was no need to continue the investigation.
>
> 501 The Ministers submit that the failure to consider information that casts the Service's opinion in a different light should not undermine the legitimacy or fairness of the proceeding as long as that information has been made available in the course of the reasonableness hearing. Indeed, the Ministers assert in their closing reply submissions, at paragraph 15, that there is no requirement that the SIR advance a case against a finding of inadmissibility. The SIR, in other words, is merely a document crafted by CSIS to plead their case and does not need to present the contradictory information within their possession. In my view, that is clearly incompatible with the duties of good faith and candour which the Court expects from the Service and the Ministers.

> 502 In this case, information that was inconsistent with that presented to the Court through the SIR only came to light when it was ordered produced in conformity with the Service's *Charkaoui II* obligations. This included surveillance and intercept reports that contradicted human source reports on which the Service and the Ministers relied. Information that was inconsistent with the content of the Source Exhibit was only disclosed when the Court began to order the production of information from the human source management files. The *Charkaoui II* disclosure obligation does not absolve the Service from the responsibility to fairly consider and present the information in their possession when they prepare the SIR. Nor does it absolve the Ministers from the responsibility to ensure that the information and evidence filed in support of the certificate is complete, thorough and fairly presented.
>
> 503 I find, therefore, that the Service and the Ministers were in breach of their duty of candour to the Court."
> (emphasis added)

Re Almrei, supra, at paras 500 – 503

(e) Justice Mosley found of the human source intelligence in *Almrei* that sources originally asserted by the intelligence service to be reliable were shown, by comparison with other material, not to be so (as will be demonstrated below in the Diab case): "And the sources relied upon by the Service were often non-authoritative, misleading or inaccurate." This is the problem with intelligence and with offering intelligence instead of evidence as the core of the Record of the Case.

Re Almrei, supra, at paras 154 – 164; 413

25. The unanimous decision of the Ontario Court of Appeal in *Thomlison* is highly relevant on the issue of Requesting State misrepresentation, lack of candour and editing out by the Requesting State of material adverse to its interests.

(a) *Thomlison* involved a U.S. extradition request based upon a five-page Record of the Case. The material included in the Record was comprised of the evidence of

two employees and business records. The Record of the Case did not represent fairly and fully the evidence of one of the employees, Friedman. Friedman testified at the extradition hearing as to exculpatory evidence she had given that had been edited out of the Record of the Case by the certifying authority. The extradition Judge and unanimous Court of Appeal both found such editing out created a misrepresentation that constituted an abuse of process.

U.S. v. Thomlison, supra, at paras 12 – 14; 18 – 21; 31

(b) In language striking similar to that used by Stromberg-Stein in *Tarantino,* by Molloy, J., in *Tollman* and by Mosley, J., in *Almrei*, Moldaver, J.A., wrote that the Record of the Case must present "a full, frank and fair" representation of the evidence (for and against) otherwise it will be "misleading". Adopting the reasons of the learned extradition judge, Moldaver, J.A., continued that a message must be sent out, "a message that full, frank and fair disclosure must form the cornerstone of the record of the case and, minimally, that there is no room for lack of diligence and care, even if it were inadvertent or misguided" (emphasis added). Moldaver, JA., agreed with the learned extradition judge that editing out exculpatory parts of Friedman's evidence was both misleading and constituted an abuse. This is the same breach of the duty of candour, of "fairness and good faith", of "fairly presenting the information in their possession", of due diligence for accuracy cited in *Tarantino, McVey*, *Tollman* and *Almrei*, now enunciated emphatically by the Court of Appeal. The Requesting State may not, indeed must not, withhold or edit out exculpatory material to create a misleading picture.

U.S. v. Thomlison, supra, at paras 31, 32

(c) Because the misrepresentation in *Thomlison* was singular and isolated to the evidence of only one witness, because the misrepresentation of Friedman's evidence did not reach further into the Record of the Case to affect the other employee's evidence or the business records, the appeal court in *Thomlison* agreed with the extradition judge that a stay should not be entered but the evidence of Friedman should be excised as an abuse of process: "Ms. Friedman's evidence should be excised from the record." Moldaver, J.A., cautioned, however, that stay applications are "largely fact driven" and that mere excision of evidence will not necessarily follow the abuse of misrepresenting the material in the Record of the Case (by misstatement, overstatement, editing out or, as in *Tollman*, "burying" exculpatory information outside the Record): "To state the obvious, the appropriate remedy, if any, will depend on the facts and circumstances of the particular case." As will be set out fully below, the facts and circumstances of the case at bar involve multiple serious misrepresentations of many different types of evidence that reach throughout the Record of the Case into other evidence/material offered in the Record. In Diab, unlike *Thomlison*, there is not a mere isolated and solitary misrepresentation of the evidence of one witness only. Multiple misrepresentations of many types of material are combined with abusive editing out, with offensive polemical argument substituting for evidence, and with unsourced, anonymous material at the heart of the Record to form a fact situation worse than any of the cases cited (even those cases in which a stay was ordered).

U.S. v. Thomlison, supra, at paras 21, 28, 31 – 32

26. The unanimous judgment of the Supreme Court of Canada in *Ferras* represents an unequivocal guarantee that fundamental justice governs Canadian extradition proceedings and that the jurisdiction of the extradition judge to grant *Charter* (or abuse) remedies is beyond argument.

- "… a person cannot be extradited except in accordance with the principles of fundamental justice."
- "This Court has repeatedly confirmed that extradition hearings are subject to the *Charter* and that an extradition judge – unlike a preliminary inquiry judge – has jurisdiction to apply the *Charter* and to grant *Charter* remedies relevant to the committal stage of extradition."

U.S. v. Ferras, supra, at paras 12 & 42

(a) The Supreme Court in *Ferras* stated that while certification is afforded a threshold presumption of reliability, it "does not preclude the possibility of error or falsification" (emphasis added), the type of falsification seen in *Thomlison*, *Tollman*, *Tarantino* and *Almrei*, the type of serious and multiple falsifications set out below in the case at bar. For such "falsification", the Court in *Ferras* clearly contemplates a meaningful remedy.

U.S. v. Ferras, supra, at par 32

27. In *Trochym*, the Supreme Court held that information that cannot be tested for accuracy or inaccuracy is "unacceptable" in a Canadian court: where "there is no way of knowing whether such information will be accurate or inaccurate", then "such information is unacceptable in a court of law". This is because material that cannot be tested for

reliability "is likely to undermine the fundamental fairness" of the process. Baldly conclusory, anonymous, unsourced and uncircumstanced intelligence received from "foreign" services is such information. It is, as has also been determined in the U.K. and internationally by an esteemed judicial panel, "unacceptable" material to put before a court. Moreover, such unacceptable material does not become acceptable or admissible "simply because it is consistent with other admissible evidence". Therefore the claim in the Record of the Case in the case at bar of the "corroboration" or "confirmation" by other material of the inherently unacceptable bare intelligence assertions does not alter its character or admissibility. It remains "unacceptable". And, as will be shown below, multiple misrepresentations undo claims of corroboration. Unacceptable material is combined in the case at bar with multiple serious misrepresentations to create a highly abusive Record.

R. v. Trochym [2007] SCJ No. 6 at paras 27, 55 & 60

The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office (U.K.); November, 2006, Hodgson at pp. 3, 4, 5, 18, 31-34, 38, 39, 40, 42, 43, 44

Terrorist Investigations and the French Examining Magistrates System; Home Office (U.K.); July, 2007, at pp. 9-11

Counter-Terrorism Policy and Human Rights; House of Lords/House of Commons Joint Committee on Human Rights (U.K.); 2005-06 at pp. 3-4 and paras 88, 127

Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights; International Commission of Jurists, 2009, at pp. 78, 83-85, 88-89, 157, 161, 162, 166

Secret Evidence: Justice, June, 2009, at pp. 5, 7, 55, 71-73, 214-218, 229

V. MAJOR MISREPRESENTATIONS, CONTRADICTIONS, INACCURACIES AND OMISSIONS: COGENT EVIDENCE OF UNFAIRNESS, FAILURE OF GOOD FAITH, FAILURE OF DUE DILIGENCE

28. Counsel for the agent for France in this extradition request, the Attorney General of Canada, repeatedly in submissions refers to the case as one of "mass murder", presumably to remind the learned extradition judge (who adopted this characterization in his ruling of September 1, 2010) of the gravity of the matter. The Applicant Hassan Diab does not seek to dispute or argue the value of such emotionally loaded language. Rather, the words of Justice Major in the Supreme Court in *O'Connor* are apposite: "When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. Fairness is a concern in every trial, but in high profile proceedings special attention must be paid because of the danger of extraneous factors interfering with the trial." The "special attention" to ensuring fairness that Justice Major counsels, in the respectful submission of the Applicant, should be brought to bear on this "mass murder" case of egregious, abusive and successive serious misrepresentations, breaches of the duty of good faith, omissions and editing that mislead, reliance on "unacceptable" materials and reliance on offensive and prejudicially worded argument instead of evidence that infect the Record of the Case.

R. v. O'Connor, supra, at para 247

29. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 1**:

(a) The Record of the Case certified December 11, 2008, by "Marc Trevidic, Vice President of Investigation" states (p. 42):

> "As the hit team responsible for carrying out the attack was supposed to come to Paris from Madrid by train using false identity documents given in Madrid, two other PFLP-SO members were assigned to make a test journey from Madrid to Paris 'to determine the reliability of the travel documents used and the frequency of checks in the train'. The operation's execution was described as follows: One of the two persons who carried out the reconnaissance in Paris in August received, in Madrid, members of the team tasked to commit the attack, recovered their passports and gave them false documents. They then separately took a train to Paris."

Application Record, Tab 3, p. 42

(b) This certified statement (represented to be true) is explicitly based on 1999 "very specific" intelligence received by the French intelligence service, the DST, received from an utterly anonymous source in unknown circumstances. It is unknown whether these intelligence assertions were based on human sources or other intelligence methods or analysis/opinion. Based on *Ferras* and *Trochym*, all of these unsourced, uncircumstanced, anonymous intelligence assertions of responsibility and operational method are "unacceptable" for use as evidence in a criminal proceedings in a Canadian court.

Application Record, Tab 3, p. 41

(c) More to the point concerning serious misrepresentation, however, this intelligence was received and stated in a DST "report dated April 19, 1999" (p. 41). This alleged report was therefore in the hands of French authorities, according to their own representations, for over 8 ½ years by the time of the certification of the Record December 11, 2008. There can have been no uncertainty or mistake as to what this allegedly "very specific" intelligence asserted.

Application Record, Tab 3, p. 41

(d) The French claim certified in the Record that the "hit team" and Hassan Diab (alleged by this unsourced intelligence to be the bomb maker and the "Alexander Panadriyu" who purchased a motorcycle) used false passports to enter France from Spain is at the heart of the case presented in support of the extradition of Dr. Diab. This claim reaches throughout the certified Record, is re-asserted in referring to other material, and is claimed to be "corroborated" by passport stamps in Hassan Diab's 1980 passport recovered in the possession of one Ahmed Ben Mohammed in 1981. This claim is at the heart of the story told by the certified Record (by the unsourced intelligence), that the PFLP-SO did the Copernic bombing, that Hassan Diab was a member of the hit team and that he and they "did it" by entering France from Spain using false passports. The passport stamps of entry to Spain September 20, 1980, and exit from Spain October 7, 1980, in Hassan Diab's 1980 passport are then claimed by the certified Record to "corroborate" the intelligence assertion. The fact that there is no stamp of entry to or exit from France in this passport "fits" with the intelligence claim that the real passport was not used to enter the target country, France. The intelligence claim is essential to the French case because without the false passport claim Hassan Diab's passport would prove he was in an entirely different country when the crime occurred; the passport and its stamps would otherwise be objective exculpatory evidence.

(e) The essential "false-passport-to-enter-France" claim (an unsourced intelligence claim) at the heart of the French case is reasserted through the case and purports to give meaning to other material (like the passport stamps):

"The terrorists arrived from Beirut with false passports…" (p. 38)

"The DST stated in this respect that 'the use of original documents to enter or leave a bordering or neighbouring country to that where the attack would be perpetrated, and subsequently providing false documents required for moving in the country where the operation would be carried out, was the usual method of Middle-East terrorist organizations and, moreover, the same modus operandi was indicated in the report of April 19, 1999, since false documents had been given in Madrid, in exchange for passports that allowed the arrival in Spain, to members of the Rue Copernic hit team, to ensure their passage and movement in France." (emphasis added). (p. 49)

"Two attacks were planned in Europe, one against a synagogue in Milan and one against a synagogue in Antwerp, and there were two hit teams: Ahmed Ben Mohammed had taken the authentic passports of the hit team members tasked to commit the Antwerp attack, namely those found on his person (including Hassan Diab's) and had given them fake papers for them to continue their route …" (p. 53)

"As a result, following were the elements observed on Hassan Diab's passport of May 10, 1980: … page 12: a Spanish visa no. 5314 issued September 17, 1980, by the Embassy of Spain in Beirut, a stamp of entry into Spain on September 20, 1980 … and a stamp of exit from Spain dated October 7, 1980." (p. 48)

"On this issue, it would be appropriate to not lose sight of the fact that the 1980 passport was in itself compromising as it contained entry and exit stamps in Spain that could be linked to the date of the commission of the Copernic attack (Spanish visa no. 5314 issued in Beirut on September 17, 1980, stamp of entry in Spain of September 20, 1980, and stamp of exit from Spain of October 7, 1980)." (p. 64)

"Examination of his passport moreover demonstrated that Hassan Diab, as indicated by the DST in their April 1999, report had indeed come to Madrid from Beirut before the Rue Copernic attack, and had left there again afterwards. This element attested the reliability of the information obtained by the DST, which was only the continuation and corroboration, in a much more specific form, of the information obtained shortly after the attack from foreign services on the involvement of a Lebanese from Beirut whose first name was Hassan." (p. 71)

Application Record, Tab 3, at pp. 38, 41, 42, 48, 49, 53, 64, 71

(f) As will be explicitly clear from the foregoing, this essential "false-passport-to-enter-France" claim is at the heart of the story allegedly told (in the Record of the Case) by the unsourced intelligence and then allegedly "corroborated" by the passport and Ben Mohammed material. It is not an isolated or passing assertion of fact – it is an essential claim repeated over and over to give meaning to the Ben Mohammed and 1980 passport material. This intelligence claim "fits" evidence of passport stamps and makes them appear inculpatory. It gives the stamps inculpatory meaning when on their own they would be exculpatory in nature. It makes the passport stamps conveniently "corroborative" of the unsourced intelligence. Further it gives purported nefarious meaning to the seizure of Hassan Diab's passport in 1981 in the possession of Ben Mohammed (even though this meaning results from mere intelligence "suppositions"). It is therefore a fundamentally important and central assertion in the Record of the Case against Hassan Diab that the certifying authority, Mr. Trevidic, (being under a duty of "fairness and good faith", of "utmost diligence and care" to be accurate – the duties made clear in *Ferras, Thomlison, Tarantino* and *Tollman*) offers to the Ontario Superior Court as reliable and truthful.

30. On November 12, 2008, the Requesting State presented to the Ontario Superior Court materials (from the "Legal Offices of Mr. Marc Trevidic, Vice President of Investigation") that it also offered as reliable and truthful. The November 12, 2008, Application of the Requesting State, founded on materials prepared by Mr. Trevidic, the certifying authority of the Record of the Case, preceded the certification of the Record by

only 29 days. The November 12 Application was an *ex parte* one, attracting the same type of duty of scrupulous candour (noted by Mosley, J., in *Almrei*) that applies to a Record of the Case (*Thomlison*, *Ferras*, *Tarantino*, *Tollman*). The November 12 Application was supported by the Affidavit of RCMP Corporal Tran who in turn relied for his sworn assertions on the Appendices co-authored by Mr. Trevidic. These Appendices were, for the most part, "International Letters Rogatory" from the "Tribunal de Grande Instance de Paris" and from Mr. Trevidic. The appendixed International Letters Rogatory were delivered under seal of the Ministry of Justice of France. These International Letters Rogatory, sealed by France, signed by Mr. Trevidic, sworn to by Cpl. Tran ("I believe the following to be true"), are "cogent evidence" of factual assertions made by France and the certifying authority Mr. Trevidic, factual assertions based upon which France sought action from the Ontario Superior Court, factual assertions that France and Mr. Trevidic offered to the court as true. The agent for the Requesting State, the Attorney General of Canada, represented to the Superior Court Judge (Maranger, J.) that there were "reasonable grounds to believe" the "facts" described in the Tran affidavit "and its appendices". Clearly, therefore, these appendixed International Letters Rogatory presented by France and the Attorney General are "cogent evidence" of the factual assertions made and held out by the Requesting State as scrupulously true.

Application Record, Tab 1
pp. 1-3 Application
p. 1 Tran Affidavit

(a) Appendix B to the affidavit of Cpl. Tran represents "Additional Information" on the "Statements of Facts" set out in Appendix A. Appendix A is "a letter rogatory

issued on January 7, 2008, by Mr. Coivre and Mr. Trevidic". Appendix B is a letter rogatory issued on June 5, 2008, emanating from the "Legal Office of Mr. Marc Trevidic". Appendix B asserts the following as factually true, based on "Information obtained from the DST":

> "It may be recalled that at the time the terrorist attacks, particularly of Palestinian origin, were very frequent in Europe and that border controls were particularly tightened.
>
> Activists who were still unknown to the specialized services had it in their own interest to cross borders with their real identity papers and use false documents only after they entered in the concerned country.
>
> With this reasoning, it was perfectly logical that Hassan DIAB entered France with his real passport, left in the same way, and used the false passport in the name of PANADRIYU to operate on French territory.
>
> It goes without saying that the false passport had a false stamp of entry into French territory in order to, in the case of an unexpected verification, be able to justify this 'legal' entry and not arouse suspicion.
>
> That, moreover, was exactly what happened for Alexandre PANADRIYU, controlled for a theft of cutting pliers and who could then justify his presence on French territory thanks to the false entry stamp dated September 15, 1980.
>
> That can also explain that Ahmed BEN MOHAMED was detained, shortly before the Antwerp attack, not only with false papers but also with Hassan DIAB's real passport, which probably he had to hand over to DIAB for him to be able to legally and safely enter Belgian territory."
>
> Application Record, Tab 1, Appendix B, para 13

(b) The above assertion is claimed by Mr. Trevidic in Appendix B to have come from "information obtained by the DST in 1999", information (unsourced intelligence) that was "more specific" than prior unsourced intelligence. This was exactly the

same source claimed as the basis for the Record's 'false-passport-to-enter-France' assertion certified by Mr. Trevidic only twenty-nine days later in December, 2008, and set out above in paragraph 29. The Record of the Case asserts (p. 41) that this "very specific" intelligence revealed the "*modus operandi*" of the Copernic perpetrators. This "very specific" intelligence report had been in French authorities' hands since 1999.

Application Record, Tab 1, para 10

(c) The glaring and serious ("*modus operandi*") contradiction between the important assertions offered as true in the Record of the Case and the Application of the Requesting State, both assertions made by the same official and both allegedly based on the identical "very specific" source, are manifest when they are juxtaposed:

Appendix B to November 12, 2008 Application of Requesting State	Record of the Case certified December 11, 2008
• "In 1999, when the DST obtained the names of the persons presumed to have participated in some capacity or another in the Rue Copernic and, for certain among them, in the Antwerp attack, Hassan Diab was not known to be a part of a Palestinian terrorist group." (para 11)	• "As the hit team responsible for carrying out the attack was supposed to come to Paris from Madrid by train using false identity documents given in Madrid." (p. 42)
• Information obtained from the DST revealed that the Rue Copernic hit team had come to France from Spain and had then left again for Spain." (para 13)	• "persons who carried out the reconnaissance in Paris in August received in Madrid, members of the team tasked to commit the attack, recovered their passports and gave them false documents. They then separately took a train to Paris." (p. 42)
• "It may be recalled that at the time the terrorist attacks, particularly of Palestinian origin, were very frequent in Europe and that border controls were particularly tightened. Activists who were still unknown to the specialized	• "the DST stated in this respect that 'the use of original documents to enter or leave a bordering or neighbouring country to that where the attack would be perpetrated, and subsequently providing false documents required for moving in

services had it in their own interest to cross borders with their real identity papers and use false documents only after they entered in the concerned country. With this reasoning, it was perfectly logical that Hassan Diab entered France with his real passport, left in the same way, and used the false passport in the name of Panadriyu to operate on French territory." (para 13)
(emphasis added)

the country where the operation would be carried out was the usual method of Middle-East terrorist organizations and, moreover, the same modus operandi was indicated in the report of April 19, 1999 since false documents had been given in Madrid, in exchange for passports that allowed the arrival in Spain, to members of the Rue Copernic hit team, to ensure their passage and movement in France." (p. 49)
(emphasis added)

(d) These flatly contradictory assertions of fact are classic examples of things that speak for themselves: they cannot both be true and cannot be mere mistakes or typographical errors – both contain detail rationalizing the respective and contradictory claims. Both identify as the basis for the assertion the identical "very specific" 1999 DST information that had been in French hands for over eight years. Both were offered by the Requesting State as true and reliable assertions of fact to the Ontario Superior Court twenty-nine days apart in 2008. At least one of these claims is untrue, seriously untrue. It is not the duty of the extradition judge to resolve serious and unexplained contradiction by the Requesting State of its own Record of the Case. It is the responsibility of the Requesting State, in its versions of the very same matters, to be reliable and consistent, not to tell two very different, very inconsistent stories. Such circumstances reasonably and gravely call into question the reliability of this crucial assertion in the Record of the Case. Given the assertions in the Appendix to the November 12 Application, the key "false-passport-to-enter-France" claim and the related corroboration claims in the Record of the Case cannot be true.

(e) Unsourced intelligence is, unfortunately, open to malleability and manipulation. That is one of the reasons it is "unacceptable" in Canadian criminal proceedings. It is "secret" and sources remain anonymous, circumstances undisclosed (even torture). One can make all sorts of claims about what intelligence reveals or is, and thus the duty of "fairness and good faith", the duty of "utmost diligence and care" for accuracy and truthfulness must be rigorously enforced by the courts, in defence of their own integrity and the fairness of their proceedings. France's own cogent documents prove a major and revealing contradiction on a central assertion of fact that goes to the heart of the Record of the Case. France's own cogent documents destroy the reliability of key assertions certified (that are repeated throughout the Record) and of the purported "corroboration" claims also certified by Mr. Trevidic.

(f) The International Letters Rogatory set out in Appendix B of the November 12, 2008, *ex parte* Application to the Superior Court by the Requesting State antedate the Record of the Case. They are asserted to be wholly true. But these 'truthful' assertions do not "fit" the objective passport evidence in an inculpatory way. Mr. Trevidic's assertion that "Hassan Diab entered France with his real passport, left in the same way, and used the false passport in the name of Panadriyu to operate on French territory" is clear. It means that, to have been involved in the crime as the bomber/motorcycle buyer/hotel registrant, Hassan Diab's passport, because "border controls were particularly tightened" at the time, would have to have a stamp of his entry to France and another of exit. The passport does not have such stamps, flatly disproving Mr. Trevidic's Letters Rogatory factual assertion of

Hassan Diab's involvement, proving in fact the innocence of Hassan Diab: the real bomber entered France with his real passport and Hassan Diab did not – he was in an entirely different country at the time. To overcome this serious problem that real and objective evidence (the passport) disproved the intelligence claim, the Record of the Case simply changed the intelligence claim to make it "fit". In only twenty-nine days the claim (asserted to be true) that Hassan Diab entered France with his "real passport" became Hassan Diab entered France with a "false document". This expedient resolved the problem of exculpatory evidence and created corroboration out of exculpation. There is no other reasonable explanation available on the French material before this Honourable Court. And France has offered no explanation. France "stands mute".

(g) There are four significant consequences of the destruction of reliability of the Record of the Case "false-passport-to-enter-France" story occasioned by the cogent evidence of the Requesting State's own 'truthful' documents:

(i) Because this false passport assertion is so central to the case set out in the Record, destruction of its reliability casts doubt in turn on all major assertions in the Record. The faith and fairness duty imposed unequivocally by the case law is seen to have been seriously, even flagrantly breached. The intelligence claim has been "manipulated" (to use Justice Doherty's language in *Larosa*) to make it inculpatory and to make "corroboration" out of

exculpation. As set out above, the false passport story and assertions are repeated throughout the case and are used to claim inculpatory meaning in other material in the case, like passport stamps and Ben Mohammed having possession of the 1980 passport in 1981. The false passport assertion permeates the rest of the Record and cannot be isolated from it. It infects with unreliability the rest of the Record of the Case; what now can be believed or treated as reliable?;

(ii) The "corroboration" offered by the passport stamps and the possession of the 1980 passport by Ben Mohammed a year later are destroyed. The 1980 passport and its stamps prove Hassan Diab never entered France – he was in another country at the time of the offence. Ben Mohammed would not have Hassan Diab's passport so that the latter could cross a border to the target country with a false passport;

(iii) The objective evidence of the passport, its stamps and lack of stamps, proves Hassan Diab's innocence. It exculpates him. The real bomber

used his real passport to enter France and Hassan Diab did not;

(iv) The Requesting State's own 'truthful' document destroys the related claim that false passports were used to enter Belgium to perpetrate the 1981 bombing (Antwerp) (pp. 53 & 70 Record).

31. For the foregoing reasons, it is respectfully submitted that this significant misrepresentation/contradiction at the heart of the Record of the Case, proved by the Requesting State's own "cogent" evidence (offered as true to the Superior Court), justifies the entry of a stay to prevent an unfair extradition hearing (on false and manipulated material assertions) and to prevent an attack on the integrity of the certification process which is the foundation of the Canadian extradition system. This is no minor or isolated false assertion but a key assertion repeated throughout the certified Record and reaching into other material in the Record purportedly to give such material (falsely) inculpatory meaning. It is the heart of the unsourced intelligence case against Hassan Diab that reaches into other material. Such manipulation disentitles the Requesting State from further resort to Canadian extradition process to secure a committal. It is the clearest case of abuse of process calling for a stay of proceedings. This serious misrepresentation/manipulation does not, however, stand alone as justifying the entry of a stay – there is much more. A pattern of systematic misrepresentation is revealed by the Requesting State's documents.

U.S. v. Cobb, supra, at paras 33, 35-37, 43-44, 52

U.K. v. Tarantino, supra, at paras 28, 30, 31, 44, 55-57

U.S. v. Tollman, supra, at paras 10, 140, 145, 149

U.S. v. Shulman, supra, at paras 44-45, 50, 61

32. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 2**:

(a) The Record of the Case certifies information (most of it "only suppositions") on the bombing in Antwerp, Belgium, October 20, 1981, as, in effect, similar fact evidence allegedly corroborating the assertion of Hassan Diab's involvement in the 1980 Paris bombing. Just as Hassan Diab is asserted by unsourced intelligence to be responsible for Rue Copernic, he is similarly asserted to be responsible also for Antwerp and the Record of the Case claims a "clear link" or "analogy" between the two bombings. Antwerp is asserted in the certified Record (pp. 52 – 54), like Copernic, to have been (i) anti-Semitic with a "synagogue targeted by the attack" (p. 53); (ii) the "suspects" stayed, like Copernic, in a hotel beforehand; and, (iii) Antwerp, like Rue Copernic, involved a major explosion, deaths, injuries and damage ("Material damage was considerable, but above all three persons were killed while about hundred were reported injured": p. 35). In addition, the same (misrepresented, as set out above) "false passport" claim made about Copernic, based on unsourced intelligence, is made of Antwerp (p. 53). Thus, the certified Record attempts to portray the information in its possession about Antwerp as showing similar fact "clear links" with Copernic, and in both cases sheer intelligence attributes responsibility to Hassan Diab. Antwerp and Hassan Diab's alleged involvement is asserted to corroborate the Record's claim of his involvement in Copernic.

Application Record, Tab 3 (Record of the Case), pp. 35, 52-54

(b) As authoritatively resolved in *Thomlison*, *Almrei*, *Tarantino* and *Tollman*, the Requesting State is under a clear duty of "utmost good faith and candour" in the representation of the information in its possession in the Record of the Case. Representations must be based on "all of the information including that which is unfavourable to their case." Justice Moldaver's message "that full, frank and fair disclosure must form the cornerstone of the record of the case and, minimally, there is no room for lack of diligence and care, even if it were inadvertent or misguided." "Material facts" (adverse to the certified claims) must not be edited out or "buried" in documents other than the certified Record. Yet that is exactly what has happened in respect of the Antwerp certified assertions in this Record: the duty of fairness and good faith, of full and frank candour has been breached, material facts adverse to the certified claim have been edited out of the Record and remain "buried" in other Requesting State documents. The representation of Antwerp is utterly distorted and rendered misleading by the fundamental breach of the duty of fairness, good faith and candour. The information about Antwerp is a serious misrepresentation of the actual intelligence received.

U.S. v. Thomlison, supra, at paras 31, 32

Re Almrei, supra, at para 500

U.K. v. Tarantino, supra, at paras 34-39, 45-46, 55-57

U.S. v. Tollman, supra, at paras 10, 140, 145, 149

(c) The report of "the French Examining Magistrate in charge of the Copernic case" (referred to at page 35 of the certified Record as "D" documents D2328 – D2331) is cited as the documentary basis for the Antwerp assertions. D2328 – D2331 is the October 28, 1981, report of Guy Joly, one of Mr. Trevidic's predecessors as examining magistrate of the Copernic bombing who attended in Belgium to gather information from Belgian officials about the Antwerp bombing. This is, again, the Requesting State's own document and cogent evidence concerning the actual information in French possession concerning the Antwerp bombing, from its own investigating judge. The following information is disclosed in the report.

Application Record, Tab 4 (D Documents), p. D2331

(i) The French investigating judge states that Belgian investigative authorities (the Belgian Prosecutor, the judge in charge of the investigation, the Belgian police) believe that Antwerp may well <u>not be an anti-Semitic bombing but rather an anti-capitalist attack</u> – the bombing was outside the Antwerp "diamond distribution group computer terminal" building. The synagogue in the area was infrequently attended and was under police surveillance, i.e. not a likely target. "Furthermore, the diamond distribution centre computer could have been an objective for extremists focusing on attacking one of the symbols of capitalism."

Application Record, Tab 4, D2330

(ii) The bombing "suspects" who stayed in the hotel are known to police and named: Kathleen Hill, an Englishwoman, Hasan Akbalickci, a Turk, and Atman Yusuf. All three were in the hotel since October 16, 1981 (four days before the bombing) and left the hotel "quickly" only an hour before the bombing October 20th. Hill's brother-in-law was a convicted I.R.A. terrorist.

Application Record, Tab 4, D2328

(iii) The explosive in Antwerp was 50 kilograms that could be a mixture of TNT and HMX, this latter an American explosive imported by a Belgian firm. Unlike Copernic, there is no suggestion of the use of penthrite as described in Appendix 4, the report of Henri Viellard, to the Record of the Case: the Copernic explosive "weighed a minimum of ten kilograms" and was composed of "the presence of penthrite in significant quantity and a small quantity of a second nitric ester that could be nitroglycerine or a degradation product of penthrite" (p. 19 Record). "Palestinian terrorists" use

"Czechoslovak-made Semtex, a penthrite-based explosive" (p. 38 Record).

Application Record, Tab 4, D2328

Application Record, Tab 3, p. 38 and Appendix 4

(iv) Two claims of responsibility were made for the Antwerp bombing: the terrorist group Black September (famous for the Munich Olympic massacre) and the terrorist group Action Direct (Belgian chapter) both claimed to have executed this bombing.

Application Record, Tab 4, D2330

(d) Actual information in the possession of the Requesting State contradicts the assertions of "clear links" between the Copernic and Antwerp bombings. More seriously, this information has been suppressed from the Record certified by Mr. Trevidic. These "material facts" have been "buried" to facilitate a similar fact, mutually corroborative picture of the two bombings when none exists. Antwerp actually appears on the information available to have been an anti-capitalist bombing perpetrated by known, named suspects (not Hassan Diab) with terrorist ties, using a much different and larger explosive than Copernic and for which, unlike Copernic, two major terrorist groups have claimed responsibility. In order to create an inculpatory picture, the Requesting State has edited out all this highly relevant and material information (adverse, obviously, to its interest in portraying similarities between the bombings) in favour instead of misleading and self-

serving "suppositions". In breach of its duty of "utmost" fairness and good faith the Requesting State has by flagrant negligence or design misrepresented in its certified Record the actual information about Antwerp in its possession. The result is an unfair representation of the evidence and a demonstrably misleading, unreliable, Record of the Case. The result is that a fair extradition hearing cannot be conducted on a Record of serious and repeated misrepresentations. The result is that the integrity of Canada's extradition system and process is compromised. The Requesting State has, by its complete failure of due diligence in honouring the duty of fairness and good faith disentitled itself from pursuing an extradition committal order.

33. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 3**:

(a) The Record certified by Mr. Trevidic on behalf of the Requesting State asserts (p. 50), based on a DST (unsourced intelligence) report dated April 20, 2001, that Souhaila Sayeh "a former PFLP-SO member" had, "'according to a reliable source of the service' carried out reconnaissance in Paris in 1979" for the bombing in 1980 (emphasis added). This claim purports to connect PFLP-SO to the Paris bombing and Souhaila Sayeh to Hassan Diab, who is also alleged, based on unsourced intelligence, to have performed reconnaissance for both Copernic and Antwerp: "Like Hassan Diab, one of the persons was mentioned as carrying out reconnaissance for both the Rue Copernic attack and the Antwerp attack." (p. 52)

Application Record, Tab 3, pp. 50 – 52

(b) D4052 is cited at p. 51 of the certified Record. It is a DST report on Souhaila Sayeh dated March 18, 2008, and is a document produced by officials of the Requesting State ("Phillippe Chicheil", Commander, DST) that is explicitly referenced in the record as a documentary basis for assertions in the "Souhaila Sayeh" (pp. 50 – 52) section of the Record. It is cogent evidence of information in possession of the Requesting State at the time the explicit claim was made in the Record of "reliable" information that Sayeh performed 1979 Paris reconnaissance in advance of the 1980 bombing.

Application Record, Tab 4, D4052/6

(c) D4052 stated, a year and a half before the Record was certified, that in fact Sayeh was hospitalized "four or five months in Prague before returning by car to Iraq at the end of 1979." Therefore, the DST Commander noted, the claim that she came to Paris to conduct surveillance on prospective targets in fact "seems erroneous". The DST concluded "Therefore, it is difficult to put her in Paris on the same date."

Application Record, Tab 4, D4052/6

(d) The very hospitalization for an extensive period in 1979 that indicated the 1979 Sayeh surveillance claim was "erroneous" is referred to in the certified Record by Mr. Trevidic ("After a long hospitalization she returned to Baghdad in late 1979": p. 51) but edits out the statement that the surveillance assertion appears to be an error. Instead, the certifying authority (Mr. Trevidic) asserts in the Record that the surveillance claim is "reliable". The statement about the lengthy hospitalization and return to Iraq comes directly from D4052/6 but is edited to

give it an inculpatory meaning instead of its true exculpatory meaning. This is exactly the type of misrepresentation by editing decried in *Thomlison*, *Almrei*, *Tarantino* and *Tollman*. It demonstrates yet again at the least the complete failure of the duty of "utmost diligence and care" for accuracy in this Record and the "careless, cavalier approach by the certifying prosecutor to the process of certification." It reflects misleading by "burying" inconvenient (adverse) information. Precisely as in *Thomlison*, this demonstrates that the certifying authority "knew or ought to have known" that the Sayeh surveillance assertion "was not portrayed in a full, frank and fair manner" and that this rendered its representation "misleading", constituting an abuse of process. At the worst, this demonstrates a pattern of misleading manipulation of the Record to make the French case look (falsely) more inculpatory in order to justify extradition. In either case – complete failure of due diligence or pattern of manipulation – it is the most serious of abuses and the clearest case for a stay.

U.S. v. Thomlison, supra, at para 31

U.K. v. Tarantino, supra, at paras 30 & 38

U.S. v. Tollman, supra, at paras 10, 140

Re Almrei, supra, at paras 154-164, 413-424, 438, 453, 480-503

34. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 4**:

(a) The Record of the Case repeatedly asserts that information received states that the Copernic bombers came to France by train from Spain and returned to Spain from France the same way (pp. 42, 48, 49, 53, 64, 71). This is an essential intelligence

claim given the reliance (set out above in paragraph 29) on the 1980 passport stamps as "corroboration".

Application Record, Tab 3, pp. 42, 48, 49, 53, 69, 71

(b) Among the information sources claimed in the Record certified by Mr. Trevidic are "particularly well informed newspaper articles" such as the October 3, 1984, article in Libération authored by Anette Levy Willard. The Record asserts that this article, "Israel solves the Copernic mystery" was "much more specific about the ones who were responsible for the Copernic attack." The certified Record attributes both importance and reliability to this "specific" and "well informed" source as it emanated, allegedly, from "prominent Israelis" and "archives in Tel-Aviv" and "solved the bombing 'mystery'".

Application Record, Tab 3, pp. 39, 40

(c) In its entirety, this is what the certified Record states is the "specific" information received from this source (p. 40):

> "Another article of the LIBÉRATION dated October 3, 1984, entitled, "Israël perce le mystère Copernic" {Israel solves the Copernic Mystery] by Anette LEVY WILLARD, was much more specific about the ones who were responsible for the Copernic attack.
>
> The journalist said she obtained information from prominent Israelis and that she had access to archives in Tel-Aviv.
>
> She claimed that the attack had been committed by the group led by Salim ABU SALEM, dissident of George HABASH, namely the PFLP-Special Command, also referred to as PFLP-SO.
>
> Salim ABU SALEM, according to this article, had to "withdraw into South Yemen due to the invasion of LEBANON by Israel in 1982."

> This group ceased all terrorist operations in 1983, according to the information gathered by the journalist from the "Israelis" who added that Salim ABU SALEM's wife had in fact been imprisoned by the Israeli army at the time of the invasion of SOUTHERN LEBANON. She was ultimately released, along with other Palestinian prisoners, on a date that was not indicated in the article (D2950).

Application Record, Tab 3, p. 40

(d) Conspicuous at the end of the above quote is the reference to "D2950", the purported source document for the Record's certified assertions. D2950 actually states that Israel has "identified the perpetrators of the murderous attack" and has "the entire history of the attack in their archives". The perpetrators and the operational history of the attack are set out explicitly: "three Palestinians" committed the Copernic bombing using "a booby-trapped motorcycle" and afterward, "the three men took off in a rented car and returned to Beirut via Germany" (emphasis added). D2950 is cogent, indeed verbatim, evidence of the "particularly well informed" article. Mr. Trevidic, the certifying authority, was careful to assert in the Record the reliability of what he called "well informed" information that was "much more specific" about who committed Copernic and how. He was, however, careless in the extreme in omitting or editing out or "burying" the key particulars of the article that three Palestinians perpetrated the attack and then fled in a rented car, travelling via Germany to Beirut. This was clearly information of which he was aware (since he referred specifically to the article) and that he knew came purportedly both from authoritative ("prominent") Israelis and Israeli archives. He knew, when certifying the Record, that this "particularly well informed" information source included this highly material

information (surely in the Israeli "solution", this is the key information – who and how). The Libération article is a short one, one-page in length. Yet he omitted this critically relevant information when certifying the Record. Of course, the information he "buried" was extremely unhelpful (to the Requesting State) when, in December, 2008, he certified the case: by that point the case was that the bombers included a Lebanese (not a "Palestinian") named Hassan Diab who came from and returned to Spain via train and false passport. Fully and fairly disclosing that the "well informed" source actually revealed that the bombers fled France by rented car to Germany would destroy the unsourced, uncircumstanced Spain-to-France-and-back-by train-with-a false-passport intelligence case that the certified Record would assert. This "well informed", key information would not "fit" the intelligence case assembled in the Record. And so, like the 'real-passports-used-by-the bombers' information referred to in paragraphs 29 – 31, the inconvenient information was edited out. A false and misleading picture results of this "well informed" article: key exculpatory material has, by omission, been turned into information consistent with the Record's inculpatory claim.

Application Record, Tab 4, D2950

(e) At the very least this misrepresentation is yet another significant example in a pattern of misrepresentations in this Record of the Case of a complete failure of due diligence to be scrupulously accurate and not to "bury" adverse information. It reflects the scale and scope of the repeated breaches of the recognized duty of good faith and fairness on the certifying authority of the Requesting State. At the

most it is yet more evidence of a gravely disturbing pattern of "manipulation" of the material presented in the Record to make it "fit" the case for extradition. In either case it is the worst case of repeated significant misrepresentations yet to come before a Canadian extradition court and the clearest case for a stay. Yet there is even more.

35. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 5**:

(a) Referring to the "very specific" April 19, 1999, intelligence that allegedly revealed "the very identities of the perpetrators of the attack", and that purports to attribute group and personal responsibility to the PFLP-SO and Hassan Diab, respectively, the Record of the Case certified by Mr. Trevidic asserts (p. 42) that Hassan Diab "was known, according to this information, as being a 'Lebanese national and a member of PFLP-SO in Beirut in 1980.'" This assertion is followed by the following statement: "Regarding the information obtained [about who did Copernic and how], the DST had the following comment: 'The information seems likely, to the extent that all the names cited (with the exception of one … *Comment added by the writer of this brief [Mr. Trevidic] and does not appear in the DST document: We are not able to indicate the name cited at this place by the DST with the ongoing investigation but it is not Hassan Diab)* were already known to our service as definite members of the PFLP-SO assigned to cells to take on the task of preparing and carrying out attacks'" (emphasis added) (p. 43). The Record certified by Mr. Trevidic is clearly asserting that the 1999 intelligence "seems likely" (i.e. is corroborated) because Hassan Diab was "already known" in 1999 when the intelligence was received as a "definite

member of the PFLP-SO assigned to cells" to carry out terrorist attacks. There is not only no evidence of this, but cogent evidence to the contrary.

Application Record, Tab 3, pp. 42, 43

(b) The International Letters Rogatory dated June 5, 2008, from the "Legal Office of Mr. Marc Trevidic" and co-authored by him (Appendix B to the Requesting State's *ex parte* Application to the Ontario Superior Court of November 12, 2008) state: "In 1999 when the DST obtained the names of the persons presumed to have participated in some capacity or another in the Rue Copernic and, for certain among them, in the Antwerp attack, Hassan Diab was not known to be part of a Palestinian terrorist group (or rather was not listed as such, as his name had in fact already appeared in a legal case, as detailed later on)" (emphasis added). Clarifying this parenthetical remark, the Letters Rogatory of Mr. Trevidic continue: "For sure Hassan Diab, as far as he is concerned, had never been implicated in French proceedings in the past, but there was a possibility that his name should have appeared incidentally. In fact, that was precisely the case in a trial that did not concern the PFLP directly but of threats, in 1988, from the 'Arab political prisoners support group (CSPPA)'" (emphasis added). The Letters Rogatory then explain that the questioning of Youcef El Khalil and Sana Salhab is where Hassan Diab's name arose, "incidentally" in 1988 (because it appeared, with others, in the address book of El Khalil).

Application Record, Tab 1, Appendix B

(c) The International Letters Rogatory make plain that in 1999, when the DST obtained its anonymous information assigning personal and group responsibility

for the Copernic bombing, Hassan Diab was not known to be part of any Palestinian terrorist group (like the PFLP-SO). Indeed his name had only surfaced "incidentally" in the questioning of El Khalil and his spouse on another case. Mr. Trevidic has not merely "buried" this fact in certifying the Record, he has changed it completely (just like the 'real-passports-used-by-the-bombers' information). In the Record he certifies the opposite, namely that in 1999 when the intelligence was received, Hassan Diab was "already known" as a "definite member of the PFLP-SO assigned to cells" to carry out terrorist attacks. This was an important assertion to make because it purportedly demonstrated "corroboration" of the unsourced, uncircumstanced, anonymous 1999 intelligence. As the cogent evidence of Mr. Trevidic's own International Letters Rogatory demonstrates, this important Record certification is untrue; indeed the opposite is the case. Once again, the pattern of misrepresentation of significant matters is demonstrated. All of these misrepresentations serve to improve or advance the Requesting State's case for extradition. All of them, individually and cumulatively, compromise a fair extradition hearing for Hassan Diab and constitute an affront to the integrity of the Canadian extradition process and system that affords procedural advantages to a Requesting State on the basis of trust and good faith, fairness and candour in the representations certified in the Record. They make a mockery of the concept of the certified Record as "the fibre with which the safety net of assurances" of accuracy and availability of evidence is woven. Cumulatively this pattern of successive significant misrepresentation in

the Record of the Case constitutes the clearest case for a stay as an abuse of process.

U.K. v. Tarantino, supra, para. 38

36. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 6**:

(a) As part of its case asserting Hassan Diab's alleged culpability in the Copernic bombing, the certified Record cites the journalistic information of Xavier Colin and Charles Villeneuve revealed in questioning "by the Crime Squad" following their February 1, 1983, Europe 1 radio program. These journalists allegedly had information received directly from "Palestinian militants" and "one of the persons implicated in the attack" (p. 40).

Application Record, Tab 3, p. 40

(b) The Record of the Case repeatedly (pp. 37, 38, 42, 43) and consistently claims that information received stated that two names were identified as Copernic "hit team" members: "a Lebanese named Hassan, codename Ahmeer" who was allegedly the Alexander Panadriyu who bought the motorcycle and placed the bomb on it (pp. 38 & 42) and an accomplice, "a Palestinian, Abdallah, who uses a Jordanian passport." Such a certification of course "fits" the Record's case asserting Hassan Diab's culpability as alleged motorcycle buyer/bomber (albeit with unsourced intelligence).

Application Record, Tab 3, pp. 37, 38, 42, 43

(c) The full text of the certified Record's representation of the 'Europe 1' information is as follows:

> "The Palestinian lead was also showed in a program broadcast on the EUROPE 1 radio station on February 1, 1983.

> Journalist Xavier COLIN in fact stated on that occasion in the summer of 1982 when he was covering the siege of Beirut with journalist Charles VILLENEUVE that he met one of the persons implicated in the attack who affirmed to them that the said attack had been committed by Palestinians (D2926 and D2927).
>
> Questioned by the Crime Squad, Charles VILLENEUVE and Xavier COLIN, who covered the battle of Beirut between June 8 and September 1, 1982, stated that they had obtained information of Palestinian militants belonging to the most radical faction and one of the persons in charge had even given them "a sufficiently solid material element." The militants had moreover spoken of not one but several terrorist acts in Europe.
>
> Both journalists refused to provide more details (D2928 to D2930)."

Application Record, Tab 3, p. 40

(d) It will be seen from the foregoing that the Record asserts that this information included a "material element" and referenced who had committed the bombing (but without any names).

Application Record, Tab 3, p. 40

(e) D2927, cited in the Record (p. 40) as documentary authority for the Europe 1 information certified, is the February 18, 1983, report of Principal Inspector Richard Villibord that records the actual information received. It is cogent evidence of the document that the Record purports to summarize and certify. D2927 actually states: "For Copernic, there were five subjects, five men who were partially identified, in particular, Alexander Panadriyu, the man on the motorcycle, who had left 10 kg of explosive in saddlebags on the vehicle. This man, also known by the name of Abdullah, had a Jordanian passport. Another man, first name Ahmed, was Lebanese" (emphasis added).

Application Record, Tab 4, D2927

(f) The information in D2927, coming from someone allegedly directly involved, was that the bomber and motorcycle buyer was a Palestinian named Abdullah, travelling on a Jordanian passport – not "a Lebanese named Hassan codename Ahmeer". The accomplice was a Lebanese named "Ahmed" (not Hassan). Although D2927 is explicitly cited as the informational source for the Record's assertions, the key or "material elements" of the document, the names of the men involved and their roles, was omitted, edited out, "buried". It is clear that this information was adverse to the Record's certified assertion that information received named "a Lebanese named Hassan" as the motorcycle buyer/bomber Alexander Panadriyu. Information received in D2927 actually named the bomber Panadriyu as a Jordanian named Abdallah. But this would not "fit" the case portrayed by the Record and so was simply excised by omission. The certified Record misrepresents in asserting that information received named Hassan (a Lebanese) as the bomber/motorcycle buyer when D2927, cited explicitly in the Record as a documentary information source, in truth named Abdallah (a Jordanian) as that man. Once again the inconvenient information is "buried", edited out, conveying a false picture of information received as to the identity of the bomber. The bomber's identity and purportedly reliable information about that is not a minor matter in a bombing case. It is a significant misrepresentation to misstate (by active assertion and by omission) information received on this critical fact. Once again, the duties identified in *Thomlison*, *Tarantino*, *Tollman*, *McVey* and *Almrei* have been breached. These are not isolated, minor

misrepresentations; they are multiple and significant, a pattern of serious misrepresentation occasioning the clearest case for a stay as an abuse of process.

37. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 7**:

(a) The Record of the Case characterizes (p. 68) the "hearing" of Nawal Copty November 24, 2008, in the United States as her having "refused to give details on the nature of her relationship with Zaki Helou (supra regarding Zaki Helou's role in the PFLP-SO)". The Record also asserts that "At the very beginning of the hearing, though, when she agreed to reply to questions concerning her identity, she mentioned the first names of her uncles and aunts, citing notably an uncle ZAKI. She was then asked to also state the family names of her uncles and aunts, not just the first names. She cited them as follows 'Etof Helou, Azngel Helou, Naiv Helou etc.' … but forgot to mention in the list the family name of her uncle Zaki." The parenthetical "supra" reference to Zaki Helou – "(supra regarding Zaki Helou's role in the PFLP-SO)" – referred to the interrogations of Souhaila Sayeh and this statement at p. 51 of the Record: "She had then, late 1976 or early 1977, undergone paramilitary training in a Palestinian camp in South Yemen, whose leader at that time was Zaki Hello (or Helou) …".

Application Record, Tab 3, pp. 51 & 68

(b) The Record is written at both pages 51 and 68 to give the clear impression that Nawal Copty had both a relationship with a terrorist leader named Zaki Hello "(or Helou)", and that she was hiding the fact that she had an uncle named Zaki Helou (leading to the further inference they could be one and the same). Since Nawal Copty had been Hassan Diab's wife, her having purported terrorist associations

with, and an uncle named, Zaki Helou was offered in the Record as alleged further terrorist association evidence against Hassan Diab.

(c) Cogent evidence emanating directly from the Requesting State itself, document D4052, the March 18, 2008, report of Philippe Chicheil, DST Commander reveals that there is no terrorist leader Zaki "Helou". D4052 is cited in the certified Record as the documentary authority for the Sayeh interrogation set out at p. 51. Page 3 of D4052, which sets out in detail the interrogation of Sayeh, reveals that the only reference is to a "ZAKI HELLO". There is no evidence Nawal Copty has any relatives surnamed "Hello". The "(or Helou)" has gratuitously been added at page 51 by Mr. Trevidic in the Record he certified. This surname change then purports to match or "fit" with the fact that Nawal Copty has relatives with the surname "Helou". Philippe Chicheil, DST Commander, never suggested or stated in D4052 the "HELLO" surname was or could be "Helou". This is purely and solely the convenient and self-serving addition of Mr. Trevidic. Not only does Mr. Trevidic add the "Helou" surname himself (p. 51), he then drops entirely the actual "Hello" surname when he writes and certifies the p. 68 assertion that Nawal Copty "refused to give details on the nature of her relationship with Zaki Helou (supra regarding Zaki Helou's role in the PFLP-SO)." The effect is obviously misleading in an inculpatory way. It is a deliberate addition and omission. It is not the function of the certifying authority to 'make up' material to embellish the Record being certified. It is flagrantly abusive to do so. This is classic "manipulation" of evidence in the record as identified by Justice Doherty (in *Larosa*).

Application Record, Tab 4, D4052

(d) Furthermore, the actual transcript of the "Deposition of Nawal Copty" held November 24, 2008, in San Francisco, California, is cogent evidence that she simply followed the legal advice of her lawyer who was present not to answer questions ("Mr. Topel: … and it is my advice to my client that she decline to answer any questions concerning this subject matter in a very broad sense …") as she was lawfully entitled to do. She did not "refuse(d) to give details on the nature of her relationship with Zaki Helou". There is nothing whatsoever to suggest that she had any relationship with a Zaki Hello, terrorist leader, or any "details" to give. She simply and lawfully declined to answer the question "Q. Did you have any relations with Zaki Helou?" (emphasis added). It is only the deliberately pejorative wording of the Record written by Mr. Trevidic that leaves (unfairly and inaccurately) the impression that she had any such relationship and had details to give. This is part of the pattern of misrepresentation demonstrated throughout this abusive Record.

Application Record, Tab 6, Deposition of Nawal Copty, p. 7, ll. 9 – 11

(e) Yet further, a reading of the Deposition transcript reveals that Nawal Copty has various "Helou" and "Copty" relatives. The reference to uncle "Siki" (earlier mis-spelled in the transcript as "Zaki" and corrected to "Ziki") is to a "Copty" relative. In the certified Record, Mr. Trevidic refers only to the "Helou" relatives: "She was then asked to also state the family names of her uncles and aunts, not just the first names. She cited them as follows: 'Etof Helou, Azngel Helou, Naiv Helou, etc. …' but forgot to mention in the list the family name of her uncle Zaki"

(emphasis added). The Record intentionally leaves the false impression that Zaki (Ziki/Siki) is a Helou. And, the Record misleadingly uses the "etc." instead of the actual transcript evidence which reads, "So let's start from the beginning then. So Etof Helou. Angel Helou. Badia Helou. Resette Helou. Amin Helou. Naiv Helou. And also Siki Copty. Fuad Copty. Zahia Copty. And Badia Copty" (emphasis added). There is no uncle Zaki Helou as the Record unfairly and misleadingly infers, only an uncle Siki (Ziki) Copty. Mr. Trevidic was present throughout this deposition. He knows this material. Yet he has crafted a misleading Record in which a terrorist actually named "Hello" becomes conveniently a "Helou" and uncle Ziki Copty becomes Zaki Helou, the renamed terrorist. These subtle but important manipulations of the actual evidence are part of the continuing and deeply offensive pattern of misrepresentations that make for the clearest case for a stay. They are flagrant and repeated breaches of the fairness, good faith and frankness duties set out in *Thomlison*, *Tarantino*, *McVey*, *Tollman* and *Almrei*.

Application Record, Tab 6, supra, p 13, l. 25 – p. 14, l. 19

38. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 8**:

(a) The certified Record asserts (p. 48) that the allegedly key "corroborative" document, the 1980 Hassan Diab passport, bears at page 60 of the passport, stamps as follows:

> "- page 60: five stamps, three illegible and two stamps of the 'Lebanese security service' for exit by the Beirut international airport dated August 22, 1980, and October 8, 1981 (D3978 and D4742)" (emphasis added).

Application Record, Tab 3, p. 48

(b) The Record re-asserts (at p. 64) that the passport bore an October 8, 1981, exit stamp from Beirut:

> "… and the above-mentioned exit stamp of Lebanon dated October 8, 1981 (supra)."

Application Record, Tab 3, p. 64

(c) This is an important claim to make because October 8, 1981, is the date Ahmed Ben Mohammed was detained in Rome in possession of Hassan Diab's passport. The passport stamp allegedly enables the inculpatory "supposition" (Mr. Trevidic's own word) set out at p. 53 of the Record that Hassan Diab was with Ben Mohammed on the flight from Beirut to Rome: "which seems to signify that they were with him in the plane (cf the Lebanon exit stamp dated October 8, 1981, on the May 10, 1981, passport of Hassan Diab)."

Application Record, Tab 3, p. 53

(d) Document D3978 is cited explicitly by the Record as the documentary authority for the Record's assertion that the passport bore a Beirut exit stamp dated October 8, 1981. D3978 is the February 15, 2008, report of Philippe Chicheil, Commander, DST that deals with "Additional Information on other Lebanese passports Hassan Naim Diab used or that were in his possession." It is cogent evidence of the actual content of the documentary source cited by the Record. D3978 is an investigative report pursuant to rogatory commissions seeking information on the Copernic bombing. Those rogatory commissions were being conducted on February 15, 2008, at Mr. Trevidic's office: "We specify that those two rogatory commissions are being conduced today at the office of Marc

Trevidic, Vice-President, Trials, Tribunal de Grand Instance, Paris." D3978 actually states as follows:

> "Page 60: five stamps, three of which were illegible and two of which were Directorate General of Security of Lebanon exit stamps dated illegible 22, 1980 and illegible 8, 1981 (cf D3207)" (emphasis added).

Application Record, Tab 4, D3978, p. 5

(e) The wording of the assertion certified in the Record and the Statement in D3978 are almost exactly the same (with a most significant difference) and it is clear that the Record assertion comes directly from the statement in the investigative report. The juxtaposition of the statements below speaks for itself.

D3978 Investigative Report of DST Commander February 15, 2008	Record of the Case certified December 11, 2008
"Page 60: five stamps, three of which were illegible and two of which were Directorate General of Security of Lebanon exit stamps dated illegible 22, 1980, and illegible 8, 1981 (of D3207)" (emphasis added)	"– page 60: five stamps, three illegible and two stamps of the 'Lebanese security service' for exit by the Beirut international airport dated August 22, 1980, and October 8, 1981 (D3978 and D4742)" (emphasis added)

(f) What was "illegible" on February 15, 2008, some eight and one-half years after French authorities came into possession of the May, 1980, passport of Hassan Diab (it was received August 31, 1999; see p. 44, Record), has become "October" only ten months later in the Record certified by Mr. Trevidic. D3978 is cogent evidence that the Record misrepresents this important fact. In what has already been demonstrated to be a deeply troubling pattern of misrepresentation of significant matters in the Record, this important

misrepresentation further taints the Record. In what has already been demonstrated to constitute at best a complete failure of due diligence and at worst manipulation, this is yet another abusive element. How very much worse than the two misrepresentations in *Tarantino* and the misstatement of one witness in *Thomlison* is this pattern of multiple serious misrepresentations.

39. **Misrepresentation (Contradiction, Inaccuracy, Omission) Number 9**:

(a) In dealing with the evidence of Youcef El Khalil and Sana Salhab, the Record makes a number of misrepresentations and unsupported, pejorative statements.

(b) At the outset (p. 56), the Record asserts that El Khalil and his spouse Salhab were "heard as witnesses" in 1988 in Nice in a case, not involving PFLP or PFLP-SO, of threats coming from the "Arab political prisoners support group (CSPPA)". Cogent evidence strongly suggests, instead, that these two were detained and interrogated as suspects in the sending of threats, and Salhab was required to give a sample of her handwriting (obviously for comparison).

Application Record, Tab 3, pp. 56 & 59; Tab 4, D3933-51

(c) D3979/1 is the February 25, 2008, report of DST Commander Chicheil that recounts the detention and questioning of El Khalil and Salhab in Nice in 1988. D3979 makes plain that both El Khalil and Salhab were subjected to "garde à vue" from the 12th through to the 15th of March. "Garde à vue" (GAV) is the investigative detention and questioning of suspects for up to six days in terrorism cases. D3979 further specifies that this was "garde à vue" in relation to terrorist threats. GAV is often "hostile", "coercive" and "aggressive". D3933 – D3951 demonstrates that El Khalil was subjected to ten interrogations by three

different police officers for 19 ¾ hours over four days, day and night. D3916 - D3928 is the police record of interrogations of Salhab March 12 – 14, 1988 in Nice and is cogent evidence that Salhab was interrogated four times for a total of nine hours and twenty minutes over three days, day and night, by two different police officers. The chart below represents the interrogations set out in the Requesting State's own documents. The notion of voluntary witness statements is belied by such "garde à vue" detention and interrogation.

Application Record, Tab 4, D3979/1; D3933-51; D3916-28

The Investigation and Prosecution of Terrorist Suspects in France, supra, at pp. 8, 24-25

Youssel EL-KHALIL

Date: March 1988	Time	Interrogator	D Doc #
12th – 13th	23:00 – 02:00 (3h)	DESPRAT Alain	D 3933 (4p)
13th	14:20 – 17:20 22:00 – 23:30	ABERGEL David DESPRAT Alain	D 3937 (2p) D 3939 (2p)
14th 14th – 15th	01:30 – 02:30 08:00 – 09:00 09:00 – 10:40 13:40 – 14:30 16:45 – 17:15 20:30 – 00:30	DESPRAT Alain CORNET Fabrice CORNET Fabrice DESPRAT Alain DESPRAT Alain ABERGEL, David	D 3944 (2p) D 3945 D 3945 D 3947 (2p) D 3948 D 3949 (2p)
15th	01:45 – 04:20 11:00 – 11:45	ABERGEL David DESPRAT Alain	D 3950 (3p) D 3951

Sana El-KHALIL (Sana SALHAB)

D series	Date: March 1988	Time	Interrogator
D3916 (4 p.)	12th – 13th	22:30 – 03:00 (4h & 30m)	BLANCHET, J.M.
D3919 (2 p.)	13th	10:30 – 12:50 (2h & 20m)	BLANCHET, J.M.
D3920 (6 p.)	13th	17:15 – 19:15 (2 hours)	BETIRAC, H.
D3928	14th	15:00 – 15:30 (30 minutes)	BLANCHET, J.M.

(d) The Record (p. 68) asserts that El Khalil was a former member of the PFLP-SO: "She [Copty] invoked the said amendment for all the photographs showing former members of PFLP-SO, including that of Youcef El Khalil" (emphasis added). This pejorative characterization of El Khalil is not founded on any evidence whatsoever and is flatly contradicted by D3933 to D3951, the cited documentary authority for the Record's assertion about El Khalil. In his interrogations, El Khalil makes plain that while he was, during university, a "sympathizer" with PFLP (not PFLP-SO – a very different group), he was never a member and never took an active role for PFLP: "I don't belong to the PFLP or the PSP," … (the Progressive Socialist Party of Lebanon). Gratuitously (and falsely) characterizing El Khalil as PFLP-SO is damaging to Hassan Diab because they were university friends and associates. In an intelligence-based case, guilt by association is a useful tool.

Application Record, Tab 4, D3933-51

Application Record, Tab 3, p. 68

(e) The Record (p. 60) asserts that the 1988 Nice interrogations of El Khalil and Salhab "centred on Hassan Diab and other individuals of that type" (emphasis added). This is clearly untrue as the International Letters Rogatory set out in Appendix B to the Requesting State's November 12, 2008, *ex parte* Application and as D3933 – D3951 cogently prove. The Letters Rogatory state that in the 1988 threats case Hassan Diab's name "appeared incidentally" (emphasis added). The El Khalil interrogations set out in D3933 to D3951 make plain that Hassan Diab's name only came up because it was one of many (the "A's" through the "Z's") that appeared in El Khalil's address book, and because they had worked together at the Bank of Lebanon. The 1988 interrogations were in no way "centred on Hassan Diab" and this is a clear and important misrepresentation, calculated to paint Hassan Diab as a major prior suspect. The pejorative addition of the words certified "and other individuals of that type" is calculated to paint Hassan Diab with the same brush as the PFLP-SO leaders named in the 1988 El Khalil interrogations. This is either grossly negligent or deliberate misrepresentation. There is no evidentiary connection between Hassan Diab and the PFLP-SO or its leaders.

Application Record, Tab 1, Appendix B

Application Record, Tab 4, D3933-3951

(f) The Record asserts (p. 72) that "in Hassan Diab's circle, Youcef El Khalil included, were several persons of the dissident group led by Salim Abu Salem,

i.e. the PFLP-SO" (emphasis added). This is demonstrably false: there is no evidence whatsoever that a single person "in Hassan Diab's circle" was a PFLP-SO member. There is not only no evidence that Youcef El Khalil was such a member, the only evidence (D3933 – D3951) is that he wasn't even a member of the non-dissident PFLP, let alone the dissident PFLP-SO.

Application Record, Tab 4, D3933-3951

(g) The successive misrepresentations about the nature of the El Khalil/Salhab 1988 extended interrogations coupled with the explicit and prejudicial misrepresentations that El Khalil was a former PFLP-SO member (contrary to the evidence), that the interrogations were "centred on Hassan Diab", and that "several" persons in "Hassan Diab's circle" were PFLP-SO are yet a further continuation of the abusive pattern of prejudicial serious misrepresentation throughout the certified Record of the Case, justifying a stay for abuse of process. Misrepresentation abounds throughout this Record.

40. **Additional Misrepresentations by Omission**:

(a) Additional significant omissions from the certified Record compound and exacerbate the seriously abusive pattern of misrepresentations set out above. These omissions, like those particularized above, "bury" evidence inconveniently adverse to the interest of the Requesting State and contribute to the pervasive nature of the abuse in this case.

(b) The Record of the Case (pp. 32, 42) explicitly asserts that in 1980, shortly after the bomb blast (i.e. 30 years ago), the Requesting State obtained "one useable

palm print" from the "inner side of the window of the right rear door" of the car France alleges was used to store the Copernic explosive(s). Fingerprints, unlike unsourced intelligence, unlike handwriting opinion, are objectively verifiable scientific evidence. This "useable palm print" is therefore important evidence directly connected to the Copernic bombing. It is reasonably inconceivable that the Requesting State did not compare this print with the fingerprints and palm print of Hassan Diab, the man they have targeted with accusation and an extradition request. It is reasonably inconceivable that the Requesting State does not know the results of that comparison. It is reasonably inconceivable that Hassan Diab is connected to that crucial print, for the Record would surely have included any inculpatory comparison result. The Requesting State knows the result of the print comparison, knows that the palm print on the bombing storage car is not Hassan Diab's yet significantly omits that important scientific evidence because it is adverse to its case and extradition request.

Application Record, Tab 3, pp. 32 & 42

(c) In fact, Appendix 11 to the Record of the Case reveals that the prints of Hassan Diab were forwarded by U.S. Immigration authorities in 2007 to the Requesting State (a year before the Record was certified).

Application Record, Tab 3, p. 54 and Appendix 11

(d) Even more telling is the RCMP Disclosed Task Report on Project 2007-5009 dated November 21, 2008 (almost three weeks before the Record was certified). This Report is cogent evidence that the palm print lifted from the bombing car is not Hassan Diab's and that the Requesting State knows this. The Report reads:

> "On 2008-11-21 at 14:30 hrs. Cpl. Abdula Essak received a fax and a fax transmission confirmation form from S/Sgt Diane Gagnon which she had received from CROPS office.
>
> The fax is from Insp. Mellon to Sgt Harker of HQ. This fax requests that HQ communicate 4 points to the DCRI.
> …
> The second point is that the palm prints that were taken from Diab did not match those provided to the RCMP by the DST (DCRI)" (emphasis added).
>
> Application Record, Tab 7, RCMP Disclosed Task Report

(e) The Record of the Case certified December 11, 2008, and the Supplemental Record certified May 30, 2010, both omit mention of this important evidence. Highly relevant, material evidence (scientific evidence) is "buried", abusively, as in *Tollman*, *Tarantino* and *Thomlison*.

(f) In addition, during the Canadian extradition proceedings (in November, 2009), the learned extradition Judge received an *ex parte* request from the Requesting State for an order requiring Hassan Diab to provide "distal fingerprints" to be compared with the print left on the statement of "Alexander Panadriyu", the shoplifter at the INNO store in Paris who gave a statement to Paris police September 27, 1980 (pp. 27 – 29 Record). An unidentified distal fingerprint had been found on the page of the statement where "Alexander Panadriyu" had affixed his signature. This is crucially important because the Requesting State alleges that the "INNO Alexander Panadriyu" is the same "Alexander Panadriyu" who purchased the motorcycle and who rented a room at the Hotel Celtic. A legitimate positive comparison of the distal fingerprint on the Panadriyu statement with the fingerprint of Hassan Diab would scientifically connect the latter to the three Alexander Panadriyu's and the crime, creating a

prima facie case for extradition. The Requesting State explicitly regarded this comparison evidence as important to obtain. Indeed the Requesting State's *ex parte* Application asserts that "Information Will Be Obtained" from this distal fingerprint comparison and that will be "in the best interest of the administration of justice". Such information about the results of the distal fingerprint comparison between Hassan Diab and the unidentified distal print on "Alexander Panadriyu's" signature page was obviously important. It is reasonably inconceivable that the Requesting State, having come to the Canadian court, *ex parte*, seeking this important information, has not done the comparison that was the purpose of the order made by the extradition Judge. The Requesting State told the Canadian court that was why the distal fingerprint of Hassan Diab was sought – to be compared with the print on the Panadriyu statement. The only reasonable conclusion is that the distal fingerprint comparison with Hassan Diab was negative, that the print on the Panadriyu statement is not his. This is objective, scientific evidence helpful to Hassan Diab and not helpful to the interest of the Requesting State. The Requesting State, having come to the Superior Court for this relief, has failed to report back the result of the comparison and failed to include in the certified Supplemental Record any information about the comparison. Once again, the pattern of "burying" evidence unhelpful to the Requesting State is revealed, even evidence the Requesting State said to this Honourable Court it was important to obtain.

Application Record, Tab 8, Distal Fingerprint *ex parte* Application, November 20, 2009

Application Record, Tab 3, pp. 27-29

(g) The Requesting State has had sketches done purporting to represent a composite picture of the motorcycle purchaser, the INNO shoplifter and the car renter. The motorcycle purchaser and shoplifter presented themselves as Alexander Panadriyu, but so did the man who registered at the Hotel Celtic. Sketches were prepared of key men but not of the hotel registrant that the Requesting State says is the same Alexander Panadriyu who bought the motorcycle and shoplifted the pliers. This is an important omission where reliance is purported to be placed on composite sketches. The only reasonable explanation for this omission is that a sketch of a 40 – 45 year old man of medium build with short brown hair, no glasses and no moustache would not match that of a very thin 25 –30 year old with long blond hair and a thin moustache that went around his mouth to his chin. Such a visual distinction of the "Alexander Panadriyu's" would not be helpful to the assertion of the Requesting State that they were all one and the same man. That there would have been such a graphic distinction is proved by the evidence of Calabri, the prostitute, who viewed all composite sketches and excluded the "Panadriyu" sketches (the motorcycle buyer and shoplifter) as being the man at the hotel (p. 34 Record): only the Mathias (car renter) sketch bore a resemblance but even with that she noted differences. The Requesting State has thus conveniently omitted to have a sketch prepared of the important hotel occupant, yet purports to rely on sketches and the common identity of all three "Panadriyu's".

Application Record, Tab 3, pp. 20 – 21; 23, 34;
Appendices 5, 6, 7

(h) The Supplemental Record (SROC) certified May 31, 2010, (pp. 8 – 9) purports to recount an identification procedure of sorts in which Philippe Gruselle of the INNO store was asked to view a "photo album of 53 photographs" in which there were "33 photographs of 18 different men". Nine of the 33 male photographs (over 25 percent of the photos) were of Hassan Diab. Canadian law requires details of purported identification procedures to assess whether any evidentiary value whatsoever will attach to the process (i.e. whether it was a fair identification test). Additionally, the Requesting State has a duty to provide sufficient detail in the certified Record (and Appendices) to enable the extradition judge to perform his/her important judicial function of assessing whether the proferred material is "demonstrably able to be used" by a Canadian jury to convict (the test for sufficiency). The Supplemental Record asserts that "all of the above-mentioned photographs comprise Appendix II of this supplemental summary evidence". In fact Appendix II contains only 10 of the 53 photos on the photo board shown to Mr. Gruselle, the 9 Hassan Diab photos and a female photo. The other 43 "comparator" photos of this identification procedure are omitted, conspicuously. On June 25, 2010, counsel for Hassan Diab sought from the agent for the Requesting State the full photo board. The agent (AG Canada) replied the same day that "you are not entitled to disclosure of this material." Disclosure between the parties is different from disclosure in the certified Record. The issue is not at this point about disclosure between the parties. It is about a continuing pattern of omission of material evidence from

the Record and Supplemental Record in violation of the duties identified in *Thomlison*, *Tarantino*, *Tollma*n and *Almrie*.

Application Record, Tab 10, June 25, 2010, Correspondence

Application Record, Tab 9, SROC pp. 8 – 9; Appendix II

U.S. v. Ferras, supra, at paras 25, 58

U.S. v. Hislop [2008] B.C.J. No. 509 at paras 14, 15, 58, 59

U.S. v. Walker [2008] B.C.J. No. 349 at paras 1, 2, 4, 21, 22, 27, 30

U.S. v. Yang (2001), 56 O.R. (3d) 52

(i) These are, individually and cumulatively, significant additional omissions from the certified Record that compound and exacerbate the abusive pattern of misrepresentation that permeates the Record in the case at bar. They represent omission of material scientific identification evidence results that prove that, of all the people in the world who left the print in the bombing car and on "Alexander Panadriyu's" police statement, it was not Hassan Diab. This relevant and material evidence, helpful to Hassan Diab but not helpful to the Requesting State, has been edited out or "buried", contrary to the "full, frank and fair" picture that *Thomlison* requires. Additional relevant identification evidence has been omitted from this Record, a Record that expressly relies on sketches, alleged common identify and a purported identification procedure. Through negligence (lack of due diligence) or design (manipulation), the Record evinces a pattern markedly lacking in the candour demanded of a Requesting State.

41. **Sheer Argument**:

(a) The unanimous decision of the Supreme Court (Arbour, J.) in Cobb states that "The Requesting State is a party to judicial proceedings before a Canadian court and is subject to the application of rules and remedies that serve to control the conduct of parties who turn to the courts for assistance." The Extradition Act is the clearest Canadian rule governing extradition proceedings in this country. Section 33 of the Act mandates ("must include") that the Record include a summary of "evidence". Argument of the prosecutor or investigator, or his or her opinion, or editorial comment, is not "evidence" and must not form part of the certified Record.

U.S. v. Cobb, supra, para 35

Extradition Act, 1999, c. 18, s. 33

U.S. v. Walker, supra, para 17

(b) Even apart from the explicit mandate of Parliament that the Record of the Case contain only an "evidence" summary, there is a sound rationale for it being improper to attempt to include argument and prosecutorial advocacy or opinion in the certified Record. As set out in Tarantino, mere certification now affords the "evidence" so certified "a broad and powerful presumption of accuracy." As the unanimous Supreme Court in *Ferras* noted: "The current Act grounds threshold reliability in … certification by the requesting state …". In *Ferras*, the Court made clear that it was talking about … the "requirement" that … "evidence" be "put before the extradition judge". In other words, sheer certification leads to a presumption that the "evidence" so certified has threshold

reliability. Certification cannot make, and is not intended to make, the certifying official's "argument" or opinion or submissions reliable or admissible.

U.K. v. Tarantino, supra, para 37

U.S. v. Ferras, supra, para 29

(c) The exceptional Record of the Case herein is not only "replete" with multiple serious misrepresentations, is not only founded on unsourced, uncircumstanced, anonymous intelligence (untestable and so "unacceptable" in Canadian criminal proceedings), it is also improperly blighted by the inclusion, from beginning to end, of sheer abusive, self-serving argument of the investigator (the juge d'instruction, Mr. Trevidic) who also happens to be the certifying authority. Following the index and formal certification, the Record begins with an "Evidence Summary" page (p. 5) that sets out instead that "French judicial authorities concluded" that the PFLP-SO and Hassan Diab did it. It is irrelevant what French authorities have "concluded"; it is relevant whether the certified "evidence" is misrepresented or not, and whether it makes out a sufficient case for extradition committal or not. This page of argument also claims (incorrectly) that "the nature and precise origin of the evidence described" would be disclosed. All of the intelligence at the heart of this case remains unsourced and uncircumstanced – its "precise origin" is a mystery. More to the point, page 5 is almost entirely (apart from the opening sentence in each paragraph) inadmissible argument deliberately or negligently included in the certified Record to advance the case for the Requesting State.

Application Record, Tab 3, p. 5

(d) The offensive pattern of lacing the Record with gratuitous, improper and self-serving argument of the investigator may be seen at pages 43, 46, 52, 53, 54, 60, 61, 62, 63, 64-65, 67-68, 68-69, 70, 71-72 and Appendices 17 and 18 of the Record. This is not a case of an isolated argumentative remark in an otherwise unblemished Record. Rather, it is a case of inadmissible and offensively self-serving argument permeating a Record already replete with the serious abuses of multiple significant misrepresentations and "unacceptable" material. The argument commences at page 5 of the Record with the assertion of French "conclusions" of responsibility and ends in the final full two pages (pp. 71-72) of the Record with Mr. Trevidic's "corroboration" argument (or submissions). In between, argument is self-servingly advanced repeatedly, as if it was evidence, asserting, for example, "suppositions" about what the Ben Mohammed detention in Rome might have meant for "two attacks" that were "planned" in Europe; arguing (falsely) that El Khalil had failed to "clear" Hassan Diab or "exculpate" him; arguing the police opinion of the purported "resemblance" between Hassan Diab and selected composite sketches; advancing (improperly) a case that Heather Winne's view (not supported by the American court) of fraudulent marriage (he "had married her and had a child with her in order to obtain the green card") was somehow relevant to the case; arguing at length "necessary implications" of Hassan Diab's statement of his lost passport and what Mr. Trevidic argued was "generally" done by people who lose passports. None of this is "evidence" as s. 33(1) mandates. Sheer argument appears and re-appears throughout the Record, intermixed with multiple serious

misrepresentations and with unsourced intelligence to create a toxic Record of abuse heaped on abuse, the clearest case of abuse calling for a stay.

Application Record, Tab 3, pp. 5, 43, 46, 52, 53, 54, 60, 63, 64-65, 67-68, 68-69, 70, 71-72, Appendices 17 & 18

42. **Unacceptable Material**:

(a) As set out above (para 27), this Record is knitted together at its heart with unsourced, uncircumstanced, anonymous, untestable intelligence. This is material that could never be, to quote the Chief Justice of Canada, "demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty". It is material identified in *Trochym* by the Supreme Court as "unacceptable". This is the same view taken in the U.K., and by the Eminent Jurists' Panel. That the Record of the Case extensively combines such unacceptable material at its core with multiple serious misrepresentations and self-serving argument improperly posing as "evidence" constitutes a manifest abuse of Canadian extradition process and the fundamental requirement of a fair extradition hearing. There has never in Canada been a Record of the Case like this, nor one so abusive.

U.S. v. Ferras, supra, para 46

R. v. Trochym, supra, para 55

The Investigation and Prosecution of Terrorist Suspects in France (U.K.), supra, pp. 3-5, 18, 31-34, 38-44

Terrorist Investigations and the French Examining Magistrates System (U.K.), supra, pp. 9 – 11

Counter-Terrorism Policy and Human Rights (U.K.), supra, pp. 3-4, 88, 127

Report of the Eminent Jurists Panel, supra, pp. 78, 83-85, 88-89, 157, 161, 162, 166

Abdelrazik v. Canada [2009] F.C. 580 at paras 25, 53, 153, 155

Charkaoui v. Canada [2007] S.C.J. No. 9 at paras 65, 139

(b) If ever there was a question about proper sourcing of this "unacceptable" intelligence, that question is conclusively answered in the Letters Rogatory from Mr. Trevidic's Legal Office. Appendix B to the Affidavit of Cpl. Tran in support of the Requesting State's November 12, 2008, *ex parte* Application to the Ontario Superior Court is International Letters Rogatory additional material co-authored by Mr. Trevidic and two other French judges. They write in paragraph 13 that the "DST may, when it believes to have sufficiently reliable information, to prepare a report that can be used in judicial proceedings. Nevertheless, as for reasons of confidentiality and security of the sources, the Examining magistrate and different parties to the proceedings have not to know the origin of the information …" (emphasis added). The intelligence sources remain unknown and anonymous, just as the intelligence itself is uncircumstanced (what were the circumstances of the production of this "information"?; was torture or mistreatment involved?; is it sheer opinion of an anonymous analyst?). Even the French Judges don't know. The "unacceptability" of this material at the heart of Canadian extradition proceedings protected by *Charter* guarantees of fundamental justice, is manifest.

Application Record, Tab 1, Appendix B, para 13

(c) On the gravely troubling issue of whether torture may have been involved in the production of unsourced, uncircumstanced intelligence, Human Rights Watch, the respected international organization, on March 11, 2010, submitted its concerns about French use of intelligence as if it was evidence to the U.N. Committee Against Torture: "Human Rights Watch is concerned that French criminal procedures in terrorism cases lack sufficient safeguards to ensure that evidence obtained under torture or prohibited ill-treatment is not used at any stage of proceedings in France. Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations. Our research indicates that there is insufficient judicial verification of intelligence material in terrorism investigations" (emphasis added). Exactly such information is "at the heart" of this Record of the Case. As Human Rights Watch rightly states, the "Convention against Torture" (CAT) is the "clearest and most detailed expression of the international community's repudiation of such inhumane acts." International law is "unequivocal: torture and ill-treatment are prohibited absolutely, in all situations and at all times, and can never be justified." There is no reasonable assurance torture was not involved in the production of the "unacceptable" intelligence replete throughout this Record of the Case.

> Human Rights Watch Concerns and Recommendations on France (Submitted to the U.N. Committee Against Torture) March 11, 2010, p. 6
>
> "No Questions Asked" Intelligence Cooperation with Countries that Torture
> Human Rights Watch, June, 2010, p. 5

(d) The Appendix B Letters Rogatory co-authored by Mr. Trevidic state that the intelligence that was received pre-1999 (before the allegedly "very specific" intelligence) constituted "shreds of information" that "were however very vague and absolutely unusable…". Although "very vague" and "absolutely unusable", this intelligence remains at the heart of this Record, bootstrapping itself with the 1999 intelligence (falsely asserting fake-passports-to-enter France). Material even the Requesting State admits is "absolutely unusable" is nevertheless "used" in this offensive Record.

Application Record, Tab 1, Appendix B, para 9

(e) The unacceptable intelligence is not isolated or confined in the Record. Rather, it is spread throughout, anchored in the "Palestinian Lead" section of the Record (pp. 36-43) but permeating also the Ben Mohammed material (pp. 44, 48-49), the Souhaila Sayeh "information" (pp. 50, 52), the Antwerp "suppositions" (pp. 52-53), the passport evidence (pp. 48, 64, 71), the Faten Faour assertions (pp. 65 – 66) and most of the Record's assertions about Hassan Diab (pp. 37, 41, 42, 43, 53, 60).

Application Record, Tab 3, pp. 36-44, 48-49, 50, 52-53, 64-66, 71

(f) This unacceptable material is replete throughout the Record and combines with multiple seriously abusive misrepresentations and with improper argument to form the clearest case for a stay as an abuse of process and violation of fundamental justice.

43. **Handwriting: A Checkered History**:

(a) The agent for the Requesting State, the Attorney General of Canada, has argued that it is at liberty to withdraw material unilaterally from the Record and thereby render defence evidence (of its manifest unreliability) inadmissible. That does not, however, mean that on an application to stay based on the conduct of the Requesting State, the history of Requesting State assertions about the withdrawn material may not be referenced to demonstrate a continuing pattern of conduct.

(b) The Record of the Case (pp. 55-56, Appendices 12 and 13) explicitly asserted that it was "preferable" to obtain "two analyses", "rather than carrying out a single analysis …". The Record claimed that "the quality of experts" had been ensured. The Record stated that "specimens of his [Hassan Diab's] 'spontaneous handwriting'" had been obtained and given to two "quality" experts who opined, respectively, that Hassan Diab had probably and conclusively printed the hotel registration card. This handwriting opinion evidence was certified and offered as reliable from December 11, 2008, until May, 2010, when it was withdrawn entirely in the face of admissible defence evidence detailing the "appalling" unreliability of the French opinion evidence. In its place (and at the last minute, causing the collapse of the scheduled June extradition hearing) was substituted a single opinion of a third French "expert", now offered as reliable just as were the two predecessors. There was no obligation on the Requesting State to withdraw the first two opinions – the third opinion could have been offered as a supplement to the existing opinions. The complete withdrawal of the opinion evidence of the first two "experts" can only

be interpreted reasonably as an acknowledgement by the Requesting State of manifest unreliability of opinion evidence it had offered as reliable for a year and a half.

Application Record, Tab 3, pp. 55-56; Appendices 12 & 13

(c) In particular, the Requesting State was directed more than once by the learned extradition judge to "report" to the court what it intended to do in the face of the body of defence expert evidence and with a lengthy extradition hearing set for June, 2010. For months the Requesting State failed to report as directed, even though it knew it had occasioned a new report to be undertaken. Just as the Requesting State failed to be "duly diligent" about the proffered reliability of the first two reports (and the specimens carelessly asserted to have come from Hassan Diab), the Requesting State failed to be "duly diligent' in responding in a frank and timely way to the court's orders that it "report" to the court. While not itself constituting an abuse of process, this conduct of the Requesting State – the "failure" to advise the court in a timely way, as directed, of the possibility of new handwriting opinion evidence – caused "a degree of frustration" in the extradition judge. Clearly the Requesting State had not cooperated with the express direction of the court. Its conduct caused the second collapse of scheduled (and lengthy) extradition proceedings. This is consistent with and part of the pattern of conduct set out in detail in paragraphs 28 through 42, a pattern of repeated serious misrepresentation, of the use of "unacceptable" material at the heart of the case, of reliance on self-serving and impermissible argument instead of mandated "evidence", a pattern that breaches judicially

recognized duties on a Requesting State and that represents a complete failure of due diligence at best and offensive manipulation at the worst, a pattern that manifests the clearest case for a stay.

France v. Diab, supra, para 15

44. Conclusion: Relief Sought

(a) Hassan Diab applies to this Honourable Court for a stay of proceedings owing to serious, multiple and flagrant breaches of fundamental justice and abuses of process. The remedy sought is directly connected to the breaches/abuses, to their seriousness and multiplicity, to their compromising a fair extradition hearing and to their constituting an assault on the integrity of the court's extradition process. The multiple cumulative breaches and abuses violate those principles of fundamental justice underlying the community's sense of fair play and decency and disentitle the Requesting State from pursuing extradition based on the abusive Record.

U.K. v. Tarantino, supra, at paras 34-59

U.S. v. Tollman, supra, at paras 1-13, 18-21, 84, 145, 149

U.S. v. Cobb, supra, at paras 10, 12-14, 22-39, 43-52

U.S. v. Shulman, supra, at paras 2, 8, 33, 45-46, 50, 61

U.S. v. Ferras, supra, at paras 12-14, 41, 60

R. v. Young, supra, at paras 88, 93, 100

R. v. Jewitt, supra, at paras 25, 56

R. v. Keyowski, supra, at para 3

R. v. Conway, supra, at paras 7-11

R. v. O'Connor, supra, at paras 58-71, 73, 78

(b) This is an exceptional case in which the Record of the Case is quite unlike any previously seen in Canadian extradition jurisprudence. Founded on unsourced, uncircumstanced intelligence and replete with multiple material misrepresentations we well as improper and self-serving argument, the Record is an affront to the duties, recognized repeatedly by Canadian judges, of "fairness and good faith", of "utmost diligence and care" for accuracy, of not "misleading" and/or "burying" relevant information, of "full, frank and fair" presentation of the evidence. The Record certified by the Requesting State makes a mockery of the "foundation document" status the *Extradition Act* confers on it and the presumption of threshold reliability – based on trust and good faith – accorded it. Cogent evidence emanating directly from the Requesting State itself proves that this trust and good faith is misplaced in respect of this Record. It should be "the fibre with which the safety net of assurances" as to accuracy and availability is woven". Instead it is a frayed quilt of misrepresentations, inaccuracies, omissions, "buried" facts, unacceptable intelligence and improper, self-serving argument that strikes at the heart of the integrity of the Canadian "certified Record" extradition process and the critical good faith on which it crucially depends to work as intended. "One of the most important fundamental purposes of extradition proceedings" is "the protection of the liberty of the individual". That liberty, and its protection, are here at the mercy of a fatally flawed, misrepresentative, manifestly unfair Record.

U.S. v. Thomlison, supra, at paras 18-21, 28-32

U.K. v. Tarantino, supra, at paras 34-42

U.S. v. Tollman, supra, at paras 10, 140

Re Almrei, supra, at paras 480, 500-502

(c) This is the clearest case for a stay. Mere excision of parts of the Record will not suffice because so very much of the Record is tainted. This is not a case like *Thomlison* where the isolated evidence of one witness only was misrepresented. This is not even a case like *Tarantino* (where a stay was ordered) based on "two examples of serious misinformation" in the Record of the Case. The significant misrepresentations in the case at bar are far more numerous than in any of the decided cases and they are not isolated to affect only one witness or matter. Rather, the misrepresentations are, to use Justice Rosenberg's word, "replete" throughout the Record, affecting many highly material areas and witnesses:

- the misrepresentations affect the 'false-passport-to-enter-France' claims essential to the entire offence *modus operandi* asserted by the Record;
- they affect directly the passport evidence (Spanish stamps) offered as "corroboration" and the evidence (and "suppositions") concerning Ben Mohammed;
- they affect starkly the assertions about Antwerp as a similar fact "analogy";
- they directly reflect on Record claims about Souhaila Sayeh;

- they directly affect the highly relevant train travel assertion to and from Spain;
- they directly impact the Record's claims that Hassan Diab was in 1999 already known as a PFLP-SO terrorist;
- they contradict assertions in the Record about the key revealed name of the motorcycle buyer/bomber, and his accomplice;
- they infect the Record's representation of the Nawal Copty hearing in the U.S. and her purported connection to a Zaki Hello;
- they directly affect the Record's claim of an October 8, 1981, Lebanese passport stamp;
- they repeatedly taint the Record's representation of the El Khalil material;
- they affect scientific evidence (important fingerprint test results) and purported identification evidence (no photospread; no sketch of the hotel registrant).

U.S. v. Thomlison, supra, at paras 21, 31-32

U.K. v. Tarantino, supra, at paras 47-59

U.S. v. Tollman, supra, at paras 10, 140, 145, 149

(d) In addition, these multiple material misrepresentations are compounded by extensive resort to unsourced, uncircumstanced, "unacceptable" intelligence and to impermissible sheer argument/submissions by the certifying official. The intelligence and argument are, like the many serious misrepresentations, also "replete" throughout the Record. The patient here cannot be saved by surgical

amputation. The abuses are so many and run so deeply through the Record that a stay is the only appropriate remedy. The breaches of the good faith, fairness and candour duties are so profound and repeated, they cumulatively constitute such a pattern, as to represent a complete failure of due diligence at least or abusive manipulation at worst. In either case, the result is an unfair Record, an unfair extradition hearing, an affront to the integrity of Canadian extradition process, serious prejudice to the Court's ability to conduct a just and meaningful committal inquiry as directed by *Ferras*, the disentitlement of the Requesting State to rely on this abusive Record to pursue extradition and the denial of liberty of a Canadian citizen. This Honourable Court is fully and unquestionably empowered to order a stay to prevent these serious abuses and to protect the integrity of the Court and its process, and this is the clearest case in which to do so.

All of which is respectfully submitted.

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