COURT OF APPEAL FOR ONTARIO

Court File No. C53812

B E T W E E N

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

Respondent

and

HASSAN NAIM DIAB

Appellant

Court File No. C55441

B E T W E E N

THE MINISTER OF JUSTICE OF CANADA

Respondent

and

HASSAN NAIM DIAB

Applicant

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I. STATEMENT OF THE CASE

1. The Republic of France seeks the extradition of the Appellant/Applicant, Dr. Hassan Diab, for offences corresponding to the Canadian crimes of murder, attempted murder, and mischief to property. The allegations arise out of the 1980 bombing of a Synagogue in Paris.

2. Dr. Diab was committed for surrender by the Honourable Justice Maranger on June 6, 2011, and was ordered surrendered by the Minister of Justice on April 4, 2012. Dr. Diab appeals against the order of committal, and seeks judicial review of the Minister's surrender decision.

II. SUMMARY OF THE FACTS

A. THE RUE COPERNIC BOMBING

3. On October 3, 1980, at 6:30 pm a bomb exploded outside the Rue Copernic Synagogue killing four.[1] Forensic analysis showed that the explosion originated from a motorcycle parked nearby.[2] Police traced the motorcycle back to a store who sold it on September 23 to Alexander Panadriyu, a Cypriot who was staying at the Hotel Celtic. Panadriyu had identified himself with his passport.[3] Inquiries with INTERPOL later showed that the passport was fake. [4]

4. Hotel Celtic records confirmed that Panadriyu had been a guest. Staff produced a guest registration card[5] where Panadriyu had printed five words: "PANADRIYU", "ALEXANDER", "LARNACA", "CYPRUS" and "technician". Fingerprinting of the card produced no results.[6]

5. In the course of their investigations, the police discovered that Alexander Panadriyu had been detained by police on September 27th for stealing a pair of pliers, but no criminal complaint was filed. Prior to being released, Panadriyu signed a police report, but was not photographed.[7]

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[1] Reasons for Committal of Maranger J., Dated January 15, 2009 ["Reasons for Committal"] **Appeal Book – Committal ["ABC"], Vol. 1, Tab 4, para. 20**.
[2] Translated Record of the Case ["ROC"], **ABC, Vol. 13, Tab 87-D, p. 3638.**
[3] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3651.**
[4] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3661-3662.**
[5] This document appears at various points in the record. One legible reproduction can be found at **ABC, Vol. 11, Tab 74, p. 3111.**
[6] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3653-3654.**

B. THE "PALESTINIAN LEAD"

6. By the end of 1980, traditional police work was overtaken by an investigation fuelled by intelligence reports provided to the French by foreign sources. On December 4, 1980, "German authorities" reported that the bombers were Palestinians, and that they had left for Beirut following the explosion.[8] French officials also noted the report of journalist Laurent Greilsamer, who indicated that a confidential Israeli source had told him that the bombers were Palestinian.[9]

7. A judicial investigation was opened into the bombing on August 21, 1981.[10] On November 12, 1981, the *juge* received information relayed by the German *Bundeskriminalamt* (BKA – the federal police force), which indicated, without providing a source, that there were five Palestinian bombers, one of whom was a Lebanese named Hassan.[11]

8. The investigating magistrate (*juge d'instruction*) wrote to the French Prime Minister on December 8th, requesting all information respecting the bombing held by French intelligence. The Prime Minister indicated that relevant materials would be reviewed by a committee of Ministers who would decide what could be disclosed, possibly subject to editing or redaction.[12]

9. On July 16, 1982 the *juge* was provided with an undated file from the *Direction de la Surveillance du Territoire* (DST) entitled "Information obtained from intelligence or foreign security services concerning the Rue Copernic attack". The report indicated that the motorcycle purchaser was named Hassan, and that he worked on behalf of Popular Front for the Liberation of Palestine – Special Operations (PFLP-SO), a splinter faction of the PFLP.[13]

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[7] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3658-3659.** A copy of the signed police report can be found at **ABC, Vol. 11, Tab 74, p. 3113.**
[8] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3667.**
[9] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3668.**
[10] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3665.**
[11] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3668.**
[12] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3668.**
[13] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3669.**

C. THE 1999 RE-LAUNCH OF THE INVESTIGATION

10. The French investigation was dormant for nearly 20 years. On April 19, 1999, the DST passed on a report to the *juge* relaying "very specific information" from an unnamed source on the identity of ten people involved in the bombing;[14] the bomber was identified as Hassan Diab.[15]

11. On August 31, 1999 the DST informed the *juge* that Italian authorities had detained Ahmed Ben Mohamed, an alleged PFLO-SO member, while trying to pass through customs in 1981. Authorities found a number of travel documents on him, including a Lebanese passport in the name of Hassan Diab.[16] An inquiry with Lebanese officials confirmed that the passport was authentic,[17] and a review of the passport showed Spanish entry and exit stamps dated September 20, 1980 and October 7, 1980, respectively.[18] Stamps from France were not present.

D. HANDWRITING COMPARISONS

12. Eight years after receiving the DST report, the *juge* issued letters rogatory to the U.S. requesting Diab's records from Syracuse University, which were to be compared against the writing on the hotel card.[19] Mme. Marganne and Mme. Barbe-Prot were assigned to this task.

13. Mme. Barbe-Prot conducted a preliminary evaluation of the two sets of writing, concluding that "the writings on the questioned document are perfectly compatible with the handwritten notes of Hassan Diab".[20] While the documents obtained from America contain varying writing styles, she concluded that this meant that the author could vary how he wrote.[21]

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[14] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3672.**
[15] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3673.**
[16] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3675-3676.** The passport can be found in the ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3762-3772.**
[17] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3677.**
[18] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3678-3679.**
[19] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3685.**
[20] Expert Report of Dominique Barbe-Prot ["Barbe-Prot Report"], **ABC, Vol. 2, Tab 9-L, p. 485.**
[21] Barbe-Prot Report, *supra*, **ABC, Vol. 2, Tab 9-L, pp. 483-484.**

14. Barbe-Prot also recognized that there were characteristics in the hotel card that found no equivalent in the U.S. records. However, she indicated these were writing traits that were easily changed, and dismissed the differences. On the other hand, she identified several similarities in how particular letters were formed,[22] leading her to conclude that common authorship between the hotel card and the university records was a "probable hypothesis".[23]

15. Mme. Marganne also noted differences between the card and the U.S. materials, but also indicated there were many similarities. She ultimately concluded that "Hassan Diab is the writer of the questioned document" and that the differences were the result of disguised writing.[24]

E. THE EXTRADITION REQUEST

16. In November 2008, based on the unsourced & uncircumstanced intelligence, and the handwriting reports, French authorities requested the surrender of Dr. Diab, then a sociology professor at Carleton and the University of Ottawa. In support of their request, the *juge d'instruction* filed a Record of the Case (ROC) containing a narrative of the police investigation, including the intelligence passed on to him by the DST, supplemented by his own hypotheses.

17. On January 15, 2009, the Minister of Justice issued an Authority to Proceed.[25]

F. THE COMMITTAL HEARING

18. Justice Maranger aptly stated that "this was not a straightforward or conventional extradition."[26] Its unusual character made it "anything but expeditious or summary."[27] Spanning two years, several factors lengthened the proceedings, the most significant being the use of intelligence in support of the surrender request and challenges to the handwriting comparisons.

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[22] Barbe-Prot Report, *supra*, **ABC, Vol. 2, Tab 9-L, pp. 488-490.**
[23] Barbe-Prot Report, *supra*, **ABC, Vol. 2, Tab 9-L, pp. 490-492.**
[24] Expert Report of Evelyne Marganne ["Marganne Report"], **ABC, Vol. 2, Tab 9-M, p. 506.**
[25] Authority to Proceed, Dated January 15, 2009, **ABC, Vol. 1, Tab 2.**
[26] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 16.**
[27] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 15.**

i) Challenge to the use of Intelligence as Evidence

19. The case for committal was based largely on intelligence reports from unnamed foreign entities, who in turn obtained information from unknown sources in unknown circumstances. In November 2009 Dr. Diab sought leave to adduce a body of evidence demonstrating that unsourced and uncircumstanced intelligence could not be used as evidence in legal proceedings.

20. The thrust of the proposed evidence was that there is no way to evaluate the reliability of an assertion without any information about where the information comes from, or the circumstances in which it is obtained.[28] Dr. Diab's position was that such material must be excised from a ROC pursuant to the Supreme Court of Canada's decision in *Ferras*.[29]

21. Leave to adduce this evidence was litigated over 11 days. The Court permitted some of the evidence to be filed, including the testimony of Prof. Kent Roach.[30] After the Court's ruling, the Attorney General of Canada sought and obtained an adjournment.[31]

22. Professor Roach testified when the hearing recommenced nearly a year later. He testified that unsourced and uncircumstanced intelligence, like that contained in the ROC, is impervious to challenge.[32] It represented the opinion of unknown persons, working from information of unknown origin, quality, and reliability.[33] He testified that the processes by which intelligence materials are analyzed often leads to confirmation bias and tunnel vision,[34] and that the ROC

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[28] Thomas A. Quiggen, "Intelligence as Evidence: Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab", **ABC, Vol. 5, Tab 22, pp. 1327, 1341-1343**; Proposed Evidence of Prof. Kent Roach ["Roach Report"], **ABC, Vol. 5, Tab 21, p. 1301.**
[29] *United States of America v. Ferras,*[2006] 2 S.C.R. 77, **Appellant's Book of Authorities ["App. Auth."], Tab 1**.
[30] Ruling re: Application to Present Evidence, **Transcript, Vol. 6.**
[31] Ruling re: Application to Present Evidence, **Transcript, Vol. 6.**
[32] Evidence of Kent Roach ["Roach Evidence"], **Transcript, Vol. 12, p. 821 l. 28 – p. 824 l. 9.**
[33] Roach Evidence, *supra*, **Transcript, Vol. 12, p. 788 l. 29 – p. 791 l. 15.**
[34] Roach Evidence, *supra*, **Transcript, Vol. 12, p. 811 l. 15 – p. 813 l. 27.**

exhibited indicia of this.[35] In his view, absent the ability to test or assess the reliability of such materials, it would be profoundly unsafe to rely on it in any legal proceeding.[36]

23. After Professor Roach's evidence was adduced, but prior to any ruling on the exclusion of the intelligence in the ROC, the Attorney General of Canada disavowed any reliance on it.[37]

ii) The Handwriting Evidence

24. The handwriting reports of Marganne and Barbe-Prot were crucial for France's case for committal. With them, Dr. Diab was linked to the hotel card, which in turn was linked to Panadriyu, the purchase of the motorcycle, and ultimately the bombing on Rue Copernic.

25. Both Marganne and Barbe-Prot strongly linked the author of the Hotel Celtic card with the author of the university paperwork. The experts' instructions stated that Diab was the author of the university documents, a premise that they accepted,[38] but which was proven to be false.

26. At the same time that Dr. Diab sought to adduce the evidence of Prof. Roach, he also sought leave to introduce the evidence of four of the world's leading forensic document examiners: Dan Purdy, Brian Lindblom, Robert Radley, and John Paul Osborn.

27. Each of these experts examined the "known" exemplars relied upon by Marganne and Barbe-Prot to match Diab to the hotel card,[39] and each concluded that the collection of

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[35] Roach Evidence, *supra*, **Transcript, Vol. 13, p. 921 l. 25 – p. 922 l. 7.**
[36] Roach Evidence, *supra*, **Transcript, Vol. 13, p. 910 ll. 7-18, p. 967 ll. 3-25.**
[37] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 146-148.** The version of the ROC contained at Tab 87-D of the Appeal Book has boxed in the portions of the materials that were disavowed.
[38] Barbe-Prot Report, *supra*, **ABC, Vol. 2, Tab 9-L, p. 480**; Marganne Report, *supra*, **ABC, Vol. 2, Tab 9-M, p. 502.**
[39] Report of Brian Lindblom Respecting Nawal Copty ["Lindblom Report re: Copy"], **ABC Vol. 3, Tab 15-A**; Report of Daniel Purdy Report Respecting Nawal Copty ["Purdy Report re; Copty"], **ABC, Vol. 3, Tab 16-A**; Report of Robert W. Radley Respecting Nawal Copty ["Radley Report re: Copty"], **ABC, Vol. 3, Tab 17-A**; Report of John Paul Osborn Respecting Nawal Copty ["Osborn Report re: Copty"], **ABC Vol. 4, Tab 18-A.**

documents were written by more than one author.[40] Each expert concluded that Nawal Copty, Dr. Diab's ex-wife, was the author of many of the documents that were "matched" to the card.[41]

28. Each expert then provided a "technical review" of the reports of Marganne and Barbe-Prot. Brian Lindblom described the nature of a technical review in the following terms:

> [A] technical review involves an evaluation of another forensic scientist's… examination methodologies and the resulting determinations; the adequacy of technical notes; verification of noted observations; applicability of references; reliable application of proper methodology and proper use of equipment; the assessment of the adequacy or limitations of the material available for examination; and of whether the conclusions are supported by the observations noted or recorded during the examination; as well as whether all pertinent examinations were performed.[42]

29. As Mr. Radley noted, "The general methodology adopted by forensic scientists specializing in the examination of handwriting documents has been relatively well established over the last century."[43] Marganne and Barbe-Prot failed to adhere to this accepted method.

30. The most obvious failing related to the multiple authors of the exemplar materials. While their instructions indicated that Diab was the sole author, it was a methodological error to simply accept this[44] and attempt to explain away the distinct groups of writing by speculating about the author's ability to change his writing,[45] rather than challenge the *juge's* stated premise.

31. The experts noted further methodological flaws, including:

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[40] Lindblom report re: Copty, *supra*, **ABC Vol. 3, Tab 15-A, pp. 660-661**; Radley Report re: Copty, *supra*, **ABC, Vol. 3, Tab 17-A, paras. 11-24**; Osborn Report re: Copty, *supra*, **ABC Vol. 4, Tab 18-A, pp. 954-955**; Note that Mr. Purdy appears only to have been provided the "Diab" documents that were suspected of being written by Nawal Copty. As such, he did not provide an opinion respecting the other documents.

[41] Lindblom report re: Copty, *supra*, **ABC vol. 3, Tab 15-A, pp. 662-663**; Purdy Report re: Copty, *supra*, **ABC, Vol. 3, Tab 16-A, p. 769**; Radley Report re: Copty, *supra*, **ABC, Vol. 3, Tab 17-A, paras. 28-31**; Osborn Report re: Copty, *supra*, **ABC Vol. 4, Tab 18-A, pp. 954-955.**

[42] Report of Brian Lindblom Respecting Evelyn Marganne ["Lindblom Report re: Marganne"], **ABC, Vol. 3, Tab 15-C, pp. 725-726.**

[43] Report of Robert W. Radley Respecting Evelyn Marganne ["Radley Report re: Marganne"], **ABC, vol. 3, Tab 17-B, para. 3.**

[44] Radley Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 17-B, para. 18**; Report of Daniel Purdy Respecting Dominique Barbe-Prot ["Purdy report re: Barbe-Prot"], **ABC, Vol. 3, Tab 16-C, pp. 825-826.**

[45] Lindblom report re: Marganne, *supra*, **ABC, Vol. 3, Tab 15-C, pp. 729-730**; Radley Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 17-B, para. 119.**

- Identifying writing characteristics between the exemplars and the hotel card as similar that were either basic forms common to many people (and thus of little identification value) or were in fact differences, while ignoring significant structural differences;[46]
- Dismissing identified differences as insignificant without explaining why;[47]
- Asserting that the writings displayed significant similarities without indicating what those similarities were or providing an analysis of the structure of the writing in question;[48]
- Making comparisons between writings that cannot validly be compared, such as between the "P" in "Panadriyu" on the hotel card with a "D" in a signature for Diab.[49]
- Rendering a conclusion with a level of certainty that in principle cannot be reached given the quality of the materials worked with.[50]

32. The Attorney General opposed the introduction of these reports. However, in his ruling permitting the evidence of Prof. Roach to be called, Maranger J. also admitted the expert reports.[51] Following the Court's ruling, but before any testimony by the authors, the Attorney General informed the court that the Republic of France was considering filing a supplementary ROC, and sought an adjournment. On December 18, 2009, Maranger J. granted the request.[52]

33. The parties returned on February 8, 2010 to provide the court with an update. Counsel for the Attorney General indicated that he had no news to provide at that time, and suggested a further reporting date be set.[53] Dr. Diab disagreed, urging the Court to set a firm hearing date.[54]

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[46] Lindblom report re: Marganne, *supra*, **ABC, Vol. 3, Tab 15-C, pp. 7-14**; Report of Daniel Purdy Respecting Evelyn Marganne ["Purdy Report re: Marganne"], **ABC, Vol. 3, Tab 16-B, pp. 805-806**; Radley Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 17-B, paras. 55, 80**; Report of John Paul Osborn Respecting Evelyn Marganne ["Osborn report re: Marganne"], **ABC, Vol. 4, Tab 18-B, p. 1000**; Purdy Report re: Barbe-Prot, *supra*, **ABC, Vol. 3, Tab 16-C, p. 830**; Report of Robery W. Radley Respecting Dominique Barbe-Prot ["Radley Report re: Barbe-Prot"], **ABC, Vol. 3, Tab 17-C, paras. 49, 57**; Report of John Paul Osborn Respecting Dominique Barbe-Prot ["Osborn Report re: Barbe-Prot"], **ABC, Vol. 4, Tab 18-C, pp. 1042-1043**; Report of Brian Lidblom Respecting Dominique Barbe-Prot ["Lindblom Report re: Barbe-Prot"], **ABC, Vol. 3, Tab 15-D, pp. 754-755**;
[47] Radley Report re: Barbe-Prot, *supra*, **ABC, Vol. 3, Tab 17-C, paras. 62-63.**
[48] Purdy Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 16-B, p. 805.**
[49] Lindblom report re: Marganne, *supra*, **ABC, Vol. 3, Tab 15-C, p. 736**; Purdy Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 16-B, p. 806**; Radley Report re: Marganne, *supra*, **ABC, Vol. 3, Tab 17-B, paras. 78-79**; Osborn report re: Marganne, *supra*, **ABC, Vol. 4, Tab 18-B, p. 1001.**
[50] Lindblom Report re: Barbe-Prot, *supra*, **ABC Vol. 3, Tab 15-D, p. 750.**
[51] Ruling re: Application to Present Evidence, **Transcript, Vol. 6.**
[52] Ruling re: Application to Adjourn, **Transcript, vol. 7.**
[53] **Transcript, Vol. 8, p. 530 ll. 9-22.**
[54] **Transcript, Vol. 8, p. 534 l. 24 – 536 l. 28.**

34. The Court set June 14th for the hearing of the defence evidence, and set an interim date of March 29th for France to provide an update on its intentions.[55] When the parties returned, counsel for the Attorney General again indicated that he had no new information to provide.[56]

35. On May 10th the parties met with Maranger J. in chambers, and the intentions the France were disclosed: The Attorney General disavowed reliance on the Marganne and Barbe-Prot reports. Instead, a supplementary ROC was to be filed, which included a new handwriting report by Anne Bisotti.[57] This precipitated the collapse of the scheduled hearing dates.[58]

G. THE BISOTTI REPORT

36. On December 15, 2009 – more than a month prior to the first interim reporting date – the *juge* commissioned Mme. Anne Bisotti to examine the Hotel card and the police report bearing Panadriyu's signature, and indicate whether Diab "is or may be" the author.[59]

37. To perform this comparison, Bisotti was provided photocopied documents which the *juge* indicated were written by Diab.[60] On January 5, 2010, Bisotti indicated that the photocopies were inadequate and requested the originals. A second commission directed Mme. Bisotti to receive original materials from Dr. Diab's immigration file, from which she could select adequate exemplars, scan them, and return the originals to the US Embassy. This commission also required her to examine, in addition to the words on the hotel card, the date written on it, on the basis of an assertion by the *juge* that Panadriyu would have written it as well.[61]

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[55] **Transcript, Vol. 8, p. 544 ll. 19-29**; **Transcript vol. 8A, p. 2 l. 4 – p. 3 l. 31.**
[56] **Transcript, Vol. 8B, p. 4 ll. 14-30, p. 12 l. 6 – p. 15 l. 19.**
[57] The events of the in-chambers meeting were placed on the record when the parties next appeared in court on May 17, 2010. See **Transcript, Vol. 9, p. 588 l. 14 – p. 589 l. 14, p. 591 ll. 6-31, p. 599 l. 31 – p. 605 l. 19.**
[58] Mr. Purdy was not available to review the Bisotti report, and did not participate further in the litigation.
[59] Report of Anne Bisotti ["Bisotti Report"], **ABC, Vol. 11, tab 74, p. 3096.**
[60] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3096.**
[61] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3099.**

38. Mme. Bisotti received the documents from the embassy, and scanned the three documents that she was originally provided as photocopies, as well as a number of additional ones. The scanned materials were authored during the period 1994–2003.[62]

39. Mme. Bisotti issued a report in which she concluded that there existed a "strong presumption" that Dr. Diab wrote the five words on the hotel card; a "presumption" that Dr. Diab wrote the signature at the bottom of the police record; and a "weak presumption" that Dr. Diab authored the date on the hotel card.[63]

40. Mme. Bisotti began her report by indicating that she would apply the methodology prescribed by the Expert Network of Forensic Handwriting Examiners (ENFHEX).[64] She then proceeded to describe principles she believed to be applicable to forensic document examination. She explained that examiners look at the organization of words on a page and the movements that authors use to produce them. Many of these movements are subconscious and can have varying identifying power depending on how common they are amongst writers.[65] She wrote:

> In fact, only when many personal characteristics are identified in both the questioned writing and the exemplar, and especially when the number of these graphic similarities is much greater than the number of dissimilarities found there, will it be possible to identify the writer of the exemplar as the author of a questioned document.[66]

41. Prior to commencing her examination, Mme. Bisotti considered the time lapse between the questioned documents from 1980 and the exemplar documents. She noted that Dr. Diab would have been 27 in 1980, and therefore he "had reached his optimal level of graphic performance." Absent a subsequent accident, she was of the view that "his writing and his

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[62] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3058-3061.**
[63] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3084.**
[64] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3062.** 11. *See also* ENFHEX, "Appendix 3 – Overview Procedure for Handwriting Comparisons", **ABC, Vol. 10, Tab 65.**
[65] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3062-3063.**
[66] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3063.**

signature would not have changed much" and "at most, the passing years would have resulted only in a smoother and more definite stroke."[67] As such, a comparison could be performed.[68]

42. Bisotti began her comparison by examining the sub-set of documents originally identified by the *juge d'instruction* as originating from Diab. From these, she identified 62 characteristics (76 including variations) with some identification value, stating that two were highly distinct: #5 – significant variation in slant; and #8 – twisting, angular breaks/indentations.[69]

43. She then looked at the other documents obtained from the US to see whether these characteristics could be found. The more personalized characteristics were present, and she detected no differences. She concluded that all of the documents were written by Dr. Diab.[70]

44. She then examined the signatures of Dr. Diab in the sub-set of documents. She described their structure, including an ending flourish following the "b". She again compared these to the signatures found in the other exemplars, and again concluded that there was a common author.[71]

45. Bisotti then examined three different sets of questioned writings: the five printed words on the hotel card; the date on the hotel card; and the signature on the police report. With respect to the printed words, she used the 76 characteristics identified in the sub-set of exemplars, and looked to see whether they could be found in the five printed words on the card. She concluded that of the 76 characteristics, 36 could be identified in the hotel card writing.[72] She also identified seven differences in the writing. Immediately after listing the differences, she stated:

> These differences are thus actually natural variations of the form of certain characters and therefore do not constitute dissimilarities that would potentially exclude the writer of the exemplar from

[67] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3065.**
[68] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3066.**
[69] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3067-3070.**
[70] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3070-3071.**
[71] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3072-3073.**
[72] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3075.**

> being the writer of the questioned documents because all of the characteristics cannot appear in such a small writing sample.[73]

No additional discussion of this conclusion was provided.

46. The 36 similarities included the important characteristics 5 and 8. Consequently, she concluded that there was a "strong presumption" that Diab was the author of the hotel card.[74]

47. Mme. Bisotti's methodology for analysing the date was essentially the same. She concluded that, of the 76 characteristics, only five could be assessed in the date; only one was similar. Further, she identified several notable dissimilarities.[75] She therefore concluded that there was a "weak presumption" that Dr. Diab authored the date on the hotel card.[76]

48. Mme. Bisotti analyzed the Panadriyu signature and described its structure. She then compared it to the signatures found in the exemplars, and identified four common characteristics, including the ending flourish.[77] Based on these common elements, Bisotti indicated that there existed a "presumption" that Dr. Diab was the author of the Panadriyu signature.[78]

H. THE CHALLENGE TO THE BISOTTI REPORT

49. In response to the Bisotti report, Dr. Diab once again sought leave to adduce evidence in the form of technical reviews by Messrs. Lindblom, Radley and Osborn, all of who concluded that the methodology used by Mme. Bisotti was fatally flawed.[79] The Attorney General opposed the introduction of these materials on the basis that they presented merely competing opinions.

50. Each expert filed a report and was vigorously cross-examined. As with their opinions respecting the Marganne and Barbe-Prot reports, Dr. Diab's experts were of the view that Mme.

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[73] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3075-3076.**
[74] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3077, 3084.**
[75] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3077-3078.**
[76] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3077, 3084.**
[77] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, p. 3081.**
[78] Bisotti report, *supra*, **ABC, Vol. 11, Tab 74, pp. 3082, 3084.**
[79] Mr. Purdy was by this point unavailable to participate further in the proceedings. He was not retained with respect to the Bisotti report.

Bisotti failed to adhere to the accepted methodology of forensic document examination. As a result, her conclusions were "patently unreliable",[80] "wholly unreliable"[81] and "fatally flawed".[82]

51. Mr. Lindblom explained that, without a valid methodology, it is impossible to tell whether a conclusion is accurate; Applying methods contrary to accepted standards could only undermine the reliability of a conclusion.[83]

52. The experts agreed that there was an accepted basic methodology for forensic document examination that had been established over a century ago through the work of Albert S. Osborn.[84] Although counsel for the Attorney General suggested that France might use a different methodology, the experts rejected this.[85] Mme. Bisotti herself indicated that she was applying ENFHEX, a set of guidelines and recommended literature that is "pure Osbornian".[86]

53. While Mme. Bisotti indicated that she was applying ENFHEX, she did not.[87] The experts testified that she violated the basic tenets of forensic document examination at every step.

54. All of the experts expressed concern about Bisotti's belief that one can reach a conclusion of identity where personal characteristics in common between writings greatly outnumber differences.[88] This view was, as one expert put it, "frankly absurd". Although similarities are important, it is *differences* that accepted methodology focuses on; a fundamental difference

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[80] Report of Brian Lindblom Respecting the Report of Anne Bisotti ["Lindblom Report re: Bisotti"], **ABC, Vol 7, Tab 36, p. 2183.**
[81] Report of John Paul Osborn Respecting the Report of Anne Bisotti ["Osborn Report re: Bisotti"], **ABC, Vol. 9, Tab 42, p. 2621.**
[82] Report of Robert W. Radley Respecting the Report of Anne Bisotti ["Radley Report re: Bisotti"], **ABC, Vol. 8, Tab 39, para. 280.**
[83] Evidence of Brian Lindblom ["Lindblom Evidence"], **Transcript, Vol. 15, p. 1082 ll. 8-19**; See also Evidence of Robert W. Radley ["Radley Evidence"], **Transcript, Vol. 23, p. 2293 ll. 20-27.**
[84] Evidence of John Paul Osborn ["Osborn Evidence"], **Transcript, Vol. 22, p. 2190 l. 20 – p. 2191 l. 19**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2270 l. 29 – p. 2272 l. 19.**
[85] Lindblom Evidence, *supra*, **Transcript, Vol. 17, p. 1366 l. 14 – p. 1367 l. 31**; Osborn Evidence, *supra*, **Transcript, Vol. 21, pp. 1979 l. 10 – p. 1981 l. 3.**
[86] Lindblom Evidence, *supra*, **Transcript, Vol. 19, p. 1663 l. 7 – p. 1666 l. 32**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2274 l. 26 – p. 2275 l. 25, p. 2308 l. 13 – p. 2309 l. 11.**
[87] Lindblom Evidence, *supra*, **Transcript, Vol. 20, p. 1877 ll. 19-30.**
[88] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2189-2190**; Osborn Report re: Bisotti, *supra*, **ABC, Vol. 9, Tab 42, pp. 2617-2618**; Radley Report re: Bisotti, *supra*, **ABC, Vol. 8, Tab 39, paras. 50-62.**

between writings is sufficient to prevent a conclusion of common authorship, no matter how many similarities exist. Bisotti's stated approach was identified as a common error made by non-experts, and was directly contrary to accepted methodology in the field.[89]

55. Bisotti's view that the exemplar documents from 1994-2003 were adequate for comparison with the hotel card from 1980 was also criticized. Her belief that Dr. Diab's handwriting would not have changed in the intervening period lacked any evidentiary foundation and was not supported by the literature in the field.[90]

56. Similarly, her assertion that the hotel card could be compared because it showed no evidence of disguise was concerning. Mr. Radley explained that the literature cautioned against any attempt to evaluate disguise in a document with such limited writing; accurate determinations are simply not possible without a sufficient quantity of text.[91] But Mme. Bisotti, having decided to attempt a disguise analysis, failed to note the presence in the questioned document of features that the literature identifies as being indicative of disguise.[92]

57. Bisotti's development of 76 features from a sub-set of the exemplar documents was not a procedure that was accepted in the community of expert document examiners. The accepted methodology required an examiner to analyze the *questioned* document, and determine whether the identified characteristics can be found in the exemplars. Examining the questioned document first ensures that all of its features are considered. Bisotti's approach, on the other hand, risked

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[89] Osborn Evidence, *supra*, **Transcript, Vol. 20, p. 1924 l. 17 – p. 1926 l. 20**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2289 l. 24 – p. 2293 l. 19.**

[90] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2190-2192**, 26; Radley Report re: Bisotti, *supra*, **ABC, Vol. 8, Tab 39, paras. 71-79**; Lindblom Evidence, *supra*, **Transcript, Vol. 16**, **pp. 1267 l. 29 – p. 1268 l. 26, Vol. 19, p. 1675 l. 32 – p. 1681 l. 30**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2303 l. 13 – p. 2305 l. 12, Vol. 26, p. 2763 l. 7 – p. 2764 l. 13.**

[91] Radley Evidence, *supra*, **Transcript, p. 2733 l. 13 – p. 2734 l. 19, p. 2739 ll. 20-32.**

[92] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2204-2205**; Radley Report re: Bisotti, *supra*, **ABC, Vol. 8, Tab 39, paras. 80-86**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2305 l. 13 – p. 2306 l. 6, Vol 26, 2739 ll. 20-32.**

ignoring identifying characteristics in a questioned document, simply because a similar form may not exist in the exemplars. Bisotti's approach was literally backwards.[93]

58. This backwards approach contributed to further errors. Bisotti failed to identify what were apparent personalized writing characteristics in both sets of writing, instead focusing on "class characteristics", writing habits common to a significant portion of the population.[94] Such comparisons provide no meaningful identification value.

59. The first of Mme. Bisotti's two most important similarities – varying slope – is a class characteristic. Both Messrs. Lindblom and Radley indicated that a significant percentage of the population never achieve consistent slope in their writing. As such, the feature identified by Bisotti as highly identifying was viewed by the field as having minimal identification value.[95]

60. The other of Bisotti's main identifying characteristics, "twisting, angular breaks/indentations", was identified as not a writing characteristic at all, but rather a series of different features, mostly attributable to characteristics of the writing surface or the pen used.[96]

61. While focusing on class characteristics, Mme. Bisotti was said to ignore features that, had she followed accepted methods, could have provided a great deal of identifying power. For example, the hotel card contained a number of capital "A"s and "N"s, for which there were hundreds of comparators in the exemplar documents. Had they been compared, they would have revealed consistent fundamental differences between Dr. Diab's writing and the hotel card.[97]

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[93] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2206, 2211-2212.**
[94] Radley Evidence, *supra*, **Transcript, Vol. 23 pp. 2309 l. 12 – p. 2313 l. 22**; Radley Report re: Bisotti, *supra*, **ABC, Vol. 8, Tab 39, paras. 102-103, 120, 133-142, 154, 186-191, 195, 216, 220-226, 246-248, 251-252, 254-255, 258, 261-265, 268-269.**
[95] Lindblom Evidence, *supra*, **Transcript, Vol. , p. 1287 l. 32 – p. 1288 l. 29**; Radley Evidence, *supra*, **Transcript, Vol. 23, pp. 2313 l. 23 – p. 2317 l. 8, Vol. 26, p. 2796 l. 17 – p. 2797 l. 19.**
[96] Lindblom Evidence, *supra*, **Transcript, Vol. 16, p. 1280 l. 10 – p. 1284 l. 29**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2317 l. 9 – p. 2318 l. 15.**
[97] Lindblom Evidence, *supra*, **Transcript, Vol. 16, p. 1292 l. 18 – p. 1301 l. 6, p. 1304 l. 7 – p. 1305 l. 19**; Radley Evidence, *supra*, **Transcript, p. 2310 l. 13 – p. 2311 l. 28, 2371 ll. 3-25.**

62. To the extent that Mme. Bisotti did note differences, these were dismissed by her as natural variation. All of the experts agreed that this represented a significant departure from accepted methodology, and wholly undermined the reliability of her entire work.[98]

63. As Mr. Osborn explained, it is crucial that an examiner, having first described a characteristic from a questioned document, proceed to actually identify the range of variation found in the same letter-forms in exemplar writings and state whether or not the questioned feature falls within it.[99] Rather than do this with the identified differences, Mme. Bisotti simply dismissed them as being due to natural variation. She provided no basis for this conclusion.[100]

64. Mr. Osborn indicated that, accepting for argument's sake Bisotti's own belief in the presence of the differences, had she not dismissed them improperly, accepted methodology would have required her to reach either an inconclusive finding, or eliminate Dr. Diab entirely.[101]

65. With respect to the signatures, the experts indicated that Bisotti had violated their discipline's golden rule: features must always be compared with like features.[102] This principle requires that capital letters be compared only with capital letters, cursive writing with cursive, A's with A's, etc. Here, she compared one genuine signature with a different, made-up one.

66. Mr. Radley explained how such attempts at comparisons are condemned in the literature, especially with a complex, illegible signature like Panadriyu's. In his discussion of Bisotti's analysis, he noted that it is always possible to isolate portions of such signatures to find a

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[98] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2214-2216**; Osborn Report re: Bisotti, *supra*, **ABC, Vol. 9, Tab 42, p. 2618**; Radley Report re: Bisotti, *supra*, **ABC, Vol. 8, Tab 39, paras. 270-271.**

[99] Osborn Evidence, *supra*, **Transcript, Vol. 22, p. 2225 l. 12 – p. 2226 l. 27**; See also Radley Evidence, *supra*, **Transcript, Vol. , p. 2365 l. 23 – p. 2366 l. 10.**

[100] Lindblom Evidence, *supra*, **Transcript, Vol. 16, p. 1324 l. 14 – p. 1325 l. 30**; Osborn Evidence, *supra*, **Transcript, Vol. 21, p. 1934 l. 14 – p. 1935 l. 14**; Radley Evidence, *supra*, **Transcript, Vol. 23, pp. 2368 ll. 18-32.**

[101] Osborn Evidence, *supra*, Transcript, **Vol. 20, p. 1929 l. 5 – p. 1931 l. 14, 2218 l. 27 – p. 2221 l. 6.**

[102] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2196-2197**; Osborn report re: Bisotti, *supra*, **ABC, Vol. 9, Tab 42, pp. 2618-2619**; Radley Report re: Bisotti,, *supra*, **ABC, Vol. 8, Tab 39, paras. 180-185, 192**; Lindblom Evidence, *supra*, **Transcript, Vol. 15, pp. 1182 l. 23 – p. 1187 l. 3**; Osborn Evidence, *supra*, **Transcript, Vol. 20, p. 1936 l. 21 – p. 1939 l. 13.**

common element. To make his point, Mr. Radley noted that, using Bisotti's approach, his own signature showed the same similarities to Panadriyu's that she 'matched' to Diab's.[103]

67. The problem with this attempt at comparison was further demonstrated by Bisotti's approach to the flourish at the end of Diab's signature. She indicated that this was an important similarity between the two signatures. However, Messrs. Lindblom and Radley independently confirmed that Diab's signature ended not with a flourish, but rather with his first name, Hassan, written in Arabic.[104] Bisotti had matched a non-letter flourish with a name in Arabic script.

68. Even the manner in which Bisotti expressed her conclusions was problematic.[105] None of the experts had ever seen a report express its conclusions in terms of "presumptions". It was unclear to the experts whether "weak presumption" meant a weak conclusion of identity, a strong conclusion of exclusion, or something else entirely.[106]

69. As Mr. Radley testified, even a sub-set of these methodological failings would result in conclusions with no reliability.[107] The experts found the flaws so egregious that concerns about bias were raised. They agreed that, at a minimum, Bisotti's instructions had built-in bias by pre-supposing that Diab was the author of the card. All stressed the grave impropriety of not expressly leaving open to Bisotti the option of concluding that Dr. Diab was not the author.[108]

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[103] Radley Evidence, *surpa*, **Transcript, Vol. 23, p. 2322 l. 27 – p. 2337 l. 8.**
[104] Lindblom Evidence, *supra*, **Transcript, Vol. 18, p. 1533 l. 12 – p. 1540 l. 21**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2319 l. 8 – p. 2322 l. 26.**
[105] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2187-2188, 2201, 2216-2217**; Osborn Report re: Bisotti, *supra*, **ABC, Vol. 9, Tab 42, pp. 2619-2620**; Radley Report re: Bisotti,, *supra*, **ABC, Vol. 8, Tab 39, paras. 45, 147-150, 193-194, 272**; Osborn Evidence, *supra*, **Transcript, Vol. 20, pp. 1941 l. 8 – p. 1945 l. 2**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2318 l. 18 – p. 2319 l. 3.**
[106] Lindblom Evidence, *supra*, **Transcript, Vol. 16, p. 1240 l. 31 – p. 1241 l. 19**; Radley Evidence, *supra*, **Transcript, Vol. 24, p. 2481 l. 26 – p. 2482 l. 25.**
[107] Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2370 ll. 16-23.**
[108] Lindblom Report re: Bisotti, *supra*, **ABC, Vol. 7, Tab 36, pp. 2185-2186, 2202-2203, 2219**;Radley Report re: Bisotti,, *supra*, **ABC, Vol. 8, Tab 39, paras. 29-34, 276**; Osborn report re: Bisotti, *supra*, **ABC, Vol. 9, Tab 42, pp. 2407, 2411**; Lindblom Evidence, *supra*, **Transcript, Vol. 15, p. 1093 l. 15 – p. 1101 l. 3**; Osborn Evidence, *supra*, **Transcript, Vol. 20, p. 1910 l. 30 – p. 1911 l. 30, p. 1921 l. 15 – p. 1923 l. 29**; Radley Evidence, *supra*, **Transcript, Vol. 23, p. 2299 l. 24 – p. 2300 l. 26, p. 2375 l. 10 – p. 2376 l. 14.**

I. THE *FERRAS* RULING AND THE DECISION ON COMMITTAL

70. In brief oral reasons, Maranger J. rejected Dr. Diab's attempt to have the Bisotti report excised from the ROC.[109] He indicated that the experts provided a "scathing criticism" of the methodology employed by Bisotti,[110] which had "substantially undermine[d]" the report,[111] but that because the contents of the ROC are presumptively reliable, the question of threshold methodological reliability was "a bridge that has already been crossed."[112] In his view, to permit a finding of manifest unreliability on the basis of the absence of threshold reliability would be to impermissibly impose Canadian standards of evidence onto a foreign state.[113]

71. His Honour further stated that "none of the experts could comment on whether or not there is or isn't a different type of methodology in France."[114] In his written reasons, he commented that Dr. Diab's experts criticized the methodology of all three French examiners, and stated that "this leaves room for the possibility that the Republic of France does have a different approach/methodology in relationship to handwriting comparison analysis."[115]

72. While strongly suggesting that he would have found the Marganne and Barbe-Prot reports manifestly unreliable,[116] Maranger J. viewed the challenges to the Bisotti report as merely constituting competing opinions.[117]

73. Responding to the Court's comments on the possibility of a distinct French method, Dr. Diab sought an adjournment to obtain a further expert opinion on this issue from examiners who had previous experience with the French system. This application was dismissed.[118]

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[109] Ruling Re: Application to Exclude Evidence, **Transcript, Vol. 27.**
[110] Ruling Re: Application to Exclude Evidence, *supra*, Transcript, **Vol. 27, para. 7**.
[111] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 120.**
[112] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 10.**
[113] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 10.**
[114] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 14.**
[115] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 112.**
[116] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 13.**
[117] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, paras. 16-17.**

74. On June 6, 2011, Maranger J. released his reasons for committal. He concluded that, once the intelligence and the first two handwriting reports were removed, the remaining evidence in the ROC only raised a suspicion of Dr. Diab having some connection to the bombing.[119] While he indicated that France had presented "a weak case" and that "the prospects of conviction in the context of a fair trial, seem unlikely"[120] Bisotti tipped the scales in favour of committal.[121]

J. INITIAL SUBMISSIONS TO THE MINISTER OF JUSTICE

75. Dr. Diab provided the Minister of Justice with extensive submissions, as well as a voluminous body of documents, to demonstrate how surrender would be unjust, oppressive, and contrary to the *Charter*. They focused on two concerns: First, that if surrendered, Dr. Diab would be tried on the basis of the secret intelligence; and secondly, if surrendered, Dr. Diab would be tried on the basis of the Marganne, Barbe-Prot and Bisotti reports. In both cases, French law would not permit Dr. Diab a meaningful opportunity to challenge the case against him.

i) The use of Intelligence

76. Dr. Diab submitted that the *Charter* requires that any person facing a deprivation of liberty must have the opportunity to know the case against them, and meaningfully respond to it. He argued that the nature of intelligence, and how it is used in France, made this impossible.[122]

77. In support of these submissions, Dr. Diab put before the Minister reports from Amnesty International, Human Rights Watch, the International Commission of Jurists, JUSTICE, the *Arar* and *Iacobucci* inquiries, studies conducted by the U.K. House of Lords, House of Commons and the Home Office, and expert evidence from Professors Kent Roach, Wesley Wark, and

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[118] Ruling Re: Diab Application for Adjournment, **Transcript. Vol. 32.**
[119] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 188.**
[120] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 191.**
[121] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 189.**
[122] Submissions to the Minister of Justice Respecting Surrender, Dated August 24, 2011 ["Submissions to the Minister"], **Appeal Book – Judicial Review ["ABJR"], Vol. 1, Tab 5, pp. 54, 75, 110-111.**

Jacqueline Hodgson, as well as Tom Quiggin (Canadian Centre of Intelligence and Security Studies) and Stephane Bonifassi (French lawyer with expertise in terrorism cases).

78. These documents established that, while France no longer operates special state-security courts, terrorism prosecutions still employ specialized procedures.[123] Of these, the most notable is the close working relationship between the specially designated investigating magistrates and the intelligence services.[124] A consequence of this close relationship is the constant flow of refined intelligence from the services to the *juge d'instruction*. Through a process known as "judicialization", intelligence reports are used as evidence in criminal trials.[125] Because the *juge* receives only refined reports, they do not know the sources of the intelligence or the circumstances under which it is obtained,[126] nor do the French intelligence agencies.[127]

79. The close relationship between judges and intelligence services and the judicialization process has led to extensive criticism of French counter-terrorism proceedings. The U.K. Home Office has noted that "the examining magistrate can never be fully confident about the validity of the information without having access to the methodology or the raw intelligence"[128]; judicial officers do not appear concerned by this. As Prof. Hodgson noted in her Home Office report:

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[123] Professor Jacqueline Hodgson, "The Investigation and Prosecution of Terrorist Suspects in France" (2006) ["Hodgson Report to the Home Office"], **ABJR, Vol. 2, Tab 6-G, p. 381**; Human Rights Watch, "Preempting Justice: Courterterrorism Laws and Procedures in France" (2008) ["Preempting Justice"], **ABJR, Vol. 2, Tab 6-J, p. 451.**

[124] House of Lords & House of Commons Joint Committee on Human Rights, "Coutner-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention" (2006) ["Joint Committee Report"], **ABJR, Vol. 1, Tab 6-E, para. 83**; The Home Office, "Terrorist Investigations and the French Examining Magistrate System" (2007) ["Home Office Report"], **ABJR, Vol. 1, Tab 6-F, p. 339**; Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 475.**

[125] Home Office Report, *supra*, **ABJR, Vol. 1, Tab 6-F, p. 343**; Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 475**; Stéphane Bonifassi, "The Use of Intelligence in Criminal Cases, and More Specifically Terrorist Cases" ["Bonifassi – The use of Intelligence"], **ABJR, Vol. 3, Tab 6-P, p. 713.**

[126] Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, pp. 480-481**; Human Rights Watch, "No Questions Asked: Intelligence Cooperation with Countries that Torture" (2010) ["No Questions Asked"], **ABJR, Vol. 2, Tab 6-M, pp. 680-681**; Home Office Report, *supra*, **ABJR, Vol. 1, Tab 6-F, p. 343.**

[127] Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 480**; Professor Wesley Wark, "Expert Witness Report" ["Wark Report"], **ABJR, Vol. 3, Tab 6-S, p. 803.**

[128] Home Office Report, *supra*, **ABJR, Vol. 1, Tab 6-F, p. 343.**

> Whilst the *juge d'instruction* is concerned to verify facts and expert opinions, she is less concerned with the way in which evidence is obtained and so with the reliability of its construction… There are accusations that the *juge d'instruction* in counter-terrorism cases is insufficiently distanced from investigating officers and over reliant on intelligence-based information, without subjecting it to proper scrutiny.[129]

80. Although a defendant in a French trial would have the right to request that the person who provided the *juge* with an intelligence report be called to testify, such witnesses could not be made to reveal information on sources or circumstances.[130] Attempts to look behind judicialized reports are viewed as impugning the integrity of the judiciary itself. [131]

81. The criticisms of the French system were in harmony with a broader global consensus that the use of intelligence-driven prosecutions in terrorism cases raised serious human rights and due process concerns.[132] Dr. Diab argued that the Canadian rejection of secret evidence in criminal trials was not merely a quirk of the *Charter* or the adversarial tradition, but reflected a global human rights norm that rejected such prosecutions as fundamentally unacceptable.[133]

ii) The use of Handwriting

82. In his reasons for committal, Maranger J. gave an example of a scenario where, in his view, handwriting evidence could be found to be manifestly unreliable:

> Finally, perhaps the clearest way to describe manifestly unreliable evidence is to provide an example. In truth at one point in time it may have existed in this case. This would be in relation to the first two handwriting reports. If I had found as a fact that these two experts had used the wrong known handwriting to arrive at their conclusions respecting the authorship of the hotel card i.e. (Nawal

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[129] Hodgson Report to the Home Office, *supra*, **ABJR, Vol. 2, Tab 6-G, pp. 376-377.**
[130] Hodgson Report to the Home Office, *supra*, **ABJR, Vol. 2, Tab 6-G, pp. 387-388**; Bonifassi – The use of Intelligence, *supra*, **ABJR, Vol. 3, Tab 6-P, p. 714.**
[131] Hodgson report to Home Office, p. 33; Bonifassi – The use of Intelligence, *supra*, **ABJR, Vol. 3, Tab 6-P, p. 714.**
[132] International Commission of Jurists "Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights" (2009) ["ICJ Report"], **ABJR, Vol. 3, Tab 6-X, pp. 925-926.**
[133] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, pp. 79-80.**

> Copty's instead of Hassan Diab's) that would… render the evidence manifestly unreliable.[134]

83. Dr. Diab submitted that in effect, Maranger J. was indicating that the reports would have been excised but for the Attorney General's pre-emptive disavowal. He argued that extradition to face trial on the basis of such evidence would violate both the Act and the *Charter*.[135]

84. Dr. Diab also submitted that extradition to face trial on the basis of the Bisotti report was equally impermissible. In support of this submission, he provided the Minister with a fourth review of the Bisotti report, this time conducted by Professor Pierre Margot and Dr. Raymond Marquis, both of the University of Lausanne, Switzerland.[136] The Swiss report confirmed what Bisotti herself indicated: French handwriting labs adhere to ENFHEX, which in turn adheres to a universally accepted and validated methodology.[137] There was no different French method.

85. Margot and Marquis' technical review of the Bisotti report independently confirmed that "The methodology described in the report does not allow reliable conclusions."[138] The methodological errors they identified included, but were not limited to: her views on counting similarities vs. differences,[139] dismissing the time gap between the questioned and exemplar documents,[140] the reversed order of comparison,[141] ignoring evidence of disguise in the hotel card,[142] and dismissing differences without providing any basis for doing so.[143]

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[134] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 125.**
[135] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, pp. 117-118.**
[136] Professor Pierre Margot & Dr. Raymond Marquis, "Review of Expert Report in the Extradition Procedure Against H. Diab" ["Margot & Marquis Report"], **ABJR, Vol. 5, Tab 6-GG.**
[137] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, §§ 3, 28.**
[138] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, p. 1545.**
[139] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, §§ 10-13.**
[140] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, §§ 22-23, 29.**
[141] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, §§ 9, 20, 29.**
[142] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, § 6.**
[143] Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, § 13.**

86. Dr. Diab submitted that extradition to face trial on the basis of reports as flawed as those produced by Marganne, Barbe-Prot and Bisotti would be unacceptable, especially in light of the evidence of how such materials would be treated by the French justice system.

87. Dr. Diab filed materials demonstrating that court-appointed experts are closely aligned to the judiciary, and their opinions are given significant weight.[144] Party-appointed experts, like Lindblom, Purdy, Osborn, Radley, Margot and Marquis are viewed as partisan advocates. As such, these experts would never be given equal weight to Bisotti, Marganne and Barbe-Prot.[145]

iii) Other physical evidence

88. Dr. Diab also submitted that physical evidence excluded Dr. Diab as the bomber: a palm print found on a car used by the hit team did not match Dr. Diab, and a fingerprint taken to compare against a print on the Panadriyu police report did not appear to produce a match.[146]

K. THE "SECOND SUPPLEMENTAL MEMORANDUM" AND DR. DIAB'S FURTHER SUBMISSIONS

89. On November 16, 2011, Senior Counsel with the International Assistance Group provided the Minister with the "Second Supplemental Memorandum".[147] This document set out information received from the Republic of France with respect to its justice system, and the current status of their proceedings respecting Dr. Diab. Subsequent correspondence confirmed that the contents of the memorandum were drafted in direct consultation with French officials, and constituted the official position of the French Republic.[148]

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[144] Stéphane Bonifassi, "Expert Witnesses Provided by the Parties" ["Bonifassi – Expert Witnesses"], **ABJR, Vol. 5, Tab 6-FF, p. 1530.**
[145] Bonifassi – Expert Witnesses, *supra*, **ABJR, Vol. 5, Tab 6-FF, p. 1531.**
[146] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, p. 131.** See also Disclosed Task Report, **ABC, Vol. 7, Tab 26-G, p. 2044**; Impression Warrant, dated November 20, 2009, **ABC, Vol. 7, Tab 26-H.**
[147] Second Supplemental Memorandum from the International Assistance Group to the Minister of Justice ["Second Supplemental Memorandum"], **ABJR, Vol. 5, Tab 14.**
[148] Letter from Ms. Palumbo to Mr. Bayne, dated December 1, 2011, **ABJR, Vol. 6, Tab 16.**

90. The memorandum confirmed that the intelligence and handwriting evidence remained in the French *dossier*, and therefore constituted evidence against Dr. Diab in French proceedings.[149]

91. It also outlined the process by which offences are brought to trial. In doing so, the French made a startling admission: *France has no present intention to place Dr. Diab on trial*.

92. The memorandum explained that once a *juge d'instruction* begins to investigate a crime, he or she may place a specific individual under judicial investigation ("*mise en examen*"). Before doing so, that person must have a "first appearance" and be allowed to make a statement.[150] Being placed *mise en examen* makes a person the official subject of the criminal investigation.[151]

93. When the investigation is complete, the *juge d'instruction* notifies the parties, and ultimately decides whether there is evidence justifying referral of the matter to a trial court, or if there is no case to answer.[152]

94. With respect to this case, the French government confirmed the following: Dr. Diab has not been placed *mise en examen*; if he were to appear before the *juge d'instruction* he might not be placed *mise en examen* at all; and that even if placed *mise en examen*, the *juge* might or might not refer Dr. Diab to stand trial at the conclusion of his investigation.[153]

95. The memorandum described rights available to individuals placed *mise en examen*. These include the right to request that the *juge d'instruction* take various investigative steps or to bring motions to annul steps taken by the *juge* where they are taken "on the basis of an irregularity".[154]

96. The memorandum confirmed that the unsourced and uncircumstanced intelligence included in the *dossier* would be considered during any potential trial. However, the

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[149] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, p. 1630.**
[150] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, p. 1623.**
[151] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, pp. 1624-1645.**
[152] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, p. 1626.**
[153] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, pp. 1629-1630.**
[154] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, pp. 1624-1626.**

memorandum asserted that such intelligence "carries no weight under French law unless it is corroborated by other evidence."[155] Reference was made to the provisions of the French code of criminal procedure respecting the taking of evidence from anonymous witnesses, which provide that a conviction cannot be based *solely* on such evidence.[156]

97. After receiving the Second Supplemental Memorandum, Dr. Diab provided the Minister with further submissions and materials, which included further expert opinions from Maître Bonifassi and Professor Hodgson, and extensive foreign and international jurisprudence.

98. The supplementary submissions to the Minister addressed several points raised in the supplemental memorandum, but focused on two matters: that the Minister lacked jurisdiction to surrender for the purposes of further investigation, and a plausible connection between the intelligence in the dossier and the use of torture rendered surrender unlawful.

i) Surrender for Investigation

99. Based on the admission that France had not yet decided whether Dr. Diab should be placed on trial, Dr. Diab submitted that the Minister lacked any jurisdiction under the *Extradition Act* to entertain France's request at all.

100. He based this position on a series of arguments related to a structural analysis of the *Extradition Act* as a whole;[157] the French-language version of the *Act*;[158] the legislative debates that preceded the passage of the *Act*;[159] relevant Canadian jurisprudence;[160] and foreign case-law related to extradition to France in similar circumstances.[161]

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[155] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, p. 1627.**
[156] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, pp. 1627-1628.**
[157] Supplemental Submissions to the Minister of Justice Respecting Surrender, Dated January 26, 2012 ["Supplemental Submissions to the Minister"], **ABJR, Vol. 6, Tab 18, paras. 10-11, 16.**
[158] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, para. 12.**
[159] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, para. 17.**
[160] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, paras. 13, 15.**
[161] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, para. 15.**

101. Both Professor Hodgson, the leading English expert on the French criminal justice system, and Maître Bonifassi, a leading member of the Parisian defence bar, confirmed that, as a matter of French law, Dr. Diab was not sought for trial, but rather for continued investigation.[162]

102. Bonifassi went on to explain that, while the Memorandum was correct to state that a first appearance was necessary to place an individual *mise en examen*, it was misleading because being placed *mise en examen* was not a necessary precondition to being referred to trial. The combined operation of Articles 134, 175 and 176 of the Code of Criminal Procedure provided that where an arrest warrant has been issued, but the individual cannot be arrested, that person is *deemed* to have been placed *mise en examen*, and may subsequently be referred to trial if the *juge d'instruction* believed that there was sufficient evidence to warrant it.[163]

ii) Intelligence and Torture

103. Based on jurisprudential developments that occurred after his initial submissions, Dr. Diab submitted to the Minister that he could not be surrendered to France as the intelligence contained in the *dossier* may have been the product of torture of third parties.

104. Relying on Canadian and international jurisprudence, Dr. Diab explained that the standard that a claimant such as him needed to meet to substantiate such a claim varied depending on the context, and that where the "evidence" was uncircumstanced intelligence, what is required is demonstrating a "plausible connection" with torture.[164]

105. Dr. Diab put before the Minister several public sources that showed that France had a special intelligence sharing relationship with Syria focusing on terrorist groups operating out of Lebanon. Syria, in turn, was shown to have regularly kidnapped Lebanese individuals and

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[162] Expert Opinion from Stephane Bonifassi, Dated January 24, 2012 ["Bonifassi – January Opinion"], **ABJR, Vol. 6, Tab 19-A, pp. 1770-1771**; Professor Jacqueline Hodgson, "Expert Opinion in Relation to Extradition Proceedings Brought Against Hassan Diab" ["Hodgson Opinion"], **ABJR, Vol. 6, Tab 19-B, p. 1788.**

[163] Bonifassi – January Opinion, *supra*, **ABRJ, Vol. 6, Tab 19-A, pp. 1771-1772.**

[164] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, paras. 56-59.**

tortured them to extract information on national security and terrorism matters.[165] Dr. Diab argued that if the Minister wished to surrender him, he had an obligation to make inquiries with the French government to obtain information on the sources and circumstances of the intelligence and confirm that it was not based on torture.[166]

iii) Response to the Second Supplemental Memorandum

106. With respect to the information respecting the use of intelligence in France, Dr. Diab introduced further information from Professor Hodgson and Maître Bonifassi, who both indicated that there existed no genuine ability to challenge intelligence in French terror trials.[167]

107. As Maître Bonifassi explained, the only method open to Dr. Diab to seek to have the intelligence removed from the *dossier* would be through the annulment procedure mentioned in France's memorandum. However, he explained that annulment proceedings can only review whether investigative steps were lawful, and that the inclusion of intelligence in the investigative file is lawful in France. He noted that identical principles applied to the handwriting reports.[168]

108. Maître Bonifassi indicated that the Second Supplemental Memorandum was misleading with respect to the evidentiary rules respecting intelligence. He explained that the anonymous witness provisions relied upon in the Memorandum had no application to intelligence.[169]

L. REASONS OF THE MINISTER FOR SURRENDER

109. On April 4, 2012, the Minister of Justice ordered the surrender of Dr. Diab.[170]

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[165] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, paras. 68-76.**
[166] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, paras. 79-94.**
[167] Bonifassi – January Opinion, *supra*, **ABRJ, Vol. 6, Tab 19-A, p. 1773**; Hodgson Opinion, *supra*, **ABJR, Vol. 6, Tab 19-B, p. 1789.**
[168] Bonifassi – January Opinion, *supra*, **ABRJ, Vol. 6, Tab 19-A, p. 1775.**
[169] Bonifassi – January Opinion, *supra*, **ABRJ, Vol. 6, Tab 19-A, pp. 1775-1776.**
[170] Order of Surrender, Dated April 4, 2012, **ABJR, Vol. 1, Tab 2.**

110. The Minister acknowledged that while Canada had recognized serious concerns about the use of intelligence in courts, France's system provided sufficient protections to make its use acceptable.[171] He identified the following protections provided by the French system:

- Dr. Diab would be presumed innocent;
- Dr. Diab would have a right to counsel;
- Dr. Diab would have a right to read the contents of the *dossier*;
- The *juge d'instruction* has a truth-seeking mandate that requires him to obtain and consider both inculpatory and exculpatory evidence;
- Dr. Diab would have the right to provide the *juge d'instruction* with any document relevant to his truth-seeking mandate;
- Intelligence must be corroborated to ground a conviction;
- Dr. Diab could ask that the sources of the intelligence be questioned by the *juge d'instruction* or be called as witnesses at trial;
- Dr. Diab could ask that the *juge d'instruction* take other investigative steps; and
- Dr. Diab would have the right to appeal decisions.[172]

111. The Minister also indicated that if he felt his rights were violated by the French, Dr. Diab could apply to the European Court of Human Rights.[173]

112. The Minister indicated that, to the extent that the evidence put forward by Dr. Diab respecting corroboration requirements for intelligence conflicted with the Second Supplementary Memorandum, he was "obligated to rely on France's clarification of its legal system" and reject Dr. Diab's.[174] The Minister did not indicate the source of this obligation.

113. With respect to the handwriting evidence, the Minister indicated that simply because the Marganne and Barbe-Prot reports were not used as part of the committal hearing did not mean

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[171] Reasons for Surrender of the Minister of Justice, Dated April 4, 2012 ["Reasons for Surrender"], **ABJR, Vol. 1, Tab 3, pp. 26-27.**
[172] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 24-25.**
[173] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[174] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 26-28.**

that they could not be used during a French trial. He indicated that all of Dr. Diab's concerns about their reliability could be addressed during the trial.[175]

114. The Minister relied on the statements in the Second Supplemental Memorandum to the effect that Dr. Diab could ask the *juge d'instruction* to seek a further expert opinion, or else call his own experts at trial. He dismissed the evidence that party-appointed experts would not be given the same weight as one appointed by the *juge*.[176]

115. With respect to his jurisdiction to surrender, the Minister indicated that he was satisfied that Dr. Diab was more than a mere suspect, but rather was someone wanted for 'prosecution'.[177]

116. With respect to the evidence that Dr. Diab's presence was not required as a matter of French law for referral for trial, the Minister indicated that he rejected it as inconsistent with the Second Supplemental Memorandum. Alternatively, he indicated that the first appearance was for Dr. Diab's benefit, and foregoing this benefit would be "unwise" on Dr. Diab's part.[178]

117. On the issue of torture, the Minister rejected the "plausible connection" standard, and indicated that Dr. Diab had to establish that the secret intelligence was a product of torture on a balance of probabilities.[179] The jurisprudence to the contrary was rejected because the cases relied upon by Dr. Diab were ones in which the requesting country was also the one that allegedly engaged in torture. France, in his view, was not a state known to torture or use torture-derived evidence.[180]

118. The Minister concluded that Dr. Diab had not made out his torture claim. The Minister indicated that the open sources relied upon by Dr. Diab noted that France has denied it entered

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[175] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 36.**
[176] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 36.**
[177] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 17-18.**
[178] Reasons Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 18-19.**
[179] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**
[180] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**

into an intelligence-sharing agreement with Syria. Moreover, he noted that Dr. Diab did not provide evidence that the specific intelligence contained in the ROC was derived from torture.[181]

119. The Minister also rejected that he had a duty to investigate Dr. Diab's concerns. An inquiry would call into question the good faith and honour of France.[182]

III. ISSUES AND LAW

120. Dr. Diab raises one ground of appeal with respect to committal, and four grounds for judicial review of the Minister's surrender decision:

a. Did the Learned Committal Judge err by ordering committal on the basis of the methodologically unsound Bisotti report, contrary to *United States of America v. Ferras*?

b. Did the Minister of Justice have jurisdiction to order Dr. Diab's surrender for a purpose other than to stand trial?

c. Did the Minister of Justice err in concluding that it would not be unjust, oppressive or contrary to the *Charter* to order the surrender of Dr. Diab to be tried on the basis of unsourced and uncircumstanced intelligence?

d. Did the Minister of Justice err in concluding that it would not be unjust, oppressive or contrary to the *Charter* to order the surrender of Dr. Diab to be tried on the basis of the manifestly unreliable Marganne and Barbe-Prot reports?

e. Did the Minister of Justice err in ordering surrender to stand trial on the basis of evidence that is plausibly connected with torture, and where he declined to conduct an inquiry into this connection?

A. THE COMMITTAL GROUND: THE BISOTTI REPORT IS MANIFESTLY UNRELIABLE; IT WOULD BE UNSAFE TO CONVICT ON THE BASIS OF THE EVIDENCE CONTAINED IN THE ROC

121. Dr. Diab adduced a significant body of expert evidence demonstrating that the Bisotti report was methodologically unsound, in that it failed to adhere to the procedures universally recognised as valid by the community of forensic document examiners. Dr. Diab submitted that, because he was able to demonstrate that the Bisotti report could not possibly meet the threshold

[181] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**
[182] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**

admissibility standard articulated in *Mohan*[183] and *Abbey*[184] in the trial context, it was therefore manifestly unreliable in the extradition context.

122. Justice Maranger indicated that, because the Bisotti report was contained in the ROC, it was presumptively reliable. In his view, the certification of the ROC established the threshold reliability of the Bisotti report, and that once crossed, the threshold issue could not be revisited.[185] In doing so, Maranger J. constructed an irrebuttable presumption of methodological validity. Such a presumption is inconsistent with both *Ferras* and the *Charter*.

123. There is some dispute in the jurisprudence of provincial courts of appeal post-*Ferras* regarding the proper approach to reliability concerns related to a ROC. Courts agree that one aspect of *Ferras* is that a committal judge can engage in a limited weighing of the evidence to assess if any of it is manifestly unreliable, such that he or she may disregard consideration of it.

124. However, there is disagreement between the courts of appeal of British Columbia and Ontario on whether *Ferras* also changed the test for committal. The leading British Columbia authority holds that extradition judges have the discretion to disregard evidence shown to be unreliable or unavailable, and "in respect of the evidence that remains, to determine by an assessment of the evidence, including a limited weighing of the evidence, whether it is sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada."[186]

125. The judgments of this Court were read by Maranger J. to hold that once an extradition judge has considered whether to disregard evidence as manifestly unreliable, there is no

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[183] *R. v. Mohan*, [1994] 2 S.C.R. 9 ["*Mohan*"], **App. Auth., Tab 2.**
[184] *R. v. Abbey* (2009), 246 C.C.C. (3d) 301 (Ont. C.A.) ["*Abbey*"], **App. Auth., Tab 3.**
[185] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 10**; Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 99, 101, 116-125.**
[186] *United States of America v. Graham* (2007), 222 C.C.C. (3d) 1 (B.C.C.A.), **App. Auth., Tab 4, paras. 22-32.**

weighing of the remaining evidence. So long as there is some evidence on each element of the offence, the extradition judge must commit.[187]

126. The Appellant submits that this reading oversimplifies those cases, and that a distinction is still drawn in Ontario between a weak case where committal is justified, and a case where the ROC is such that it would be "dangerous" or "unsafe" to convict, which cannot justify committal.

127. On the record in this case, whichever approach is followed, the committal order cannot stand because the Bisotti report is manifestly unreliable. However, if the effect of the decisions of this Honourable Court in *Thomlison*, *Anderson* and *Michaelov* is that as long as there is some evidence on each element of the offence there must be a committal, even if it would be unsafe or dangerous to convict, then those decisions are inconsistent with *Ferras* and ought not to be followed. Because of the need to clarify issues in relation to the committal test and manifest unreliability, the Appellant will request that a panel of five Judges hear this appeal.

i) The 'disregarding manifestly unreliable evidence' approach to *Ferras*

128. Justice Maranger held that the *Extradition Act* prevented him from applying the *Mohan/Abbey* threshold analysis because to do so would be to impose Canadian standards of admissibility on the requesting state. He further held that the issue was one of ultimate reliability, because it would require him to choose between competing inferences. He held that "manifest unreliability" as the term is used in *Ferras* means "evidence so devoid of reliability that it should be rejected out of hand when considering the issue of committal." He concluded that the Bisotti report "had been shown to be based on some questionable methods and on an analysis that seems

[187] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 129-**142; *United States of America. v. Thomlison* (2007), 216 C.C.C. (3d) 97 (Ont. C.A.), **App. Auth., Tab 5, paras. 45, 47**; *United States of America v. Anderson* (2007), 218 C.C.C. (3d) 225 (Ont. C.A.), **App. Auth., Tab 6, para. 30**; *United States of America v. Michaelov* (2010), 264 C.C.C. (3d) 480 (Ont. C.A.), **App. Auth., Tab 7, paras. 44-47.**

very problematic", that the defence evidence "has largely served to *substantially undermine* the French report", that the report was "convoluted, very confusing, with conclusions that are suspect" – but despite this held that: "I cannot say that it is evidence that should be completely rejected as 'manifestly unreliable.'"[188]

129. An inquiry into the threshold reliability of expert evidence – whether or not it follows accepted methodology – is neither a matter of applying Canadian rules of evidence, nor an exercise in weighing competing inferences. Rather, it is an inquiry into whether expert opinions are manifestly unreliable, as directed by the Supreme Court of Canada in *United States of America v. Ferras*.[189]

130. In *Ferras*, Chief Justice McLachlin writing for a unanimous Supreme Court, addressed the role of an extradition judge in preventing a committal from being based on "manifestly unreliable evidence." The Chief Justice noted early in the analysis: "I take it as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it."[190] The person sought may challenge the sufficiency of the case, including the reliability of the certified evidence.[191] McLachlin C.J. described the committal Judge's role in assessing the reliability of the evidence as follows:

> Section 29(1)'s direction to an extradition judge to determine whether there is admissible evidence that would 'justify committal' requires a judge to assess whether admissible evidence *shows the justice or rightness* in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot 'justify committal'.
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> …

[188] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 99-126** (emphasis added).
[189] *Ferras, supra,* **App. Auth., Tab 1**.
[190] *Ferras, supra,* **App. Auth., Tab 1, para. 40.**
[191] *Ferras, supra,* **App. Auth., Tab 1, para. 53.**

> Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt or innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.
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> . . .
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> Simply put, the extradition judge has the discretion to give no weight to unavailable or unreliable evidence when determining whether committal is justified under s. 29(1).[192]

131. The authorities from this Court in *Thomlison*, *Anderson* and *Michaelov* are clear that one impact of *Ferras* is that the extradition judge can weigh the evidence to a limited extent (threshold reliability) and discard from consideration evidence that is manifestly unreliable.[193]

132. The issue in this case is, when the impugned evidence is expert opinion, what approach should the Court use to assess threshold reliability? In *Anderson*, speaking generally about what may render evidence so unreliable that it should be discarded from consideration by the extradition judge, Justice Doherty held as follows:

> Evidence may be rendered "so defective" or "so unreliable" as to warrant disregarding it due to problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors.[194]

133. The validity of the methodology supporting an expert opinion surely falls within this class of considerations. The question is not whether methodology can be considered by an extradition judge, but rather how this should be done. The Appellant submits that the answer is

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[192] *Ferras, supra,* **App. Auth., Tab 1, paras. 46, 54, 59.**
[193] *Thomlison, supra,* **App. Auth., Tab 5, para. 45**; *Anderson, supra,* **App. Auth., Tab 6, paras. 28-30**; *Michaelov, supra,* **App. Auth., Tab 7, paras. 44-47, 52-53.**
[194] *Anderson, supra,* **App. Auth., Tab 6, para. 30.**

found in the *Abbey/Mohan* framework. The Appellant relies on this test not as a matter of importing Canadian evidence law into the extradition process, but because *Abbey/Mohan* is a well-established framework to assess threshold reliability of expert evidence, the very question a committal judge is asked to assess in light of *Ferras* and *Anderson*. The test fits well into the extradition context, because, as *Ferras* requires, it draws a distinction between threshold and ultimate reliability, leaving a committal judge to consider only the threshold issue.

134. The *Mohan/Abbey* framework requires that expert evidence not be admitted unless it meets a threshold test of reliability.[195] In the words of the *Goudge Report*, the trial judge plays the role of a gatekeeper, "to protect the system from unreliable evidence".[196] The threshold inquiry for admissibility of expert evidence includes an inquiry into the reliability of the theory, method or technique on which the opinion is based, whether it is generally accepted, and whether there exist meaningful peer review, professional standards, and quality assurance processes.[197] Where an expert uses a methodology that is simply not accepted in the field, their evidence will not pass the threshold test because the methods used to form the opinion are not reliable.[198]

135. The purpose of the threshold test is to allow for the admission of reliable expert opinion, and screen out opinions that have no reliable foundation.[199] This screening mechanism is based

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[195] *Mohan*, *supra*, **App. Auth., Tab 2, pp. 411-415, 423**; *Abbey*, *supra*, **App. Auth., Tab 3, paras. 71-96, 104-120**; The Honourable Stephen T. Goudge Commissioner, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario*, Vol. 3 (Toronto, 2008), **App. Auth., Tab 8, Ch. 18**; *R. v. J.-L. J.*, [2000] 2 S.C.R. 600, **App. Auth., Tab 9, paras. 25-35**. Although some of the earlier case law refers to the threshold reliability assessment for expert evidence applying to "novel" scientific or social-scientific techniques, more recent authority is clear that as scientific and social-scientific knowledge can change over time, the threshold reliability assessment is appropriate in any situation where reliability of a scientific or social-scientific evidence is challenged: *Goudge Report*, *supra*, **App. Auth., Tab 8, pp. 478-480**; *R. v. Trochym*, [2007] 1 S.C.R. 239, **App. Auth., Tab 10, paras. 31-32.**

[196] *Goudge Report*, *supra*, **App. Auth., Tab 8, pp. 470.**

[197] *Goudge Report*, *supra*, **App. Auth., Tab 8, pp. 487-496**; *Abbey*, *supra*, **App. Auth., Tab 3, paras. 104-120**; *J.-L.J.*, *supra*, **App. Auth., 9, paras. 33-35.**

[198] *Goudge Report*, *supra*, **App. Auth., Tab 8, pp. 477, 495**; *Abbey*, *supra*, **App. Auth., Tab 3, para. 89.**

[199] *Goudge Report*, *supra*, **App. Auth., Tab 8, pp. 477-496**; *Abbey*, *supra*, **App. Auth., Tab 3, paras. 73, 76**; *J.-L.J.*, *supra*, **App. Auth., 9, paras. 28-29.**

on reliability of methodology,[200] not the conclusions drawn by the expert. In *Abbey*, Doherty J.A. described the distinction between the judge as gatekeeper and the jury as fact-finder:

> In assessing the potential benefit to the trial process flowing from admission of the evidence, the trial judge must intrude into territory customarily the exclusive domain of the jury in a criminal jury trial. *The trial judge's evaluation is not, however, the same as the jury's ultimate assessment. The trial judge is deciding only whether the evidence is worthy of being heard by the jury and not the ultimate question of whether the evidence should be accepted and acted upon*. [Emphasis added.][201]

136. This distinction between threshold and ultimate reliability in screening expert evidence fits well with the distinction in *Ferras* of the committal judge's function of considering threshold reliability, but not ultimate reliability.[202]

137. *Ferras* makes clear that the presumption of reliability in the contents of a ROC is exactly that, a presumption. Like other presumptions, it can be rebutted.[203] Where the ROC relies on expert evidence that employed a methodology that is shown to be unsound, the presumption of threshold reliability is rebutted, the evidence is manifestly unreliable, and it must be discarded.

138. To avoid becoming an unconstitutional rubber stamp,[204] a committal judge must consider any genuine issue raised going to the methodological validity of an expert opinion. The *Mohan*/*Abbey* framework is the most appropriate and sensible vehicle by which the Court may discharge this obligation.

139. The constitutional challenge in *Ferras* was dismissed because, properly read, the *Act* gives a committal Judge the power to refuse to extradite where the evidence is manifestly

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[200] *Goudge Report, supra*, **App. Auth., Tab 8, pp. 487-496**; *Abbey, supra*, **App. Auth., Tab 3, paras. 87-89, 104-120.**
[201] *Abbey, supra*, **App. Auth., Tab 3, para. 89**; See also *Goudge Report, supra*, **App. Auth., Tab 8, pp. 477, 495.**
[202] *Ferras, supra*, **App. Auth., Tab 1, paras. 53-54**; *Anderson, supra*, **App. Auth., Tab 6, para. 28**; *Michaelov, supra*, **App. Auth., Tab 7, paras. 52-53.**
[203] *Ferras, supra*, **App. Auth., Tab 1, paras. 52-54**; *Anderson, supra*, **App. Auth., Tab 6, para. 31**; *Michaelov, supra*, **App. Auth., Tab 7, paras. 52-53.**
[204] *Ferras, supra*, **App. Auth., Tab 1, paras. 25, 34**; see also **para. 47**.

unreliable.[205] If, contrary to the Appellant's argument, an extradition judge may not assess the threshold reliability of expert opinion evidence where it is alleged that an unaccepted methodology was employed, then our extradition law permits extradition based on manifestly unreliable evidence – contrary to the conclusion in *Ferras*.

140. The approach to manifest unreliability of expert evidence proposed by the Appellant was applied in an unreported and sealed decision of the Ontario Superior Court.[206]

141. It is submitted that applying these principles to the case at bar leads to the inevitable conclusion that the Bisotti report is manifestly unreliable. The evidence at the committal hearing is clear that the methods by which its conclusions were reached are unsound and not generally accepted by experts in the field. The authorities are clear that considering the methodology employed by an expert is a question of threshold reliability, not ultimate reliability.[207]

142. Justice Maranger accepted that the defence experts who reviewed the Bisotti report were "highly regarded experts in the area of document examination, including handwriting comparison."[208] They testified that the Bisotti report was based on a method of analysis that was inconsistent with the universally accepted methodology for handwriting comparison. They testified that the methodology of Mme Bisotti and the mandate she was given exhibited scientific bias.[209] They testified that as a result, the Bisotti report was "patently unreliable", "wholly unreliable" and "fatally flawed".[210]

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[205] *Ferras, supra,* **App. Auth., Tab 1, paras. 42, 50.**
[206] See the judgment filed under seal with this court, particularly paras. 36-41, and more generally paras. 4-6, 30-41, 44-60.
[207] *Goudge Report, supra,* **App. Auth., Tab 8, pp. 477, 495**; *Abbey, supra,* **App. Auth., Tab 3, para. 89.**
[208] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 92.**
[209] The reasons of Justice Maranger suggest that he may have confused the concept of scientific bias as it applies to choice of scientific methods, with the legal concept of apprehension of bias.
[210] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 93.**

143. Although Justice Maranger adverts to the possibility that there might be some distinct French methodology of handwriting analysis,[211] there was no evidence before him that this was the case. The evidence that was before him supported the contrary position, that there is one accepted method of handwriting analysis used around the world by experts in the field, based on the foundational work of Albert S. Osborn. ENFHEX, the particular standards that Bisotti herself identifies as authoritative, is Osbornian.[212] The proposed fresh evidence confirms this.[213]

144. Mme Bisotti's failing was, having properly identified ENFHEX procedures as authoritative, she did not follow them.[214] To the extent that Justice Maranger's acceptance of the Bisotti report is based on the possibility that she used some unknown distinct French method of analysis, his conclusions are speculative and misapprehend the evidence that was before him.[215]

145. Justice Maranger, having thoroughly reviewed the ROC, concluded that the Bisotti report was necessary evidence for committal.[216] Counsel for the Attorney General all but conceded that the entire case turned on the report.[217] If this Court accepts the Appellant's arguments that the Bisotti report is manifestly unreliable, then the committal must be quashed.

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

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

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[211] Ruling Re: Application to Exclude Evidence, *supra,* **Transcript, Vol. 27, para. 14**; Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 111-112.**
[212] See evidence referenced at paragraph 57 above.
[213] Margot & Marquis Report, *supra,* **ABJR, Vol. 5, Tab 6-GG, §§ 2-3, 28 and p. 1545**. For the purposes of the appeal against committal, this report is located in the sealed envelope fled with the Court on the Application to Adduce Fresh Evidence.
[214] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 91.**
[215] *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), **App. Auth., Tab 11, pp. 217-218.**
[216] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 143-184, 188-189.**
[217] Submissions of Mr. Johnston, **ABJR, Vol. 1, Tab 6-C, p. 234 ll. 11-22**; Submissions of Mr. Johnston, dated March 4, 2011, **ABJR, Vol. 1, Tab 6-D, p. 235, ll. 13-20.**

convict on the evidence in the ROC. It is not merely a matter of the evidence forming a "weak" case. In the context of all of the evidence in the ROC before Justice Maranger, it would be "dangerous or unsafe to convict", to use the words of Moldaver J.A. in *Thomlison*.[218]

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

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

149. Whatever the difference in approach between Ontario and British Columbia, this Court's decisions do not stand for the proposition that committal must be ordered even where it would be unsafe or dangerous for a reasonable and properly instructed jury to convict on the evidence in the ROC.[222] This would be contrary to *Ferras' Charter*-based conclusions.[223]

150. The ROC in this case discloses a case that is not merely weak, but which would be unsafe or dangerous to convict upon. The methodologically unsound handwriting report bears the full burden of connecting Dr. Diab to Alexander Panadriyu. As Justice Maranger correctly found,

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[218] *Thomlison, supra*, **App. Auth., Tab 5, para. 45.**
[219] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 142.**
[220] See generally Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 129-142**.
[221] In this regard, the Court may wish to consider the discussion in *United v. Francis*, 2009 ABQB 596, **App. Auth., Tab 12, para. 21** to the effect that the differences between the British Columbia Court of Appeal and this Court regarding the interpretation of *Ferras* are "distinctions without a difference".
[222] Note in particular the characterization of the argument put forward by the appellant in *Thomlison, supra*, **App. Auth., Tab 5, paras. 7, 39, 47**; *Anderson, supra*, **App. Auth, Tab 6, paras. 28, 33.**
[223] *Ferras, supra*, **App. Auth., Tab 1, paras. 40, 46-47, 54.**

the balance of the evidence in the ROC "at best… create[s] a certain degree of suspicion concerning his involvement in the terrorist bombing."[224]

151. Where Justice Maranger went wrong was in describing the case against the Appellant in the ROC as merely "weak".[225] It is submitted that in circumstances where the methodologically unsound handwriting analysis carries the whole burden of identification, and the rest of the evidence in the ROC creates "at best… a certain degree of suspicion", the evidence in the ROC discloses a case where it would be dangerous and unsafe to convict. *Thomlison*, *Anderson* and *Michaelov* do not require (and indeed, do not allow) committal for extradition in a case such as this. For this reason the committal should be quashed.

iii) Alternatively, *Thomlinson, Anderson* and *Michaelov* were wrongly decided

152. In the alternative, if this Court reads the decisions of *Thomlison*, *Anderson* and *Michaelov* as preventing an assessment of whether the ROC as a whole is sufficient to justify committal in the sense that a reasonable and properly instructed jury could convict, then those decisions are inconsistent with *Ferras*, inconsistent with the Charter, and should not be followed. The approach in *Graham* is consistent with *Ferras*, and should be followed. In particular, it is submitted that *Ferras* was clear that it did change the committal test from the test in *Shephard*:

> It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty… This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.
>
> . . .
>
> This may explain the conclusion in *Shephard* that the extradition judge has no discretion to refuse to extradite if there is any evidence, however scant or suspect, supporting each of the elements of the alleged offence. *This narrow approach to judicial*

[224] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, paras. 188-189.**
[225] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 191.**

> *discretion should not be applied in extradition matters, in my opinion.*
>
> . . .
>
> Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. *However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal*.[226]

B. THE FIRST JUDICIAL REVIEW GROUND: THE MINISTER LACKED THE JURISDICTION TO ORDER SURRENDER BECAUSE DR. DIAB IS NOT WANTED BY FRANCE FOR THE PURPOSE OF TRIAL

153. France describes its criminal justice system as comprising two distinct phases: "The Investigation Phase"[227] and "The Trial Phase".[228] France describes Dr. Diab as a "person under investigation" and confirms that if surrendered he may or may not be made *mise en examen*. If placed *mise en examen* he may or may not be referred to trial.[229] No one disputes those facts. What is disputed is, given those facts, does the Minister have jurisdiction to surrender? As the act only permits surrender of a person to stand a trial, the answer to that question must be 'no'.

154. This question is a "true question of jurisdiction" to be decided on the standard of correctness.[230] The Minister is no doubt owed deference in determining whether the conditions

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[226] *Ferras, supra,* **App. Auth., Tab 1, paras. 39-54**, in particular **paras. 46-47, 54 [**Emphasis added].
[227] Second Supplemental Memorandum, *supra,* **ABJR, Vol. 5, Tab 14, pp. 1623-1625.**
[228] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, p. 1627.**
[229] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, pp. 1629-1630.**
[230] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, **App. Auth., Tab 13, paras. 33, 39.**

for a valid surrender request under the *Act* exist; but the question of what those conditions actually are is a true question of *vires*.[231]

155. Extradition is wholly a creature of statute.[232] Every power the Minister wields – from the issuance of a provisional arrest warrant[233] to his final power of surrender[234] – must be found in the *Act*. The Minister has no power, discretion or authority at common law.[235]

156. The *Extradition Act* also governs the judicial review of the exercise of the Minister's powers.[236] It incorporates by express reference the grounds available under the *Federal Courts Act*, including where a decision maker "acted without jurisdiction".[237] Parliament clearly assigned to this Honourable Court the role not only of guarding against unreasonable decision making, but also of policing, when necessary, the *Act's* jurisdictional boundaries.[238]

157. While most provisions of the *Act* are not jurisdictional in nature, some surely are. If the Minister were to purport to authorize surrender of a person to a state with whom Canada has no extradition agreement,[239] he would be acting *ultra vires*. Section 3, styled as the "general principle" of the *Act*, only permits surrender "on the request of an extradition partner".[240] A request from a non-partner leaves the Minister without any power under the *Act*.

158. The jurisdictional nature of s. 3 is confirmed by the structure of the *Act* as a whole. The Minister is only authorized to issue an Authority to Proceed if he is satisfied that the conditions

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[231] See *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761 ["*Lake*"], **App. Auth., Tab 14, para. 41**; *United States of America v. Cail* (2009), 254 C.C.C. (3d) 205 (Alta. C.A.), **App. Auth., Tab 15, para. 10.**
[232] *Canada (Justice) v. Fischbacher*, [2009] 3 S.C.R. 170 ["*Fischbacher*"], **App. Auth., Tab 16, para. 64.**
[233] *Extradition Act*, S.C. 1999, c. 18, s. 12.
[234] *Extradition Act*, s. 40.
[235] *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475, **App. Auth., Tab 17, p. 508.**
[236] *Extradition Act*, S.C. 1999, c. 18, s. 57(7).
[237] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4).
[238] *Fischbacher*, *supra*, **App. Auth., Tab 16, para. 64** (per Fish J., Concurring).
[239] Or a state with which Canada has entered into a specific agreement, or if they are listed in the schedule to the *Act*. Neither of these alternatives is applicable to this case.
[240] "Extradition partner" is in turn defined as "a State or entity with which Canada is party to an extradition agreement": *Extradition Act*, s. 2.

in ss. 3(1)(a) and 3(3) of the *Act* are met.[241] The ATP, in turn, is the jurisdiction-granting document for the committal hearing, akin to an information or indictment in criminal matters.[242]

159. Section 3 of the *Act* imposes a second jurisdictional limit, one based on the purpose of the surrender request. In the English version of the *Act*, the section requires that a request be for "the purpose of prosecuting the person". In the French version, it is "pour subir son procès" [to stand trial]. It is therefore no surprise that Canadian courts have affirmed that the *Act* does not authorize extradition for investigatory purposes.[243]

160. The English and French versions of the *Act* do not obviously mean the same thing. The term "prosecution" appears broader than the idea of standing trial; it is certainly more vague. Because the two language versions of s. 3 differ, it is important for this Court to employ rules of bilingual interpretation in order to determine the meaning and scope of s. 3.

161. The rules of statutory interpretation in these circumstances are well-established. The ultimate goal is for the court to determine the shared meaning of the two versions of the section. Where one version is clear, and the other is ambiguous but reasonably capable of bearing the meaning of the clear version, the shared meaning is that expressed by the clear provision. Similarly, where one version is narrow, and the other is broad but can reasonably be read to include the narrower version, the shared meaning is that expressed by the narrow version.[244]

162. Under either rule, the shared meaning of the *Act* is that expressed by the French text, namely that an extradition request must be for the purpose of having the person stand trial.

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[241] *Extradition Act*, s. 15.
[242] *Fischbacher*, *supra*, **App. Auth., Tab 16, para. 32.**
[243] *Germany (Federal Republic) v. Ebke* (2001), 158 C.C.C. (3d) 253 (N.W.T.S.C.), **App. Auth., Tab 18, para. 27**; *AG of Canada v. Artes-Roy*, 2005 BCSC 1686 (CanLII), **App. Auth., Tab 19, paras. 15-16.**
[244] *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, **App. Auth., Tab 20, para. 56**; *R. v. Daoust*, [2004] 1 S.C.R. 217 ["*Daoust*"], **App. Auth., Tab 21, paras. 28-29**; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th Ed. (Toronto: Thompson Reuters Canada Ltd., 2011), **App. Auth., Tab 22, pp. 347-349.**

163. The rest of the English version of the *Act* provides little insight into the meaning of the term "prosecution". Indeed, in places, the *Act* appears to conflate it with the notion of "trial", suggesting that even the English version read alone would be limited to the narrower concept. This is most clearly seen within s. 66, which governs temporary surrender.

164. Section 66(1) establishes the power of the Minister to temporarily surrender a person serving a Canadian sentence to a foreign state "so that the extradition partner may prosecute the person".[245] However, s. 66(3)(a) describes this as "temporary surrender *for a trial*", suggesting that Parliament understood "prosecution" in the narrower sense expressed by the French text.

165. Given that the French version of s. 3 is both clearer and narrower, and that "prosecution" can reasonably be read to mean "trial", the tenets of bilingual interpretation of statutes dictate that the shared meaning is that expressed in the French: trial.

166. This conclusion is entirely consistent with Parliament's intent in passing the *Act*.[246] When the *Extradition Act* was being debated by Parliament, the Minister of Justice discussed the role to be played by the committal judge as "to evaluate the sufficiency of the evidence and to determine that the conduct *for which the person is sought to stand trial* or undergo a sentence is considered to be criminal under Canadian conceptions of criminality."[247] Similarly, during a technical briefing to the Standing Committee on Justice and Human Rights, Senior Counsel in the International Assistance Group described the operation of the *Act* in the following terms:

> The Extradition Act operates on the basis of a request being made by a foreign state for a specific purpose, which is to ensure that the person who is wanted in that state to be tried or to serve a sentence be sent to that state for that purpose.[248]

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[245] *Extradition Act*, s. 66(1).
[246] See *Daoust, supra*, **App. Auth., Tab 21, para. 30.**
[247] Standing Committee of Justice and Human Rights, *Evidence*, No. 96 (4 November 1998), **ABJR, Vol. 6, Tab 19-H, p. 1968** (Anne McLellan) [emphasis added].
[248] Standing Committee on Justice and Human Rights, *Evidence*, No. 95 (3 November 1998), **ABJR, Vol. 6, Tab 19-H, p. 1950** (Jacques Lemire).

167. The *Act's* provisions respecting the use of the ROC also reflect that extradition is necessarily grounded in the anticipation of a foreign trial. Section 33(3) sets out the requirement that a ROC must always certify that the evidence summarized therein "is available for trial".[249]

168. Requiring this certification would make no sense if surrender could be ordered for purposes other than trial. Demanding that the supporting evidence be available for a trial that might never happen would be a needless hurdle that is inconsistent with the principles of comity, flexibility, and respect for Canada's international partners that typify the extradition process.[250]

169. Given the central role comity plays, it is of some importance that other countries decline to extradite individuals to France in circumstances identical to those facing Dr. Diab.

170. In *Fletcher*[251] a decision of the Supreme Court of Gibraltar, the person sought was, like Dr. Diab, not even *mise en examen* when France requested her surrender. Examining the matter within the European Arrest Warrant framework – a regime that was designed to *lower* the traditional bars to extradition[252] – the Court held that the request was not a proper one because France had not yet decided to place Ms. Fletcher on trial:

> [U]ltimately there can be little doubt that Fletcher is not "*mise en examen*", and apparent both from M. Bonifasi's evidence and the Deputy Prosecutor's letter that the decision whether or not to indict her has not in fact been taken. It therefore follows that in my view there must be clear doubt as to whether strictly a *decision to try* her has been taken.[253]

171. More recently in *Bailey*[254] the Supreme Court of Ireland reached a similar conclusion. Mr. Bailey, like Ms. Fletcher and Dr. Diab, was requested for surrender by France at the stage

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[249] *Extradition Act*, s. 33(3)(a).
[250] *Ferras, supra,* **App. Auth., Tab 1, para. 33.**
[251] *Fletcher v. France (Govt.)* (2007), 9 Gib. L.R. 191 (S.C.) ["*Fletcher*"], **App. Auth., Tab 23.**
[252] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, OJ L 190/1 (18 July 2002), **App. Auth., Tab 24, recitals 5-6.**
[253] *Fletcher, supra*, **App. Auth., Tab 23, para. 31.**
[254] *The Minister for Justice, Equality and Law Reform v. Bailey*, [2012] IESC 16 ["*Bailey*"], **App., Auth., Tab 25**.

prior to the first appearance before the *juge d'instruction*. Although each member of the Court issued separate reasons, all agreed that a request under these circumstances was not for the purpose of trial, and so could not be honoured.[255]

172. Both *Fletcher* and *Bailey* belie the claim that a first appearance is a necessary pre-condition for being referred to trial. As Maître Bonifassi explained, if one cannot be arrested by the French authorities, the *juge*, upon concluding that there is sufficient evidence to justify a trial, may close the dossier and refer the matter to the trial court. Through this procedure, the suspect is *deemed* to have been placed *mise en examen*.[256] As the Second Supplementary Memorandum makes clear, this has not been done.

173. The Minister's rejection of the existence of this procedure is unreasonable. The Second Supplemental Memorandum included provisions of the French Code of Criminal Procedure from an official government website, www.legifrance.gouv.fr. That website shows exactly what Maître Bonifassi indicated: that Article 134 provides for trial in the absence of an appearance.[257]

174. If the Minister were correct, how could France hold in absentia trials for persons outside of their territory? As this Court has itself confirmed, France can, and does refer persons to trial *in absentia*, exactly as Article 134 says they can.[258]

175. Given that the *Act* only permits surrender for the purposes of standing trial, and given the very clear statements from France that no decision to put Dr. Diab on trial has yet been made, the Minister acted *ultra vires* in ordering surrender. His order must be quashed.

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[255] *Bailey*, *supra*, Reasons of Denhem C.J., **App., Auth., Tab 25-A, paras. 97, 101-102**; Reasons of Murray J., **App. Auth., Tab 25-B, pp. 14-15**; Reasons of Hardiman J., **App. Auth., Tab 25-C, pp. 16-17, 21**; Reasons of Fennelly J., **App. Auth., Tab 25-D, paras. 112-113**; Reasons of O'Donnell J., **App. Auth., Tab 25-E, para. 53.**
[256] Bonifassi – January Opinion, *supra*, **ABJR, Vol. 6, Tab 19-A, pp 1771-1772.**
[257] *Code of Criminal Procedure (France)*, **ABJR, Vol. 6, Tab 19-I, p. 1986.** Although the copy contained in Dr. Diab's submissions appears differently formatted than the copy included in the Second Supplemental Memorandum, Dr. Diab's version comes from the same government website. The difference is that the version Dr. Diab included in his materials is the PDF version of the document, while the Supplemental Memorandum contains the HTML version. See **http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf**
[258] See *France (Republic) v. Ouzghar* (2009), 252 C.C.C. (3d) 158 (Ont. C.A.), **App. Auth., Tab 26, paras. 2-6.**

C. THE SECOND JUDICIAL REVIEW GROUND: TRIAL ON THE BASIS OF UNSOURCED & UNCIRCUMSTANCED INTELLIGENCE WOULD SHOCK THE CONSCIENCE OF CANADIANS; THE MINISTER ACTED UNREASONABLY IN SURRENDERING IN THESE CIRCUMSTANCES

176. In *Schmidt*, the Supreme Court recognized that when the application of criminal procedures of a foreign state would shock the conscience of Canadians, extradition to that country would violate the *Charter*.[259] Surrender would be *per se* unreasonable.

177. Repeated public inquiries have described the shocking injustice that the use of unsourced and uncircumstanced intelligence can wreak upon the innocent, whether inside a courtroom or without.[260] NGOs and governments alike have criticized the use of intelligence in courts, both as a troubling global phenomenon,[261] and as a matter of serious concern specific to the French Republic.[262] The use of unsourced and uncircumstanced intelligence to deprive a person of their liberty is "simply unacceptable."[263]

178. Because the Minister's reasons for surrender both ignore the evidence placed before him, and rely on features of the French justice system that have no logical relationship to the dangers inherent in using intelligence, his decision to surrender is unreasonable and must be quashed.

179. Canada rejects the use of secret intelligence by the prosecution in criminal trials; it would violate the fundamental requirement that a person be "informed of the case against him or her, and be permitted to respond to that case."[264] This principle is not a mere quirk of the *Charter*. It expresses a universal norm inherent in the idea of a fair trial.[265]

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[259] *Canada v. Schmidt*, [1987] 1 S.C.R. 500, **App. Auth., Tab 27, p. 522.**
[260] See generally, *Report of the Events Relating to Maher Arar*, ["Arar Report"], **ABJR, Vol. 6, Tab 19-J**; *Internal Inquiry Into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* ["Iacobucci Report"], **ABJR, Vol. 6, Tab 19-K.**
[261] ICJ Report, *supra*, **ABJR, Vol. 3, Tab 6-X, pp. 925-926** (describing the dangers in global/international terms).
[262] *Preempting Justice*, *supra*, **ABJR, Vol. 2, Tab 6-J**; *No Questions Asked*, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 676-687.**
[263] *United States of America v. Burns*, [2001] 1 S.C.R. 283, **App. Auth., Tab. 28, paras. 66-68.**
[264] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, **App. Auth., Tab 29, para. 53.**
[265] *International Covenant on Civil and Political Rights*, U.N. Doc. A/RES/2200A (XXI), **App. Auth., Tab 30, Art. 14(3)(b), (e).**

180. In disavowing reliance on any intelligence in the ROC, the Attorney General effectively conceded that the use of such materials would violate basic tenets of justice. This proposition was put to the Minister in Dr. Diab's submissions,[266] and the Minister did not disagree.

181. Instead, the Minister recognized that "the admission of such evidence would, in Canada's adversarial system of justice, render a trial unfair" and as such, the use of such material was a relevant factor for him to consider. The question for him was whether the foreign state's justice system offered sufficient protections so as to render the use of such materials acceptable.[267]

182. The Minister concluded that the use of intelligence in France terrorism trials was not objectionable, and that comity dictated that their own evidentiary rules be respected. To reach this conclusion, he was required to do two things: First, he had to identify elements of the French justice system that eliminated the dangers in relying on secret intelligence; and second, he needed to reject the body of evidence put before him by Dr. Diab that indicated the contrary.

i) The protections provided by the French justice system are the same as those in Canada, or do not logically respond to the dangers inherent in the use of unsourced, uncircumstanced intelligence

183. The Minister, drawing on the Second Supplemental Memorandum, concluded that France's justice system had particular characteristics that rendered the use of unsourced and uncircumstanced intelligence acceptable.[268] Most of these characteristics are either substantially the same as those found in Canada, or are otherwise entirely non-responsive to the underlying issues that render the use of secret intelligence simply unacceptable.

184. The only reasonable way the Minister could conclude that France's justice system could fairly accommodate the use of intelligence is if it had protections that are absent from Canada's. It would be utterly unreasonable if he concluded that, while Canada's system cannot fairly accept

[266] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, p. 81.**
[267] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 26.**
[268] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 24-27.**

such information, surrender to a fundamentally similar foreign system would not infringe Dr. Diab's s. 7 rights.

185. However, the Minister did just that. Most of the features of the French justice system the Minister relied upon are no different from those that exist in Canada, including the presumption of innocence,[269] the right to legal representation,[270] the right to disclosure of evidence (contained in the *dossier*),[271] and the right to call witnesses[272] or adduce documents.[273] Indeed, the Minister identified as relevant the fact that the French criminal justice system is organized as a search for the truth.[274] While Canada's system may be different, no one would suggest our trials lack a truth-seeking purpose.

186. Other aspects of the French justice system identified by the Minister are different from procedures in Canada, but only in trivial ways. The Minister stressed that the *juge d'instruction* must investigate all relevant evidence, whether inculpatory or exculpatory.[275] It is true that in Canada, this is not a function of a judge, but of the police and Crown counsel. But to suggest that these actors are entitled to search only for incriminating evidence and ignore exculpatory information is simply wrong.

187. The Minister also identified differences of substance, but failed to explain how these features could render the use of unsourced, uncircumstanced intelligence safe. It is true that, unlike the Canadian system, all evidence in France is placed into a *dossier*.[276] But it is unclear how this has any impact on the acceptability of using secret intelligence. As the authorities put to the Minister established, the dangers in the use of intelligence arise not because an accused

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[269] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[270] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[271] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[272] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[273] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[274] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[275] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 24.**
[276] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 24.**

person cannot access the final intelligence-product, but because he or she is unable to look behind it to test the reliability of its sources and the methods used to obtain it.[277] The fact that the 1999 DST report is located in an investigative file cannot possibly ameliorate the problem posed by the inability of Dr. Diab, the French judiciary, or even the DST itself to know from where, and under what circumstances, this information was actually obtained.[278]

188. The Minister also relied on the fact that an accused person has broad participatory rights during the investigative phase of the French criminal proceedings.[279] While this represents a true difference from Canada's system, it could only be a reasonable basis to support surrender if the rights granted were capable of addressing the dangers inherent in intelligence. They were not.

ii) The Minister rejected Dr. Diab's evidence by claiming it conflicted with the Second Supplemental Memorandum when no such conflict existed

189. The Minister indicated that, absent evidence of bad faith by France, he was "obliged to rely on France's clarification of its legal system".[280] Throughout his reasons, the Minister indicated that the materials adduced by Dr. Diab were at variance from the Second Supplemental Memorandum, and therefore would be disregarded. The basic problem with the Minister's reasoning was that, for the most part, there was no variance between the materials.

190. The Minister relied on the statements from France that Dr. Diab could, if placed *mise en examen*, "ask" the *juge d'instruction* to take investigative steps, and that he could "request" that the *juge* examine the sources of the intelligence.[281] What the memorandum did not address is how such requests would be answered by the *juge*.

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[277] ICJ Report, *supra*, **ABJR, Vol. 3, Tab 6-X, pp. 925**; Quiggin Report, *supra*, **ABJR, Vol. 3, Tab 6-R, p. 732**; Roach Report, *supra*, **ABJR, Vol. 4, Tab 6-AA, pp. 1334, 1339.**
[278] Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 480-481**; No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 680-681**; Home Office Report, *surpa*, **ABJR, Vol. 1, Tab 6-F, p. 343.**
[279] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 27.**
[280] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 26.**
[281] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**

191. The evidence put before the Minister by Dr. Diab filled this gap. The materials repeatedly indicated that, while French intelligence officials could be brought before the judiciary and questioned, they could not be compelled to reveal how and from whom they received intelligence.[282] Indeed, the evidence showed that such officials would not even know the ultimate source of information obtained from foreign states, or how it was obtained.[283] The *juge d'instruction* – the very official mandated to conduct the investigation – himself stressed that he did not know where the intelligence came from, but that "for reasons of confidentiality and security of the sources" he "[had] not to know" its origins.[284]

192. The Second Supplemental Memorandum does not dispute any of this. It merely indicates a generalized right to seek to have French intelligence officers examined. To say that the information from France is inconsistent with the materials adduced by Dr. Diab simply because the former is broad and vague, while the latter was focused and detailed, is simply wrong.

193. Similarly, the Minister relied on the fact that Dr. Diab could "raise concerns with respect to the evidence, including with regard to the secret nature of the intelligence assertions against him."[285] Surely a person in Canada faced with secret evidence could "raise concerns" as well. But given that such intelligence in terror trials is generally viewed as "strong evidence"[286] it is difficult to see the utility or effectiveness in the right to "raise concerns".

194. The only distinct feature of the French system that the Minister pointed to was that Dr. Diab would have "the right to appeal the decisions of the investigating judge, as well as the trial

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[282] Hodgson Report to the Home Office, *supra*, **ABJR, Vol. 2, Tab 6-G, pp. 387-388**; Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 477**; Bonifassi – The use of Intelligence, *supra*, **ABJR, Vol. 3, Tab 6-P, p. 714.**
[283] Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, p. 480-481**; No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 680-681**; Home Office Report, *surpa*, **ABJR, Vol. 1, Tab 6-F, p. 343.**
[284] International Letters Rogatory, dated June 5, 2008, ["MLAT Request"], **ABJR, Vol. 2, Tab 6-I, p. 428.**
[285] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[286] Bonifassi – The use of Intelligence, *supra*, **ABJR, Vol. 3, Tab 6-P, p. 714.**

court."[287] The Second Supplemental Memorandum indicates that there are two ways to challenge steps taken by the judiciary: motions to annul, and appeals. The Memorandum did not state which of these procedures would be available to challenge the inclusion of intelligence in the *dossier* by the *juge*. The only evidence on this crucial point came from the opinion of Stephane Bonifassi, who clarified that challenging the inclusion of evidence in the *dossier* may only be done by way of annulment. He further indicated that a motion to annul can only be successful if the *juge's* action is unlawful; with respect to the intelligence, such a motion would necessarily fail as collecting and using intelligence this way is lawful in France.[288]

195. The Memorandum set out, in broad terms, the existence of a system of challenge and appellate review. Maître Bonifassi provided more detailed information about how this regime would be applied to the intelligence in the *dossier*. The information was not in conflict. It was complimentary.

196. Ultimately, the only actual conflict in the evidence was whether or not there existed a corroboration requirement for the use of the intelligence reports as evidence.

iii) The Minister misapprehended the facts relevant to the use of intelligence; In any event, a corroboration requirement cannot render the use of secret intelligence acceptable

197. The Second Supplemental Memorandum referred to provisions of the French Code of Criminal Procedure dealing with the use of anonymous witnesses, and in particular, the requirement that their evidence not be the sole basis for a conviction.[289]

198. These provisions are irrelevant. Unsourced and uncircumstanced intelligence is not the same thing as an anonymous witness. The intelligence in question may not have come from a

[287] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 25.**
[288] Bonifassi – January Opinion, *supra*, **ABJR, Vol. 6, Tab 19-A, p. 1775.**
[289] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 5, Tab 14, 1627-1628.**

human source at all. An anonymous witness can be questioned about the circumstances in which he or she made the relevant observations. Not so with secret intelligence reports.

199. The Memorandum also indicates that there is a free-standing corroboration requirement for intelligence, a proposition that Maître Bonifassi denies exists,[290] and which the judicial decisions cited in the Memorandum do not support.[291] But even if such a requirement did exist, it could not reasonably serve to "cure" the inherent unfairness in the use of secret evidence in a criminal trial.

200. The core of the dangers inherent in intelligence is that its reliability is untestable. The existence of corroborative evidence does not change this epistemic dilemma. In *Trochym*, the Supreme Court of Canada rejected the suggestion that corroboration was a cure for evidence with unknowable reliability. The court noted that permitting the use of this type of evidence when there existed consistent 'ordinary' evidence simply gives rise to "a danger… that a web of consistent but unreliable evidence will lead to a (potentially wrongful) conviction."[292]

201. France has provided no information on what principles govern their supposed corroboration requirement, but the construction of the ROC provides some insight into what the French judiciary views as corroborative. What emerges is a very troubling picture, which is most clearly expressed in the treatment of Dr. Diab's passport.

202. In 1981, Ahmed Ben Mohamed was detained in Italy, and was found carrying Dr. Diab's passport.[293] The passport had two stamps indicating entry and exit from Spain: the first dated 20 September 1980, and the second 7 October 1980. The passport was identified by the *juge*

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[290] Bonifassi – January Opinion, *supra*, **ABJR, Vol. 6, Tab 19-A, p. 1775-1776.**
[291] Supplemental Submissions to the Minister, *supra*, **ABJR, Vol. 6, Tab 18, para. 37(g).**
[292] *Trochym*, *supra*, **App. Auth., Tab 10, para. 60.**
[293] Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 22.** The passport can be found in the ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3762-3772.**

d'instruction as important physical evidence in two sets of materials transmitted to Canada: a request pursuant to the *Mutual Legal Assistance in Criminal Matters Act*,[294] and the ROC.

203. In the June 2008 MLAT request, the following intelligence was relied upon:

> Information obtained by the DST revealed that the Rue Copernic hit team came to France from Spain and then returned to Spain.
>
> One had to find that the stamps on Hassan DIAB's passport were completely compatible with this information.
>
> It should be recalled that at the time, terrorist attacks, particularly by Palestinian groups, were quite frequent in Europe and border controls were particularly strict.
>
> Thus, it would be in the interest of activists who were still unknown to the specialized services to cross borders with their real identity papers and use false documents only once they arrived in a given country.
>
> According to this hypothesis, it would be completely logical that Hassan DIAB would have entered and left France with his real passport and used the false passport under the name PANADRIYU when operating in France.[295]

204. The passport appears to only have been fully analyzed by France in October 2008.[296] The passport had no entry or exit stamps for France in it, which appears inconsistent with the above-quoted intelligence. In the ROC, which was transmitted in December 2008, the same *juge* provided the following about the intelligence from the DST:

> 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

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[294] *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.).
[295] MLAT Request, *supra*, **ABJR, Vol. 2, Tab 6-I, pp. 427-428.**
[296] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3678-3679.**

> that allowed the arrival in Spain, to members of the Rue Copernic hit team, to ensure their passage and movement in France.[297]

205. These two sets of statements cannot both be true. Alexander Panadriyu either entered France using his real passport or a fake one. Either the MLAT's intelligence is wrong, or the ROC's is. When confronted with this inconsistency, the *juge d'instruction* merely indicated that he continues to rely on the intelligence in the ROC, and reiterated that the passport is supportive of this intelligence. He offered no explanation for these two contradictory versions of events.[298]

206. In a very narrow sense, the *juge* is correct: the Diab passport is *not inconsistent* with the new version of the intelligence contained in the ROC. But in reality, the passport is only evidence that supports an inference that Dr. Diab was in Spain in 1980. Under the MLAT version of events, it would be exculpatory evidence proving that he was not in France. The passport is only corroborative of the intelligence if one were to pre-suppose that Dr. Diab were the bomber. This is impermissible circular reasoning,[299] but given the weight assigned to the passport by the *juge d'instruction* in both the MLAT and the ROC, one cannot escape the impression that this is the very "corroboration" that renders the use of intelligence safe in France.

207. This is to say nothing of the fact that the *juge d'instruction* has indicated that the manifestly unreliable Marganne and Barbe-Prot handwriting reports "go clearly towards confirming" the intelligence.[300]

208. Absent any procedural protection that could conceivably serve to address the problems of using intelligence as evidence, the Minister could not reasonably conclude that any possible trial

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[297] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3680.**
[298] Letter from Marc Trevidic, Vice-President of Investigation to Claude LaFrançois, Exhibit B to the Affidavit of Julie Wilson, **ABC, Vol. 7, Tab 30, p. 2101.**
[299] *AGC v. Laird*, 2010 ONSC 1553, **App. Auth., Tab 31, paras. 40-54.**
[300] MLAT Request, *supra*, **ABJR, Vol. 2, Tab 6-I, pp. 430-431.**

of Dr. Diab would be fair. To surrender in those circumstances surely must be unjust, oppressive, and indeed, shocking to the conscience.

D. THE THIRD JUDICIAL REVIEW GROUND: IT IS UNREASONABLE FOR THE MINISTER TO SURRENDER DR. DIAB WHEN HE WOULD BE TRIED ON THE BASIS OF HANDWRITING EVIDENCE "FOUND" MANIFESTLY UNRELIABLE BY THE EXTRADITION JUDGE

209. In *Ferras*, the Supreme Court introduced limited reliability weighing into the committal process.[301] In doing so, it articulated a crucial constitutional proposition: Even if the requesting state's evidence is sufficient to place a person on trial under their law, if that evidence is manifestly unreliable under Canadian law, s. 7 of the *Charter* bars extradition.

210. In the present case, the reports of Marganne and Barbe-Prot were effectively found to be manifestly unreliable. The Attorney General of Canada, acting on behalf of the Republic of France, was only able to avoid such a ruling by disavowing reliance on these reports. However, France subsequently confirmed that these reports remain evidence for use against Dr. Diab.[302]

211. In ordering surrender, the Minister acted unreasonably by failing to appreciate the difference between evidence whose ultimately reliability is in issue, and evidence which is manifestly unreliable. By failing to avert to this distinction, the Minister failed to discharge his duty to ensure that surrender would not violate Dr. Diab's s. 7 *Charter* rights by surrendering him to face trial on the basis of manifestly unreliable evidence.

212. In his submissions to the Minister of Justice, Dr. Diab stressed that the Committal Judge had effectively found that the Marganne and Barbe-Prot reports were manifestly unreliable. He submitted that surrender to stand trial on the basis of manifestly unreliable evidence anywhere in

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[301] *Ferras*, *supra*, **App. Auth., Tab 1, para. 46.**
[302] Second Supplemental Memorandum, *supra*, **ABJR, Vol. 4, Tab 14, p. 1630.**

the world would violate s. 7 of the *Charter*.[303] He then relied on the evidence that indicated, if put on trial, he would not have a realistic opportunity to challenge the handwriting reports.[304]

213. In his reasons, the Minister ignored the first issue, and proceeded directly to the question of whether Dr. Diab would have an opportunity to effectively challenge the flawed reports. In doing so, he failed to address a more fundamental submission: extradition to face trial where manifestly unreliable evidence would be relied upon, other than in a trivial way, will always violate the principles of fundamental justice.

214. There can be no question that manifest unreliability in the *Ferras* sense is different from ultimate reliability. *Ferras* draws a constitutionally significant distinction between evidence whose ultimate reliability is impugned and evidence that is manifestly unreliable:

> The Act recognizes the requirement that evidence put before the extradition judge must possess indicia of threshold reliability. The former Act required either that the evidentiary provisions of the relevant extradition treaty be followed or, in the absence of provisions in a treaty, that the requesting country attest to the reliability and availability of its evidence by affidavits based on first-hand knowledge. The current Act grounds threshold reliability in conformity to treaty, or alternatively, certification by the requesting state that the evidence either justifies prosecution in the requesting state or was gathered according to the law of that state...
>
> …
>
> The absence of particular indicia of reliability or availability in itself does not violate the principles of fundamental justice applicable to extradition hearings. No particular form or quality of evidence is required for extradition, which has historically proceeded flexibly and in a spirit of respect and comity for extradition partners. It is thus difficult to contend that the provisions of the Act for the admissibility of evidence, in and of themselves, violate the fundamental norms of justice applicable to extradition.
>
> …
>
> I take it as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a

[303] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, pp. 117-118.**
[304] Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, pp. 121-124.**

> judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1).[305]

215. Issues raised by the absence of classic indicia of reliability, in the face of the statutory substitutes contained s. 33 of the *Act*, do not give rise to *Charter* concerns. Evidence that is manifestly unreliable does; it cannot constitutionally be considered when adjudicating an extradition request.[306]

216. The reason for rejecting such evidence is that resting a verdict upon it would be "dangerous" or "unsafe".[307] The court in *Ferras* repeatedly linked the concept of manifest unreliability to the standard for removing a case from a jury, indicating that, once found to be manifestly unreliable, the *Charter* would prohibit reliance on such evidence during trial.[308]

217. Considerations of comity provide no answer to the above considerations. Evidence in a ROC is already presumptively reliable based on considerations of comity, including the recognition given to the requesting state's certification that the evidence is sufficient to justify trial under their own laws.[309] Notwithstanding this, constitutional requirements will still operate to bar surrender when evidence is manifestly unreliable according to Canadian standards.

218. In this case, Maranger J. never formally ruled that the Marganne and Barbe-Prot reports were manifestly unreliable because, following the ruling permitting Dr. Diab to adduce the evidence of Messrs. Purdy, Lindblom, Osborn and Radley, the Attorney General disavowed reliance on them. To suggest that this was anything other than a concession that the reports were manifestly unreliable is untenable. Maranger J. made it abundantly clear that he would have

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[305] *Ferras*, *supra*, **App. Auth., Tab 1, paras. 29, 33, 40.**
[306] *Thomlison*, *supra*, **App. Auth., Tab 5, para. 45.**
[307] *Thomlison*, *supra*, **App. Auth., Tab 5, para. 45**; *United States of America v. Mylvaganam*, 2009 ONCA 495, **App. Auth, Tab 32, para. 10.**
[308] *Ferras*, *supra*, **App. Auth., Tab 1, paras. 9, 26, 43, 46, 54.**
[309] *Extradition Act*, S.C. 1999, c. 18, s. 33(3)(a)(i); *Ferras*, *supra*, **App. Auth., Tab 1, para. 52.**

viewed the reports as manifestly unreliable had he not been pre-empted by the Attorney General's last-minute disavowal.[310]

219. Notwithstanding that according to French law, these reports were properly obtained and placed in the *dossier* for use at a criminal trial, they are so flawed that not even a committal judge in Canada could consider them. While a committal judge and the Minister play different roles in the extradition regime, this is not a warrant for the Minister to disregard the shocking problems in the Marganne and Barbe-Prot reports. The *Charter* prohibits their consideration at the judicial phase of extradition; the *Charter* requires their consideration by the Minister when assessing whether surrender would be unconstitutional. Given the holding in *Ferras*, the only reasonable conclusion the Minister could reach is that surrender would violate s. 7.

220. The Minister avoided the issue by telling Dr. Diab that he should raise his concerns respecting these reports with the French authorities themselves.[311] Such an answer might well be reasonable where the issue is a question as to the reliability of particular evidence. Presuming a fair foreign justice system, comity could ground an approach that requires a requested person to address such matters with the requesting state.

221. Not so when the evidence reaches the constitutionally significant stage of being manifestly unreliable. It is at this point that concerns about comity give way to the basic constitutional protections applicable to the extradition regime. The Minister's logic is inconsistent with the principle that, notwithstanding our respect for our extradition partners' justice systems, the *Charter* does not permit extradition on the basis of evidence so manifestly unreliable that it would be dangerous to rest a verdict upon it.

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[310] Ruling Re: Application to Exclude Evidence, *supra*, **Transcript, Vol. 27, para. 13**; Reasons for Committal, *supra*, **ABC, Vol. 1, Tab 4, para. 125**; Submissions to the Minister, *supra*, **ABJR, Vol. 1, Tab 5, p. 117.**
[311] Reasons for Surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 34.**

222. Delegating to the requesting state the obligation to ensure against trial on the basis of manifestly unreliable evidence is not just inconsistent with *Ferras*; it is also unrealistic in light of the evidence on how the French judiciary would view the Radley, Purdy, Lindblom, Osborn, Margot and Marquis reports. The Minister was presented with evidence that French courts do not give equal weight to party-appointed experts. They are viewed as partisans witnesses, acting for profit, unlike the neutral court-appointed experts who work for justice.[312]

223. Even if the Minister could decline to consider the issue of the manifest unreliability of the Marganne and Barbe-Prot reports – which constitutionally, he cannot – his suggestion that Dr. Diab simply raise these concerns with the French authorities is not a realistic option.

224. Ultimately, the Ministers reasons reveal three fatal errors: First, he failed to recognize the distinction between evidence with impugned ultimate reliability, and evidence that is manifestly unreliable. Second, flowing out of his first error, the Minister failed to consider the *Charter* implications of surrendering a person to be tried on the basis of evidence that lacks the threshold reliability that *Ferras* requires. Third, he avoided addressing these concerns by directing Dr. Diab to address these issues with the French authorities, in circumstances where this did not represent a realistic avenue to ensure that his fair trial rights would be maintained.

225. These errors, individually and as a whole, rendered the Minister's decision unreasonable.

E. THE FOURTH JUDICIAL REVIEW GROUND: THERE IS A PLAUSIBLE CONNECTION BETWEEN THE INTELLIGENCE FRANCE WILL RELY ON AND THE USE OF TORTURE; THE MINISTER CANNOT ORDER SURRENDER WITHOUT MAKING APPROPRIATE INQUIRIES

226. International human rights law prohibits extradition where there is a real risk that evidence derived from torture would be used in a foreign trial.[313] Where the impugned evidence

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[312] Bonifassi – Expert Witnesses, *supra*, **ABJR, Vol. 5, Tab 6-FF, p. 1531**; Margot & Marquis Report, *supra*, **ABJR, Vol. 5, Tab 6-GG, p. 1536**; Bonifassi – January Opinion, *supra*, **ABJR, Vol. 6, Tab 19-A, p. 1774.**

[313] *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09 (17 January 2012)(Eur. Ct. H.R.) ["*Othman*"], **App. Auth., Tab 33, paras. 281-282, 287.**

is intelligence obtained in secret circumstances unknown to the requested person, he or she must only establish a plausible connection between that intelligence and the use of torture. Once this is done, surrender may only occur if the Minister satisfies himself through appropriate inquiries that the evidence was not obtained through torture.[314] Should the Minister decline to make such inquiries, he must refuse surrender.

227. In the present case, Dr. Diab established that by the time of the 1999 re-launch of the investigation, France was actively obtaining intelligence related to the operations of pro-Palestinian organizations such as the PFLP-SO from Syria, and that Syrian Military Intelligence regularly employed torture in order to obtain such information.

228. The Minister's reasons show that he misunderstood Dr. Diab's submissions respecting the appropriate evidentiary threshold, ignored relevant evidence respecting the use of torture to obtain information like that contained in the 1999 DST report, and denied the existence of a well-established duty to investigate.

i) The standard of proof in these circumstances is a "plausible connection" with torture; the Minister misunderstood the nature of Dr. Diab's submission

229. A disturbing feature of modern counter-terrorism policy is the tendency of states to trade intelligence with foreign powers with horrific human rights records.[315] From a legal standpoint, such activities present a serious dilemma. Evidence obtained by torture may never be used as evidence in a legal proceeding.[316] Logically, there must be some mechanism to ensure that torture-derived information is not used. However, where secret intelligence is traded between

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[314] Tobias Thienel, "The Admissibility of Evidence Obtained by Torture under International Law" (2006) 17 Eur. J. Int'l L. 349 ["Thienel"], **App. Auth., Tab 34, p. 355.**

[315] ICJ Report, *supra*, **ABJR, Vol. 3, Tab 6-X, p. 926.**

[316] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113, **App. Auth., Tab 35, Art. 15**; *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 269.1(4).

states, it will usually be impossible to know with certainty whether the information is tainted by torture.

230. In his reasons for surrender, the Minister indicated that he rejected Dr. Diab's submission that "in the extradition context, the standard to be met by the person claiming the use of torture derived evidence is 'plausible connection'." Instead, relying on the *Khadr*[317] and *Singh*[318] decisions, he indicated that the proper standard was a balance of probabilities.[319]

231. Dr. Diab has never submitted that extradition cases represent a special case in which the standard to be made out is a plausible connection. Rather, he put forward a simple proposition that has already been accepted by Canadian and international courts: the standard of proof varies depending on the nature of the evidence (not the type of proceeding in which it arises), and in particular, whether a person is able to know its source and the circumstances in which it was collected.

232. When unsourced and uncircumstanced intelligence is suspected of being derived from torture there is inevitably a problem in substantiating the claim. Without access to information about the circumstances in which it was gathered, proving the existence of torture is difficult. Applying a balance of probabilities standard would, in the words of Lord Bingham, be to apply "a test which, in the real world, can never be satisfied."[320] Because the guarantee against using torture-derived evidence cannot be illusory, a balance of probabilities standard is unworkable.

233. Dr. Diab urged the Minister to adopt an approach that has already been used by the Federal Court of Canada for half a decade. In the *Mahjoub* security certificate proceedings, Tremblay-Lamer J. recognized that when a claimant is not permitted to know "the content of the

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[317] *United States of America v. Khadr* (2011), 273 C.C.C. (3d) 55 (Ont. C.A.) ["*Khadr*"], **App. Auth., Tab 36**.
[318] *India v. Singh* (1996), 108 C.C.C. (3d) 274 (B.C.S.C.) ["*Singh*"], **App. Auth., Tab 37**.
[319] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**
[320] *A & Ors. v. Secretary of State of the Home Department*, [2005] UKHL 71, **App. Auth., Tab 38, para. 59** (per Binghman J., dissenting); See also **para. 80** (per Nicholls J., dissenting), **para. 98** (per Hoffman J, dissenting).

statements and the identities of those who made them" then the appropriate standard is to require them only to offer "a plausible explanation" as to why the evidence is tainted by torture.[321] When the same issue was revisited by Blanchard J., he adopted Tremblay-Lamer J.'s reasoning, expressing the standard as a "plausible connection".[322]

234. The very same problem was addressed by the House of Lords in *A & Others*. That case dealt with claims that secret evidence before the UK Special Immigration Appeals Commissions was derived from torture. Lord Bingham wrote:

> I do not for my part think that a conventional approach to the burden of proof is appropriate in a proceeding where the appellant may not know the name or identity of the author of an adverse statement relied on against him, may not see the statement or know what the statement says, may not be able to discuss the adverse evidence with the special advocate appointed (without responsibility) to represent his interest, and may have no means of knowing what witnesses he should call to rebut assertions of which he is unaware. It would, on the other hand, render section 25 appeals all but unmanageable if a generalized and unsubstantiated allegation of torture were in all cases to impose a duty on the Secretary of state to prove the absence of torture. It is necessary, in this very unusual forensic setting, to devise a procedure which affords some protection to an appellant without imposing on either party a burden which he cannot ordinarily discharge.
>
> The appellant must ordinarily, by himself or his special advocate, advance some plausible reason why evidence may have been procured by torture.[323]

235. Although Lord Bingham, along with Lords Hoffmann and Nichols, was in the minority, the European Court of Human Rights in *Othman* rejected the majority's balance of probabilities standard, effectively rendering Lord Bingham's position the law throughout Europe.[324]

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[321] *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 247 [*"Mahjoub v. Canada*"], **App. Auth., Tab 39, paras. 28-35.**
[322] *Mahjoub (Re)*, 2010 FC 787, **App. Auth., Tab 40, paras. 51-59.**
[323] *A & Ors., supra*, **App. Auth., Tab 38, paras. 55-56.**
[324] *Othman, supra*, **App. Auth., Tab 33, paras. 272-276**; see also Christopher Michaelsen, "The Renaissance of Non-Refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights" (2012), 61 Int'l & Comp. L.Q. 750, **App. Auth., Tab 41, pp. 762-763.**

236. The Minister's reliance on *Khadr* and *Singh* to reject this pragmatic approach was misplaced. Both decisions stand for the proposition that claims respecting torture, in the context of a committal hearing, will ordinarily be adjudicated based on a balance of probabilities. Neither case, however, reflected the problems inherent in secret intelligence.

237. In *Khadr*, it was the claimant himself who was mistreated.[325] He had first-hand knowledge of sources and circumstances. In *Singh* the claimant was fully aware of the exact sources of the evidence. On that basis he was able to conduct his own investigations, obtaining information directly from the persons who were mistreated.[326] Dr. Diab's situation is different. He knows absolutely nothing about the sources of the intelligence contained within the *dossier*; no one in his position could ever establish tainting by torture on a balance of probabilities.[327] In demanding that Dr. Diab meet an impossible standard, the Minister acted unreasonably.

ii) The evidence clearly established a plausible connection to torture; the Minister failed to give sufficient reasons for concluding otherwise

238. All that Dr. Diab could do to establish a plausible connection with torture was to rely on public sources of information. These sources were more than sufficient to make out a plausible connection between the information contained in the *dossier*, and the use of torture by Syrian Military Intelligence.

239. Starting in the 1970s, the Syrian government became increasingly involved with terrorist groups operating out of Lebanon.[328] Although the Syrian regime had relatively friendly relations with some PFLP groups, there is no evidence of a cooperative relationship with the PFLP-SO.[329]

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[325] *Khadr*, *supra*, **App. Auth., Tab 36 at paras. 7-9.**
[326] *Singh*, *supra*, **App. Auth., Tab 37, p. 282**; *Mahjoub v. Canada*, *supra*, **App. Auth., Tab 39, paras. 29-30**.
[327] Quiggan Report, *supra*, **ABJR, Vol. 3, Tab 6-R, p. 755.**
[328] Flynt Leverett, *Inheriting Syria* (Washington, D.C.: Brookings Institution Press, 2005) ["Leverett"], **ABJR, Vol. 8, Tab 19-X, p. 2692.**
[329] Leverett, *supra*, **ABJR, Vol. 8, Tab 19-X, p. 2701, n. 40.**

Indeed, the ROC indicates that the PFLP-SO had an antagonistic stance towards Syria.[330] Throughout the 70s and 80s, Syria gained a reputation for its practice of abducting Lebanese citizens in Lebanon and Syria and detaining them incommunicado.[331]

240. Syria's reputation for torturing detained persons is well-established. The Assad regimes have traditionally been quite willing to employ torture in order to get information related to state security and terrorism,[332] and have done so to generate intelligence of interest to its Western intelligence partners.[333]

241. France began to seek out such intelligence in the mid-80s due to increasing numbers of terrorist attacks taking place on its soil. In September 1986, government officials, including representatives of the DST, travelled to Damascus. Once there, they negotiated an agreement whereby France would provide Syria with economic support in exchange for Syrian aid in securing the release of French hostages held in Beirut, and on-going intelligence sharing related to Lebanese terrorist groups. One month later, the French hostages were released.[334]

242. This intelligence-sharing relationship has proven extremely durable. As recently as 2009 the head of the DCRI – the successor to the DST – has publically referred to Syria as an important source of intelligence for France.[335] Even the French judiciary has found that investigating magistrates have been implicated in the use of torture by Syria in order to gain

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[330] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, pp. 3688-3689.**
[331] Human Rights Watch, "Country Summary – Syria", **ABJR, Vol. 9, Tab 19-BB, p. 2931.**
[332] *Arar Report*, *supra*, **ABJR, Vol. 6, Tab 19-J, pp. 2002, 2010**; *Iacobucci Report*, *supra*, **ABJR, Vol. 6, Tab 19-K, p. 2022.**.
[333] Iacobucci Report, *supra*, **ABJR, Vol. 6, Tab 19-K, pp. 2024-2027.**
[334] Douglas Porch, *The French Secret Services* (New York: Farrar, Straus and Giroux, 1995), **ABJR, Vol. 8, Tab 19-V, pp. 2647-2648**; Jeremy Shaprio and Benedicte Suzan, "The French Experience of Counter-terrorism" (2003) 45 Survival 67, **ABJR, Vol. 8, Tab 18-W, p. 2660.**
[335] No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 677-678.**

information in counter-terrorism investigations.[336] The possibility that the intelligence contained in the *dossier* is tainted by torture is far from speculative; it is eminently plausible.

243. The Minister simply stated that Dr. Diab had not "established a credible foundation" even on a plausible connection standard.[337] The Minister offered two reasons for his conclusion: First that France has traditionally denied the existence of the 1986 agreement with Damascus, and second, that the sources relied on, even if believed, do not establish that the particular evidence in the *dossier* originated from Syria.

244. That France denies a secret agreement to exchange money and arms for sensitive intelligence is not particularly insightful. It would be shocking if they took any other stance. Whether such an agreement exists or not, Paris would be likely to deny it. The existence of a public denial says nothing. What says rather more is the acknowledgement by the head of French intelligence that they actively receive intelligence from Damascus.[338]

245. Dr. Diab agrees that the information he put forward does not prove that the specific intelligence contained in the *dossier*, which he does not have access to and can never know the source of, was obtained from Syria. That would be a proposition that no one could ever establish, and to demand it from Dr. Diab is completely unreasonable.

246. That said, the materials before the Minister established, not only an information-sharing relationship between Damascus and Paris, but also examples of the German BKA being complicit in torture by Syrian officials in order to obtain intelligence.[339] This further cements a

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[336] No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, p. 686.**
[337] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**
[338] No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 677-678.**
[339] No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, p. 667.**

plausible connection to torture in this case, bearing in mind that the "Palestinian Lead" intelligence in 1980 and 1981 came to France by way of German sources, including the BKA.[340]

iii) Having established a plausible connection with torture, the Minister had a duty to investigate; having failed to investigate, surrender remains unlawful

247. The establishment of a plausible connection with torture does not *per se* bar surrender. Rather, it places an onus on the Minister to conduct an appropriate inquiry into Dr. Diab's allegations. It always remained open to the Minister to satisfy himself on the basis of objective and verifiable criteria that there exists no connection between the intelligence and torture.

248. The Minister relied on two closely-related considerations to decline to embark on an inquiry: First that the cases cited by Dr. Diab in his submissions could be distinguished because there the requesting state was also the state alleged to have tortured; and secondly, that France is not a state known to torture. Ultimately he concluded that inquiring into the connection Dr. Diab alleged would be to "question, without a legitimate basis the good faith, integrity and honour of Canada's traditional extradition partners".[341]

249. The Minister's first consideration demonstrates that he fundamentally misunderstood the legal issue before him, basing his decision on an irrelevant consideration. The concern is not that if surrendered Dr. Diab would be tortured by France. Rather, as the *Othman* decision makes clear, surrendering a person to face trial on the basis of evidence obtained by torture violates principles of international human rights law (and presumptively the *Charter* as well[342]). The identity of the torturer is immaterial.[343] It is the anticipated use of the evidence that crystallises the prohibition against surrender.

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[340] ROC, *supra*, **ABC, Vol. 13, Tab 87-D, p. 3668.**
[341] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, pp. 33-34.**
[342] See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, **App. Auth., Tab 42, p. 1056.**
[343] Thienel, *supra*, **App. Auth., Tab 34, pp. 356-365.**

250. If France were to receive an extradition request from Canada so that a person would stand trial on the basis of evidence obtained by torture – perhaps the sort of information discussed in the *Arar* and *Iacobucci* Reports – the *Othman* decision would bar surrender. To the extent that the Minister relied on the fact that France itself is not alleged to have tortured anyone related to this case, his decision was based on an irrelevant consideration.

251. The Minister also opined that France is not "known to use evidence that is the product of torture in its criminal proceedings."[344] But the very materials put before the Minister by Dr. Diab did refer to France convicting persons on the basis of evidence that was derived from torture.[345] Nor is it a secret that the United Nations Committee Against Torture has found on several occasions that France has violated the Convention Against Torture,[346] the very instrument that the Minister relied on to conclude that France was unlikely to use such materials in its proceedings.[347]

252. The Minister's view that making inquiries with France about the intelligence in the dossier would be somehow improper is contradicted by this Court's own jurisprudence. In *Zajicek*, the majority referred to the Minister's inquiries with the Czech government respecting a claim of torture as "quite [proper]".[348]

253. Having established a plausible connection with torture, two options were open to the Minister: He could conduct an inquiry into the allegations, or he could decline to investigate, and

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[344] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 33.**
[345] Preempting Justice, *supra*, **ABJR, Vol. 2, Tab 6-J, pp. 474-477**; No Questions Asked, *supra*, **ABJR, Vol. 2, Tab 6-M, pp. 683-686.**
[346] *Mafhoud Brada v. France*, Communication No. 195/2002, U.N. Doc. CAT/C/34/D/195/2002 (2005), **App. Auth., Tab 43, para. 14**; *Adel Tebourski v. France*, Communication No. 300/2006, U.N. Doc. CAT/C/38/D/300/2006 (2007), **App. Auth., Tab 44, at para. 9.**
[347] Reasons for surrender, *supra*, **ABJR, Vol. 1, Tab 3, p. 34.**
[348] *Czech Republic v. Zajicek* (2012), 280 C.C.C. (3d) 1 (Ont. C.A.), **App. Auth., Tab 45, para. 21** (leave to appeal granted, 2012 CanLII 36253).

refuse surrender due to the plausible connection. By failing to select either of the two options lawfully open to him, the Minister acted unreasonably.

F. ALTERNATIVELY, THE MINISTER ACTED UNREASONABLY IN DECLINING TO SEEK ASSURANCES

254. Alternatively, the Minister acted unreasonably in declining to seek assurances that the intelligence in the ROC, and the Bisotti, Marganne and Barbe-Prot reports will not be relied upon, and/or that all of Dr. Diab's expert handwriting reports, and other exculpatory evidence identified in his submissions to the Minister, will be included in the *dossier*.

IV. ORDER REQUESTED

255. The Appellant seeks an order allowing the appeal and discharging him, or in the alternative, ordering a new committal hearing.

256. The Applicant seeks an order quashing the decision of the Minister of Justice and discharging him, or in the alternative, referring the matter back for reconsideration in accordance with the reasons of this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Toronto, this ___ Day of January, 2013

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Marlys Edwardh
Donald Bayne
Jill Copeland
Daniel Sheppard

Lawyers for the Appellant/Applicant, Dr. Hassan Diab

SCHEDULE A: AUTHORITIES TO BE CITED

CASE LAW

A & Ors. v. Secretary of State of the Home Department, [2005] UKHL 71

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AG of Canada v. Artes-Roy, 2005 BCSC 1686 (CanLII)

AGC v. Laird, 2010 ONSC 1553

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, [2011] 3 S.C.R. 654

Canada (Justice) v. Fischbacher, [2009] 3 S.C.R. 170

Canada v. Schmidt [1987] 1 S.C.R. 500

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350

Czech Republic v. Zajicek (2012), 280 C.C.C. (3d) 1 (Ont. C.A.)

Fletcher v. France (Govt.) (2007), 9 Gib. L.R. 191 (S.C.)

France (Republic) v. Ouzghar (2009), 252 C.C.C. (3d) 158 (Ont. C.A.)

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R. v. Abbey (2009), 246 C.C.C. (3d) 301 (Ont. C.A.)

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R. v. Trochym, [2007] 1 S.C.R. 239

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Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

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United States of America v. Anderson (2007), 218 C.C.C. (3d) 225 (Ont. C.A.)

United States of America v. Burns, [2001] 1 S.C.R. 283

United States of America v. Cail (2009), 254 C.C.C. (3d) 205 (Alta. C.A.)

United States of America v. Ferras, [2006] 2 S.C.R. 77

United States of America v. Graham (2007), 222 C.C.C. (3d) 1 (B.C.C.A.)

United States of America v. Khadr (2011), 273 C.C.C. (3d) 55 (Ont. C.A.)

United States of America v. Michaelov (2010), 264 C.C.C. (3d) 480 (Ont. C.A.)

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United States of America. v. Thomlison (2007), 216 C.C.C. (3d) 97 (Ont. C.A.)

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SECONDARY SOURCES

Christopher Michaelsen, "The Renaissance of Non-Refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights" (2012), 61 Int'l & Comp. L.Q. 750

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113

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The Honourable Stephen T. Goudge Commissioner, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario*, Vol. 3 (Toronto, 2008), Ch. 18

Tobias Thienel, "The Admissibility of Evidence Obtained by Torture under International Law" (2006) 17 Eur. J. Int'l L. 349

SCHEDULE B: LEGISLATION

EXTRADITION ACT, S.C. 1999, C. 18	**LOI SUR L'EXTRADITION, L.C. 1999, CH. 18**
Definitions 2. The definitions in this section apply in this Act. "extradition partner" means a State or entity with which Canada is party to an extradition agreement, with which Canada has entered into a specific agreement or whose name appears in the schedule.	Définitions 2. Les définitions qui suivent s'appliquent à la présente loi. « partenaire » État ou entité qui est soit partie à un accord d'extradition, soit signataire d'un accord spécifique avec le Canada ou dont le nom figure à l'annexe.
Extradition from Canada Extraditable Conduct General principle 3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada, (i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and	Extradition vers l'étranger Situations donnant lieu à extradition Principe général 3. (1) Toute personne peut être extradée du Canada, en conformité avec la présente loi et tout accord applicable, à la demande d'un partenaire pour subir son procès dans le ressort de celui-ci, se faire infliger une peine ou y purger une peine si : a) d'une part, l'infraction mentionnée dans la demande est, aux termes du droit applicable par le partenaire, sanctionnée, sous réserve de l'accord applicable, par une peine d'emprisonnement ou une autre forme de privation de liberté d'une durée maximale de deux ans ou plus ou par une peine plus sévère; b) d'autre part, l'ensemble de ses actes aurait constitué, s'ils avaient été commis au Canada, une infraction sanctionnée aux termes du droit canadien : (i) dans le cas où un accord spécifique est applicable, par une peine d'emprisonnement maximale de cinq ans ou plus ou par une peine plus sévère,

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.	(ii) dans le cas contraire, sous réserve de l'accord applicable, par une peine d'emprisonnement maximale de deux ans ou plus ou par une peine plus sévère.
Warrant for Provisional Arrest Minister's approval of request for provisional arrest 12. The Minister may, after receiving a request by an extradition partner for the provisional arrest of a person, authorize the Attorney General to apply for a provisional arrest warrant, if the Minister is satisfied that (a) the offence in respect of which the provisional arrest is requested is punishable in accordance with paragraph 3(1)(a); and (b) the extradition partner will make a request for the extradition of the person.	Arrestation provisoire Satisfaction du ministre 12. Le ministre peut, lorsqu'un partenaire demande l'arrestation provisoire d'une personne, autoriser le procureur général à présenter la demande visée à l'article 13 s'il est convaincu que : a) d'une part, l'infraction à l'origine de la demande est sanctionnée de la façon prévue à l'alinéa 3(1)a); b) d'autre part, le partenaire demandera l'extradition de l'intéressé.
Authority to Proceed Minister's power to issue 15. (1) The Minister may, after receiving a request for extradition and being satisfied that the conditions set out in paragraph 3(1)(a) and subsection 3(3) are met in respect of one or more offences mentioned in the request, issue an authority to proceed that authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person under section 29. Competing requests (2) If requests from two or more extradition partners are received by the Minister for the extradition of a person, the Minister shall determine the order in which the requests will be authorized to proceed. Contents of authority to proceed (3) The authority to proceed must contain	Arrêté introductif d'instance Pouvoir du ministre 15. (1) Le ministre peut, après réception de la demande d'extradition, s'il est convaincu qu'au moins une infraction satisfait aux conditions prévues à l'alinéa 3(1)a) et au paragraphe 3(3), prendre un arrêté introductif d'instance autorisant le procureur général à demander au tribunal, au nom du partenaire, la délivrance de l'ordonnance d'incarcération prévue à l'article 29. Demandes concurrentes (2) En cas de demandes concurrentes visant l'extradition d'une même personne, le ministre détermine l'ordre dans lequel elles seront traitées. Teneur de l'arrêté (3) L'arrêté comporte les éléments suivants :

(a) the name or description of the person whose extradition is sought; (b) the name of the extradition partner; and (c) the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long as one of the offences would be punishable in accordance with paragraph 3(1)(b). Copy of authority to proceed (4) A copy of an authority to proceed produced by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of this Part.	a) le nom ou description de l'intéressé; b) le nom du partenaire; c) la désignation des infractions qui, du point de vue du droit canadien, correspondent à l'ensemble des actes reprochés à l'intéressé ou pour lesquels il a été condamné et dont au moins l'une d'entre elles serait sanctionnée de la façon prévue à l'alinéa 3(1)b). Copie (4) La copie de l'arrêté reproduite par un moyen de télécommunication qui rend la communication sous forme écrite a, pour l'application de la présente partie, la même force probante que l'original.
Record of the case Certification of record of the case 33. (3) A record of the case may not be admitted unless (a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and (i) is sufficient under the law of the extradition partner to justify prosecution, or (ii) was gathered according to the law of the extradition partner; or (b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.	Dossier d'extradition Certification 33. (3) Le dossier n'est admissible en preuve que si : a) dans le cas d'une extradition en vue d'un procès, une autorité judiciaire ou un poursuivant du partenaire certifie, d'une part, que les éléments de preuve résumés au dossier ou contenus dans celui-ci sont disponibles pour le procès et, d'autre part, soit que la preuve est suffisante pour justifier la poursuite en vertu du droit du partenaire, soit qu'elle a été recueillie conformément à ce droit; b) dans le cas d'une extradition en vue d'infliger une peine à l'intéressé ou de la lui faire purger, l'autorité judiciaire, un fonctionnaire du système correctionnel ou un poursuivant du partenaire certifie que les documents au dossier sont exacts.

Powers of Minister Surrender 40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.	Pouvoirs du ministre Arrêté d'extradition 40. (1) Dans les quatre-vingt-dix jours qui suivent l'ordonnance d'incarcération, le ministre peut, par un arrêté signé de sa main, ordonner l'extradition vers le partenaire.
Judicial Review of Minister's Order Review of order 57. (1) Despite the Federal Courts Act, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40. Grounds of review (7) The court of appeal may grant relief under this section on any of the grounds on which the Federal Court may grant relief under subsection 18.1(4) of the Federal Courts Act.	Révision judiciaire de la décision du ministre Révision judiciaire 57. (1) Malgré la Loi sur les Cours fédérales, la cour d'appel de la province où l'incarcération a été ordonnée a compétence exclusive pour connaître, conformément au présent article, de la demande de révision judiciaire de l'arrêté d'extradition pris au titre de l'article 40. Motifs (7) Elle peut prendre les mesures prévues au présent article pour les mêmes motifs que la Cour fédérale peut le faire en application du paragraphe 18.1(4) de la Loi sur les Cours fédérales.
Temporary Surrender Temporary surrender 66. (1) The Minister may order the temporary surrender to an extradition partner of a person who is ordered committed under section 29 while serving a term of imprisonment in Canada so that the extradition partner may prosecute the person or to ensure the person's presence in respect of appeal proceedings that affect the person, on condition that the extradition partner give the assurances referred to in subsections (3) and (4).	Extradition temporaire Arrêté d'extradition temporaire 66. (1) Le ministre peut, pour permettre que des poursuites soient intentées contre elle par le partenaire ou qu'elle puisse être présente lors de la procédure d'appel la concernant, prendre un arrêté d'extradition temporaire visant une personne qui est incarcérée au titre de l'article 29 et qui purge par ailleurs une peine d'emprisonnement au Canada si le partenaire prend les engagements visés aux paragraphes (3) et (4).

Federal Courts Act, R.S.C., 1985, c. F-7	**Loi sur les Cours fédérales, L.R.C. (1985), ch. F-7**
Application for judicial review Grounds of review 18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law.	Demande de contrôle judiciaire Motifs 18.1 (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas : a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer; b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter; c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier; d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages; f) a agi de toute autre façon contraire à la loi.

COURT OF APPEAL FOR ONTARIO

Court File No. C53812

B E T W E E N

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

Respondent

and

HASSAN NAIM DIAB

Appellant

Court File No. C55441

B E T W E E N

THE MINISTER OF JUSTICE OF CANADA

Respondent

and

HASSAN NAIM DIAB

Applicant

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