In The Matter of A Request by the Republic of France For The Extradition of Hassan Naim Diab

Submissions to the Minister of Justice (s. 43 *Extradition Act*)

INDEX

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A. Introduction

The Republic of France has requested the extradition of Hassan Naim Diab for the purpose of prosecution in respect of alleged conduct for which the corresponding Canadian offences are murder, attempted murder and mischief.

The Authority to Proceed upon which the extradition hearing was based was dated January 15, 2009, and listed the above-noted offences.

On June 6, 2011, The Honourable Justice Maranger of the Ontario Superior Court of Justice ordered Hassan Naim Diab "*committed into custody pursuant to s. 29(1)(a) of the Extradition Act for the corresponding Canadian offences contained in the authority to proceed to await a decision on surrender*."[1]

For all of the reasons set out hereafter, it is respectfully submitted that this is a case in which the Minister of Justice should decline Hassan Naim Diab's surrender and should discharge Dr. Diab pursuant to s. 48 of the *Extradition Act*. In the alternative, it is respectfully submitted that if the Minister orders surrender of Dr. Diab, such surrender should be subject to effective, enforceable and sufficient assurances being received from France in writing as hereafter set out, in the absence of which it is respectfully submitted such surrender would be both "*unjust*" and "*oppressive*."

[1] *A.G. Canada (France) v. Diab*, 2011 ONSC 337 para. 192

B. (Context) Background to the Extradition Request

Hassan Naim Diab is a Canadian citizen of Lebanese birth. He was born November 20, 1953 (currently 57 years old). He has no criminal record. In 1982 Dr. Diab received a Bachelor's degree in social sciences from the Lebanese State University in Beirut. In 1983, he received his Masters in social sciences from the same university. In 1987 Dr. Diab commenced a second Masters degree (in sociology) at Syracuse University in New York State, which degree he received in 1990. In 1989 Dr. Diab emigrated to Canada, to Oakville, Ontario, and then to Montreal, Quebec, in 1990. At this time Dr. Diab was working on his Masters and then PhD. In 1993 Dr. Diab received his Canadian Citizenship. In 1995 Dr. Diab received a PhD in sociology from Syracuse. Dr. Diab thereafter taught (1996-99) in the sociology department at the American University in Beirut, at the United Arab Emirates University (1999-2001) and in the U.S.A. (2001-2002) at Syracuse University. In 2003 and 2004 Dr. Diab taught at Brandon (Manitoba) University and thereafter at the Gulf University for Science and Technology in Kuwait (2005-2006). In 2007 Dr. Diab moved to Ottawa and began teaching at both the University of Ottawa and Carleton University where he remained until he was arrested in November, 2008, pursuant to an arrest warrant in connection with these extradition proceedings. In March, 2009, Dr. Diab was released on bail by the extradition judge (which release was upheld by the Ontario Court of Appeal in June, 2009). Dr. Diab lived with his common law spouse, Rania Tfaily, from his release in March, 2009, to June 6, 2011 (2 years, 2 months) at 900 Dynes Road, Ottawa. The Ontario Court of Appeal (Cronk, J.A.) has ordered Dr. Diab's release pending appeal of the committal order.[2]

[2] *A.G. Canada (France) v. Diab*, July 19, 2011; Ont. C.A. (Cronk, J.A.)

Dr. Diab was described by the learned extradition judge as "*a very well-liked individual*" who "*has a great deal of support in both the immediate community, and to some extent nationwide. Many of his friends and colleagues from Carleton University and elsewhere have provided unrelenting support*." Character evidence (from people in Canada, the U.S. and U.K.) was filed in both the Ontario Superior Court and Ontario Court of Appeal testifying to Dr. Diab's "*non-violent*" and "*humanist*" nature: he never indicated any signs of anti Semitism (that a synagogue bombing would presumably require), he was described as "*a gentleman and a scholar*", as "*conscientious and dependable*", as "*a peace loving man, a devoted teacher*". Petitions in support of Dr. Diab have been signed by over a thousand people across Canada, the U.S., the U.K. and beyond, concerned about injustice in this case and particularly about the circumstances that would make surrender unjust and oppressive by virtue of being in violation of fundamental justice.

C. Record of the Case/The Case for Extradition

This is an exceptional extradition case. The learned extradition judge stated (A.G. Canada (France) v. Diab, 2011 ONSC 337): "*I also recognize that this was not a straight forward or conventional extradition.*"

The Record of the Case (ROC) on which the extradition request was based, was also exceptional, being anchored in unsourced, uncircumstanced, anonymous, secret "*intelligence*", most of it foreign intelligence. In addition, the ROC is/was replete with sheer argument and speculation of the investigating French magistrate ("*juge d'instruction*") rather than a summary of evidence. The extradition judge found that "*The ROC in this instance was unusual*". He continued, observing that the ROC:

- "*was not easy to read as many of the pages were replete with seemingly disconnected information. The ROC, while providing some conventional evidence, also contained a great deal of argument, hypothesis, conjecture and references to information received, without describing the source of that information or the circumstances upon which it was received.*"

The lengthy, rambling ROC (72 pages) was analyzed in sections by the learned extradition judge. He found that Part One (pp. 1 – 36) contained a summary of conventional evidence: a bombing in Paris October 3, 1980, with deaths, injuries and property damage; sale of the motorcycle to which the bomb was attached; physical descriptions and composite drawings of the young blond man who bought the motorcycle, giving the (false) name of Alexander Panadriyu; evidence from the Hotel Celtic where a dark-haired man aged 40 – 45 years rented a room also in the name of Alexander Panadriyu – 5 words were block printed by this man ("*PANADRIYU, ALEXANDER, LARNACA, CYPRUS, Technician*") on the hotel registration card; the renting by a man, giving the (false) name of Joseph Mathias, of a car suspected of ferrying the explosives for the bomb (on which a palm print was retrieved from the car interior) and descriptions and a composite sketch of this man; the arrest of an Alexander Panadriyu on a shoplifting charge and descriptions and composite drawings of this man; evidence of a prostitute and hotel clerk from the Celtic Hotel who viewed the composite drawings of the motorcycle buyer, car renter and shoplifter and said none was the man who registered at the hotel. Part One also included information concerning a bombing in Antwerp, Belgium on October 20, 1981.

Part Two of the ROC (pages 36 – 41) is where "*The conventional investigation and evidence seems to largely end*", in the words of the extradition judge. This is where bald, conclusory intelligence assertions begin, seeking to attribute responsibility for the Paris bombing to a Hassan Diab. This intelligence comes from "*information from foreign sources*", from "*informants*" to "*a foreign police force*", from "*information from an official Israeli source*", from

"*confidential*" and "*secret*" "*information obtained from intelligence or foreign security services*", from "*various intelligence or foreign security services*" the anonymity of whose sources had to be protected. All this foreign intelligence had been received by the "*DST*", the French internal intelligence service (now known as the "*DCRI*"). Newspaper reports and radio program excerpts were offered as evidence as well in the ROC although in all cases the journalists declined to name their alleged sources. One person claimed "*the Mossad*" told him who was responsible for the Paris bombing.

Part Three of the ROC (pages 41 – 50) continues the unconventional intelligence, describing the receipt in 1999 by the DST of "*information*" received, but not indicating from whom or in what circumstances the alleged information was generated. This intelligence purported to attribute more specifically responsibility for the Paris bombing to Hassan Diab: unsourced, uncircumstanced, secret and anonymous intelligence assertions claim that the PFLP-SO terrorist group committed the 1980 Paris bombing (and the 1981 Antwerp bombing), that Hassan Diab was the fictitious Alexander Panadriyu and that the bombers came to Paris from Spain using false passports. None of this material was evidence (it was all "*unattributed hearsay*" from confidential sources – see *U.S.A. v. Asiegbu*[3]). This material received by the French intelligence service caused the re-launch of the investigation "*after being dormant for 15 years.*" This intelligence material (not evidence) is the core of the ROC's assertion of Hassan Diab's alleged criminal responsibility. In his analysis of "*The Evidence in the ROC,*" the learned extradition judge stated in respect of all of this intelligence material (in Parts Two, Three and elsewhere in the ROC) that "*The ROC as previously indicated was unconventional. It contained argument, analysis, and references to information that did not disclose a source or the circumstances of the providing of the information.*" The extradition judge heard expert evidence

[3] *U.S.A. v. Asiegbu* [2008] B.C.J. No. 2437 (at paras. 12, 20, 31, 35, 84, 87)

"*on the dangers of using 'intelligence' as evidence*" (a developing international consensus, as will be set out hereafter). In the face of this expert evidence, counsel for France "*opted not to rely upon those parts of the ROC that could be categorized as 'intelligence', thereby rendering the issue moot. This approach also resulted in removing from the court's consideration components of the ROC that could be construed as argument, speculation, and analysis, and <u>not evidence</u>*" (emphasis added). In other words, for the purpose of the Canadian extradition proceedings, the "*intelligence*" in the ROC was disavowed. (As will be explained more fully below, the intelligence has not been disavowed by French authorities for use at a French trial. Moreover, unsourced, uncircumstanced, intelligence is regularly used as evidence in French terrorist trials. In this case, the intelligence is the heart of the French case against Hassan Diab, apart from the "*weak*" and "*suspect*" handwriting opinion).

Parts Four through Seven of the ROC (pages 50 – 72 and pages 4 – 10 of the Supplemental Evidence) – they are mis-numbered in the judge's decision, there being two Part Four's – contain the original two French handwriting reports (disavowed in their entirety by France, as will be discussed below); the replacement French handwriting report (that became the contested evidence on which committal would depend); summaries of interviews with various people (Souhaila Sayeh, Youcef El Khalil, Sana Salhab, Nawal Copty, members of Hassan Diab's family, Philip Gruselle); and allegations that the Antwerp and Paris bombings were linked. The material in Parts Four through Seven – with the notable exception of the new, replacement handwriting report (the Bisotti report) – proved of little evidentiary value in establishing a *prima facie* case against Dr. Diab. The learned extradition judge drew the following conclusions: "*The reduced version of the ROC (with the agreed upon material removed from the court's consideration) can be described as a circumstantial evidence case that*

has five fundamental components requiring analysis. They are: a passport, evidence of membership in the PFLP, eyewitness descriptions of Alexander Panadriyu, composite sketches of two suspects and photos of Mr. Diab, and the handwriting report of Ms. Bisotti." Of the passport evidence, the judge stated that "*the passport standing alone becomes a relatively innocuous piece of evidence*". Of membership in the PFLP, the judge found that "*In terms of its utility as evidence, it is simply evidence that in and around the time of the bombing Mr. Diab was a member of an anti-Semitic terrorist group. The ROC does not contain evidence that the PFLP was responsible for the terrorist bombing on October 3, 1980. It is fair to say that with the 'intelligence' removed from the ROC and therefore from the court's consideration, the importance attached to Mr. Diab's membership in the PFLP is considerably weakened. At its highest it demonstrates that at the time in question Mr. Diab was a member of an anti-Semitic terrorist organization*". Of the eyewitness descriptions of Panadriyu, the extradition judge noted that "*there was a fairly wide divergence of descriptions offered by the various witnesses"* and he concluded that "*this evidence, standing alone, provides very little evidence of identification*". In reference to the composite sketches as compared with photos of Hassan Diab, the judge observed that they were "*at their highest evidence of resemblance. It is not evidence that I would categorize as eyewitness identification evidence that Hassan Diab was Panadriyu. It is circumstantial evidence of resemblance*".

The learned extradition judge found that the ROC, with the "*intelligence*" and sheer argument removed, could support committal only on the basis of the highly disputed handwriting report of Ms. Bisotti. The other items of evidentiary value in the ROC could not make out, individually of collectively, a *prima facie* case justifying committal for extradition under s. 29. The judge found that "*The first four aforementioned components taken from the ROC, namely,*

the passport, the PFLP membership, the eyewitness descriptions, and the composite sketches/photographs, whether taken individually or viewed as a whole, would not be sufficient to justify committing Mr. Diab to trial in the Republic of France. At best they create a certain degree of suspicion concerning his involvement in the terrorist bombing. The evidence that tips the scale in favour of committal is the handwriting comparison evidence". Although he found that he could not exclude the handwriting evidence as manifestly unreliable, the judge stated this evidence "*was nonetheless highly susceptible to criticism and impeachment*", and was "*convoluted, very confusing, with conclusions that are suspect*".

Of his overall assessment of the ROC presented by France in support of its extradition request – after the exclusion by disavowal of all of the "*intelligence*" and argument in the ROC – the learned extradition judge observed that "*The fact that I was allowed to scrutinize the report to the degree that I did, together with the lack of other cogent evidence in the ROC, allows me to say that the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely*" (emphasis added). Guaranteeing a fair trial in accordance with fundamental justice is therefore critical. In the context of the Minister's statutory duty reasonably to assess whether surrender would in the circumstances be unjust or oppressive (s. 44), and given the circumstances of a "*weak*" case built on what the judge identified as "*suspect*" handwriting opinion evidence, the Minister must be satisfied, to a standard of objective reasonableness, that Dr. Diab's French trial will in fact be fair. That assessment will be informed, *inter alia*, by evidence concerning French trials in terrorism cases and by French treatment of expert opinion evidence.

In sum, the learned extradition judge found that while "*some*" conventional evidence was summarized in this exceptional ROC, "*a great deal*" of the ROC was comprised of material not

properly part of a certified Record and "*not evidence*" (see s. 33 *Extradition Act*: "*The record of the case must include … a document summarizing the evidence available*" emphasis added). This material was unsourced, uncircumstanced intelligence, as well as "*argument, hypothesis, conjecture" and "speculation"*. Although lengthy, the actual evidentiary content of the ROC was limited. Once the unsourced intelligence assertions and sheer argument (the non-evidence) were excised by disavowal from consideration for sufficiency for committal, and once the minimal evidentiary value of the material remaining in the ROC was identified, this extradition case was left to turn entirely on the "*suspect*" handwriting opinion: "*The evidence that tips the scale in favour of committal is the handwriting evidence*". (This was the assessment also of counsel for France: in submissions on the case, counsel stated as follows, "*On sufficiency, it's a very narrow question – and Your Honour has already adverted to this – the narrow issue on sufficiency is whether or not there's prima facie evidence that Mr. Diab is the Alexander Panadriyu whose actions are set out in the Record of the Case, and at the end of the day, that inference turns or falls on the handwriting evidence*".[4] Counsel for France repeated this submission in final argument, conceding that, "*If we had lost the handwriting evidence, I fairly concede, we would be facing an uphill battle. There's no doubt in my mind*".[5])

An extradition case built around intelligence (not evidence) and set out in a lengthy, "*disconnected*", "*not easy to read*" and "*unusual*" ROC came down to a disputed piece of opinion evidence in a field described by the extradition judge as a "*pseudoscience*" and identified as "*very problematic*", as "*highly susceptible to criticism and impeachment*" and leading the experienced extradition judge to conclude that "*the prospects of conviction in the context of a fair trial, seem unlikely*". Because in the Requesting State the unsourced intelligence will be able to be adduced

[4] Submissions of Jeffrey Johnson, counsel for the A.G. Canada (France); transcript of proceedings; p. 960
[5] Submissions of Jeffrey Johnson, counsel for the A.G. Canada (France); transcript of proceedings, March 4, 2011; p. 46

as evidence in seeking to convict Dr. Diab, and because of the Requesting State's treatment of the disputed, "*problematic*" and "*suspect*" handwriting opinion evidence (and even the disavowed handwriting evidence), in the absence of effective and enforceable assurances, a fair trial commensurate with the principles of fundamental justice will not occur.

D. Trial in France: Use of Intelligence as Evidence

It is well-recognized and by now a matter of public record that in its trials involving allegations of terrorist acts, France uses unsourced, uncircumstanced, anonymous intelligence as evidence in seeking to obtain a conviction. A trial of Dr. Diab in the Requesting State would be such a trial: the learned extradition judge noted that "*The charges arise as a result of a terrorist act that took place in France on October 3, 1980, on Rue Copernic in the city of Paris*."

The United Kingdom, in the wake of terrorist activities in England, and in evaluating how appropriate and just legal responses to terrorism might be fashioned, closely examined the legal regime in place in France for the conduct of trials involving allegations of terrorist acts.

On August 1, 2006, the U.K. House of Lords, House of Commons Joint Committee on Human Rights published "*Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*". The Committee reported that "*We were told that in the French system not only is anonymous information acceptable but full protection of the source of intelligence information is guaranteed*."[6]

More expansively and more pertinently, the Home Office of the United Kingdom in 2006-2007 led a study into the French system relating to the investigation and prosecution of terrorist suspects, looking particularly at the French practice "*in terrorism cases of introducing*

[6] House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; Twenty-fourth Report of Session 2005-06 at para. 97

intelligence material as evidence in court."[7] Entitled "*Terrorist Investigations And The French Examining Magistrate's System*", the resulting 2007 Home Office Report details the findings of the Home Office concerning French terrorism trials and the use of unsourced, uncircumstanced, anonymous intelligence as evidence to prosecute and convict.

The Home Office in 2006 commissioned Professor Jacqueline Hodgson, the United Kingdom's foremost expert on the French legal system to conduct empirical research into the functioning of the French terrorist trial system, including "*meetings in Paris with various officials and members of the judiciary dealing with counter-terrorism policy and investigations*."[8] Professor Hodgson, fluently bilingual (English and French) is the author of "*French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*", the United Kingdom's leading text on the functioning of the French criminal trial process, as well as numerous other publications on the French criminal justice system.[9] Professor Hodgson has also taught French law in 1993 and 2005 in the faculty of law at the Université de Bordeaux. Professor Hodgson's expertise dates back to 1993 when she conducted a "*systematic empirical study of the investigation and prosecution of crime in France.*"[10] This empirical research involved observation and interviews of police, gendarmes, juges d'instruction and public prosecutors in France. In 2006, in preparation of her report to the Home Office on French terrorist investigation and trial procedure and the use of intelligence as evidence, Professor Hodgson "*accompanied the Home Office*" to France "*to meet Ministry of Justice representatives, members of parliament, counter-terrorism police, prosecutors and juges d'instruction, to discuss*

[7] Terrorist Investigations And The French Examining Magistrates System; Home Office, U.K., July 2007, p. 1
[8] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 6
[9] See C.V. Professor Jacqueline Hodgson
[10] See C.V. Professor Jacqueline Hodgson

their work and its possible application in the U.K.."[11] In November, 2006, Professor Hodgson reported the findings of her empirical research, entitled "*The Investigation and Prosecution of Terrorist Suspects in France.*"

In her Independent Report, Professor Hodgson states that "*the features of counter-terrorism investigations in France*" involve the use of "*exceptional procedures*", in particular the use of intelligence: "*Intelligence plays a key part in these investigations*", and "*intelligence can be 'judicialized' when it is produced under the supervision of a magistrat and so be made admissible as evidence*."[12] The juge d'instruction works closely with the DST and "*almost all counter-terrorism cases will be investigated by the juge d'instruction*."[13] As we have seen in the Diab case, the juge d'instruction (M. Trevidic) has conducted the investigation, obtained the intelligence through the DST and prepared the ROC, the case against Dr. Diab. Indeed, terrorism investigations in France are conducted by a limited number of specially designated juges d'instruction[14] (of whom one is M. Trevidic: see p. 4 ROC). So extensive is the use of and reliance on intelligence in terrorism cases and investigations that "*The danger is that such an enquiry becomes an intelligence gathering operation clothed in the legitimacy of a focused judicial investigation.*"[15] When intelligence is gathered (i.e. by the DST), it is "*converted*" into evidence in terrorism cases by the intelligence officials reporting their information to the juge d'instruction who then includes it in the trial dossier as evidence: "*This is obviously of even greater pertinence in counter-terrorism cases where intelligence gathered within the*

[11] See C.V. Professor Jacqueline Hodgson
[12] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 4
[13] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, pp. 4, 18 - 38
[14] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, pp. 23, 37 - 38
[15] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 27

administrative enquiry will be converted into 'evidence' by the device of the same officers making statements in the judicial enquiry in their capacity as 'judicial' police."[16] The DST, "*the domestic intelligence agency*"[17] can be placed under the authority of an investigating magistrate ("*juge d'instruction*") so that the intelligence the DST receives is "*judicialized*" and thereby turned into evidence:

- "*The DST work very closely with the counter-terrorist magistrats and there is a high degree of trust on both sides. Just as the police in ordinary investigations will initiate the opening of an information, so too the DST will go directly to the procureur or juge d'instruction if they feel that they have intelligence that justifies a judicial enquiry. If an information is opened, the intelligence gathered is part of what is termed an administrative investigation and so is not admissible as evidence, but it will form the basis on which the judicial investigations will be carried out – searches, wire taps, interrogations, seizure of financial records etc. Switching hats, as it were, acting in their capacity as judicial police, officers of the DST are then able to transform intelligence into evidence through the vehicle of the judicial investigation – what a number of magistrats described as a process of 'judicialisation'.*"[18]

This "*judicialised*" intelligence is neither sourced nor circumstanced; it is anonymous and French judges do not and cannot know the sources or background of the intelligence assertion:

- "*How is the reliability of this intelligence evidence to be tested? Magistrats recognise that they are unable to determine the reliability of intelligence as they do not know the name of the informant, nor are they able to look behind the information. They rely upon professional trust, subsequent evidence obtained and claims that it would not be in the interests of officers to provide unreliable information.*"[19]

- "*As noted above, in reviewing the instruction process, the courts can only take account of the dossier and cannot enquire into the process by which evidence is obtained and developed.*"[20]

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[16] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 37
[17] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 38
[18] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 38
[19] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 42
[20] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 44

Professor Hodgson's reported finding that the French courts do not know or inquire as to the sources or circumstances of the judicialised intelligence that forms part of the case against the terrorist suspect is confirmed by the juge d'instruction in the Diab case. M. Trevidic writes, in Letters Rogatory to the Canadian extradition court on January 7, 2008, and June 5, 2008,[21] that "*Nevertheless, as for reasons of confidentiality and security of the sources, the Examining magistrate and different parties to the proceedings have not to know the origin of the information.*" The intelligence used as evidence to prosecute those accused in France of terrorist acts (like Dr. Diab) remains unsourced, uncircumstanced, anonymous and secret – to the accused, even to the investigating magistrate and, ultimately, to the trial court.

In addition, in his letters Rogatory (January 7 and June 5, 2008) on behalf of the French Ministry of Justice, seeking Canada's assistance, the investigating magistrate wrote that the early evidence and intelligence (1980 – 1999) was not helpful in building a case against Hassan Diab: "*These shreds of information were very vague and absolutely unusable, nothing allowed investigators to put a name to the Lebanese person known only by the first name Hassan.*"[22] The turning point in the case was the 1999 intelligence from an unknown, unidentified source: "*More recently, the DST (French counter-intelligence agency) obtained more specific intelligence on the very identities of the perpetrators of the attack. Among them, a person named Hassan Naim Diab…*"[23]. This is the intelligence the investigating magistrate describes as unknown and unknowable to the parties to the French judicial proceedings, as to sources or circumstances.

[21] International Letters Rogatory January 7, 2008, (Additional Information and new elements), Sgd Marc Trevidic, et al, Paris, June 5, 2008 at p. 28
[22] International Letters Rogatory January 7, 2008, (Additional Information and new elements), Sgd Marc Trevidic, et al, Paris, June 5, 2008 at p. 21
[23] International Letters Rogatory January 7, 2008, (Additional Information and new elements), Sgd Marc Trevidic, et al, Paris, June 5, 2008 at p. 24

The Home Office reported in July, 2007. It prefaced its findings and conclusions with the following remarks:

- "*This paper sets out the findings of a Home Office led study into the French examining magistrate system in relation to the investigation and prosecution of terrorist suspects. The examining magistrate system is sometimes presented as a possible alternative model for the investigation and prosecution of terrorist suspects in the UK because of the difficulty in terrorism cases of introducing intelligence material as evidence in court*."

- "*For the purposes of this study we have concentrated on the French system*."

- "*The conclusions of this study have been based on a literature search, consultation with French liaison and discussions with a wide range of French officials, including senior representatives from the judiciary and law enforcement agencies, during a visit to Paris. We are grateful to colleagues in France for their assistance in enabling us to produce this study*."

The Home Office Report then states the following in its introduction:

- "*If the local prosecutor suspects that the case is terrorism related, then he/she will transfer the dossier to specialist terrorism prosecutors based in Paris, who will decide whether it is a terrorist case and one which they should therefore deal with*."

- "*The French government has repeatedly reinforced its legislation … by centralizing all judicial proceedings relating to terrorism …. The use of intelligence is particularly important in establishing*" a criminal association in relation to a terrorist undertaking.

- "*At the core of the system is the relationship between the DST (Direction du Surveillance Territoire) and the examining magistrate. The DST is the French domestic intelligence agency which also has police judicial functions*."

- "*… examining magistrates now work closely with the DST during a terrorist investigation*."[24]

The Home Office then notes that the French trial into terrorist allegations is based on a written dossier produced by the juge d'instruction and secret, unsourced, uncircumstanced intelligence is received as evidence despite the fact that no party to the proceedings can probe this intelligence:

[24] Terrorist Investigations And The French Examining Magistrate's System; Home Office, supra, at pp. 1, 2, 5

- "*Other forms of intelligence or sensitive information can be introduced as evidence by 'judicialising' the material. The intelligence is summarised, without revealing sources or methodology, and produced as a police statement. This is then submitted to the examining magistrate during the investigation and included in the dossier of evidence. French law also provides a clearly defined basis for secrecy and the need to protect secrets.*

  The police report may say, for example, that there is intelligence to show that X was in contact with Y. However, no party, including the examining magistrate, the defence lawyer or the trial judge can probe the information underpinning the report. During the trial, Counsel for the defence may challenge the facts in a report by seeking to prove that his client was not at a certain address at a certain time, for example, but he cannot challenge the information on which the report is based. However, the report does not have the value of proof: no statement is made on its reliability.

  This demonstrates the confidence placed in the intelligence by the judiciary. In reality, the examining magistrate can never be fully confident about the validity of the information without having access to the methodology or the raw intelligence. However, in practice any particular concerns tend to be resolved through regular communication and the professional trust which exists between the DST and the examining magistrate."[25]

The Home Office report concludes that introducing unsourced, uncircumstanced intelligence, which cannot be challenged or tested, as evidence would "*have Article 6 implications*". Article 6 of the European Convention for the protection of Human Rights and Fundamental Freedoms (to which France is a signatory) is the "*fair trial*" guarantee and includes the right to test the evidence – Article 6(3)(d). The UK Home Office put it this way:

- "*It has been suggested that the examining magistrate system could provide a model for the introduction of intelligence as evidence*."

- "*Denying the defence the opportunity to respond to potentially significant parts of the prosecution case would, in the UK system, have Article 6 implications. <u>The inability to probe or question the material underpinning the intelligence reports has never been challenged in France</u>*." (emphasis added).[26]

In July, 2008, the international human rights organization, Human Rights Watch, publicly reported about counter-terrorism laws and procedures in France. In its report entitled

[25] Terrorist Investigations And The French Examining Magistrate's System; Home Office, supra, p. 9
[26] Terrorist Investigations And The French Examining Magistrate's System; Home Office, supra, p. 11

"*Preempting Justice – Counterterrorism Laws and Procedures in France*", Human Rights Watch (HRW) noted that "*Intelligence material, including information coming from third countries*" (as in the Diab case) is often at the heart of terrorist investigations – "*Indeed, most if not all investigations are launched on the basis of intelligence information*."[27] HRW further reported its findings about the use in French investigations and prosecutions of unsourced, uncircumstanced intelligence as follows:

- "*… terrorism investigations and prosecutions are subject to exceptional procedures …*";
- "*… the prominent use of intelligence material in judicial investigations, in the context of the close links between judges and the intelligence services, raises concerns about procedural fairness and reliance on evidence obtained from third countries where torture and ill-treatment are routine*."
- "*… the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons*."
- "*The ease with which sensitive intelligence material is put to use in judicial proceedings without compromising intelligence sources and methods is the pride of French counter terrorism officials …*";
- "*Not only can unsourced intelligence reports be entered into the case file (and subsequently used at trial), investigating judges may authorize any number of investigative steps, including arrests, on the basis of intelligence information alone*."
- "*Because intelligence agents "cannot be obligated to reveal their sources", defendants face "difficulties … in effectively responding to or challenging intelligence material*."
- "*… French [intelligence] services normally receive a refined product, in the form of a summary or simply a tip-off, from a foreign intelligence service, rather than the raw intelligence*."
- "*In practice, judicial control over this phase is non-existent. As Bruguière explained, investigating judges receive information only from the DST, not directly from third-country sources: 'They're the ones who do the interfacing [with other intelligence services], and they don't tell us where they got the information … We don't know whether the methods used were human or technical, or [even whether] the*

[27] Preempting Justice – Counterterrorism Laws and Procedures in France; Human Rights Watch; July, 2008, p. 3

> *information comes from a third country…' … 'There is no judicial control over the intelligence services. … The origin of the intelligence is not important, and we don't always know it.' Under these circumstances, it is difficult to see how the investigating judge can exercise any control over the legitimacy of the methods used and the veracity of the information obtained when determining whether to open an official investigation or authorize certain investigative steps*."[28]

The 2008 HRW report confirmed findings in an earlier, 2007 HRW report entitled "*In The Name of Prevention: Insufficient Safeguards in National Security Removals.*" This 92-page report described how deportations from France in the name of 'national security' are often conducted in a manner that violates fundamental human rights. Of particular interest in this report is the reliance of French authorities on intelligence as 'evidence' to substantiate threat assessments that inform deportation proceedings. Intelligence in the form of 'notes blanches' ('white notes') are unsigned, sometimes undated, and do not provide any details about the sources of the information they contain. The French cases examined by HRW were "*based on intelligence reports that do not disclose either the sources of their information or how the information was obtained.*"[29] This situation obtaining in the deportation context is precisely that found by HRW in the criminal law (terrorist prosecution) context. As HRW noted, "*And then there's no chance for a criminal judge to verify the information and its source*."[30] Unsourced, uncircumstanced intelligence is regularly used as evidence in French proceedings, both criminal and administrative.

In March, 2010, HRW again reported on France and concerns about French use of intelligence as evidence. In its March 11, 2010, report entitled "*Human Rights Watch Concerns and Recommendations on France*", HRW reported that "*Intelligence material, including*

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[28] Preempting Justice, supra, pp. 10, 19, 33, 34, 35, 36, 39, 40
[29] In The Name of Prevention: Insufficient Safeguards in National Security Removals; Human Rights Watch; June, 2007; p. 3
[30] In The Name of Prevention, supra, p. 26

information coming from third countries with poor records on torture, is often at the heart of terrorism investigations."[31]

In June, 2010, HRW again publicly reported on the use by France of intelligence as evidence in its prosecution of terrorist suspects. Specifically, HRW noted the following:

- "*A French counter terrorism official told Human Rights Watch that French services normally receive a 'refined product', in the form of a summary or simply a tip-off, from a foreign intelligence services, rather than the raw intelligence. … In practice however, as detailed below, such material has been admissible as evidence in French courts*."

- "*If the activities and international information-sharing arrangements of French intelligence services remain relatively opaque, the role of intelligence material in the judicial process is clear and troubling. Most if not all terrorism investigations are launched by judges on the basis of information collected by intelligence services, including through relations with similar services in foreign countries*."

- "*One counter terrorism investigating judge explained, however, that where the French intelligence services do the 'interfacing' with foreign services, it is impossible to have any information about sources and methods. 'They don't tell us where they got the information … We don't know whether the methods used were human or technical, or [even whether] the information comes from a third country.'*"

- "*The ease with which sensitive intelligence material is put to use in judicial proceedings is a source of pride to French counter terrorism officials and specialized investigating judges. The specialized investigating judge may authorize any number of investigating steps, including arrests, on the basis of intelligence alone. In doing so, the judge will normally not know – or take any particular interest in – the sources or methods used to acquire the information*."[32]

The comments, above, by HRW in its many reports on France, repeat and confirm what the investigating magistrate in the Diab case conceded in his Letters Rogatory – parties to French terrorist trials know neither the sources nor circumstances of the "*intelligence*" offered as evidence to gain conviction. And, as set out above (S. C of these Submissions) under the heading "*Record of the Case/The Case For Extradition*", the French case against Hassan Diab is anchored

[31] Human Rights Watch Concerns and Recommendations on France; March 11, 2010; p. 6
[32] "No Questions Asked" Intelligence Cooperation with Countries that Torture; Human Rights Watch; June, 2010; pp. 47-49

centrally around unsourced, uncircumstanced, bald and conclusory, anonymous intelligence assertions of his alleged guilt.

Stéphane Bonifassi is a judicially recognized expert in French law and procedure (see *Fletcher v. France*, Supreme Court of Gibraltar[33]). Mr. Bonifassi is an experienced trial lawyer, having been admitted to the Paris Bar in 1991. Mr. Bonifassi has held distinguished positions in the Paris Bar, the International Bar Association (co-chair of the Business Crime Committee) and has served as President of the Criminal Law Commission of the Union Internationale des Avocats. In Paris he was elected Premier (First) Secrétaire de la Conférence of the Paris Bar and has conducted the most serious criminal cases as well as many matters involving mutual legal assistance issues. An author on criminal law issues in French legal journals, Mr. Bonifassi is a regular speaker at International Bar Association and Union Internationale des Avocats conferences, addressing issues including mutual legal assistance and extradition.[34]

Writing on May 23rd, 2011, about "*The Use of Intelligence in Criminal Cases, and More Specifically in Terrorist Cases*", Mr. Bonifassi gives an informed and experienced account of the use of unsourced, uncircumstanced intelligence as evidence in French criminal/terrorist trial proceedings. Mr. Bonifassi notes that:

- "*As a consequence of this free proof system, there is no distinction under French law between evidence and intelligence*".
- "*It is common practice for intelligence filed in 'proces-verbaux' or 'rapports' to be read at trial by the judge*".
- "*As a result, intelligence will be accepted as a sound source of information by prosecutors and investigating judges and will give a basis for the indictment of suspects*."

[33] *Fletcher v. France*; Supreme Court of Gibraltar; Criminal Appellate No. 8 of 2007; February 19, 2008; pp. 8-12
[34] See CV Stéphane Bonifassi

- Any defence argument at trial "*that such intelligence is unfounded*", will be met with non-disclosure of sources or circumstances because "*the source of information cannot be disclosed*".

- Terrorist cases in France are heard "*by a special court comprised of seven professional judges*", who will consider intelligence offered by the investigating judge (because he/she "*judicialized*' it by including it in the dossier) as being "*strong evidence*" of guilt.

- Challenging the intelligence or its reliability or sources or circumstances (including torture) will be ineffective: "*challenging this approach and requesting that such intelligence be discarded will fail …. Challenging such approach, asking for witness deposition that are the source of the intelligence will not be successful …. Allegations that evidence might be based on torture will not be investigated in any way, even though the source of the intelligence is located in countries where it is widespread.*"

- No effective challenge at trial may be mounted to the intelligence offered as evidence of guilt because there is "*no access to the source of intelligence*".[35]

Mr. Bonifassi's statements about the French use of unsourced, uncircumstanced intelligence being used as evidence to convict in French terrorist trials confirm all the other authoritative sources cited in these submissions.

Thomas Quiggin is an intelligence expert and the Senior Research Fellow at the Canadian Center for Intelligence and Security Studies at the Norman Patterson School of International Affairs, Carleton University, in Ottawa. Previously he served, *inter alia,* as a security consultant to the European Experts Network on Terrorism and Radicalization, as research analyst for the RCMP Integrated National Security Enforcement Team, as Senior Analyst to the Case Management Branch, Modern War Crimes at Citizenship and Immigration, Canada, and in the Office of the Prosecutor at the International War Crimes Tribunal for the former Yugoslavia.[36] In his report "*INTELLIGENCE AS EVIDENCE: Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab*" (October 8, 2009), Mr. Quiggin notes that "*The*

[35] Bonifassi, Stéphane; The Use of Intelligence in Criminal Cases, And More Specifically In Terrorist Cases; May 23, 2011; pp. 1, 2, 3
[36] CV Thomas Quiggin

French system allows for an administrative process which simply converts (judicializes) intelligence into evidence without the ability of either the defence or the trial judge to see the source involved or to know the circumstances in which the alleged information was produced."[37]

Wesley Wark, one of Canada's pre-eminent intelligence experts, analyzed the French Record of the Case against Dr. Diab. His Expert Witness Report: *In the Matter of the Request by France for the Extradition of Hassan Naim Diab From Canada for Prosecution*[38] details his findings. Consistent with all the other authorities, Dr. Wark noted that the terrorist bombing case against Hassan Diab was built on unsourced, uncircumstanced intelligence presented in conclusory form from secret sources and secret intelligence assessments. Dr. Wark, associate professor of History and International Relations at the University of Toronto, a Fellow of the Munk Centre for International Studies, the author of numerous intelligence publications over the past 28 years, two-time President of the Canadian Association for Security and Intelligence Studies, a two-term member of the Prime Minister's Advisory Council on National Security and a witness on numerous occasions on intelligence and security matters to both Houses of the Canadian Parliament[39], notes that the "*very specific information*" asserted in the 1999 intelligence received (from an unidentified source(s)) "*brought the investigation back to life*", after the early intelligence (1980 – 1999) was "*unfruitful*". Dr. Wark notes, however, about the key 1999 intelligence in the case against Dr. Diab that "*no indication whatsoever is provided of the provenance of the 1999 material. We know nothing about the source or sources of this information, not even whether it was generated by the DST itself from collection methods under*

[37] INTELLIGENCE AS EVIDENCE: Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab; p. 37
[38] Wark, Wesley; EXPERT WITNESS REPORT: In the Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution
[39] see CV Wesley Wark

its control or came from a foreign service."[40] By way of overview, Dr. Wark notes the following about the French case against Hassan Diab: "*Overall, it is a story of a 28-year intelligence manhunt, that went 'cold' for long periods of time, and that was heavily dependent on secret, foreign sources of information, the original provenance of which remains entirely unknown. … The first phase of the investigation relied entirely, it would appear, on intelligence of unknown provenance from two foreign sources, one named as the BKA, the other unnamed. … The French record offers absolutely no illumination about the source(s) of the new 1999 intelligence. … We have no way of knowing where this 1999 information came from, how it was obtained and in what circumstances it came into the possession of the DST. … It could have come from anywhere*."[41]

Dr. Wark continues about France's case against Hassan Diab that "*The French intelligence case, on the record provided of a 28-year intelligence manhunt, rests on secret processes for collection and assessment and on secret information that can be probed perhaps but cannot be properly tested. Intelligence is asserted here as evidence but intelligence is not the same as evidence. … The accumulated layers of secret information of unknown provenance and of secret intelligence assessment of unknown quality and outcomes … cannot be peeled back. The French intelligence case is presented in conclusory form …*".[42]

These "*accumulated layers of secret information of unknown provenance*" form the core of the ROC's assertion of criminal responsibility of Hassan Diab, they form the core of the French case against Dr. Diab and will all be accepted and used – absent effective and sufficient assurances being received from France – as evidence in seeking to convict Dr. Diab during a French criminal/terrorism trial. Citing many of the authorities referred to above, Dr. Wark

[40] Wark, supra, at pp. 24; 26
[41] Wark, supra, at pp. 31; 32
[42] Wark, supra, at p. 33

observes that the French counter-terrorism investigation and trial process is exceptional and intelligence-driven: "*The investigating magistrates in the French system have unusual powers, with no parallel in the Anglo-Saxon world of justice. … These investigating magistrates become, in effect, a kind of intelligence service themselves. … A second unique feature of the French system of counter-terrorism was the close relationship that developed between the investigating magistrates and the DST*." Noting that the French system then 'judicializes' intelligence into evidence for use in French trials, Dr. Wark states that "*What is being 'judicialized' in this way in the French system are secrets derived from intelligence work*."[43]

It may be seen from all of the foregoing that France regularly uses in its criminal/terrorism trials unsourced, uncircumstanced, anonymous, secret intelligence as evidence against the accused. The ROC summarized above in section C of these Submissions (and by the learned extradition judge in his Reasons for Decision, June 6, 2011) is replete with bald, conclusory, uncircumstanced intelligence allegations (from unknown sources) of Hassan Diab's involvement in the 1980 Paris bombing. The ROC in its own terms and content demonstrates the heavy reliance by the Requesting State upon unsourced sheer intelligence in attempting to make a case against Dr. Diab. The ROC summarizes (as it must under s. 33 of the *Extradition Act*) "*the evidence available to the extradition partner for use in the prosecution.*" France therefore offers in the case of Hassan Diab, unsourced intelligence as "*evidence available*" to be used in France to prosecute Dr. Diab at a French trial. In the absence of effective and sufficient assurances from France that none of this intelligence material will be used in the prosecution of Dr. Diab at a French trial, the only reasonable conclusion to draw from all of the evidence, information and authorities available is that unsourced, uncircumstanced intelligence – although disavowed in the Canadian extradition proceeding – will be used by France in prosecuting and seeking to convict

[43] Wark, supra, at pp. 38; 41

Dr. Diab. Intelligence material identified by the learned extradition judge as "*not evidence*", will be used as evidence in France at the French trial of Dr. Diab.

E. **Law and Standards Governing Ministerial Direction**

It is respectfully submitted that pursuant to S. 40(1) of the *Extradition Act* the Minister has a discretion to order surrender or not.[44] That discretion is not unlimited. The exercise of the Ministerial discretion is constrained, guided and informed by statute and jurisprudence. S. 44(1) of the Act requires the Minister to refuse surrender when the Minister is satisfied that "*the surrender would be unjust or oppressive having regard to all the relevant circumstances.*"[45] The jurisprudence makes clear that the Ministerial discretion must be exercised in accordance with the principles of fundamental justice and must not be in violation of the *Charter* rights of the person sought. In short, the Minister must ensure that a surrender decision does not give rise to a violation of the principles of fundamental justice.[46]

In particular, the appeal courts have stated that

- the executive surrender (or not) decision is subject to an "*undoubted duty to ensure that its actions conform to constitutional requirements …*"[47];
- it is the duty of executive authorities (the Minister) to respect "*their duty to obey constitutional norms …*"[48]
- the executive "*must have recognized that it too has a duty to ensure that its actions comply with constitutional standards …*"[49]

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[44] *Extradition Act* SC 1999 c. 18, s. 40(1)
[45] *Extradition Act*, supra, s. 44(1)(a)
[46] *Argentina v. Mellino* [1987] SCJ No. 25 (S.C.C.) at paras. 36 & 37;
Canada v. Schmidt 1987 SCJ No. 24 at paras 42; 47-49;
Lake v. Canada 2008 SCJ No. 23 at paras 24, 27;
Canada v. Fischbacher [2009] SCJ No. 46 at paras 36-39;
Phillipines v. Pacificador [1993] OJ No. 1753 (Ont. C.A.).
[47] *Argentina v. Mellino*, supra, para. 37
[48] *Canada v. Schmidt*, supra, para. 47

- "*The courts may intervene if the decision to surrender a fugitive for trial in a foreign country would in the particular circumstances violate the principles of fundamental justice*."[50]

- "*The Minister's power to order or refuse surrender is subject to the provisions of the Treaty and the Act, and must be exercised in accordance with The Canadian Charter of Rights and Freedoms*."[51]

The particular circumstances of each case will determine whether surrender will violate the principles of fundamental justice: the Minister "*reviews the case in its entirety*" and "*must consider all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive*."[52] As the Supreme Court of Canada noted recently, "*An extradition that violates the principles of fundamental justice will always shock the conscience. In turn, as recognized by this Court in Lake, at para. 24, where surrender is found to be contrary to the principles of fundamental justice protected by s. 7 of the Charter, it will also be unjust and oppressive under s. 44(1)(a), and the Minister must refuse surrender*."[53]

If the person sought faces in the Requesting State "*a situation that is simply unacceptable*", the Supreme Court has held this will violate the person's rights under s. 7 of the *Charter*.[54] As the Ontario Court of Appeal held, "*Where an individual establishes that he or she would face a situation that would be 'simply unacceptable' or that would 'shock the conscience', a s. 7 claim has been established and a Ministerial surrender order must be set aside*."[55] The "*simply unacceptable situation*" standard is highly relevant to the Diab case, as will be set out hereafter, and should reasonably inform a Ministerial decision to refuse surrender or, in the

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[49] *Canada v. Schmidt*, supra, para. 49
[50] *Argentina v. Mellino*, supra, para. 36
[51] *Canada v. Fischbacher*, supra, at para. 36
[52] *Canada v. Fischbacher*, supra, at para. 36 & 37
[53] *Canada v. Fischbacher*, supra, at para. 39;
Lake v. Canada, supra, at para. 24
[54] *Lake v. Canada*, supra, at para. 31
[55] *Phillipines v. Pacificado*, supra, at paras. 55 & 56

alternative, to obtain sufficient and enforceable assurances to redress the "*simply unacceptable situation*" that will occur in the particular circumstances of this case if a surrender order is made.

The manner in which the foreign state will deal with the person sought on surrender, even if legal in the Requesting State (i.e. the use of unsourced intelligence as evidence; practical constraints on defence expert evidence; ignoring or marginalizing exculpatory evidence), may violate fundamental justice and so render a proposed surrender "*unjust or oppressive*". Therefore, as part of the Minister's duty to ensure that surrender will not in the circumstances violate the principles of fundamental justice, a close consideration of the foreign state's criminal procedures, investigatory and trial processes and their individual and collective impact on the person's C*harter* rights to fundamental justice must be undertaken. The Minister can consider both foreign law and foreign trial procedures and their impact(s) in the particular circumstances on the right to fundamental justice. The Supreme Court of Canada has explicitly enunciated these principles:

- "*I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances.*"[56]

Whether, in all the circumstances, trial in the foreign state will breach the person's right to fundamental justice or cause the person sought to "*face unfair proceedings*"[57] is a matter the Minister must closely and reasonably consider. As the learned extradition judge held, the issue of fair trial in the foreign state is one the Minister must consider: "*If it can be demonstrated that that may not be the case* [i.e. that a Canadian citizen will have a fair trial in the Requesting State]

[56] *Canada v. Schmidt*, supra, para. 47
[57] *USA v.Cobb* [2001] SCJ No. 20 at para. 33

then it is a matter for the ministerial phase of the extradition process."[58] And, as the Supreme Court held in *Charkaoui I* [59], fundamental justice requires substantial compliance with the principle that the person must both know and have a real opportunity to meet, test and challenge the case against him or her.

The principle of comity underlies the entire extradition process.[60] The Minister must consider comity or its practical absence in exercising the discretion to order or decline surrender.[61] Finally, the Minister must advert as well to the terms of the governing extradition treaty. As set out by the Supreme Court in *McVey*[62], an extradition treaty is a mutual agreement to surrender on request, a contract between the party states to do just that. Whether France, the Requesting State, actually surrenders its nationals to Canada for trial, as it requests Canada to do in the case of Dr. Diab, is a relevant and necessary consideration in the exercise in this case of Ministerial discretion.

F. **Intelligence as Evidence "Simply Unacceptable"**

It is respectfully submitted that there is a developing worldwide consensus, notwithstanding the use by France of unsourced, uncircumstanced, anonymous and secret intelligence as criminal trial evidence, that it is contrary to the principles of fundamental justice and simply unacceptable to use such material as evidence to prosecute and convict. In Canada,

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[58] Ruling on Application Under ss 7 & 24(2) of The Charter; March 1, 2011; Maranger, J.
[59] *Charkaoui v. Canada (Citizenship and Immigration)* [2007] SCJ No. 9 at para. 61
[60] *Argentina v. Mellino*, supra, at paras. 24, 31, 36;
USA V. Cobb, supra, at paras. 32, 33, 41;
Canada v. Fischbacher, supra, at para. 52
[61] *USA v. Cobb*, supra, at para 34
[62] *McVey v. USA* [1992] SCJ No. 95 para 53

the use of such material as evidence is seen as a violation of the Charter. A trial in which such material is used to prosecute and seek conviction is therefore "*unjust or oppressive*".

The principles of fundamental justice require that the person accused have a real and effective opportunity to know the case he/she has to meet and a real opportunity then to meet the case. Meeting the case involves a realistic opportunity to challenge, test and refute the case disclosed, including the evidence on which the case to be met relies. In this case, key "*evidence*" on which France relies is actually unsourced, uncircumstanced, anonymous and conclusory intelligence assertions, representing untraceable layers of opinions and analysis of unknown intelligence analysts formed from original raw intelligence in unknown form from unknown sources in utterly unknown circumstances. The intelligence in this case, as Dr. Wesley Wark notes (see below), "*could have come from anywhere*".[63] In no meaningful sense can Dr. Diab "*know*" the case he has to meet and in no real or effective way can he challenge, test and refute such material. Real and effective challenge of this material, which France asserts is "*available*" to be used as evidence to prosecute Dr. Diab, and which the ROC demonstrates is the core of the French case, is impossible. A trial using such material to prosecute Dr. Diab would therefore be in violation of Section 7 of the *Charter*, contrary to the principles of fundamental justice and unjust or oppressive.

Moreover, because key material France relies upon to prosecute Dr. Diab in France flows from unknown sources, many or most of them foreign, in completely unknown circumstances, and "*could have come from anywhere*", torture or cruel, inhuman and degrading treatment cannot reasonably be excluded as having been involved in the production of this intelligence. Turning a blind eye, or an eye of indifference to the circumstances in which intelligence from unknown sources, and in unknown form, is produced runs the grave risk of becoming party to or condoning

[63] Wark, supra, p. 32

torture. A trial based on such material is contrary to the principles of fundamental justice, to the *Charter* and to the Convention Against Torture to which Canada is a signatory. Surrender to a trial on such material is both "*unjust or oppressive*" and "*simply unacceptable*.".

In the face of Professor Kent Roach's evidence on the purported use of intelligence as evidence, the Requesting State disavowed reliance on all intelligence in the Canadian extradition proceeding.

It is respectfully submitted that there can be little doubt that France disavowed completely for the purposes of the Canadian extradition hearing reliance on the unsourced, uncircumstanced intelligence in recognition that reliance on such material would offend fundamental justice, that the material was, as the learned extradition judge noted, "*not evidence*" and that the judge would have excluded it from the ROC. Yet France says this intelligence material is "*available*" to be used as "*evidence*" at a French trial to prosecute Hassan Diab. Such a trial relying on such material in whole or in part, violates the principles of fundamental justice and the *Charter*. Surrender to such a trial is simply unacceptable.

(i) <u>A Developing International Consensus</u>

As set out above, in Section D of these Submissions, the United Kingdom has recently (2006) closely examined the use in French terrorism trials of unsourced, uncircumstanced intelligence as evidence to prosecute and convict. And the U.K. rejected the use of such 'intelligence as evidence' as being simply unacceptable, unacceptable because such material cannot be meaningfully challenged, tested or assessed at trial, unacceptable because the circumstances of its production are utterly unknown (and may have involved mistreatment or

torture), unacceptable because it would be in violation of Article 6 – fair trial and the right to test the evidence. Article 6 expressly addresses the type of "*fundamental justice*" rights more broadly enshrined and protected in s. 7 of the *Charter of Rights and Freedoms*. A violation of Article 6 (as the U.K. found the evidentiary use of unsourced, uncircumstanced intelligence to be) would also be – and is – a violation of s. 7 of the *Canadian Charter of Rights*, a violation of fundamental justice.

The U.K. House of Lords/House of Commons Joint Committee on Human Rights reported to Parliament that it "*firmly*" rejected as incompatible with fundamental justice and the right to a fair trial, the French use of intelligence as evidence. The Committee found as follows:

- "*It also finds that any withholding of intelligence material from the defendant or the public in such a way that it might influence the outcome of the trial would infringe the right to a fair trial*."[64]

- "*The Committee therefore is firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements, nor is there anything in the investigative approach which might be borrowed or grafted on to our more adversarial tradition in this country*."[65]

- "*If protection of the public through criminal prosecution is genuinely to be the first objective of counter-terrorism policy, then turning information into evidence should be uppermost in the minds of al those involved in acquiring intelligence at the earliest possible stage in that process. Intelligence should always be gathered with one eye on the problem of how to turn it into admissible evidence before a judge in a criminal court*."[66]

- "*… it must be based on evidence which will be admissible at trial and not merely intelligence information …*"[67]

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[64] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra at p. 3, Summary
[65] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra at p. 3, Summary; para. 76
[66] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra at p. 4, Summary
[67] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra at p. 5, Summary

- "*The reasons why such a process would be inconsistent with the fundamental principles of a fair trial …*"[68]

Of considerable relevance is that the U.K. Joint Parliamentary Committee noted that its empirical research revealed that Canada would not regard as acceptable the use as evidence in a criminal trial of unsourced, uncircumstanced intelligence. In Canada that would violate the *Charter*:

- "*On a recent visit to Canada he [the DPP] told us he had spoken to Canadian prosecutors who were horrified at the suggestion that such material could be used as evidence for the prosecution at the trial. This would be contrary to the Charter of Rights, the DPP was told. Inadmissible material could not become admissible simply by certification of a judge. The defence had to be able to test the primary material relied upon against them. The same was true under the ECHR [European Convention on Human Rights] in the DPP's view. Introducing into a criminal trial sanitized intelligence material which is contested by the defence would require a derogation from the ECHR.*"[69]

The U.K. Joint Committee concluded, in agreement with the U.K. Government, that fair trial and fundamental justice would unacceptably be compromised by the use in a criminal trial of unsourced, uncircumstanced intelligence:

- "*After careful examination of real intelligence relating to terrorist cases, the Government had concluded that it would not be possible to withhold such material from the defendant or the public in such a way that it might influence the outcome of the trial without infringing the defendant's human rights. We agree*."[70]

Such material is the very core of the French case against Dr. Hassan Diab, the "*evidence*" the Requesting State claims in its ROC it has "*available*" to be used to prosecute him at his trial if he is surrendered.

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[68] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra, para. 41
[69] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra, para. 74
[70] U.K. House of Lords, House of Commons Joint Committee on Human Rights: "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention"; supra, para. 75

Professor Hodgson, after careful examination of the functioning of the French terrorist trial process on behalf of the U.K. Home Office, came to the same conclusion. It is simply unacceptable to attempt to use unsourced, uncircumstanced intelligence as evidence to prosecute and convict:

- "*Transposing such a procedure across to our more adversarial process would be unacceptable – in requiring the judiciary to participate in the prosecution case and in eliminating the defence from any serious role of evidential scrutiny*."[71]

- Using judicialized intelligence to prosecute and convict, "*would be extremely problematic within our own criminal procedure, where the defence's ability to test out the prosecution case is fundamental*."[72]

- Unsourced intelligence is "*inherently incapable of being probed properly*."[73]

- Unsourced intelligence "*fails to produce credible evidence that can be relied upon at trial*."[74]

- "*How is the reliability of this intelligence evidence to be tested? Magistrats recognise that they are unable to determine the reliability of intelligence as they do not know the name of the informant, nor are they able to look behind the information. They rely upon professional trust, subsequent evidence obtained and claims that it would not be in the interests of offices to provide unreliable information.*"[75]

The Home Office also concluded that the use of unsourced, uncircumstanced intelligence as evidence to prosecute was simply unacceptable in the U.K. as being in violation of the principles of fundamental justice and fair trial enshrined in Article 6:

- "*The police report may say, for example, that there is intelligence to show that X was in contact with Y. However, no party, including the examining magistrate, the*

[71] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 4-5
[72] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 39
[73] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 39
[74] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 40
[75] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 42

defence lawyer or the trial judge can probe the information underpinning the report."[76]

- "*Denying the defence the opportunity to respond to potentially significant parts of the prosecution case would, in the U.K. system, have Article 6 implications. The inability to probe or question the material underpinning the intelligence reports has never been challenged in France.*"[77]

In his important Report of the Events Relating to Maher Arar, Associate Chief Justice O'Connor detailed the perils and unreliability of unsourced, uncircumstanced, bald and conclusory (exactly as in the Diab case) intelligence allegations relied on to deprive a Canadian citizen of his liberty. He also noted the danger of the condonation of torture inherent in the reliance upon unsourced, uncircumstanced intelligence. And this was in the context of administrative proceedings, not the more stringent fundamental justice principles that apply in the criminal trial context:

- "*States party* [to the Convention Against Torture] *may contravene their treaty obligations when they consent to or acquiesce in torture inflicted by another state.*"[78]

Justice O'Connor pointed out the "*very different*" nature of intelligence and evidence:

- "*Legal obligations aside, adherence by the RCMP and CSIS to their distinct mandates also makes practical sense. CSIS has special expertise and capacity to collect information and to apply analytical skills to that information to produce the intelligence necessary to inform government about threats to Canada's national security. This involves a very different expertise and a different relationship with government than that required by the RCMP for its law enforcement activities. Although both investigate and collect information, the context within which they do so, the purpose for collecting the information and the use to which the information is put are very different*" (emphasis added).[79]

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[76] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 9

[77] The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, supra, p. 11

[78] Report of the Events Relating to Maher Arar: Analysis and Recommendations; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar; O'Connor, ACJO; September, 2006; p. 52

[79] Report of the Events Relating to Maher Arar: Analysis and Recommendations; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar; O'Connor, ACJO; September, 2006, at p. 314

The point being made by Justice O'Connor is that evidence (admissible for use in a criminal trial) is "*very different*" from unsourced, uncircumstanced intelligence. And, as Justice O'Connor reported, there are "*devastating consequences*" of relying (as happened in the Arar case) on intelligence assertions that cannot be challenged for reliability and that prove inaccurate:

> - "*In this report, I speak often of the need for accuracy and precision when collecting, recording and sharing information. Inaccurate information can have grossly unfair consequences for individuals, and the more often it is repeated, the more credibility it seems to assume. Inaccurate information is particularly dangerous in connection with terrorism investigations in the post-9/11 environment. Officials and the public are understandably concerned about the threats of terrorism. However, it is essential that those responsible for collecting, recording and sharing* information be aware of the potentially devastating consequences of not getting it right."[80]

Justice O'Connor gave graphic examples of the bald and conclusory intelligence assertions, unsourced and uncircumstanced, that led to Mr. Arar's tragic experience and deprivation of liberty. The examples given ring a bell in the Diab case as they are precisely the bald and conclusory type of intelligence allegations about Dr. Diab made (and said to be "*available*" as evidence in the Requesting country) throughout Parts Two and Three (and parts of Part Four) of the ROC. Mr. Arar was baldly asserted by the intelligence to be

> "
> - *an Islamic Extremist … suspected if being linked to the Al Qaeda terrorist movement;*
> - *a suspect or target;*
> - *a principal subject of the investigation;*
> - *a person with 'an important connection' to Mr. Almalki;*
> - *a person linked to Mr. Almalki in a diagram titled 'Bin Laden's Associates; Al Qaeda Organization in Ottawa'; and*
> - *a business associate or close associate of Mr. Almalki.*
>
> *These descriptions of Mr. Arar were either completely inaccurate or, at a minimum, tended to overstate his importance in the Project A-O Canada investigation.*"[81]

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[80] Report of the Events Relating to Maher Arar: Analysis and Recommendations; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, supra, pp. 61- 62

[81] Report of the Events Relating to Maher Arar: Analysis and Recommendations; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, supra, pp. 113 - 114

With troubling similarity, Hassan Diab is baldly asserted by the unsourced, uncircumstanced intelligence in the ROC, to be

- "*informants*" to "*a foreign police force*" said "*a Lebanese named Hassan*" was a "*member of the hit team*"[82];

- undated "*CONFIDENTIAL DEFENSE*" intelligence received by the French DST from "*various intelligence or foreign security services*" who underscored "*the necessity for protecting their sources*", stated that "*The person who proceeded to buy the motorcycle on which the explosives were placed is a Lebanese national known in Beirut under the assumed name of AMER whose real name is HASSAN*"[83];

- information received by the DST in 1999 from unnamed, unknown sources alleged that "*Regarding, specifically, Hassan Diab, the above-mentioned information indicated that he was the individual who had used the alias PANADRIYU, the SUZUKI motorcycle buyer, and it is he who made the bomb and placed it on the motorcycle on the day of the event. He was known, according to this information, as being 'a Lebanese national and member of PFLP-80 in Beirut in 1980' who had obtained a psychology degree in that city in 1982.*"[84]

- "*Information obtained by the DST indicated moreover that Hassan Diab had also planted the bomb in Antwerp, on October 20, 1981.*"[85]

The parallels are strikingly clear. Both the Arar and Diab cases involve the use of unsourced, uncircumstanced, bald and conclusory intelligence allegations as the basis for seeking to deprive liberty. What makes the Diab case even more offensive than Arar is that in Diab all the unsourced intelligence is being used and offered as "*available*" evidence to prosecute Dr. Diab in a criminal trial. If Mr. Arar's detention was wholly unjustified, resulting in substantial Canadian government monetary reparation, Dr. Diab's proposed criminal trial on such intelligence offends the core principles of fundamental justice and would be manifestly unjust and oppressive. In short, such a trial will be simply unacceptable.

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[82] ROC, p. 37
[83] ROC, p. 38
[84] ROC, p. 42
[85] ROC, p. 43

Human Rights Watch has for the past 30 years been one of the international community's most reliable and respected independent organizations dedicated to defending and protecting human rights throughout the world. Human Rights Watch investigates and reports to the international community on abusive, unjust government practices, seeking "*to bring greater justice and security to people around the world*."[86]

In four successive reports (June, 2007; July, 2008; March, 2010; June, 2010) Human Rights Watch (HRW) has focussed direct and explicit attention on the current French practice in terrorism trials of using unsourced, uncircumstanced intelligence as evidence to prosecute and convict. This practice, says HRW, undermines the right to fair trial, denies fundamental justice in compromising the rights to know and challenge the case and threatens complicity in torture and contravention of the absolute international ban on the use of material sourced by torture in "*any proceedings*."[87]

In its 2008 report, "*Preempting Justice: Counterterrorism Laws and Procedures in France*", HRW states that "*In practice, French counterterrorism laws and procedures undermine the right of those facing charges of terrorism to a fair trial*."[88] Such trials (and this is so in Dr. Diab's case) prominently feature reliance on unsourced, uncircumstanced intelligence material to prosecute:

- "*Intelligence material, including information coming from third countries, is often at the heart of association de malfaiteurs investigations. Indeed, most, if not all investigations are launched on the basis of intelligence information*."[89]

- "*… the prominent use of intelligence material in judicial investigations, in the context of the close links between judges and the intelligence services, raises concerns about*

[86] www.hrw.org/en/about
[87] Human Rights Watch, June, 2007; July, 2008, March, 2010; June, 2010
[88] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 2
[89] Human Rights Watch, July, 2008, Preempting Justice, supra, at pp. 3 and 33

procedural fairness and reliance on evidence from third countries where torture and ill-treatment are routine."[90]

HRW cites the "*difficulties defendants face in effectively responding to or challenging intelligence material*"[91] and cites as well the U.K. Home Office finding of the French system that "*the inability to probe or question the material underpinning the intelligence reports*"[92] as clear indicia that fair trial is undermined by the use of intelligence as trial evidence.

Additionally, and equally important, HRW reports that the French reliance in terrorism trials on unsourced intelligence emanating from unknown circumstances gravely threatens complicity in torture:

- "*One of the greatest concerns arising from the close relationship between the investigative judges and security services in France is that information obtained in third countries under torture or prohibited ill-treatment will be used in criminal proceedings in France. The absolute prohibition against torture is firmly embedded in customary international law and international treaties to which France is a party. The International Covenant on Civil and Political Rights, the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights all affirm this cardinal principle. The ban on torture permits no exceptions or derogations and extends to the use of information obtained under torture in legal proceedings. Article 15 of the Convention Against Torture provides that any statement that has been made as the result of torture shall not be invoked as evidence in any proceedings …*"[93]

- "*The use of evidence obtained by torture or ill-treatment is prohibited not only because it is unreliable but because, according to the European Court, its use 'would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Art. 3 of the Convention sought to proscribe, or as it was so well put in the US Supreme Court's judgment in the Rochin case … to afford brutality the cloak of the law.'*"[94]

- "*The DST and RG also share information and collaborate with a wide range of services, including those with reputations for torture. … French services normally receive a refined product, in the form of a summary or simply a tip-off from a foreign*

[90] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 19
[91] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 36
[92] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 36
[93] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 38
[94] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 38

intelligence service, rather than the raw intelligence."[95] [this is precisely the type of bald intelligence assertion received in the Diab case].

- "*In practice, judicial control over this phase is non-existent. As Bruguière explained, investigating judges receive information only from the DST, not directly from third-country sources: 'They're the ones who do the interfacing [with other intelligence services] and they don't tell us where they got the information … We don't know whether the methods used were human or technical or [even whether] the information comes from a third country …*"[96]

- "*Counterterrorism prosecutor Philippe Maitre confirmed this, explaining, 'There is no judicial control over the intelligence services. … The origin of the intelligence is not important, and we don't always know it*."[97]

- "*… evidence obtained under torture or prohibited ill-treatment in third countries has been used in criminal proceedings in France*."[98]

In its reports in 2010 (Human Rights Watch Concerns and Recommendations on France, March 11, 2010; No Questions Asked: Intelligence Cooperation with Countries That Torture, June, 2010), HRW pursues this gravely troubling theme of the danger, in using as trial evidence intelligence from unknown original sources and emanating from unknown circumstances, of becoming complicit in torture, of turning "*a blind eye to allegations of abuse*."[99]

- "*This memorandum provides an overview of Human Rights Watch's concerns and recommendations on France, submitted to the United Nations Committee Against Torture … Our comments are focused primarily on counterterrorism measures that the government has introduced which we believe breach Convention [Against Torture] standards*."[100]

- "*Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations. Our research indicates that there is insufficient judicial verification of intelligence material in terrorism investigations. In practice, security services provide prosecutors and specialized investigating judges with information they have obtained through intelligence-gathering methodologies, including cooperation with third countries with poor records on torture. Investigating judges may then order any number of*

[95] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 39
[96] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 39
[97] Human Rights Watch, July, 2008, Preempting Justice, supra, at pp. 39-40
[98] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 40
[99] Human Rights Watch, July, 2008, Preempting Justice, supra, at p. 40
[100] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 1

investigative steps, including arrests, on the basis of this intelligence, without exercising any control over the legitimacy of the methods used to obtain the information."[101]

- "*As the [UN] Committee made clear in P.E. v. France, states have a positive obligation 'to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.' The absence of any mechanism or requirement on the part of investigative judges to verify whether the information was obtained under any form of ill-treatment is a breach of that obligation, because the information constitutes evidence for the purposes of a judicial investigation.*"[102]

- "*Foreign torture intelligence is used to identify terrorism suspects on national territory, launch police and surveillance operations and, in some cases, to initiate judicial investigations leading to arrests and prosecution*."[103]

- "*In practice, however, France appears all too willing to set aside this principled approach.* [The international condemnation of torture and absolute proscription of the use of material derived from torture]. … *Insufficient verification by judicial authorities of information coming from the intelligence services leads to the use by the judiciary of foreign torture material, both at the investigative phase and at trial*."[104]

- "*… the role of intelligence material in the judicial process is clear and troubling. Most if not all terrorism investigations are launched by judges on the basis of information collected by intelligence services, including through relations with similar services in foreign countries. The lack of effective judicial control over intelligence information received from security services, the operational use of such information to open official investigations and detain people, and the use of torture evidence at trial all undermine the rule of law and the absolute prohibition on torture*."[105]

- Martin Scheinin, the UN Special Rapporteur on human rights while countering terrorism, reports that "*States that receive information obtained through torture or inhuman and degrading treatment are <u>complicit</u> in the commission of internationally wrongful acts*."[106] (emphasis in original).

The dangers and unreliability of unsourced intelligence characterizations of people were emphasized by The Honourable Frank Iacobucci, Commissioner of the Internal Inquiry Into The

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[101] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 6
[102] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 6; and U.N. Committee Against Torture, Decision: P.E. v. France CAT/C/29/D/193/2001 (Dec. 19, 2002, para. 6.3)
[103] June, 2010, Human Rights Watch, No Questions Asked, supra, at p. 1
[104] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 45
[105] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 48
[106] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 13

Actions of Canadian Officials In Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. Mr. Justice Iacobucci reported to Parliament in October, 2008, and stressed from the outset the need to respect the rule of law (such as fair trial) and due process (the principles of fundamental justice) in cases involving allegations of terrorism:

- "*A democracy, however, must justify the means to any end – including, in this case, its response to terrorism. Canada must choose means to deal with terrorism that are governed by the rule of law and respect for our cherished values of freedom and due process*."[107]

Mr. Justice Iacobucci found that bald intelligence assertions (that he characterized as "*labelling*") about Mr. Elmaati shared among "*foreign intelligence and law enforcement agencies*" led to mistreatment of Mr. Elmaati when relied on by Syrian and Egyptian officials. This labelling by CSIS of Mr. Elmaati "*described Mr. Elmaati in quite definitive terms, variously referring to him as:*

- *an individual of Egyptian descent who had recently arrived in Canada from Afghanistan where he spent approximately seven years involved in jihad-related activities;*
- *an individual with links to local religious and Islamic extremists;*
- *an associate of Osama Bin Laden aide Ahmed Said Khadr; and*
- *an individual involved in the Islamic extremist movement.*"[108]

Hauntingly like the bald and conclusory intelligence descriptions of Maher Arar decried by Justice O'Connor, these unsourced, uncircumstanced intelligence assertions about Mr. Elmaati were criticized by Justice Iacobucci as "*dangerous*" and specifically created (using Justice O'Connor's words) "*the danger that inaccurate information becomes credible the more often it is repeated*."[109] Justice Iacobucci noted that intelligence descriptions of and assertions about people

[107] Iacobucci, Frank; Internal Inquiry Into the Actions of Canadian Officials In Relation to Abdullah Almalki, Ahmad Abou-Elmaati And Muayyed Nureddin; October, 2008, at p. 1
[108] Iacobucci Inquiry, supra, at p. 351
[109] Iacobucci Inquiry, supra, at p. 352

"*depends on what is in the mind of the analyst who drafts the communication*"[110] to foreign agencies. Justice Iacobucci relied on the Supreme Court of Canada's observation that "*inaccurate information or mislabelling, even by a degree, either alone or taken together with other information, can result in a seriously distorted picture*."[111] Intelligence agencies sometimes pass on information, noted Justice Iacobucci, to other (foreign) agencies "*to elicit information from the foreign agency", "to prompt a response*."[112] This, of course, is exactly what has happened in Dr. Diab's case: the French intelligence service, the DST, has received intelligence from foreign services identifying neither sources nor circumstances; Hassan Diab is merely "*definitively*" (to use Justice Iacobucci's word) labelled as the terrorist who bought the motorcycle and set off the Paris bomb. Dr. Diab cannot challenge or test this "*evidence*" at a trial. It may well be the product of torture. No party to his proposed French trial will know. And it is mere intelligence, the product of an unknown intelligence analyst based on unknown material. As Justice Iacobucci noted about the Elmaati intelligence "*labelling*": "*In my view, this is a very dangerous practice, one that puts the person labelled in this manner at risk, and increases the possibility that inaccurate information will be treated as credible*."[113] Using such unsourced, uncircumstanced intelligence labelling as evidence to prosecute in a criminal trial – as is proposed by the Requesting State in Dr. Diab's case if surrender is not refused – would be inconceivable and unacceptable to Justice Iacobucci given his reasoning in his Inquiry Report. In no way can such material comport with the rule of law or principles of fundamental justice essential to fair trial. Surrender to such a trial will clearly be contrary to the Charter and "*unjust or oppressive*".

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[110] Iacobucci Inquiry, supra, at p. 352
[111] Iacobucci Inquiry, supra, at p. 352; and *Charkaoui v. Canada*, 2008 SCJ No. 39 at para. 41
[112] Iacobucci Inquiry, supra, at p. 352
[113] Iacobucci Inquiry, supra, at p. 352

The International Commission of Jurists "*is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world*."[114] Unsourced, uncircumstanced intelligence posing as criminal trial evidence was rejected by the International Commission of Jurists in their 2009 report, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism. Echoing the same due process, fair trial, principles of fundamental justice and complicity in torture concerns enunciated by the U.K., by Justices O'Connor and Iacobucci, by Human Rights Watch, the International Commission of Jurists (an organisation of judges from around the world that includes Mr. Justice Binnie and Mr. Justice Rivet from Canada) began its report stressing the importance of fundamental justice and rule of law (just as Justice Iacobucci had prefaced his Inquiry Report):

- "*Since 11 September 2001, countering terrorism has become one of the biggest priorities for many governments and for the international community. Terrorism is a real threat in many parts of the world and States must address terrorism robustly and effectively. However it is no less imperative that they do so through methods that do not undermine the fundamental values at the heart of the international legal system. It is regrettable that during the last eight years States have responded to terrorism in a manner that threatens the very core of the international human rights framework, that represents perhaps one of the most serious challenges ever posed to the integrity of a system carefully constructed after the Second World War*."[115]

The Commission's report by its Eminent Jurists Panel, "*represents the culmination of an intense and in-depth inquiry over a period of three years*."[116] Sixteen hearings were held in different countries throughout the world. Among the concerns identified by the Panel as requiring "*urgent action*" was "*the need to re-establish the primacy of the criminal justice system*

[114] Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights; International Commission of Jurists; Geneva; 2009; preface
[115] Assessing Damage, supra, p. v foreword
[116] Assessing Damage, supra, p. v foreword

in the context of responding to terrorism."[117] This was because, the report noted, "*Counter-terrorism laws have frequently in the past (and still today as will be seen) reduced legal safeguards relating to arrest, detention, treatment and trial in order to provide a supposedly more effective framework to combat terrorism*."[118] The Panel noted that intelligence and its use was a central concern relating to fair trial and fundamental justice: "*One of the most striking developments brought to the attention of the Panel is the increasing central role that intelligence plays in modern counter-terrorist efforts … and the Panel learnt that intelligence is now acted upon and used in an increasing variety of legal and administrative proceedings*."[119] The Panel continued: "*Intelligence, by its very nature, poses potential risks to human rights and the rule of law*."[120] Because intelligence (and its gathering and production) is secret, accountability is extremely challenging and this problem increases with intelligence shared across transnational borders by intelligence agencies: "*it is clear that holding domestic intelligence agencies to account is difficult, and that difficulty is multiplied when seeking remedies for actions carried out by transnational intelligence operations*."[121] This is the type of 'received' intelligence so prominent in the proposed French "*evidence available*" for trial against Hassan Diab.

The Eminent Jurists Panel continued in identifying the fair trial, fundamental justice problems of reliance on intelligence as evidence to ground legal sanctions: "*Intelligence, by its very nature poses problems for the principle of due process. In seeking to protect intelligence sources, some States have amended the regulations governing legal or administrative procedures to broaden the permissible grounds for non-disclosure of materials to suspects; and suspects are given limited opportunities to test the veracity of the information upon which their arrest,*

[117] Assessing Damage, supra, p. vi foreword
[118] Assessing Damage, supra, p. 38
[119] Assessing Damage, supra, p. 67
[120] Assessing Damage, supra, p. 68
[121] Assessing Damage, supra, p. 69

detention, or subsequent charges rest."[122] The Panel gave as an example of the problems of reliance on secret, unsourced, uncircumstanced intelligence the Canadian case of Maher Arar who lost his liberty and was tortured because he was "*characterised*" by unsourced intelligence "*as a suspected terrorist*."[123] The Panel recommended that "*States should recognise the clear distinction between the roles of intelligence and law enforcement; intelligence agencies should not perform the function of law enforcement personnel*."[124]

The Panel concluded about the use of intelligence as evidence, as follows:

- "*Intelligence, procured legally and illegally, is exchanged with security services of other countries with limited controls. Sometimes these exchanges involve countries that are widely known to have bad human rights records. This intelligence, sometimes faulty, is being used in an increasing array of administrative procedures, in which more often than not the information relied on is not disclosed to the individuals concerned or their legal representatives. Raw intelligence starts to substitute for evidence, to the detriment of individuals and the criminal justice system.*"[125] (emphasis added).

And of course that is precisely what is proposed for the trial of Hassan Diab: if he is surrendered, intelligence will "*substitute*" for evidence to prosecute him, to the "*detriment*" of his rights to fair trial and fundamental justice.

The Eminent Jurists Panel also noted the danger of complicity in torture in the reliance on unsourced, uncircumstanced intelligence in any type of legal proceedings:

- "*However, routine, regular and systematic exchanges of information, of the kind that the Panel was told are common between intelligence agencies, raise serious dilemmas. If intelligence or other State agencies are systematically sharing information with countries and agencies with a known record of human rights violations, it is difficult to resist the argument that States are complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism.*"[126]

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[122] Assessing Damage, supra, p. 78
[123] Assessing Damage, supra, p. 83
[124] Assessing Damage, supra, p. 89
[125] Assessing Damage, supra, p. 161
[126] Assessing Damage, supra, p. 85

- States that receive and rely on intelligence produced in unknown circumstances from unknown sources to foreign intelligence services run the grave risk of becoming complicit consumers of torture: "*in so doing they become 'consumers of torture and implicitly legitimise, and indeed encourage, such practices by creating a 'market' for the resultant intelligence. In the language of the criminal law, States are 'aiding and abetting' serious human rights violations by others*."[127]

Since, as Dr. Wesley Wark correctly notes about the unsourced, uncircumstanced intelligence said by the Requesting State to be "*available*" to be used as "*evidence*" in the trial of Dr. Diab, "*It could have come from anywhere*", in addition to violating the *Charter*, the fair trial rights of Dr. Diab and the principles of fundamental justice, the use of such material in any way to prosecute Dr. Diab risks making the Requesting state and the surrendering state – Canada – complicit in torture. This is simply unacceptable.

"*JUSTICE*" is a 54 year old (founded in 1957) U.K.-based human rights and law reform organization whose mission is "*to advance justice, human rights and the rule of law*."[128] Writing in June, 2009, JUSTICE produced its report on "*Secret Evidence*", material that cannot effectively be known or challenged, and that ought not, in the interests of fair hearing and fundamental justice, according to JUSTICE, to be used in legal proceedings:

- "*It is a basic principle of a fair hearing that a person must know the evidence against him*."[129]

- The right to a fair hearing includes as well "*the right to confront one's accuser; to know and challenge the evidence given by the other side*."[130] (JUSTICE cited the Supreme Court of Canada decision in *Charkaoui* for the proposition that "*last, but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it*.")[131]

- "*This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging …*"[132]

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[127] Assessing Damage, supra, p. 85
[128] SECRET EVIDENCE: a JUSTICE report; London; June, 2009; p. 6
[129] SECRET EVIDENCE, supra, p. 5
[130] SECRET EVIDENCE, supra, p. 7
[131] SECRET EVIDENCE, supra, p. 16
[132] SECRET EVIDENCE, supra, p. 5

- "*It should be self-evident, therefore, that the use of secret evidence by any court runs utterly contrary to the idea of a fair hearing.*"[133]

The intelligence sought to be used, if Hassan Diab is surrendered, to prosecute and convict him at a proposed trial in the Requesting State is "*secret*" and "*Confidential*" (the ROC says so). It emanates from foreign and domestic intelligence services but where they sourced the material no one at trial will know. The original sources are secret and unknown – they remain anonymous. The circumstances in which the intelligence was produced from these anonymous sources are unknown, a guarded intelligence secret.

The JUSTICE report detailed "*the difficulties with using intelligence assessments as evidence to prove facts in issue*"[134]:

- "*Unlike, say, a witness statement taken by police investigating a crime, intelligence assessments are not prepared with a view to prosecuting suspects in open court. They are summaries of information, which may come from many different sources, including direct testimony of covert agents; hearsay from informants, various kinds of surveillance including interception, information gained third hand from foreign intelligence liaisons, and so forth.*"[135]

In setting out "*The case against secret evidence*", the JUSTICE report cites the following:

- "*First, secret evidence is not reliable. The reliability of evidence matters greatly to the courts because they have an interest, independent of fairness to the parties, to arrive at conclusions that are accurate.*"[136] (As the Arar and Iacobucci Inquiries made plain, the unsourced intelligence labelling was tragically unreliable);

- Reliability depends on a procedure of testing or challenge: "*And if it is a principle of rationality that a tribunal must act upon evidence, it is surely rational to conclude that evidence that has been tested by all the parties is more likely to lead to accurate conclusions than a one-sided account.*"[137];

- Much secret evidence (as in the Diab case) is merely intelligence: "*It is the product of the security and intelligence services who, despite their expertise in intelligence, have*

[133] SECRET EVIDENCE, supra, p. 7
[134] SECRET EVIDENCE, supra, p. 71
[135] SECRET EVIDENCE, supra, p. 72
[136] SECRET EVIDENCE, supra, p. 215
[137] SECRET EVIDENCE, supra, p. 216

no background in evidence-gathering and for whom the prosecution of suspected terrorists is much less of a priority than the disruption of their activities. Accordingly, intelligence material may contain second- or third-hand hearsay, information from unidentified informants, information received from foreign intelligence liaisons, data-mining and intercepted communications, not to mention the hypotheses, predictions and conjecture of the intelligence services themselves. That much of this material would be inadmissible in a normal court is not a criticism of the intelligence services but it is a criticism of the use of intelligence as evidence. In February, 2009, the UN Special Rapporteur on human rights and counter-terrorism criticised the use of intelligence material as evidence, particularly that based on foreign intelligence-gathering."[138] (emphasis added);

- "*Secondly, secret evidence is unfair. It is not only that evidence that has been tested by all the parties will be a more reliable basis for the court to make its judgment, but that it is fundamentally fairer to give both parties an equal opportunity to present evidence as well as to comment on the evidence given by the other side.*"[139];

- "*Thirdly, secret evidence is undemocratic*"[140]: the public cannot know or assess if the law is being applied properly as the "*evidence*" is secret and unknowable;

- "*Fourthly, the use of secret evidence is damaging the integrity of the courts. It is "an affront to the basic principles of fairness for the courts to determine issues of fact by reference to evidence not disclosed to a party.*"[141] And, the risk of reliance on torture-sourced material further damages the integrity of the courts: "*It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do, they are of an essentially short-term interim character. Often there is a need for urgent action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.*"[142]

Expert evidence from France confirms all the foregoing evidence and submissions (from the U.K. Joint Parliamentary Committee, the U.K. Home Office, Professor Hodgson, the Eminent Jurists Panel, JUSTICE, Human Rights Watch, the Arar Inquiry, the Iacobucci Inquiry). If Hassan Diab is surrendered to trial in France, intelligence will be used and accepted as evidence

[138] SECRET EVIDENCE, supra, p. 218
[139] SECRET EVIDENCE, supra, p. 220
[140] SECRET EVIDENCE, supra, p. 222
[141] SECRET EVIDENCE, supra, p. 224
[142] SECRET EVIDENCE, supra, p. 224-225

at his trial, as a "*sound source of information by prosecutors and investigating judges*." Furthermore, such intelligence, even though unsourced and uncircumstanced, will be "*most often*" considered by the trial court judges as "*strong evidence*".[143] And because such "*strong evidence*" cannot be effectively challenged at trial, the sources and circumstances remaining secret, there is every likelihood Hassan Diab will not only be prosecuted on this manifestly unfair material, but he will be convicted based on such "*strong evidence*". The learned extradition judge noted in his Reasons for Decision that "*the prospects of conviction in the context of a fair trial, seem unlikely*."[144] The learned judge's comment was in the context of a case (ROC) that excluded the intelligence. Only in the context of an unfair trial, where secret, unsourced, uncircumstanced intelligence <u>is used</u> to prosecute and convict, and is regarded as "*strong evidence*" that cannot meaningfully be challenged, will Dr. Diab's conviction become likely – only if Hassan Diab's trial is unfair. This is contrary to the *Charter*, to the principles of fundamental justice. It is simply unacceptable.

Stéphane Bonifassi, a leading Paris lawyer, expert in French law and former First Secretary of the Paris Bar, writing in his paper "*The Use of Intelligence In Criminal Cases, And More Specifically in Terrorist Cases*"[145], notes the following:

- "… *there is no distinction under French law between evidence and intelligence*";
- "… *intelligence will be accepted as a sound source of information by prosecutors and investigating judges* …";
- "… *intelligence that has been found reliable by an investigating judge* ["Judicialized" as explained above], *that has been included in the investigation file (the 'dossier') and that served as one of the elements for this judge to forward the case to trial will be most often considered by his/her colleagues in charge of judging the case in 'Cour d'Assises Spéciale' as <u>strong evidence</u>*" (emphasis added);

[143] Bonifassi, supra, at pp. 2, 3
[144] *A.G. Canada (France) v. Diab*, supra, para. 191
[145] Bonifassi, supra, at pp. 1, 2, 3

- "*challenging this approach and requesting that such intelligence be discarded will fail and result most often in a hostile reaction from judges and will be very often counterproductive …*";

- "*Such a situation makes it particularly difficult for a defence lawyer to challenge such intelligence*"; "*It is doubtful that at the hearing, if there is one in France, the intelligence that supports the prosecution of Mr. Diab might be challenged in any efficient way by the defense*."; "*The defense lawyer will not be in a position to request the hearing of those who have provided such intelligence*";

- "*Allegations that evidence might be based on torture will not be investigated in any way, even though the source of the intelligence is located in countries where it is widespread. There will be no way, because of no access to the source of intelligence, for the defense lawyer to start proving torture allegations. The court will simply not address the issue*."

Canadian intelligence expert, Thomas Quiggin, in his report entitled "*Intelligence As Evidence: Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab*"[146], details the "*intelligence cycle*" by which intelligence is processed and notes important differences between intelligence and criminal trial evidence. Intelligence is "*processed information*", a product the result of successive layers of hearsay, analysis, hypothesis, assumptions, opinion, interpretation and evaluation. The sources of original or raw intelligence are almost always secret and unidentified as the processing continues – analysts will not know the source(s) (or their reliability); users will not know either: *"In the intelligence process, it is a common occurrence that analysts cannot, even if they want to, drill down through a report to find its ultimate source. There is frequently no indication in most reporting about the original source, the source's reliability, the translator's knowledge of language and contextual affairs, or the nature of the origin of the information (i.e. was coercion or torture used). As such, there is a significant difference between the intelligence information collection process and the legal*

[146] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at pp. 14, 15

information collection process."[147] Mr. Quiggin continues, noting that "*The simple reality is that an 'end user' of the intelligence is several steps removed from the original human source and will have no means of establishing the reliability of the information. At this point, the information is often little better than multiple level hearsay in the evidentiary sense of the term.*"[148] And, because this hearsay also includes the opinions of unknown analysts and hearsay that originated in unknown circumstances, it is especially unsuitable for use as evidence in a criminal trial. The problems become more pointed when intelligence is shared and emanates from foreign sources. For all of these reasons, Mr. Quiggin states that (unsourced, uncircumstanced) intelligence may not be used as trial evidence.

More specifically, however, Mr. Quiggin assesses the intelligence specifically offered as "*available*" evidence by the Requesting State in its ROC and concludes that "*The intelligence, as provided in this case, cannot reliably be considered as evidence for the following reasons.*"[149] The reasons carefully set out by Mr. Quiggin are:

- that the intelligence set out in the ROC "*is conclusory and provides no basis in fact for its views*"[150]; as in the Arar and Iacobucci Inquiries, bald, conclusory intelligence assertions "*label*" Dr. Diab as the person responsible;

- the intelligence in the ROC "*contains no intelligence sources nor any means of identifying the sources*"[151];

- no explanation of the circumstances of the obtaining or production of the intelligence is set out: "*No explanation is offered as to how or under what circumstances the BKA came into possession of this information*"[152];

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[147] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 16

[148] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 21

[149] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 33

[150] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 33

[151] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 33

- "*Again, given what is available in the Dossier, it is not possible to make an assessment or a determination as to source or information reliability*"[153];

- "*… in almost all situations listed in the Dossiers not even the type of sources involved is identified … this lack of identification of either the source or its type makes it impossible to render any judgment and is therefore unreliable as evidence in court*"[154];

- "*… we are simply given a series of conclusory statements with no sourcing or facts*."[155]

After commenting on the use in the French terrorist trial process of intelligence as evidence, Mr. Quiggin reaches 3 conclusions:

"1. *Intelligence cannot be reliably used as evidence in a common law court unless the sources of the intelligence are identified and can be produced in court for cross examination. The circumstances of how the intelligence was obtained must also be disclosed for purposes of reliability.*

2. The reliance upon intelligence documents always raises issues of reliability due to the reality that the intelligence community is forced to work in grey areas with imperfect information. In other words, the intelligence process as a whole has inherent problems of reliability. However, the intelligence provided in this case appears particularly suspect as courtroom evidence due to the almost complete lack of sourcing. Furthermore, none of the circumstances under which the intelligence was collected are identified either.

3. *The French system allows for an administrative process which simply converts (judicializes) intelligence into evidence without the ability of either the defence or the trial judge to see the source involved or to know the circumstances in which the alleged information was produced*."[156]

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[152] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 33

[153] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 34

[154] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 35

[155] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 35

[156] Quiggin, "Issues Concerning the Reliability of Intelligence and the Record of the Case of Hassan Diab, supra, at p. 37

Mr. Quiggin's expert analysis confirms and corroborates all the prior evidence and submissions that a trial of Dr. Diab based on such material, if surrender were to be ordered, would clearly be "*unjust or oppressive*", would violate the *Charter* and be contrary to the principles of fundamental justice.

Dr. Wesley Wark, the eminent and respected Canadian intelligence expert and National Security advisor, carefully and thoroughly confirms the important differences between criminal trial evidence and unsourced, uncircumstanced intelligence. Dr. Wark's Expert Witness Report[157] describes intelligence (pp. 2-17) as an "*acutely fallible*" construct:

- "*… intelligence is acutely fallible. The propensity for failure built into the intelligence cycle means that intelligence cannot be equated with evidence or automatically assumed, somehow because it is 'intelligence', to be true. Intelligence is crafted; evidence is discovered. Intelligence is a construct which involves multiple processing filters between raw data and finished conclusions*."[158]

Intelligence may only be used as evidence if and when it is "*scrubbed to bedrock*", only when accurately sourced and thoroughly circumstanced. This, notes Dr. Wark, will be a rare and challenging occurrence: "*The process may be self-defeating, as assessed intelligence cannot easily be turned back into raw material*."[159]

Dr. Wark closely examined the intelligence offered as available evidence in the ROC (pp. 17-42) and makes the following observation:

- "*The French intelligence case, on the record provided of a 28-year intelligence manhunt, rests on secret processes for collection and assessment and on secret information that can be probed perhaps but cannot be properly tested. Intelligence is asserted here as evidence but intelligence is not the same as evidence, as I have demonstrated in earlier sections of this report. The accumulated layers of secret information of unknown provenance and of secret intelligence assessment of unknown*

[157] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 1
[158] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra. p. 15 - 16
[159] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 17

> *quality and outcomes, all adding over many years to a doubtful and encrusted mix, cannot be peeled back. The French intelligence case is presented in conclusory form, welded to an overarching hypothesis that remained unchanged throughout most of the time frame of the investigation. We cannot see the original information in its original form, cannot see the processes by which that information was collected, transmitted, evaluated and selected for inclusion in the investigative file. The French intelligence case cannot be tested and must be regarded as manifestly unreliable as evidence in a judicial proceeding. It would be dangerous to rely for evidentiary purposes on a secretive and mysterious intelligence process that produced an early hypothesis about the genesis of the Rue Copernic attack based entirely on foreign sources, that went cold for 15 plus years as the French authorities pursued 'fruitless' leads, and that was resurrected in 1999 on the basis of new intelligence, from an entirely unknown source, that the DST itself judged as not more than 'at least likely.' To deprive an individual of his liberty on the basis of such material would be manifestly unjust.*"[160]

Dr. Wark notes the prevalence of foreign intelligence in the French ROC: "*The apparent reliance on foreign sources of intelligence for major leads in the Rue Copernic bombing is especially striking in the French record. Foreign sources of intelligence, even from trusted allies and partners, are often impervious to challenge and testing by the receiving intelligence service, as a foreign partner will go to great lengths to protect the sources and methods used by its own intelligence community.*"[161] Who is the foreign service?; from whom or what service did the foreign service receive the intelligence before passing it on to the French?; was mistreatment or torture involved? These questions have no answer at the proposed French trial based on this unsourced, uncircumstanced intelligence.

Dr. Wark is clearly knowledgeable about the use of judicialized intelligence in French terrorism trials and also about the international criticism of such a practice (see pp. 37-42 of his Report). Not only does French judicialization of the intelligence not solve the "*endemic*

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[160] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, pp. 33-34

[161] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 35

intelligence problems,"[162] the French use of unsourced, uncircumstanced intelligence as trial evidence to prosecute and convict is both "*dangerous*" and makes the investigating magistrate "*complicit in intelligence errors*."[163] In the final analysis, as Dr. Wark explicitly states, the use of such intelligence material at a proposed French trial – if surrender is ordered – would "*be manifestly unjust*". It is respectfully submitted that surrender to a manifestly unjust trial would be "*unjust or oppressive*" in the language of s. 44.

Professor Kent Roach is Canada's leading academic writer/teacher on the use of intelligence as evidence and the international perspective on this issue. Professor Roach has highly practical experience as well, having served as counsel on major appeals, serving with the United Nations Legal Expert Group (on Terrorism), as Research Director to the Goudge Inquiry into Pediatric Forensic Pathology and to the Air India Inquiry, as Research Advisor to Justice O'Connor in the Arar Inquiry and to Justice Linden in the Ipperwash Inquiry, as researcher for the Privacy Commissioner of Canada (in the 3-year review of the Anti-Terrorism Act). Dr. Roach holds the Pritchard-Wilson Chair of Law and Public Policy at the University of Toronto, is the former Dean of Law, University of Saskatchewan, instructed at the Transnational Legal Studies Centre in England and at the National Judicial Institute and was the keynote speaker to the 2005 Department of Justice, Canada, Annual Conference. Dr. Roach's expertise in the area of intelligence as evidence is broad and deep (see CV pp. 1-41)[164] with numerous publications on this issue. He is author of the leading Canadian text on the relationship of intelligence to evidence. He is published and respected on this issue in Canada and internationally (U.S., U.K.,

[162] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 42
[163] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 42
[164] see CV Kent Roach

Australia, India, South Africa, China, Netherlands, Hong Kong, Italy, Singapore, Denmark, Germany, New Zealand, Indonesia).

Dr. Roach gave expert evidence (November 24th and 25th, 2010) during the Diab extradition hearing and filed as Exhibit 9 his expert report. After hearing Dr. Roach's evidence and reading his report, after cross-examining Dr. Roach on all of his evidence, counsel for the Requesting State disavowed entirely for the purposes of the Canadian extradition proceedings reliance on any of the unsourced, uncircumstanced intelligence set out in the ROC and offered as "available evidence" in a proposed French trial. The Requesting State still proposes – if surrender is ordered – to rely on this intelligence as evidence to prosecute and convict Hassan Diab at trial.

Dr. Roach gave expert evidence on the "*differences between intelligence and evidence*", on the "*problems associated with reliance on secret intelligence as a means to impose legal consequences on individuals*" and on the "*dangers of miscarriages of justice caused by the use of intelligence that is manifestly unreliable or of unknown reliability*" as well as "*the dangers of reliance on evidence that can never be produced at trial and exposed to adversarial challenge and the full application of rules relating to the burden and quantum of proof and the basic rules of evidence because of the need to protect the secrecy of intelligence sources, methods and promises of secrecy given to foreign agencies.*"[165]

Dr. Roach's evidence was that intelligence is a product made up of opinion, hearsay and secrecy: "*Secrecy has been an essential attribute of intelligence. … Secrecy is essential both to protect the sources and methods of the intelligence agency and promises of secrecy made to other agencies that share intelligence. The secrecy of sources and methods also means that it may be impossible to know how information was obtained even if the method used could affect the*

[165] Kent Roach Report: Proposed Evidence, p. 2

reliability of intelligence."[166] Intelligence and evidence have "*competing norms and assumptions,*"[167] such that "*there are many instances where it is impossible to use intelligence as evidence both because of principled concerns about ensuring the secrecy of intelligence sources and methods and because the reliability of the intelligence will be unknown and unknowable or suspect enough to make it unsafe to rely upon for the purposes of imposing significant legal consequences on individuals.*"[168] In addition, Professor Roach noted, "*a recurring problem that has been revealed in the post 9/11 era is the difficulty of knowing whether intelligence was obtained under circumstances, including torture or threats, that cast doubt on the reliability of the intelligence.*"[169]

In his report (pp. 11, 12, 18) and oral evidence (pp. 1750-1803), Professor Roach detailed the objectionable, unsourced intelligence offered as evidence in the ROC. In addition to insuperable problems of secrecy, lack of sources, lack of circumstances, inability to test or challenge, and potential for complicity in torture, Professor Roach noted the "*problem of tunnel vision or confirmation bias*"[170] evident in the ROC, with its attendant dangers of discounting disconfirming evidence (like the fingerprint, palm print and physical description exclusions of Hassan Diab which will be discussed below) and filling evidentiary gaps with assumptions or sheer speculation, many of these features noted by the learned extradition judge in his review of the ROC.

Professor Roach discussed in detail as well (report pp. 13-18; oral evidence pp. 1735-1746) jurisprudence in Canada (*Abdelrazik*) and Europe (*Kadi*) that confirmed that unsourced, uncircumstanced intelligence offered as evidence in bald, conclusory form (precisely as in the

[166] Kent Roach Report; Proposed Evidence, pp. 5 & 6
[167] Kent Roach Report; Proposed Evidence, p. 9
[168] Kent Roach Report; Proposed Evidence, p. 11
[169] Kent Roach Report; Proposed Evidence, p. 12
[170] Kent Roach Report; Proposed Evidence, p. 18

Diab case but also the Arar and Iacobucci Inquiry cases) is unacceptable, is simply not evidence. Citing *Abdelrazik*, Professor Roach stated that "*bald, unsourced assertions cannot be taken at face value because their reliability is not known. … Unsourced conclusions of unknown reliability cannot and should not be used as evidence to impose serious legal consequences on people.*"[171] Mr. Justice Zinn, writing the decision in *Abdelrazik*, called this "*no evidence*".[172] The European Court of Justice came to the same conclusion in *Kadi*[173]: unsourced, uncircumstanced intelligence assertions that can in no meaningful way be challenged may not be relied upon without constituting a breach of fundamental rights. Professor Roach gave evidence that the bald, unsourced, uncircumstanced intelligence assertions of Dr. Diab's alleged involvement in the Copernic bombing were "exactly" like those decried by the Canadian and European courts in *Abdelrazik* and *Kadi*.

Professor Roach concluded his report[174] stating that intelligence may be offered as evidence only when fully and accurately sourced and circumstanced in order to provide a real and effective opportunity to confront and challenge the material. In his oral evidence,[175] Professor Roach confirmed that in the absence of such full sourcing and circumstancing, in the absence of such effective opportunity to challenge, it is "*impossible*" to use intelligence as evidence without denying fundamental justice.

In the face of Professor Roach's evidence, the Requesting State disavowed reliance on all of the unsourced intelligence for the purposes of the Canadian extradition proceedings. All of this objectionable material will be available for use as evidence at a trial in the Requesting State, a trial that will therefore not comport with the principles of fundamental justice. It is respectfully

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[171] Kent Roach Report; Proposed Evidence, p. 17
[172] *Abdelrazik v. Canada*, 2009 F.C. 580 at para. 11
[173] *Kadi v. European Commission;* General Court of The European Union; September 30, 2010
[174] Kent Roach Report: Proposed Evidence, p. 22
[175] Kent Roach: evidence; Transcript of Proceedings November 24, 2010, at p. 1748

submitted on behalf of Dr. Diab that, absent effective assurances that all such intelligence will form no part of the evidence at Dr. Diab's trial in the Requesting State, surrender ought to be refused. Surrender to such a trial would be unjust and oppressive.

(ii) Jurisprudence: trial on secret, untestable material "unacceptable"

The decisions of the Supreme Court of Canada in *Trochym*, *Charkaoui I* and *Charkaoui II* make clear that trials based on unsourced, uncircumstanced, secret material that cannot be tested violate s. 7 of the *Charter*, are contrary to the principles of fundamental justice, deny the ability to know and meet (challenge) the case and are simply "*unacceptable*".[176]

In *Trochym*, the Supreme Court stressed from the outset of the decision (paragraph 1) that its concern was "*to ensure basic fairness of the criminal process*" and "*the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect….*"[177] The court found that material presented as evidence against an accused that could not be tested for reliability "*is unacceptable in a court of law*."[178] Such is the unsourced, uncircumstanced intelligence of secret provenance said to be available for use as evidence against Dr. Diab in the Requesting State. Material of insufficient or untestable reliability "*is likely to undermine the fundamental fairness of the criminal process*,"[179] said the court. Nor, continued the Supreme Court, does it matter that such material is consistent with other, properly admissible, testable evidence; the use of such material in the criminal trial process remains unacceptable: "*However*,

[176] *R. v. Trochym* [2007] S.C.J. No. 6;
Charkaoui v. Canada (Citizenship and Immigration) [2007] S.C.J. No. 9;
Charkaoui v. Canada (Citizenship and Immigration) [2008] S.C.J. No. 39
[177] *R. v. Trochym*, supra, para. 1
[178] *R. v. Trochym*, supra, para 55
[179] *R. v. Trochym*, supra, para. 27

if evidence whose reliability cannot really be tested is admitted and relied upon simply because it is consistent with other admissible evidence, the danger is that a web of consistent but unreliable evidence will lead to (potentially wrongful) conviction."[180] *Trochym* makes clear that a trial of Dr. Diab in the Requesting State that relies in any way on such material will be unacceptable and in violation of fundamental justice. But *Trochym* does not stand alone.

In *Charkaoui I*, the Supreme Court struck down as unconstitutional (in violation of s. 7 of the *Charter*) the Security Certificate regime in Canada because the security intelligence relied on to justify the Certificate could neither be known nor challenged by the detainee. This was in the administrative, immigration (refugee) context, not the more stringent context of a criminal trial. Citing the intelligence labelling in Arar,[181] Professor Roach's evidence[182] and its own decision in the *Ferras*[183] extradition case, the Supreme Court stated that "*Fundamental justice requires compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case*."[184] The court's conclusion finding a violation of s. 7 is explicitly applicable to the proposed trial of Dr. Diab using unsourced intelligence as evidence: "*Yet, the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision on all the relevant facts and law*."[185] Dr. Diab will not truly know the case against him in the Requesting State and will have no meaningful way of challenging it. This is unacceptable.

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[180] *R. v. Trochym*, supra, para. 60
[181] *Charkaoui I*, supra, paras. 26, 79
[182] *Charkaoui I*, supra, para. 82
[183] *U.S.A. v. Ferras* [2006] 2 SCR 77; cited at para. 20 et al
[184] *Charkaoui I*, supra, para. 61
[185] *Charkaoui I*, supra, para. 65

In *Charkaoui II*, the Supreme Court made plain in requiring the intelligence service (CSIS) to retain original evidence, that there was a clear distinction between intelligence and evidence: "*unverifiable information*" (such as intelligence summaries) was held to be unacceptable – "*The retention and accessibility of this information is of particular importance where the person named in the certificate and his or her counsel will often have access only to summaries or truncated versions of the intelligence because of problems connected with the handling of information by intelligence agencies.*"[186] This "*unverifiable information*" theme is completely consistent with the untestable material rationale of *Trochym*.

The British Columbia Court of Appeal has also pronounced on the purported reliance on bald and conclusory assertions of guilt (the "*labelling*" identified in the Arar and Iacobucci inquiries so identical to the intelligence labelling of Dr. Diab). In *Asiegbu*, the Court of Appeal ruled inadmissible as "*unattributed hearsay*" unsourced, uncircumstanced information from a Special Agent, saying "*I would not characterize the information as 'evidence'.*"[187]

In *Almrei*, Mr. Justice Mosley of the Federal Court, Trial Division found, during Security Certificate proceedings, that unsourced, uncircumstanced intelligence was not acceptable as evidence in a criminal proceeding: "*The information about Almarabh and the passport was intelligence that could not have been introduced as evidence in a criminal proceeding without compromising the sources.*"[188]

As set out above, the decisions of the Federal Court Trial Division in *Abdelrazik* and General Court of the European Union in *Kadi* found that the unsourced, uncircumstanced, bald and conclusory intelligence assertions could not be relied upon to justify inclusion on the UN's 1267 List (of identified terrorists) without being in breach of fundamental rights.

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[186] *Charkaoui II*, supra, paras. 42, 44
[187] *USA v. Asiegbu* [2008] BCJ No. 2437, paras 31, 84, 87
[188] *Almrei (Re)* [2009] F.C.J. No. 1579 Para. 496

In sum, then, the jurisprudence is consistent: because unsourced, uncircumstanced intelligence cannot be known or meaningfully challenged, its use in a criminal trial is simply unacceptable and a clear violation of the principles of fundamental justice. Dr. Diab's proposed trial on such material will be unjust and oppressive, and surrender will violate s. 7 of the *Charter*.

G. Aggravating Factor: Manipulation of the Intelligence By The Requesting State

The Supreme Court of Canada's expressed view that unsourced, uncircumstanced intelligence that is both unknowable and untestable is therefore "unacceptable" as trial evidence, is particularly apposite to the case of Dr. Diab. At its best, the reliability of such intelligence is unknown and unknowable (untestable). In the Diab case, however, the key intelligence assertion – that the Copernic bombers came to and went from France using false passports (and therefore Dr. Diab's 1980 passport shows no French entry or exit stamps, and so the passport is claimed to be "*consistent*" with the bald intelligence assertion) – this key intelligence assertion is demonstrably unreliable: it has been altered.

On November 12, 2008, the Requesting State presented materials to the Superior Court of Ontario in an *ex parte* application that it represented to be both true and reliable. *Ex parte* applications attract a very high duty of candour.[189] The *ex parte* application relied on Letters Rogatory from Mr. Trevidic, the same French official who only 29 days later – on December 11, 2008, certified the Record of the Case. The Letters Rogatory were delivered to Canada under the seal of the Ministry of Justice of France and set out "Statements of Facts" in the Copernic bombing case. In these Letters Rogatory, Mr. Trevidic set out what he claimed the secret,

[189] See *Ruby v. Canada (Sol. Gen.)* [2002] 4 SCR 3 at para. 27

unsourced 1999 intelligence received by the DST stated. This is what Mr. Trevidic represented the intelligence said:

> "*It may be recalled that at the time the terrorist attacks, particularly of Palestinian origin, were very frequent in Europe and that border controls were particularly tightened.*
>
> *Activists who were still unknown to the specialized services had it in their own interest to cross borders with their real identity papers and use false documents only after they entered in the concerned country.*
> *With this reasoning, it was perfectly logical that Hassan DIAB entered France with his real passport, left in the same way, and used the false passport in the name of PANADRIUYU to operate on French territory."*[190]

This assertion by Mr. Trevidic is exactly the opposite of his claim in the ROC (at pp. 42 and 49) that the 1999 intelligence stated that false passports were used by the bombers to enter France. On November 12, 2008, the 'version' of the 1999 intelligence was that "*Hassan Diab entered France with his real passport*" and left the same way. But of course this meant that Mr. Diab's 1980 passport proved his innocence – his passport shows he never entered France as claimed. On December 11, 2008, the 'version' of the 1999 intelligence changed 180 degrees. The "*false-passport-to-enter France*" version of the 1999 intelligence is at the heart of the intelligence case produced against Dr. Diab – it makes the 1980 Diab passport appear 'corroborative' of the intelligence; it turns exculpatory evidence into allegedly inculpatory evidence. The glaring and serious contradiction between Mr. Trevidic's two versions of the 1999 intelligence received is manifest when the versions are juxtaposed:

[190] Ex Parte Application November 12, 2008, Appendix B, para. 13 (International Letters Rogatory)

- "*In 1999, when the DST obtained the names of the persons presumed to have participated in some capacity or another in the Rue Copernic and, for certain among them, in the Antwerp attack, Hassan Diab was not known to be a part of a Palestinian terrorist group.*" (para, 11)

- "*Information obtained from the DST revealed that the Rue Copernic hit team had come to France from Spain and had then left again for Spain.* (para. 13)

- "*It may be recalled that at the time the terrorist attacks, particularly of Palestinian origin, were very frequent in Europe and that border controls were particularly tightened. Activists who were still unknown to the specialized services had it in their own interest to cross borders with their real identity papers and use false documents only after they entered in the concerned country. With this reasoning, it was perfectly logical that Hassan Diab entered France with his real passport, left in the same way, and used the false passport in the name of Panadriyu to operate on French territory.*" (para. 13) (emphasis added)

- "*As the hit team responsible for carrying out the attack was supposed to come to Paris from Madrid by train using false identity documents given in Madrid.*" (p. 42)

- "*persons who carried out the reconnaissance in Paris in August received in Madrid, members of the team tasked to commit the attack, recovered their passports and gave them false documents. They then separately took a train to Paris.*" (p. 42)

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

This is no typographical error: it is two mutually inconsistent "*intelligence stories*" written by the same French official.

This one example confirms what all the authorities, Canadian and international, say, that unsourced, uncircumstanced, bald and conclusory intelligence assertions of secret provenance are

unreliable and unacceptable as evidence, that a trial in which they are used to prosecute a person breaches fundamental justice, that they are untestable and breach the "*venerated*" principles of knowing and having a meaningful opportunity to challenge the case. These flatly contradictory versions of the 1999 intelligence graphically demonstrate why surrender to a trial based on such intelligence material is a violation of s. 7 of the *Charter* and unjust or oppressive in the words of s. 44 of the Act. No Canadian should be surrendered to be tried on such material.

H. Expert Handwriting Evidence

Once the objectionable intelligence was disavowed, the case for extradition committal turned entirely on handwriting evidence: "*The evidence that tips the scale in favour of committal is the handwriting evidence*."[191]

The history of the handwriting evidence is important. From the outset of these extradition proceedings, when the ROC was certified on December 11, 2008, the handwriting opinions of a Mme. Marganne and a Mme. Barbe-Prot were offered by the Requesting State as ostensibly reliable evidence purporting to connect Dr. Diab to the 5 block-printed words on the hotel registration card filled out by the bombing suspect "*Alexander Panadriyu*". This was done by comparing the block-printed 5 words written in 1980 with writings from 1993 the two French "*experts*" assumed were the writings of Hassan Diab.

Dr. Diab offered the evidence of international handwriting experts who reviewed the Marganne and Barbe-Prot reports and whose reports detailed the unreliability of those two opinions for a multitude of reasons, one of which was that the French "*experts*" had failed to notice that the supposed 1993 writings of Hassan Diab used for comparison with the hotel card

[191] *A.G. Canada (France) v. Diab*, 2011 ONSC 337 at para. 189

actually included a number of documents written by Dr. Diab's wife. Writings by her were identified by the French "*experts*" as matching the printing done in 1980 by the 40–45 year old man who registered as Panadriyu. When the defence expert evidence was all ruled admissible by the extradition judge, the Requesting State sought a lengthy adjournment of the extradition proceedings (causing the collapse of the fixed proceeding date) and then disavowed entirely reliance on the Marganne and Barbe-Prot reports for the purpose of the Canadian extradition proceedings. In the face of defence expert evidence, the Requesting State disavowed reliance on handwriting opinion evidence it had offered as available and reliable evidence from 2008 to 2010.

The handwriting opinion evidence of both Mme. Marganne and Mme. Barbe-Prot was referred to explicitly by the extradition judge as a clear example of manifestly unreliable evidence:

- "*A clear instance of manifest unreliability in the context of expert evidence in an extradition hearing would be where it has been demonstrated that the opinion is founded on erroneous facts such as using the wrong known handwriting when doing the handwriting comparison*."[192]

- "*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.*"[193]

The obvious serious problem that remains, however, is that these two manifestly unreliable handwriting opinions (based on a totally different person's comparison handwriting), while disavowed here in Canada, remain in the trial dossier as evidence available to be used in a trial in the Requesting State. As was emphasized by the Supreme Court of Canada in *Trochym* and *Charkaoui I*, trial on unreliable evidence is contrary to fundamental justice and fairness: "… *evidence that is not sufficiently reliable is likely to undermine the fundamental fairness of the*

[192] Reasons for Decision, Maranger, J., February 18, 2011, para. 13
[193] *A.G. Canada (France) v. Diab*, supra, para. 125

criminal process."[194] Surrender of Dr. Diab to face a trial that in any way relies upon these two manifestly unreliable handwriting opinions would be unfair, unjust and oppressive. Unless effective assurances are received that the Requesting State will not rely in any way on the Marganne and Barbe-Prot opinions, surrender ought to be refused.

Upon the disavowal of the Marganne and Barbe-Prot handwriting opinions, the Requesting State offered in the extradition proceedings (in a Supplement to the ROC) a replacement handwriting opinion, that of one Mme. Bisotti. This is the opinion evidence upon which committal turned.

As with the Marganne and Barbe-Prot opinions, Dr. Diab offered the evidence of internationally-recognized handwriting experts (Canadian, American, British) to demonstrate the unreliability of this replacement opinion. The experts all consistently confirmed that, owing to flagrant methodological errors made by Mme. Bisotti, her opinion was completely and patently unreliable.

In allowing the Bisotti handwriting opinion to remain part of the ROC (in a ruling February 18, 2011) and to form the basis for a committal order (June 6, 2011), the learned extradition judge nevertheless made the following key findings about this evidence. He found that, having heard the evidence of the three defence experts, "*Each expert has, in no uncertain terms, provided scathing criticism of the French evidence*."[195] Earlier the learned extradition judge had noted that "*Propping up this report* [the Bisotti report] *is a task that's pretty difficult. I mean, you had three experts essentially torch the report.*"[196] He stated that he found the Bisotti handwriting opinion to be "*very problematic, very confusing, with conclusions that are*

[194] *R. v. Trochym*, supra, at para. 27
[195] Reasons for Decision, Maranger, J., February 18, 2011, para. 7
[196] Transcript of Proceedings, February 15, 2011, p. 29

suspect."[197] The extradition judge added that Mme. Bisotti's opinion was in a field he identified as a "*pseudoscience*"[198] and further observed that "*the three experts have certainly caused the Court to wonder about the reliability of the Bisotti report.*"[199] The judge agreed that "*the appearance of bias*"[200] was also arguably raised by the Bisotti opinion. Justice Maranger found further that "*The Bisotti report has been shown to be based on some questionable methods and on an analysis that seems very problematic.*"[201] The expert evidence offered by Dr. Diab he found had substantially undermined the Bisotti handwriting opinion: "*The evidence presented on behalf of the person sought has largely served to substantially undermine the French report; it has been shown to be evidence that is susceptible to a great deal of criticism and attack.*"[202] Finally, the learned extradition judge noted that the case on which he was committing Dr. Diab, based on the Bisotti "*pseudoscience*" opinion, was weak, with conviction at a fair trial unlikely: "*…the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely.*"[203]

It follows from Justice Maranger's findings that only in an unfair trial will Dr. Diab's conviction become likely. Therefore, a fair trial must be ensured. A fair trial will be a trial without reliance on unsourced, uncircumstanced intelligence, without reliance on "*manifestly unreliable*" handwriting opinions (Marganne, Barbe-Prot), and with full and fair trial court consideration of the important defence expert evidence that the learned extradition judge found had substantially undermined the Bisotti opinion and shown it to be "*very problematic*", "*suspect*" and based on "*questionable*" methodology. This important defence expert evidence,

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[197] Reasons for Decision, Maranger, J., February 18, 2011, para. 14
[198] Reasons for Decision, Maranger, J., February 18, 2011, para. 14
[199] Reasons for Decision, Maranger, J., February 18, 2011, para. 16
[200] *A.G. Canada (France) v. Diab*, supra, para. 106
[201] *A.G. Canada (France) v. Diab*, supra, para. 118
[202] *A.G. Canada (France) v. Diab*, supra, para. 120
[203] *A.G. Canada (France) v. Diab*, supra, para. 191

however, will not receive full consideration in the French trial process, leaving the suspect Bisotti report (and the unreliable Marganne and Barbe-Prot reports) essentially unchallenged. This will constitute a breach of the principles of fundamental justice because, as the Supreme Court of Canada has found, it is "*unacceptable*"[204] not to permit meaningful challenge of the case against the accused: "*Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and a opportunity to meet the case.*"[205] The only way for Dr. Diab to challenge the unreliable and suspect handwriting evidence proposed to be used at trial against him is with expert handwriting evidence that is fully and fairly considered against the flawed French evidence. This will not happen in the French trial process.

Justice Maranger committed Dr. Diab based on the Bisotti handwriting opinion, despite his many and obvious misgivings about the reliability and bias of that evidence. His rationale for committal was to presume that at a French trial the defence expert handwriting evidence that had so significantly revealed the unreliability of the Bisotti opinion would receive (as in Canada) full and fair consideration. He presumed that the French trial court would equally consider and weigh the defence expert evidence along with the Bisotti report and, assuming that (i.e. a fair consideration of all the evidence), would be "*unlikely*" to convict. In other words, at a fair trial, the Bisotti opinion, fully considered against Dr. Diab's expert evidence, would not likely stand up to justify a conviction. The learned extradition judge reasoned that full consideration of these "*competing opinions*" was "*the stuff of trial*" and that the "*very strong competing inferences*" (the

[204] *R. v. Trochym*, supra, at para. 55
[205] *Charkaoui v. Canada (Citizenship and Immigration)*, supra, at para. 61

defence expert evidence) would be seen, when fully and fairly considered, to demonstrate "*serious weaknesses*" in the French handwriting opinion evidence.[206]

When evidence was led before Justice Maranger that in fact the French trial court would not give fair, full and equal consideration of the defence expert evidence as compared with the prosecution expert evidence put in the trial dossier by the investigating magistrate, Mr. Trevidic, the learned extradition judge ruled that this was a matter for the Minister to address.

The evidence of Stéphane Bonifassi was put before the learned extradition judge. Mr. Bonifassi, the recognized expert in French law and procedure, explains that only experts on a list set up by the French Courts of Appeal or Cour de Cassation have standing as experts in French trial courts. Further, he explains, it is the juge d'instruction (Mr. Trevidic) who selects what expert reports to enter into the trial dossier for trial court consideration. Only those reports receive full trial court consideration. Experts offered by the accused person, by contrast, are viewed with "*extreme suspicion*" and trial courts are often "*extremely critical*" of defence expert evidence. For these reasons, Mr. Bonifassi explains, Dr. Diab will not be able effectively to challenge the suspect Bisotti report or manifestly unreliable Marganne and Barbe-Prot reports. In his report Mr. Bonifassi says specifically the following:

- "*Expert witnesses as is the case in Mr. Diab's file are requested by investigating judges.*"
- "*They most often appoint experts that are registered in a list set up by the various Courts of Appeal or by the Supreme Court (Cour de Cassation).*"
- "*Courts are often extremely critical of parties appointed experts when they depose against the findings of a judge appointed expert.*"
- Defence experts "*are considered with extreme suspicion by the judges in charge of the case.*"

[206] Reasons for Decision, Maranger, J., February 18, 2011, paras. 15, 16, 17

- "*Furthermore, such defense appointed expert will not be in a position to access the original documents but only the copies supplied by the judge. This situation will place such expert in a disadvantageous position compared to the judge appointed expert.*"

- "*For all the foregoing reasons, there will be little way to efficiently challenge the 'expertise' made by the investigating judge experts and most notably the handwriting expertise.*"

- "*I am aware that this outline will be remitted to the Court in charge of Mr. Diab's case. I believe this outline is a fair account of the way party appointed experts are considered by the French criminal system.*"[207]

The evidence of Jacqueline Hodgson, the U.K. expert on the French criminal trial process, is to the same effect. In her report commissioned by the U.K. Home, Office Professor Hodgson discusses "*French criminal procedure*" and explains that the credibility of trial evidence in France depends on whether it comes from the parties or the juge d'instruction (the investigating magistrate – in the Diab case Mr. Trevidic): "*And finally, the credibility of evidence at trial will depend upon whether it is regarded as the prosecution case, the defence case, or the product of a judicial investigation.*"[208] In Dr. Diab's case, of course, only the Marganne, Barbe-Prot and Bisotti reports are the product of Mr. Trevidic's putting them in the trial dossier as available trial evidence. The defence expert evidence is not part of the French trial dossier.

Professor Hodgson explains that criminal trials in France are based on written evidence in the case dossier. There is little oral evidence and the defence plays a "*diminished*" role as an "*outsider*" at the trial. Essentially, trials become almost mere formalities with the resolution of guilt being determined pre-trial, by the juge d'instruction who assembles the case in the dossier:

- "*In France, great emphasis is placed upon written evidence. … The evidence collected during the investigation is placed in the case dossier … which then forms the centrepiece of the trial, the central point of reference from which the judge will*

[207] Expert Witnesses Provided By The Parties, May 23, 2011, Stéphane Bonifassi
[208] Hodgson: The Investigation and Prosecution of Terrorist Suspects in France; supra; p. 7

question the accused. In most instances the evidence of witnesses will be accepted in written form, with no need for live testimony."[209]

- "*…The defence has no real opportunity to participate in the pre-trial investigation. This is extremely significant given the importance attached to written evidence gathered during the pre-trial phase and the lack of testimony at trial. As noted above, when comparing French criminal procedure with that in England and Wales, the diminished role enjoyed by the defence in France is part of the fundamental difference in the two procedures.*"[210]

- "*The defence lawyer, in contrast, as an avocat, is very much a professional outsider; she has neither the professional status nor the ideology of the magistrat* [the juge d'instruction] … *It is very difficult for the defence to play any part in the investigation, or to have any impact on the construction of the dossier.*"[211]

- "*Historically, the pre-trial investigation was the most important stage in inquisitorial procedure, the trial serving almost as a formality confirming the earlier findings. Whilst the trial has taken on a different form with both the procureur and defence lawyers playing a more active part, during the instruction, the emphasis continues to be on obtaining and evaluating all the relevant information during the pre-trial, rather than the trial phase. In this way, the instruction characterises most strongly the inquisitorial roots of French criminal procedure, where issues are selected and debated not by the prosecution and defence at trial but by a judge during a pre-trial investigation.*"[212]

Finally, just as Stéphane Bonifassi stated, Professor Hodgson's report notes that challenging at trial the evidence assembled by the investigating magistrate in the trial dossier (i.e. the handwriting opinion evidence of Mmes. Marganne, Barbe-Prot and Bisotti) is seen as both "*inappropriate*" and "*risky*". Unlike what the learned extradition judge assumed, Dr. Diab will not be able to challenge effectively the highly flawed French handwriting evidence, even with the evidence of renowned international experts.

- "*The centrality of the case dossier at all stages of the criminal process and the lawyer's dependence upon the juge d'instruction as the investigator upon whose evidence the court will base its decision, means that outright challenge and confrontation would be inappropriate and the establishment of a wholly separate defence case risky. In England and Wales, the defence may seek to dispute evidence*

[209] Hodgson, supra, p. 10
[210] Hodgson, supra, p. 10
[211] Hodgson, supra, pp. 15 & 21
[212] Hodgson, supra, p. 26

> *produced by the police by bringing their own witnesses to contradict the prosecution case. To do this within an inquisitorial procedure (without channelling such claims through the pre-trial enquiry) where investigations are understood to be judicially supervised, is to challenge the integrity of the judiciary itself. Furthermore, in its subsidiary role, the status of the defence in France as a party to the proceedings is inferior to that of the magistrat and the lawyer is trusted less than the (judicially supervised) police. This places a clear constraint on her ability to engage in any form of proactive defence.*"[213]

Professor Pierre Margot is one of Europe's leading forensic scientists. Dr. Margot is the chair of Forensic Science at the University of Lausanne. He has been called as an expert forensic witness in France. He and his colleague, Dr. Raymond Marquis, handwriting expert for the Institut de Police Scientifique (IPS), have reviewed the Bisotti report in detail and concluded that its handwriting opinions are unreliable, being based on flawed methodology and the product of a biased approach. The report of Professor Margot and Dr. Marquis was not available to the extradition Judge during the course of the committal hearing. Hassan Diab sought an adjournment on May 25th, 2011, of the date that had been scheduled for a ruling on committal to allow for the opportunity to perfect an application to reopen the extradition hearing. The adjournment was denied by Maranger, J. on June 6th, 2011, in part because both the question of whether a unique methodology, different from the standard methodology used in the field of forensic handwriting comparison, was employed in France and relied upon by Ms. Bisotti and whether any effective challenge to the Bisotti opinion could be mounted through the calling of defence experts was a question of foreign law and therefore matters to be addressed at the ministerial stage. The report of Professor Margot and Dr. Marquis is now available and is being filed with the Minister for consideration on the issues raised in the submission.

The learned extradition judge, in permitting the Bisotti handwriting opinion – despite his expressed misgivings about its "*suspect*" and "*very problematic*" nature – to remain in the ROC

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[213] Hodgson, supra, p. 33

as the ultimate basis for committal, stated that, because the defence experts had no direct experience practising or testifying in France, therefore, "*none of the experts could comment on whether or not there is or isn't a different type of methodology used in the Republic of France*."[214] This speculation, that France may employ a different handwriting comparison methodology from that accepted as standard and universal throughout the rest of the world (which was contrary to the evidence of all defence experts), is expressly refuted by Professor Margot and Dr. Marquis. As their report makes plain, the mother tongue of both is French, they know "*the state of the art in this area of expertise in Europe*" and they know "*the French evidential rules*."[215] In addition, Professor Margot has been called as an expert in the French system, in a case directly involving Mme. Bisotti. Professor Margot and Dr. Marquis state that "*The methodology for handwriting comparison is universal*" and "*ENFHEX recommendations correspond to this universal approach*." Mme. Bisotti "*refers to ENFHEX methodology that she claims to have followed*."[216] France does not, and Mme. Bisotti did not purport to, use any unique methodology different from that universally accepted by professionals in the discipline throughout the world. "*ENFHEX recommendations correspond to the universal methodology for handwriting comparison, which is generally applied by every forensic document examiner*."[217] But Mme. Bisotti failed to apply proper ENFHEX methodology – repeatedly and glaringly – and her conclusions are therefore clearly unreliable: the methodology employed by Mme. Bisotti "*does not correspond to the standard approach such as the one recommended by ENFHEX, and it leads to unreliable conclusions*."[218]

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[214] Ruling on Application to Exclude Evidence, Maranger, J., February 18, 2011, at para. 14
[215] Prof. Pierre Margot & Dr. Raymond Marquis: Review of Expert Report in the Extradition Procedure Against H. Diab Report No. PFS 183-05.11; August 16, 2011, pp. 2; 3
[216] Margot/Marquis, supra, p. 6
[217] Margot/Marquis, supra, p. 14
[218] Margot/Marquis, supra, p. 8

In particular, Professor Margot and Dr. Marquis state the following:

"28. *Ms Bisotti claimed to have followed the ENFHEX methodology, which corresponds to the accepted universal approach in forensic handwriting examination. The recommendations of the ENFHEX indeed include a list of references that are recognised worldwide in this field. However, numerous methodological flaws were highlighted in the report of Ms Bisotti, which clearly demonstrate that the followed approach does not correspond to the accepted universal procedures regarding this area of expertise.*

29. *First, Ms. Bisotti failed to proceed to a pre-evaluation phase where, before any handwriting comparison, she would have determined whether the questioned material is likely – or not – to provide valuable information to the magistrate regarding the mandate questions. Second, the questioned material is very limited in quantity and characterised by a simplistic style. It should be discussed whether this may be disguised or not. Third, there is a very long time lapse between the handwritten questioned entries and the reference material, which makes the latter inadequate for comparison. The important limitations regarding both the questioned and the reference documents makes difficult any reasonable attribution to a source, and are in contradiction with the strong conclusion level reached by Ms Bisotti. Fourth, the comparison methodology reported by Ms Bisotti, which consists of searching into the questioned material the features first highlighted in the reference material, is improper to find out eventual features of the reference material that may represent differences from the reference material. Fifth, Ms Bisotti compared reference handwriting specimens to a spurious signature that does not appear to be comparable to the reference. Such a comparison is not justified. Finally, the interpretation of the results does definitely not come down to a count of similarities and differences as Ms Bisotti refers to. In fact Ms Bisotti simply failed to assess the evidence in evaluating the significance of the similarities and differences under balanced propositions.*

30. *Next to handwriting methodological problems, it must be considered that the questions of the mandate were leading questions, leaving no possibility for the expert to give a balanced opinion taking into account the possibility that someone else than Mr Diab wrote the questioned entries. These numerous and serious flaws undoubtedly lead to state that the conclusions given by Ms. Bisotti in her report cannot be reasonably considered as reliable.*"[219]

The report of Professor Margot and Dr. Marquis explicitly concludes that the manifestly incorrect methodology employed by Mme. Bisotti renders unreliable her handwriting opinion(s):

"*This does not correspond to the standard methodology recommended in the field of forensic*

[219] Margot/Marquis, supra, p. 13

handwriting examination. In this respect and due to several other serious flaws, the conclusions of Ms Bisotti's report cannot be considered to be reliable."[220]

Drs. Margot and Marquis also explain in their "*Review of Expert Report in the Extradition Procedure Against H. Diab*" (consistent with the evidence of Stéphane Bonifassi, the French legal expert) that defence expert evidence is not regarded equally in French trials with expert evidence generated by the juge d'instruction; indeed, it isn't treated as expert evidence at all but merely as an "*allegation*", a submission by the defence. Drs. Margot and Marquis confirm that no effective challenge at trial to the flawed and unreliable Bisotti opinion may be mounted through the adduction of defence expert handwriting evidence: "… *any report submitted by parties is not received by the courts in the form of an expert opinion but as any other allegation made by a party. It does not have the value of the official court appointed expert …*"[221]

The lack of an effective opportunity to meet the French handwriting opinion evidence case assembled in the trial dossier by Mr. Trevidic, the investigating magistrate, means Dr. Diab's trial on such unreliable and suspect evidence will be, in the words of the Supreme Court of Canada, "*unacceptable*" and contrary to the principles of fundamental justice. Dr. Diab will be tried on unreliable and suspect evidence he cannot challenge.

When the above evidence was led before the extradition judge, the judge determined that this was a matter the Minister must address. The judge agreed that his rationale for allowing the Bisotti handwriting opinion to remain in the record as the basis for a committal order was the premise ("*the notion*") that its ultimate reliability would be tested at trial as against the defence expert evidence. Any "*catch 22*" that results from that notion being inaccurate was a matter for the Minister:

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[220] Margot/Marquis, supra, p. 15
[221] Margot/Marquis, supra, p. 5

- "*Counsel representing the person sought submits that ultimate reliability of the French report will not be tested because of trial procedure in France, it was said that the person sought will not be allowed to present his own expert evidence to challenge the French expert report.*

  The proposition put forward was that this affects the fairness of the extradition proceeding because the report was kept in the Record of the Case based in part on the notion that its ultimate reliability will be tested at a trial and that this results in a 'catch 22' situation for the person sought."[222]

- "*If it can be demonstrated that that may not be the case* [a full opportunity to challenge the suspect Bisotti handwriting opinion] *then it is a matter for the ministerial phase of the extradition process. … I do not have the jurisdiction to examine the fairness or unfairness of a foreign state's trial procedure. However, the Minister does, which is meant to prevent a catch 22 from ever occurring.*"[223]

In the unique circumstances of Dr. Diab's case, where the case for committal rests entirely on "*very problematic*" and "*suspect*" handwriting opinion evidence that defence expert evidence substantially undermines and exposes as highly susceptible to "*criticism and attack*", but that attack will not be accommodated in the Requesting State's trial process, the proposed trial of Dr. Diab on such flawed evidence that cannot effectively be challenged by Dr. Diab is an unacceptable affront to the principles of fundamental justice. Absent effective assurances from the Requesting State that there will be no trial reliance on the manifestly unreliable, disavowed Marganne and Barbe-Prot reports, and that defence expert handwriting evidence will be fully, fairly and equally considered with the Bisotti opinion, surrender ought to be refused as unjust and oppressive. As the learned extradition judge ruled after examining all the expert evidence on both sides, at a fair trial "*the prospects of conviction*" were "*unlikely*". The minister, it is respectfully submitted, must ensure such a fair trial or decline surrender.

[222] Ruling, Maranger, J., March 1, 2011, paras. 7 & 8
[223] Ruling, Maranger, J., March 1, 2011, para. 9

As with the unsourced intelligence, so too with the flawed handwriting opinion evidence: inability effectively to test and challenge at trial makes such a trial "*unacceptable*" and surrender contrary to fundamental justice.

I. S. 6(1) of the Charter and Comity

Dr. Diab is a Canadian citizen. Section 6(1) of the *Charter* guarantees the right of every Canadian citizen "*to enter, remain in and leave Canada*". In *United States of America v. Cotroni*,[224] the Supreme Court of Canada found that extradition is a *prima facie* violation of s. 6(1) which, to be constitutional, must be justified as a reasonable limit under s. 1. A majority of the Court found extradition to be a reasonable limit on a Canadian citizen's s. 6 rights having regard to the interests generally served by the extradition process. Nevertheless, LaForest, J. held that, in determining whether a Canadian should be prosecuted in Canada or abroad, Canadian authorities

- "*must give due weight to the constitutional right of a citizen to remain in Canada. They must in good faith direct their minds to whether prosecution would be equally effective in Canada, given the existing domestic laws and international cooperative arrangements. They have an obligation flowing from s. 6(1) to assure themselves that prosecution in Canada is not a realistic option.*"

In *United States of America v. Kwok*,[225] Arbour, J. quoted this passage and then held as follows:

- "*Thus, a person whose extradition is sought from Canada can argue that, in the circumstances of his or her case, a surrender order would be an unjustified infringement of s. 6(1) if, for instance, an equally effective prospect of prosecuting in Canada had been unjustifiably and improperly abandoned.*"

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[224] *United States of America v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.)
[225] *United States of America v. Kwok* (2001), 152 C.C.C. (3d) 225 (S.C.C.)

In other words, extradition is not *per se* a reasonable limit justified under s. 1; there can be circumstances in which it is not a reasonable limit on s. 6(1) rights.

Extradition is rooted in the principle of comity, the notion that for mutual benefit, you will do for me what you ask me to do for you. Canada's extradition treaty partner, France, does not extradite its own nationals, trying them instead in France. Professor Gary Botting, author of the leading Canadian text on extradition (Canadian Extradition Law Practice), notes that "*civil law countries such as France are forbidden to extradite their nationals by constitutional fiat. France does not extradite its nationals because it recognizes that sovereignty extends to citizens, and citizens have the right to be protected from the clutches of foreign prosecutors with an axe to grind – and to be prosecuted at home for alleged criminal acts committed abroad. The requesting nation must be prepared to supply all the evidence to France so that the trial of its own citizen can proceed.*"[226]

In this case France has already submitted to Canada the evidence that it will offer at trial. As set out above, French trials are virtually all based on the written material in the dossier and the ROC sets out the evidence on which France relies. Dr. Diab is prepared to admit the entire French case (absent the intelligence, the Marganne report and the Barbe-Prot report), call his defence and have his guilt or innocence fairly and impartially determined here in Canada. Such a trial will be expeditious, with the prosecution case admitted. The prosecution would be equally effective in Canada, in the words of Justices LaForest and Arbour, and would be a "*realistic option*" to a trial in France that will, as set out above, be "*unacceptable*" and contrary to the principles of fundamental justice. Surrender to such a trial will constitute an "*unjustified infringement of s. 6(1)*" when there is a realistic and effective option of a fair and expeditious trial in Canada.

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[226] Botting, Gary; Prism Magazine June 17, 2011 – "*Canada's Extradition Law: The Least Fair Act on Earth?*

J. Further Exculpatory Evidence

The objective physical and scientific evidence in France's possession excludes Dr. Diab as the "*Alexander Panadriyu*" who purchased the motorcycle, registered at the Hotel Celtic or was detained for shoplifting.

The palm print retrieved by French police on the car used to transport the explosives has been compared by the RCMP with the palm print of Hassan Diab and excludes Dr. Diab:

- "*The second point is that the palm prints that were taken from DIAB did not match those provided to the RCMP by the DST (DCRI).*"[227]

The "*Alexander Panadriyu*" who registered at the Hotel Celtic in September, 1980, was a 40-45 year old man. At that time Hassan Diab was 25 years old. Such a difference excludes Hassan Diab, as was decided by the Supreme Court of Canada in *Chartier*.[228]

The distal fingerprint lifted by French authorities from the signed statement of the shoplifter "*Alexander Panadriyu*" does not match Hassan Diab.

The scientific exclusion of Dr. Diab by the palm print and distal fingerprint appears nowhere in the ROC. It is not part of the case the Requesting State will offer to the trial court. This further compounds what, as set out above, is an "*unacceptable*" trial in the Requesting State, a trial (absent extensive and effective assurances) in violation of the principles of fundamental justice.

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[227] RCMP Disclosed Task Report Project 2007-5009, November 21, 2008
[228] *Chartier v. Quebec (A.G.)* [1979] SCJ No. 56

K. Ancillary Matters

It is respectfully submitted that, just as it is "*unacceptable*" to use unsourced, uncircumstanced intelligence as evidence to prosecute Dr. Diab, it is equally unacceptable for the Minister to consider the intelligence in the ROC in making a decision to grant or refuse surrender, except to note its unsourced, uncircumstanced form.

On behalf of Dr. Diab, I am requesting disclosure of all information and/or documentation submitted to the Minister for his consideration on the surrender issue, subject only to any claim of privilege that may be made over such material. Pursuant to the decisions in *Kwok*[229] and *Whitley*[230], Dr. Diab must be made aware of the case he has to meet on surrender and have a reasonable opportunity to respond, to meet the case.

L. Conclusion

For all of the reasons set out above, individually and cumulatively, it is respectfully submitted that surrender should be refused and Dr. Diab should be discharged. In the alternative, surrender should be ordered only if fully effective and binding assurances are received from the appropriate authorities in the Requesting State that no unsourced, uncircumstanced intelligence be used as evidence to prosecute Dr. Diab (i.e. all of the material disavowed in the ROC plus any other such material in French possession), that the reports and evidence of Mme. Marganne and Mme. Barbe-Prot (disavowed by France in the Canadian extradition proceedings) not be relied upon in any way by the Requesting State at trial, that the defence expert evidence and reports of

[229] *U.S.A. v. Kwok*, supra
[230] *U.S.A. v. Whitley* (1994) 94 C.C.C. (3d) 99 (Ont. C.A.); aff'd (1996) 104 C.C.C. (3d) 447 (S.C.C.)

Brian Lindblom, Robert Radley, John Paul Osborn, Pierre Margot and Raymond Marquis be entered into the trial dossier so as to receive full, fair and equal consideration at trial as the report of Mme. Bisotti, that the exculpatory scientific palm print and distal fingerprint evidence be entered into the trial dossier to receive consideration by the trial court. In the absence of such effective assurances, it is respectfully submitted that surrender should be refused and Dr. Diab should be discharged.

Dated at Ottawa this 24th day of August, 2011.

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Donald B. Bayne
Counsel for Hassan Naim Diab