CITATION: Attorney General of Canada (The Republic of France) v. Diab, 2011 ONSC 337
COURT FILE NO.: 12838 and 12796

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
THE ATTORNEY GENERAL OF CANADA ON BEHALF OF THE REPUBLIC OF FRANCE	)	Claude LeFrançois, Jeffrey G. Johnston for the Applicant/Requesting State
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
HASSAN NAIM DIAB	)	Donald Bayne, Yves Jubinville for the Respondent/ Person Sought
	)	
	)	
Respondent	)	**Heard: November 8 to 30**
	)	**December 1,2,3,6,8, 13 to 17**
	)	**20,21,22, 2010**
	)	**January 4 to 7**
	)	**February 9, 10, 11,14,15,18,23,28**
	)	**March1,2,3,4,7,8,9.**

REASONS FOR DECISION

Justice Robert L. Maranger

Introduction

1. The Republic of France seeks the extradition of Hassan Diab to face trial on four counts of murder, multiple counts of attempted murder, and multiple counts involving the destruction of property.

2. 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. On that date a bomb blast ripped through the street, killing four people, injuring over 40 others, and causing substantial damage to a number of buildings in the area.

3. The targets were the members of a nearby synagogue who were celebrating the final day of a Jewish festival known as Simchas Torah. This was an anti-Semitic terrorist act. Thankfully the congregation stayed longer than expected that day, otherwise the death toll would have been much worse. The events of that day have become infamous in the minds of the people of France; it is a nation that clearly wants closure. The Jewish community takes particular interest in seeing that the perpetrators of this heinous act are brought to justice.

4. Hassan Diab was arrested in November 2008 to face extradition on these charges. Mr. Diab was born in Lebanon on November 20, 1953. He lived part of his life in the United States, arriving there in 1987. He became a citizen of Canada in 2006. He is a University Professor with a PhD in Sociology, who held contract positions lecturing at Carleton University and the University of Ottawa since 2006.

He has no criminal record. He appears to be a very well-liked individual. He 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.

General Principles Governing Extradition

5. In Canada the *Extradition Act,* S.C. 1999, c.18 (the "Act") provides a two-stage process for the extradition of a person facing charges in a foreign country: the judicial phase and the executive or ministerial phase. The judicial phase involves an extradition judge conducting a hearing to determine whether sufficient evidence exists to justify committal for trial in Canada. The ministerial phase is triggered if committal is ordered. The Minister of Justice ultimately decides in his or her discretion whether the person sought should be surrendered to the requesting state: the *Extradition Act,* s. 40(1).

6. The fundamental role of a judge in an extradition hearing is to decide whether a requesting state's evidence sets out a *prima facie* case of conduct that would constitute a criminal act in Canada: the *Extradition Act,* s. 29(1)(a).

7. This determination is customarily made on the basis of documentary evidence presented by the requesting state in the Record of the Case (ROC).

8. The Act contains its own rules of evidence. The contents of any document in a properly certified ROC are admissible under s. 32(1)(a), even if not admissible under Canadian law. Thus, the ROC may include hearsay. Threshold reliability of the contents of the ROC is presumed based on its certification: see *USA v. Michaelov*, 2010 ONCA 819, at para. 48.

9. The extradition judge should prevent the hearing from taking on the characteristics of a criminal trial. It is meant to be an expeditious process. *United States of America v. Mach* [2006] O.J. No. 3204 (S.C.J.) para.14.

10. In *United States of America v. Ferras*, [2006] 2 S.C.R. 77, Chief Justice McLachlin set out a series of important principles relating to the law of extradition in Canada. These include but are not limited to the following:

> 19. A person cannot be sent from the country on mere demand or surmise. The case for extradition need not be presented in a particular technical form. But it must be shown that there are reasonable grounds to send the person to trial. A *prima facie* case for conviction must be established through a meaningful judicial process. It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process...
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> 20. It follows that before a person can be extradited, there must be a judicial determination that the requesting state has established a *prima facie* case that the person sought committed the crime alleged and should stand trial for it.

21…. International comity does not require the extradition of a person on demand or surmise. Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes a case sufficient to put the person on trial.

…

23….The judicial phase must not play a supportive or subservient role to the executive. It must provide real protection against extradition in the absence of an adequate case against the person sought.

…

25…. It follows that the extradition judge must judiciously consider the facts and the law and be satisfied that they justify committal before ordering extradition. The judge must act as a judge, not as a rubberstamp.

…

40….I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1).

…

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

…

53. The person sought for extradition may challenge the sufficiency of the case including the reliability of certified evidence. Section 32(1)(c) of the Act permits the person sought to submit evidence "if the judge considers it reliable". This does not require an actual determination that the evidence presented by the person sought is in fact reliable. The issue is threshold reliability. In other words, the question is whether the evidence tendered possesses sufficient indicia

> of reliability to make it worth consideration by the judge at the hearing. Once it is admitted, its reliability for the purposes of extradition is determined in light of all the evidence presented at the hearing. When viewed in this way s. 32(1)(c) in effect presents no greater evidentiary hurdle to the person sought than s. 32(1)(a) or (b) presents to the requesting state.
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> 54. Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt or innocence is at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

11. In *United States of America v. Anderson* (2007), 218 C.C.C. (3d) 225, the Ontario Court of Appeal interpreted some of the key elements of the *Ferras*, *supra*, decision in the following manner:

> 26 *U.S.A. v. Ferras*, turned a new jurisprudential page in the law of extradition. The Supreme Court unanimously concluded, at paras. 39-40, that the principles of fundamental justice enshrined in s. 7 of the *Charter*, considered in the context of an extradition proceeding, required a judicial assessment of the evidence beyond a simple consideration of whether there was some evidence, regardless of its quality, to support the existence of each element of the parallel criminal offence. Chief Justice McLachlin explained that since extradition proceedings could result in the removal of the person

> sought for extradition from Canada, an obvious significant interference with that person's liberty and security, the principles of fundamental justice required some qualitative assessment of the evidence relied on to support the extradition request.
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> 28 *U.S.A. v. Ferras,* contemplates a limited qualitative evaluation of the evidence proffered by the requesting state. As this court recently said in *U.S.A. v Thomlison*, [2007] O.J. No. 246 at paras. 45-46 (C.A.), *U.S.A. v. Ferras*, does not envision weighing competing inferences that may arise from the evidence. It does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable. Nor does it call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.
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> 29 *U.S.A. v. Ferras,* does permit an extradition judge to remove evidence from judicial consideration if the extradition judge is satisfied that the evidence is "so defective" or "appears so unreliable" that it should be disregarded and given no weight for the purposes of deciding whether the test for committal has been met under s. 29 (1) a the *Extradition Act*…

12. Finally, in an extradition, there is the important consideration of the comity between treaty nations. In *Canada (Justice) v. Fischbacher*, [2009] 3 S.C.R. 170, at para. 52, the Supreme Court of Canada expressed the following:

> 52. Comity demands that the requested state maintain a limited role in the extradition process to prevent the proceeding from becoming a trial on the merits. The fundamental tension between comity and any assessment by the Canadian judiciary or executive of the law of the foreign state has been enunciated on numerous occasions by this Court in the context of defining the mandate of the extradition judge under the Act. In *Argentina v. Mellino*, [1987] 1 S.C.R. 536 at p. 551, this Court explained as follows:

> At all events, the assumption by a Canadian court of responsibility for supervising the conduct of the diplomatic and prosecutorial officials of a foreign state strikes me as being in fundamental conflict with the principle of comity on which extradition is based. [Emphasis in original]

13. It is through the lens of these principles that the extradition judge is to conduct a hearing and decide the issue of committal.

Overview

14. The jurisprudence at the appellate level is replete with reminders that an extradition hearing in Canada is meant to be an expeditious, summary process, where the role of the Judge is confined to determining whether the requesting state has presented a *prima facie* case justifying the committal of the person sought.

15. The extradition of Hassan Diab is a testament to the adage that "some things are easier said than done." This proceeding was anything but expeditious or summary. The two sides in this case were zealously and skillfully represented. Once the person sought was arrested it seems as though battle lines were drawn, and virtually every part of the process was intensely litigated. Matters such as bail, admissibility of defence evidence, *Charter* applications, translation issues, etc. went on for days, sometimes weeks; the result was a protracted, at times acrimonious, extradition case that spanned more than two years. The rancor and

tension between counsel was at times palpable. The amount of hyperbole and rhetoric levied by both sides was in my experience unprecedented. I recognize in no uncertain terms that the stakes were high for both sides. I also recognize that this was not a straightforward or conventional extradition, as I hope will become apparent in the reasons that follow.

The Record of the Case (ROC)

16. The original and formal ROC was presented by the requesting state in the French language, Mr. Diab while fluently English, does not speak French. The matter proceeded in the English language. The ROC as a consequence required translation as did virtually every appendix, document, and expert report relied upon for extradition. Because of the need for precision, a protocol for any contested translation issues was developed, and caution was exercised to be certain that Mr. Diab knew exactly what was being relied upon or alleged in any given document. As a consequence, the Court was the final arbiter of what a particular French word or phrase meant in the English language. In the final analysis nothing of substance turned on any specific translated word or phrase.

17. "The case for extradition need not be in a particular technical form": see *Ferras,* at para. 19. The ROC in this instance was unusual. It was originally 72 pages of text with a 17 page list of exhibits referred to as "D. documents." These

included photographs, a copy of a passport, sketches, expert reports, police reports, maps, photographs and miscellaneous other documents. It 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.

18. In July 2010, a supplemental summary of the evidence in the ROC was filed on behalf of the requesting state.

19. The issues raised in this hearing necessitated the providing of a synopsis of the ROC as well as the supplemental summary of evidence. I chose to summarize and divide the contents of the ROC and the supplemental summary into the following specific parts:

Part One Pages 1- 36

20. In this part the ROC details the early investigation of a bombing that took place on October 3, 1980, at approximately 6:30 PM near a synagogue located at 24 Rue Copernic in Paris, France. The investigation uncovered the following facts:

- The bomb was planted on a motorcycle. Four people were killed, several persons were injured and a great deal of property was

damaged. Photographs of the bomb site are contained in the appendices. (See Pages 1-17, Appendix 2 and 3.)

- The bombing coincided with the completion of a Jewish festival. Members of the synagogue exited later than anticipated (7 PM). These facts are relied upon to support the conclusion that this was an anti-Semitic terrorist act. (See Page 18.)

- The explosive device is described as a “bare charge of penthrite” or an association of penthrite and dynamite. The motorcycle was traced to a specific dealership, and was sold on September 23, 1980, to an Alexander Panadriyu. Physical descriptions of Panadriyu from two employees and the owner of the motorcycle shop were obtained. Two composite drawings were prepared. (See Pages 18 to 22, Appendix 5.)

- Documents used in the purchase of the motorcycle led the investigation to the Celtic Hotel; Panadriyu stayed there from September 22 to September 23, 1980, and personally filled out a hotel registration card and wrote the following five words in block letters: “PANADRIYU,ALEXANDER,LANARCA,TECHNICIAN, CYPRUS.” He was described as a Cypriot national. Two employees of the hotel who saw him when he registered provided physical descriptions. (See Pages 22-23.)

- The ROC then describes the renting of and failure to return a vehicle by a person named Joseph Mathias, also a Cypriot national like Panadriyu. Three witnesses from the car rental agency gave differing physical descriptions of this particular individual. A composite drawing of Mathias was prepared based on the first witness’s description. Through the assistance of Cypriot authorities it was determined that Mathias's passport and driver’s license were fake. (See Page 22-26.)

- There is the investigation of a theft of a pair of cutting pliers by Panadriyu and further descriptions and comparisons to existing

sketches were given. A police officer who questioned Panadriyu and was shown his passport states that the passport had an entry stamp from Lyon, France dated September 15, 1980. The police officers provided physical descriptions of Panadriyu. The Cypriot authorities confirmed that, as in the case of Mathias, it was a fake passport. (See Pages 27-32.)

- On October 12, 1980, the missing vehicle rented by Joseph Mathias was discovered. One usable palm print was extracted from the window of the right rear door.

- A prostitute, Angela Calabri, describes having relations with a man at the Celtic Hotel in room 110 on September 22, 1980. She offered a physical description of the individual to the investigators. After reviewing the composite drawings (both of Panadriyu and Mathias), she couldn't positively identify the man she was with that night but indicated he more resembled the composite drawing of Mathias.

- Cypriot authorities confirmed that the false passports of Panadriyu and Mathias are part of the same series.

- This part of the ROC concludes with a description of a bombing committed in Antwerp on October 20, 1981, and that an investigation was undertaken to determine whether there were any similarities between the two attacks.

Part Two Pages 36-41

21. The conventional investigation and evidence seems to largely end at this point. The ROC then begins to summarize “information received” from a series of reports and newspaper articles:

- It references the Palestinian lead. Reports from the “crime squad” and a “senior superintendent” describe confidential information received from German authorities, the BKA (Germany's federal criminal police

office) and Israeli sources (referenced by a French journalist), which are said to provide confirmation that the attack was perpetrated by Palestinians, and that a Lebanese man named Hassan was one of a group of five involved in the attack.

- The "Direction de la surveillance du territoire" (DST) and "various intelligence or foreign security services" and the BKA specify particular names of the people involved in the attack including a Lebanese national known as Hassan and that the Popular Front for the Liberation of Palestine-Special operations (PFLP-SO), a terrorist group founded by Wadie Haddad, were the perpetrators of the attack. It describes information received on the use of false Cypriot passports, a man and a woman staying in Paris before the attack, and the type of explosives used by this group. (See pages 36-39.) It connects an attack on a South Yemen embassy on February 16, 1981, as an avenging of the Rue Copernic attack. It cites newspaper articles dated July 27, 1982, and October 3, 1984, and a radio program that aired on February 1, 1983, as providing information received from "prominent Israelis" and others confirming that the attack was perpetrated by the PFLP-SO, led by Salim Abu Salem. (See pages 39-41.)

Part Three Pages 41-50

22. The ROC explains that the investigation was re-launched in 1999 after being dormant for 15 years. It proceeds to describe "information" provided to the DST, including specific evidence regarding the retrieval of Hassan Diab's passport. This "information" includes:

- Very specific information on the persons responsible for the attack. It states that the PFLP-SO terrorist group is responsible for the bombing, and that it is a splinter group of the PFLP headed by Salim Abu Salem.

- The operation and planning of the attack, specifically the method of travel used by the perpetrators (by train from Madrid to Paris, using false documents) and that two people acted as reconnaissance but only one rented a vehicle in Paris.

- Hassan Diab is the fictitious Mr. Panadriyu and the person who placed the bomb on the motorcycle on the day in question. Hassan Diab planted the bomb in Antwerp on October 20, 1981, and he was known to them as a definite member of the PFLP-SO.
- How Hassan Diab and Nawal Copty were traced back to Canada.

- How Hassan Diab's passport issued May 10, 1980, was seized from Ahmed Ben Mohammed on October 8, 1981, in Rome by Italian authorities. It lists a series of passports and other documents also seized from this individual, including a map of Milan with red markings on it. He was said to have received these documents from Ahmed Salim.

- A copy of the Diab passport is at appendix 8. The specifics contained in the passport are then listed; a translator processed the information on the password including “five stamps three illegible and two stamps for exit from Beirut dated August 22, 1980 and October 8, 1981.”

Part Four Pages 50-56

23. This part covers three separate areas: the investigation of Souhaila Sayeh, the alleged link between the Antwerp and Copernic bombings, and the gathering of the handwriting evidence:

- Information concerning Souhaila Sayeh is provided. According to the DST’s information, she had conducted reconnaissance in both the Copernic and Antwerp bombings. In German judicial proceedings when she was convicted of having participated in a hijacking of a German plane in 1977, she was described as a PFLP member.

Information is also provided concerning her dealings with the leadership of the PFLP-SO. She is described as having been hospitalized for a long period of time in 1979.The German service also attributes the Copernic and Antwerp bombings to the PFLP-SO.

- The ROC then describes links between the Copernic and Antwerp attacks. It describes a "clear link" between the two attacks. These include: that they both took place during the same Jewish festival, that they were planned in Europe, and that both bombing sites were near a hotel and railway station. A connection to Milan and a map found on Ben Mohammed is then made, including what evidence they have in relation to a connection between the Antwerp and Copernic bombings and a planned bombing in Milan. The ROC attributes the distribution of documents for all the attacks to Ben Mohammed.

- Evidence supports that the hotel card was filled in by Alexander Panadriyu. Handwriting comparison analyses and the procedure used to obtain handwriting examples from the United States are detailed. A comparison of the Celtic Hotel card filled in by Panadriyu to known samples of handwriting of Hassan Diab was undertaken. Two reports and their findings are described.

Part Four Pages 56-65

24. In this part there is an analysis of evidence taken from two witnesses at two different hearings, an analysis of photos of Diab, and information respecting his application for a new passport:

- The witnesses were Youcef El Khalil and his spouse Sana Salhab. There is a detailed description of their involvement with the PFLP and the PFLP-SO, and various individuals connected thereto including their leaders.

- It states that Hassan Diab was a member or quite probably a member of the PFLP, as was his spouse at the time, Nawal Copty. It also alleges that El Khalil and Salhab had a friendship with Hassan Diab from 1978 to 1988.

- Youcef El Khalil also testified about seeing a sketch of the Copernic bomber in a French newspaper that resembled Hassan Diab.

- A series of photographs of Hassan Diab taken from 1980 through to 1995 are described.

- It states that Hassan Diab applied for new passport on May 17, 1983. His explanation to the authorities was that he lost his previous passport. The exits and entries out of Lebanon in the past 10 years were also provided apparently from Lebanese authorities.

Part Five Pages 65-72

25. In this part the Canadian investigation is described, including the testimony of two former spouses of Hassan Diab, details respecting photographs and composite sketches are provided, and finally a summing up of sorts of what evidence France purports to have in support of Diab's committal:

- The ROC references the Canadian investigation. It describes Hassan Diab's connection to Nawal Copty and Fatima Faour. It explains the DST information concerning Copty's connection to the PFLP as well as the FDR-L, and her associations with known members of these groups. On February 16, 2007, Hassan Diab is seen at the Montréal airport with Faour. On November 29, 2007, Copty is said to have visited Ottawa.

- It describes Copty's questioning in the United States as well as Heather Winn (both former spouses of Diab). Copty invokes the Fifth

Amendment and refuses to answer questions. An analysis as to why follows. Ms. Winn details her relationship with Diab, and their ultimate separation. She details his traveling, identifies photographs of him, but offers nothing about his politics.

- Details of comparisons between photographs and composite sketches of Panadriyu are described.

- The following conclusion is offered in support of the French position that Hassan Diab is the Copernic bomber: a) The seizure of his passport from Ben Mohammed and the inferences that it says can be drawn from this fact; b) The passport showing that he came from Beirut to Madrid, Spain around the time of the attack (which is said to be in accord with the information obtained by the DST); c) The resemblance between photographs of Diab, particularly in the passport dated May 10, 1980, and the various composite drawings of Panadriyu; d) the handwriting comparison analysis between Diab and Panadriyu; and e) Diab's association with the PFLP and various members of the PFLP.

Part Six (the Supplemental Evidence) Pages 4-10:

26. The supplemental to the ROC describes “new evidence that has come to light”

and can be summarized as follows:

- Investigators locate members of Hassan Diab’s family. Intercepted communications and e-mails between members of the family are described. Examinations of some of the family members that took place under oath are summarized. Pierrette Coutelle an ex-sister in law and Saana Diab, a niece, are questioned. A photo album with photos of Hassan Diab with photos taken in the 1970’s and 80’s is shown to both of these witnesses and they recognize some of the photos.

- Fatima Faour’s connection to the PFLP and her participation in paramilitary training is described; the evidence is obtained from a

certain Bassam Haidar. (He stipulates that he does not know Hassan Diab).

- Phillipe Gruselle, the floor walker at the store where the pliers were stolen, provides a physical description of the individual he stopped in 1980 (Panadriyu); he is shown a photo album of 33 photographs with 18 different men, 9 of which are of Hassan Diab. He indicates that photos 5, 6, 7, 9, 10, 29, and 44 "showed similarities with the cutting pliers thief." All were photos of Hassan Diab. The similarities are then described.

- Finally, it describes a new handwriting report prepared by Ms. Anne Bisotti where she provides conclusions respecting Hassan Diab being the author of certain writing, ranging from a "strong presumption as the author of the hotel card", to a "presumption as author of a signature: (on a police report), to a "very weak presumption as author of the date on the hotel card."

27. Despite the length, complexity and unusual characteristics of the ROC, this matter essentially comes down to a question of identification. That a bombing occurred on the third day of October 1980 in France with devastating consequences is uncontroverted. The issue of committal will ultimately depend upon what evidence can be used from this ROC to support the proposition that Mr. Diab was one of the people responsible for this alleged terrorist act.

Issues To Be Determined

28. The issues raised during the course of this extradition proceeding are the following:

1. Has France violated Hassan Diab's rights under the *Canadian Charter of Rights and Freedoms* by abusing the process during the course of

this extradition hearing? If so is the appropriate remedy a stay of proceedings?

2. Is the expert report prepared by Ms. Anne Bisotti respecting handwriting analysis manifestly unreliable so that it should be excluded from the ROC, and removed from the determination of whether or not to commit Hassan Diab?

3. Is there sufficient evidence in the ROC to justify committing Hassan Diab to stand trial in the Republic of France?

Issue 1 : Charter and Abuse of Process Application

29. The person sought applies for a stay of proceedings on the basis that his *Charter* rights were violated by virtue of an abuse of process on the part of the Republic of France. The determination of a *Charter* application in an extradition proceeding is a two-stage process in which the Court first decides whether there is an air of reality to the request, and if so, the court then adjudicates the application proper. In this case, the parties presented all of the evidence and arguments relating to both stages. The court in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.) at para. 76, provided the following three-part air of reality test:

(a) the abuse alleged must be properly justiciable before the extradition judge;

(b) the abuse alleged must be supported by an evidentiary foundation namely, an "air of reality"; and

(c) the abuse alleged, if made out, must be capable of supporting the remedy sought.

30. The air of reality requirement is not a perfunctory exercise or a mere formality. The jurisprudence establishes that there must exist a "realistic possibility" that the allegations giving rise to the alleged *Charter* violation and remedy sought can be substantiated.

31. Counsel on behalf of Mr. Diab alleges that France has on at least nine specified occasions misrepresented the contents of the ROC to either deliberately manipulate the material to create a falsely inculpatory impression, or, at the very least acted without the requisite due diligence in the presentation of its evidence.

32. Notably, evidence in support of the abuse of process claim was obtained from material provided by France: affidavit evidence and supporting material used in related Mutual Legal Assistance proceedings (MLAT) or for obtaining search warrants, documents that were filed as appendices or exhibits to the ROC, transcriptions of examinations of certain witnesses, and other sources.

33. Counsel for Mr. Diab has demonstrated a degree of irregularity between what is contained in the ROC and other evidence, which in my view warrants closer scrutiny. The threshold “air of reality” has been met and the allegations should be examined to determine whether or not an abuse of process has been established on a balance of probabilities.

34. The granting of a stay of proceedings on the basis of an abuse of process is reserved for only the “clearest of cases”: see *USA v. Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.), at para. 38.

35. It is fair to say that finding an abuse of process on the basis of misrepresentation or a failure of due diligence is very rare in the context of an

extradition. The threshold for such a finding was set out in the case of *United Kingdom of Great Britain and Northern Ireland v. Tarantino* (2003), 177 C.C.C. (3d) 284 (B.C.S.C.) at paras. 46, 53 and 56:

> [46] Where the conduct of a foreign certifying authority falls so far below an expected reasonable standard to amount to complete failure of due diligence, this impacts on the fairness of the extradition process, due to the quality of the material placed before the court, and on the ability of this court to preserve the integrity of the process.
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> …
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> [53] … a violation occurs where it is concluded that the diligence of the requesting state is not of a standard which justifies the granting of the presumption. A statutory shortcut that impacts on the liberty of the citizen and may result in extradition to a foreign country requires a careful, considerate approach by the foreign authority to the extradition powers granted them by the new Extradition Act. The court has the power to control its own process and should demand that the foreign certifying authority be diligent and accurate. Conduct of foreign officials seriously lacking in diligence and accuracy interferes with fundamental justice and protection of the liberties of Canadian citizens.
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> …
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> [56] A stay of proceedings precludes the resolution of issues on the merits. It is the most drastic of remedies to which the courts should resort to only in the clearest of cases: *USA v. Cobb*. Here, there is cogent evidence that the diligence and care exercised by the requesting state falls far below the standard inherently demanded by the Extradition Act, such that the presumption of accuracy cannot reasonably be made.…

36. The facts in *Tarantino* are telling. In that case extradition turned on the evidence of three witnesses. The person sought to be extradited demonstrated that

successive records of the case were replete with inaccuracies respecting the whereabouts and availability of all three witnesses. Justice Stromberg-Stein noted at paragraph 31 of her decision that there were no reported cases "where there has been a history of certifications that had been proven to be inaccurate about important, allegedly available evidence."

37. In the *United States of America v. Thomlison*, [2007] O.J. No. 246 (C.A.), the extradition judge found that an abuse of process took place, and granted the remedy of excising that portion of the evidence that was misrepresented. In that case, a witness testified at the hearing that her evidence as set out in the ROC was incomplete. In fact, her testimony at the extradition hearing dramatically affected the character of her evidence as summarized in the ROC. The Court of Appeal upheld the extradition judge in granting the remedy of an excision, indicating the following:

> 28. The appellant submits that the extradition judge erred in failing to stay the proceedings on account of abuse of process. I disagree. In my view, this ground of appeal is largely fact driven.
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> 32. I see no basis for interfering with the remedy fashioned by the extradition judge. In so concluding, I should not be taken as holding that the remedy of excision will be warranted in all cases where disclosure is found to be incomplete and misleading. To state the obvious, the appropriate remedy, if any, will depend on the facts and circumstances of the particular case.

38. In both *Tarantino* and *Thomlison* the person sought needed to take specific steps to retrieve evidence of misrepresentation on the part of the requesting state (the hiring of a private investigator in *Tarantino* and the subpoenaing of a witness in *Thomlison*), which eventually revealed the abuse of process.

39. The decisions of *Cobb, supra*, *USA v. Schulman,* [2001] S.C.J. No. 18, *USA v. Tollman,* [2006] O.J. No. 3672 (S.C.) and *U.S.A. v. Khadr* (2010), 258 C.C.C. (3d) (S.C.) aff'd 2011 ONCA 358, were also decisions where an abuse of process in the extradition context was found. However, the findings in those decisions were based on issues other than the misrepresentation of evidence in the ROC.

40. In this matter, counsel for Mr. Diab has frequently drawn analogies between the misrepresentations found in *Tarantino* and *Thomlison* to those he submits exist in this case. Nine specific allegations of what are referred to as misrepresentations (omissions, inaccuracies, contradictions), and a series of general matters were advanced in support of the argument that the proceedings should be stayed because of an abuse of process. Each of these will be independently examined.

Alleged Misrepresentation #1

41. The first alleged misrepresentation relates to the 1999 intelligence that re-launched the investigation into the Copernic bombing. As part of the recitation of

the intelligence, the requesting authority indicates that “the team responsible for carrying out the attack was supposed to come to Paris from Madrid by train using false identity documents given in Madrid”. This is said to be important because Hassan Diab's 1980 passport, a physical piece of evidence recovered in 1981, contained stamps that show him entering Spain on September 20, 1980 and exiting Spain on October 7, 1980. It is submitted that this “false-passport-to-enter-France” claim is required to support the proposition that he was in Paris France on October 3, 1980, and not Spain.

42. The person sought has demonstrated that an affidavit filed in the related MLAT proceedings states that the “intelligence” indicated “that 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… Hassan Diab entered France with his real passport, left the same way, and used a false passport in the name of Panadriyu to operate in French territory”. This its face contradicts the ROC.

43. The requesting state, in a letter dated October 28, 2010 (exhibit 4), explained that the ROC is the accurate document. In that correspondence it indicates:

> I would like to make clear that the hypothesis that I supported as being correct is the one that is based on information obtained by the DST in 1999, which is described at pages 44 and 45 of the ROC

> submitted to the Canadian authorities in support of our request for extradition certified on December 12, 2008. Specifically, it is that the perpetrators of the Rue Copernic attack went to Spain traveling with their real documents, but entered France using false documents. Furthermore, this hypothesis is consistent with the analysis of Hassan Diab's passport issued on May 10, 1980, which contains Spanish entry and exit stamps but none from France.

44. I find that what took place here was an inadvertent error. I come to this conclusion not only based on the contents of the letter, but through the logic that Mr. Diab's passport had been in the possession of the requesting authority well before the preparation of either the MLAT affidavit, or the ROC. The exit and entry stamps on Mr. Diab’s passport demonstrated that he never entered France using his real passport. The physical evidence here is uncontroverted; the most plausible explanation is that the requesting authority made an error in the materials used in the MLAT proceeding. Although it was a blatant error requiring an explanation, I cannot find that it constitutes a complete failure of due diligence, or deliberate manipulation by the requesting state as suggested by counsel for the person sought. In any event, this theory would not be relied upon when determining the issue of committal. Only the passport and what inferences could be taken from the passport would be considered.

Alleged Misrepresentation # 2

45. The ROC describes a bombing that took place in Antwerp, Belgium on October 20, 1981, and draws analogies between it and the bombing of Rue Copernic in Paris, on October 3, 1980. One of the links was that both attacks took place at the completion of the same Jewish festival. The person sought referenced information contained in one of the exhibits attached to the ROC which described apparently stark differences between the two bombings. One was that in lieu of an anti-Semitic attack it may have been an anti-capitalism attack because of its proximity to a diamond district. There was also information which indicated that certain specified terrorist groups other than the PFLP-SO (Popular Front for the Liberation of Palestine-special operations) had taken responsibility for the Antwerp attack and not the Copernic bombing. This information was omitted from the body of the ROC.

46. Counsel for Mr. Diab, citing language used in *Thomlison*, *supra*, has advanced the proposition that a requesting state has a duty to put forward all information, whether inculpatory or exculpatory, in the ROC. In *Thomlison*, the extradition judge did indicate that "full frank and fair disclosure must form the cornerstone of the record of the case."

47. Counsel for the Attorney General submitted in no uncertain terms that the state of the law in Canada remains clear: the requesting state has no duty to

provide full disclosure in extradition proceedings. The obligation is to provide only that evidence it considers necessary to justify the committal of the person sought through the vehicle of a certified ROC.

48. The case of *Thomlison* did not change the law of extradition in Canada. In that case, the extradition judge was clearly referencing the testimony of one specific witness and the failure to disclose all of what that witness would say at a trial. The failure to do so in that case resulted in an ROC that summarized the witness's evidence erroneously. The reference to "full frank and fair disclosure" has to be taken in that context; it wasn't meant to be analogous to the disclosure obligation of a domestic criminal trial.

49. I accept the proposition advanced by the counsel for the Attorney General that the state of the law in Canada in an extradition case is that there is no responsibility upon a requesting state to provide full disclosure of all of its evidence: see *Federal Republic of Germany v. Krapohl* (1998), 110 O.A.C. 129, at paras. 14-17.

50. With respect to this specific allegation, regardless of any perceived obligation on the requesting state, it concerns a part of the ROC that has virtually

no impact on the issue of committal. Consequently, there is no misrepresentation of the kind found in *Tarantino* or *Thomlison.*

Alleged Misrepresentation # 3

51. The ROC describes that Souhaila Sayeh, a former PFLP-SO member, had according to a reliable source carried out reconnaissance in Paris in 1979 in preparation for the 1980 bombing. However, one of the exhibits attached to the ROC has a report indicating that she would have been in the hospital for four to five months in 1979, making it unlikely that she conducted any such reconnaissance during that time. The seemingly contradictory information is provided by the requesting authority. The respondent fairly points out that the reconnaissance could have taken place in August of 1980. I do not accept that this is a misrepresentation that could amount to an abuse of process. It arises from material provided to the person sought, of which there are alternative explanations, and it does not impact on any evidence relevant to the determination of committal.

Alleged Misrepresentation # 4

52. The person sought submits that a misrepresentation took place when France failed to include in the ROC all of a newspaper article it referenced dated October

3, 1984, which ascribed blame for the attack to the PFLP-SO. When read in full, the article actually alleged that three Palestinians who committed the bombing departed in a rented car and returned to Beirut via Germany. This differs from the numerous references in the ROC to intelligence that the bombers came to France by way of train from Spain and returned to Spain from France the same way.

53. This was an omission, not a misrepresentation, and for it to constitute a misrepresentation would require a finding that full disclosure is a requirement in extradition law. It is not. Furthermore, it is information provided by the requesting state that offers an alternate hypothesis about the bombing.

Alleged Misrepresentation # 5

54. This concerns a portion of the ROC at page 42 stating that Hassan Diab was "known as being a Lebanese national and member of the PFLP-SO in Beirut in 1980." This is juxtaposed to information used in the MLAT proceedings, specifically letters rogatory dated June 5, 2008, where the requesting authority indicated "In 1999 when the DST obtained the names of the persons presumed to have participated in some capacity or another in the Rue Copernic attack and, for certain among them, in the Antwerp attack, Hassan Diab was not known to be a part of a Palestinian terrorist group or rather was not listed as such as his name had in fact already appeared in a legal case as detailed later on." It later states that "for

sure Hassan Diab, as far as he's concerned, had never been implicated in French proceedings in the past, but there was a possibility that his name could have appeared incidentally."

55. Mr. Diab's counsel submits that a clear misrepresentation exists because the ROC indicates that the 1999 intelligence disclosed that Hassan Diab was a definite member of the PFLP-SO, while the MLAT material indicates otherwise. I disagree with the applicant's analysis of the information. I believe that the author of the MLAT material is speaking about particular information at one point in time, which changed at a later date. In additional international letters rogatory, also forming part of the MLAT material, the author seems to provide information which closely resembles the ROC. (See Page 59 of the Application Record Ex. 1a.)

56. Even if I accepted this position as valid, it still relates to a matter that is not evidence for the purposes of adjudicating the issue of committal. If the court were to accept the statements made at page 42 of the ROC as evidence, the issue of committal would be a foregone conclusion. After all, the intelligence referenced therein boldly asserts that Hassan Diab is the individual who planted the bomb and was masquerading as Alexander Panadriyu. These statements are not evidence; consequently, it becomes very difficult to accept the argument that the differences

between the ROC and external information are misrepresentations in the nature of those found in *Tarantino* and *Thomlison*.

Alleged Misrepresentation #6

57. The allegation relates to page 40 of the ROC which states:

> Journalist Xavier Colin in fact stated on that occasion in the summer of 1982 when he was covering the siege of Beirut with journalist Charles Villeneuve that he met one of the persons implicated in the attack who affirmed to them that the said attack had been committed by Palestinians… They stated that they had obtained information of Palestinian militants belonging to the most radical faction and one of the persons in charge had even given them; a sufficiently solid material element; The militants had moreover spoken of not one but several terrorist actions in Europe. Both journalists refused to provide more details.

58. The person sought points out that a further report disclosed that "Alexander Panadriyu is also known by the name Abdullah and had a Jordanian passport". The complaint is that this is inconvenient information that was buried in exhibits and that the omission constitutes a failure of due diligence and misrepresentation by the requesting state.

59. Counsel for the Attorney General submits that the information had changed by virtue of the April 19, 1999, DST report. In other words, the information had become stale and no longer relevant. I find that this is a plausible and reasonable explanation. In any event, this once again becomes a question of the disclosure

obligation on the part of the requesting authority. This was not a misrepresentation in the nature of *Tarantino* and *Thomlison*, as the requesting authority had no duty to disclose all of the information received from these journalists, and the information had in fact changed.

Alleged Misrepresentation # 7

60. The allegation here is in relation to depositions that were held in the United States on November 24, 2008, of Nawal Copty. The requesting authority states in the ROC at page 68 that this particular witness "refused to give details on the nature of her relationship with Zaki Helou." At the deposition, the witness testified as to her identity, and named her aunts and uncles, initially only using first names, one being the name Zaki. When pressed the witness then provided last names, including the last name "Helou", but never mentioned that last name in conjunction with the first name Zaki. It turns out there is a terrorist known as Zaki Hello (or Helou.)

61. Mr. Diab's counsel submits that there is cogent evidence provided by the requesting state that suggests that there is no terrorist leader known as Zaki Helou, only a Zaki Hello (D4052, a report from the DST, only references Zaki Hello.) The suggestion is that the requesting authority gratuitously added the name Helou as a means of manipulating the evidence to show Mr. Diab in a bad light, by suggesting

that his former spouse has close associations with a known terrorist and failed to disclose this during the conduct of a deposition. Newspaper articles filed as exhibits by the requesting state indicate that there is a terrorist known as Zaki Helou.

62. In this instance, I agree that the requesting authority drew inferences from the answers given at the deposition and use of names that are difficult to justify. The analysis offered by the requesting authority is a self-serving interpretation of the evidence. Malfeasance is attributed to the witness, and persons related to the witness without much justification. As it turns out, this was clearly a mistake on the part of the requesting authority that should have been corrected (The uncle's name was in fact Siki, and the name Zaki was a transcription spelling error that was corrected at a later date.) However, this relates to an issue that will have no impact whatsoever on the ultimate question of committal. Who may or may not have been related to Nawal Copty has very little to do with the ultimate question of whether Hassan Diab should be extradited to France.

63. This alleged misrepresentation has more to do with the unusual nature of the ROC. Ultimately, it will have no bearing whatsoever on the issue of committal. It is not the type of misrepresentation that could justify a finding of abuse of process and the imposition of a stay of proceedings.

Alleged Misrepresentation #8

64. The allegation here is in relation to stamps said to be found in Hassan Diab's 1980 passport. The ROC indicates the following at page 60: “five stamps, three illegible and two stamps of the Lebanese security service for exit by the Beirut international Airport dated August 22, 1980 an October 8, 1981 (D3978 and D 4742).” However, in the exhibits attached to the ROC, the applicant has uncovered (D3978) a report from the DST commander that states that the exit stamps were illegible or in French “illisible”.

65. I have reviewed the evidence, and in particular, a blowup of the subject passport. It is clearly legible, but written in Arabic. Exhibit D4742 explains that the entry stamps were later translated. I find as a fact that what took place constituted a misunderstanding of the word “illegible”. It was illegible to anyone who does not read Arabic, but legible to someone who does. It was later translated; it is not a misrepresentation.

Alleged Misrepresentation # 9

66. In this instance, the person sought alleges a number of misrepresentations relating to the ROC's description of evidence obtained from Youcef El Khalil and Sana Salhab. Testimony was obtained from them on two separate occasions, first

in Nice in March 1988, and then on October 10, 2008, in Lebanon pursuant to letters rogatory.

67. The complaint includes: the ROC describing the 1988 testimony as being obtained from witnesses, implying the passive gathering of information, when lengthy strenuous police interrogations in fact occurred; the ROC's assertion that El Khalil was a former PFLP-SO member and that many persons in Diab's circle were also members of the PFLP-SO, while it is submitted the evidence does not support these assertions.

68. Pages 56 to 62 of the ROC, while containing some evidentiary references to material extracted from these two witnesses, also contains argument and analysis by the author. When read as a whole, I find that there is no serious overt misrepresentation of the testimony of El Khalil or Sana Salhab.

69. In any event, the only tangible evidence that can be taken from this part of the ROC for the purposes of determining whether or not to commit Hassan Diab is the evidence that he may have been a member of the PFLP when El Khalil and Salhab knew him from 1977 to 1988.

Miscellaneous allegations

70. The person sought also proffered a series of general problems with the ROC, and the evidence, in support of a finding of abuse of process and stay of proceedings. These included the following:

a) Omissions relating to fingerprint evidence in that nothing was disclosed concerning findings relating to Hassan Diab's fingerprints as compared to a palm print located on the vehicle, or on a document; or the failure to have a specific composite sketch prepared based on the differing eyewitness descriptions of the suspect.

b) The ROC contained argument in lieu of evidence.

c) The ROC contained unacceptable material such as “intelligence.”

d) The requesting authority acted inappropriately in the manner that it withdrew handwriting evidence.

71. The submissions respecting the failure to disclose evidence are negated by the fact that the law in Canada remains that a requesting authority has no obligation to provide all of the evidence gathered during the course of an investigation.

72. The submissions with respect to the resort to argument and use of “intelligence” are matters more appropriately raised in relation to the issue of the sufficiency of evidence in the ROC for committal.

73. The issue of the conduct of the Republic of France and how it withdrew the two original reports respecting handwriting evidence as constituting an abuse of

process was already adjudicated by me when the person sought brought an abuse application in August 2010. (see *France v. Diab*, [2010] O.J. No. 3722 (S.C.)

Conclusion Re Abuse of Process

74. The case of *Tarantino, supra*, was described by Justice Rosenberg in the case of *USA v. Pannell* (2007), 227 C.C.C. (3d) 336 (Ont. C.A.) as an "exceptional case." Counsel for Mr. Diab has advanced a forceful, detailed attack against the ROC. However, what fundamentally sets it apart from the *Tarantino* and *Thomlison* matters is, in many respects, a question of form over substance. In each of those cases the alleged misrepresentation or omission had to do with very specific evidence being used to extradite the individual. In each of those cases, conventional ROCs were filed with the courts. This is not the case with Hassan Diab.

75. The sum total of the alleged misrepresentations (omissions, inaccuracies contradictions) are strongly rooted in the unconventional, pleading like nature of the requesting state's ROC. None of the alleged misrepresentations have any impact on the evidence to be considered when deciding whether or not to commit Mr. Diab. In every instance the alleged problems related to peripheral matters, which unfortunately formed part of the requesting state's ROC.

76. It seems to me that for a lack of due diligence to amount to an abuse of process justifying a stay of proceedings, the failure would have to go to the issue of whether or not to commit the person sought. In truth, despite the length and detail in the ROC, the conclusion lists: the passport, the composite sketches, the affiliation to the PFLP, and the handwriting report, as for all intents and purposes the evidence that can be relied upon to connect the bombing to Mr. Diab. Very little of the alleged wrongdoing in support of the argument for abuse has any impact on this evidence.

77. It should also be re-emphasized that all of the material relied upon by the applicant was provided by the requesting state. This renders the notion of malfeasance or deliberate misrepresentation highly implausible.

78. Therefore, I conclude that the Republic of France has not committed an abuse of process, or violated the *Charter* rights of Hassan Diab. In any event, had such a finding been available it would not have justified a stay of proceedings. None of the allegations either individually or collectively could be said to amount to "the clearest of cases" that would justify the termination of this case without it being decided on its merits.

Issue 2: Manifest unreliability/Expert Evidence On Handwriting /The Bisotti Report

79. The person sought applies to have an expert report authored by Ms. Anne Bisotti, forming part of the ROC, excluded as evidence for the purposes of determining the issue of committal.

80. The Act creates a presumption that evidence contained in the ROC is reliable. The only means available to rebut the presumption of reliability is to demonstrate that the evidence is "manifestly unreliable" or "so defective" that it should be removed from consideration when deciding the issue of committal. In the *United States of America v. Michaelov*, [2010] O.J. No. 5226 (C.A.) the Court of Appeal stated:

> It is clear that evidence may be rendered "so defective" or "so unreliable" to warrant disregarding it in making the decision on committal. Problems inherent in the evidence, problems that undermine the credibility of the source of the evidence or a combination of both factors may render the evidence "so defective" or "so unreliable" to warrant its disregard in the committal analysis.

81. The ROC provided by France depends upon circumstantial evidence in support of the proposition that Mr. Diab was one of the perpetrators of the bombing on October 3, 1980. One of the key links in the chain of circumstantial evidence is a hotel guest registration card at the Celtic Hotel situated near the area of the bombing in Paris in 1980.

82. The ROC provides compelling circumstantial evidence to demonstrate that the fictitious Alexander Panadriyu was one of the parties responsible for the bombing. It also establishes that he stayed at the Celtic Hotel in the city of Paris

and filled out a hotel registration card in late September 1980. Furthermore, he is alleged to have also signed a police report when he was arrested for the theft of a pair of pliers in and around the same time frame.

83. The hotel card contained five words in printed form: Panadriyu, Alexander, Lanarca, cyprus, and technician. It also had a date 22/09/80.

84. The requesting state, through international letters rogatory obtained Hassan Diab's, and his then wife, Nawal Copty's, immigration and university files from the United States. The purpose was to obtain samples of Mr. Diab's handwriting. This resulted in France providing reports from two "handwriting comparison experts" a Ms. Barbe-Prot and Ms. Evelyne Marganne. They each performed handwriting comparisons using the material from the United States and the hotel card. They then proffered opinions as to the probability that Hassan Diab was the individual who filled out the hotel card, and therefore was Alexander Panadriyu.

85. The person sought applied to the court to call expert evidence as a means of arguing that these reports were manifestly unreliable. After several days of argument the court allowed the application. A written decision was released on January 27, 2010: see *Canada (AG) v. Diab*, [2010] O.J. No. 298. Part of the reasoning for allowing evidence included the following:

> In relationship to this issue, the person sought has offered the testimony of four of arguably the world's leading experts in the field of handwriting analysis. The evidence of the experts offer extremely harsh criticism of the French opinion evidence both with respect to methodology, as well as the analysis offered in their reports. Most importantly, they conclude that the factual foundation upon which the French reports were based, may have been in part or in whole erroneous; the specific error being that some of the handwriting samples used to compare to the hotel registration card presumed to be Hassan Diab's were in fact someone else's. (Emphasis added.)

86. The proposed expert evidence arguably demonstrated that some of the samples of handwriting from the United States used to compare to the hotel card were in fact samples of the handwriting of Nawal Copty.

87. The requesting state subsequently withdrew both reports from the ROC approximately 5 months following the release of the January 27, 2010 admissibility decision.

88. In a supplemental to the ROC, filed in May 2010, a third expert report was deposited, that being the report of Ms. Bisotti.

89. The person sought again requested the opportunity to present expert evidence to demonstrate that this report was manifestly unreliable. The court allowed the second application: see *France v. Diab*, [2010] O.J. No. 5317. The following reasons were provided:

> 14. The thrust of the argument against the admission of this evidence at this extradition hearing is that it is evidence of strong competing inferences, and if admitted it will amount to nothing more than a

> choice between competing expert opinions. It was argued that I would be transforming the extradition proceeding into a criminal trial by impermissibly weighing competing inferences derived from expert evidence. There is merit to the submission; on the face of it there is a real danger that I would be doing exactly that if I allow this evidence to be introduced. The *Extradition Act* legislates that the Bisotti report is admissible and presumptively reliable; I am not allowed to weigh its ultimate reliability. That is the responsibility of the finder of fact, not the Extradition Judge. The applicant advanced the proposition that the evidence is not being proffered for the purposes of a competing inference. They submitted is being tendered for the sole purpose of demonstrating manifest unreliability...
>
> 17. When all things are considered, including each of the reports filed, and the current state of the law, I find that the line here between expert opinion evidence being used to support a competing inference or as evidence demonstrating manifest unreliability is blurred.

The Bisotti Report

90. This was a "handwriting comparison expert's" report. The materials that were used for comparison purposes were immigration and university materials from the United States of America. In this instance there was no evidence that the handwriting of Nawal Copty was inadvertently used by this expert.

91. The Bisotti report is a 36 page document, with a number of appendices, including the author's curriculum vitae. The report and c.v. can be summarized as follows:

- Ms. Bisotti's curriculum vitae indicated in part that she had a postgraduate technical degree in biology and biochemistry, a university degree in forensics (University of René Descartes Paris). Professional development: 21 hours of training in expert analysis.

Position of Chief engineer, head of the documents handwriting and traces sections of the material and traces division of the laboratory of the police scientifique of Paris. Expert in the handwriting and document specialties since 1993 and in the traces specialties since 2009. Activities as an expert: 315 expert orders (magistrates) 2003-2009, 352 judicial requests (police forces) 2003-2009, 15 appearances in court 2004 to 2009.

- The report was prepared pursuant to an expert commissioning order issued by the investigating magistrate Marc Trevidic.

- The order's mandate directed Ms. Bisotti to "state whether the writer of these exemplars is certainly or may be (in which case, try to indicate a degree of probability) the writer of" the five words and date contained on the hotel registration card, and the signature at the bottom of the police report.

- Ms. Bisotti describes her mandate to determine whether the signature at the bottom of the police report or the words written on the hotel registration card "are all or in part written by Hassan Diab".

- She describes the methodology in her report as "we follow the procedure of ENFHEX (European network of forensic handwriting experts)". She then sets out a series of principles applicable to handwriting analysis.

- At pages 12-13 of the report some of the specific principles said to be used when performing handwriting analysis were described; including "In fact only when personal characteristics identified in both the questioned writing and the exemplar, and especially when the number of these graphic similarities is much greater than the number of dissimilarities found there, will it be possible to identify the writer of this exemplar as the author of the questioned document and in the case of signature comparison unlike for handwriting comparison is not enough to study their graphic form, since some writers never produced two identical signatures…"

- The report then describes what known exemplars (documents that were supplied by the United States) were used in analyzing Hassan Diab's writing (described as documents 7, 13 and 14).

- The report then identifies 62 specific characteristics attributable to the known writing of Hassan Diab. Two are said to be significant: #5 “Its slant varies considerably: within the same word, there are straight characters, then slanted ones, then straight ones followed by opposite slants. However, there is no visible crowding of successive characters. This is a significant identifying factor.” #8 “The characters reveal, particularly on the down strokes, twists tremors and dented patterns. Angular breaks appear in curve strokes and bowls. The ovals may thus be triangular. The bars are often wavy. This is a significant identifying factor.”

- Ms. Bisotti then proceeded to look at “all or some of the 62 graphic characteristics to determine whether or not they were found in the questioned writing”. She finds that of the 76 characteristics (62 and 14 variations) identified in the exemplars 31 listed characteristics are not assessable in the questioned writing. Of those that could be assessed, 36 are said to be found in the questioned writing. She then lists 7 differences and their characteristics. She then explains that “these differences are thus actually natural variations of the form of certain characters and therefore do not constitute dissimilarities that would potentially exclude the writer of the exemplar from being the writer of the questioned documents because all of the characteristics cannot appear in such a small writing sample.”

- The hotel registration card also contained the date 22/09/1980. An analysis of the numbers found in the exemplars and the date was described. She explained that of the 76 graphic characteristics in the comparison writing, only 5 were assessable of these only 1 is found in the questioned date. The report then indicates that there are notable dissimilarities at page 27: “The numerals are linked together whereas they are always disconnected in comparison documents. The initial stroke of the ‘8’ is located at the intersection of the loops; thus the direction of graphic movement is reversed here.”

- Ms. Bisotti then provides a comparison analysis between the signatures attributed to Hassan Diab (taken from documents provided by the United States) and the fictitious signature of Alexander Panadriyu said to be found at the bottom of the police report. A complicated description of the fictitious signature is provided including diagrams showing the directionality of the signature. It is then compared to Hassan Diab's known signature and the report indicates what the expert found in common with the two signatures.

- The report concludes with three separate propositions: A) That there is a very strong presumption with regards to Hassan Diab as the author of the notes "Panadriyu, Alexander, Lanarca, Cyprus, and technician" … The degree of presumption cannot be quantified numerically... B) There is a very weak presumption with regards to Hassan Diab as the author of the date 22/09/80… The degree of presumption cannot be quantified numerically. C) There is a presumption with regards to Hassan Diab as the author of the questioned signature…. The degree of presumption cannot be quantified numerically.

The Expert Evidence Presented on behalf of Hassan Diab

92. The court received the reports and heard testimony from three experts from three different countries: Brian Lindblom (Canada), John Paul Osborne (USA), and Robert Radley (England). They are highly regarded experts in the area of document examination, and handwriting comparison.

93. They offered extremely harsh criticism of the Bisotti report and advanced a three-pronged attack in which they proposed that the French expert was: biased, unqualified, and based her conclusions on flawed methodology. They did this through the auspices of what they termed technical reviews of the French expert's

report. The essential evidence from the three experts can be summarized as follows:

- They testified that the appropriate and universally accepted methodology when performing handwriting comparison was that originally developed by Alfred S. Osborne in 1910.

- Robert Radley testified that ENFHEX (the methodology said to be used by Ms. Bisotti) is based on Osborne methodology.

- Despite this proclamation at the beginning of the Bisotti report, the report went on to describe methodology that runs afoul of certain accepted principles taken from that methodology. They each conclude that because of this fact her results were “patently unreliable” “wholly unreliable” and “fatally flawed”.

- Some of the key methodological problems they described were: Counting similarities versus dissimilarities as a means of determining identification, and failing to place the correct emphasis on the dissimilarities; passing off stated dissimilarities as natural variations without an evidentiary basis; comparing one signature with an entirely different fictitious signature (not comparing like with like); and using known samples that were written 15 years after the unknown writing.

- The three experts, while each expressing it differently, indicated the Bisotti report was convoluted, confusing, with conclusions that were difficult to understand. They each had particular difficulty with the use of the word “presumption” in the conclusions.

- The three experts with varying degrees of emphasis, found that the French report exhibited bias, both in the mandate offered by the requesting authority, and in the expert’s interpretation of that mandate. They interpreted the mandate as precluding the finding that Hassan Diab was <u>not</u> the author of the hotel card.

- The three experts testified that they found her to be an unqualified expert in handwriting/document examination. They interpreted her

curriculum vitae as lacking in any evidence of continuing education or ongoing training in the field of document examination.

- Brian Lindblom and Robert Radley provided very detailed reports. They each provided alternate opinions (criticism) respecting some of the specific findings made by the French expert in terms of letter forms, specific handwriting characteristics and stated similarities.

- Brian Lindblom for instance at page 29 of his report stated the following “her dissection and analysis of many letterforms on the hotel registration card is superficial in the extreme, often ignoring important structural elements. As I've mentioned previously, both the ‘A’ and ‘N’ in the questioned hand printing are formed with an initial upward movement from the baseline. Seven A’s and three N’s exhibit this important element of internal consistency. Nowhere in her report does Ms. Bisotti address this characteristic. Given that the specimens include 220 occurrences of the ‘A’ and 183 examples of the uppercase ‘N’.... Each specimen shows a retrace of the left stem that is consistently absent from the 10 letters in question, making it a repeated fundamental difference.”

- Robert Radley, by way of example, at page 25 of his report indicated the following: “I would wish to make it clear that I'm not disagreeing with Madame Bisotti that the exemplars do show a wide range of slope variation (as does the questioned writing), it is, in the above cases, more by way of criticism of her accuracy, or lack of the same and also the wisdom of the choice of examples, which must represent her cognitive process in the examination procedure and its application.”

- The experts, each using different language, expressed the view that the conclusions reached particularly in relationship to the authorship of the hotel card, were ones they felt could not be reached based on the evidence.

- Each expert, without saying so directly, nonetheless expressed their opinion on the issue of authorship.

- None of the experts have ever testified or have any experience in the Republic of France with respect to handwriting analysis.

- Finally, when pressed on the issue of providing competing opinions, they steadfastly maintained the position that these were technical reviews of the work of another expert and not competing opinions.

Position of the Parties

94. Counsel representing the person sought has submitted that the expert evidence called demonstrates that the Bisotti report is manifestly unreliable. He argued that the Bisotti opinion would not be admissible expert evidence in Canada using the principles enunciated in the Ontario Court of Appeal case of *Regina v. Abbey*, [2009] O.J. No. 3534 (Ont. C.A.) and expanded upon by Mr. Justice Goudge in his report following the commission of inquiry into the injustices caused by the notorious and disgraced forensic pathologist, Charles Smith.

95. Some of the criteria that can be taken from the Goudge report and the *Abbey* decision for admitting expert opinion evidence in a domestic criminal trial include the following:

- The trial judge is a gatekeeper who must vigilantly control the admission of expert evidence.

- The evidence must be relevant, necessary, and reliable (presented by a properly qualified expert).

- Novel science should be subject to special scrutiny; the theory and technique must have been tested and have been generally accepted.

- Expert witnesses must be adequately qualified and remain scrupulously impartial.
- Reliability in terms of threshold admissibility now includes careful consideration of the methodology used by a given expert.

96. The proposition advanced was that evidence of the methodological problems, bias, and the lack of qualifications testified to by the three experts serve to demonstrate manifest unreliability. The thrust of the argument is that if Ms. Bisotti's report would be found to lack threshold reliability in a Canadian court, then it should be considered manifestly unreliable evidence for the purposes of an extradition proceeding.

97. The argument presented by counsel for the Attorney General on behalf of the Republic of France, was that the evidence offered by the person sought was simply evidence of competing inferences that went to the weight of the French report, or its ultimate reliability, which are matters that should be addressed at a trial.

98. They further propose that the evidence in question is by virtue of the Act, presumptively reliable. Threshold reliability/admissibility has already been established; the term "manifest unreliability" means something else such as evidence that is, or can be shown to be, totally unreliable. Further, they submit that it would be wrong to use Canadian standards of admissibility in an extradition case.

Analysis

99. While the argument presented on behalf of the person sought was in many ways compelling, and forcefully argued, when the dust settled on the argument the fact remains that this is an extradition hearing. The powers of the court are derived from a statute. The Act mandates that evidence contained in an ROC is presumptively reliable. It is admissible evidence. To rebut the presumption of reliability the person sought has to demonstrate that the evidence is manifestly unreliable. To use standards of admissibility derived from Canadian criminal law as a means of demonstrating manifest unreliability in my view runs afoul of the governing statute. The threshold reliability analysis in *Abbey, supra,* and referenced in the Gouge Report, are principles that are applicable to determining the issue of admissibility. The *Abbey* case was about the admissibility of expert opinion evidence.

100. In *USA v. Michaelov, supra,* the Ontario Court of Appeal described the admissibility requirements under the *Extradition Act* as follows:

> 48. The *Extradition Act* contains its own rules of evidence. The contents of any documents in a properly certified ROC are admissible under s.32(1)(a) even if they would not be admissible under Canadian law. Thus, the ROC could include hearsay: *Ferras*, para. 28. Threshold reliability of the contents of the ROC is presumed based on its certification.

101. To do what is suggested by counsel for Mr. Diab would necessitate the imposition of Canadian standards of admissibility of expert opinion evidence on the requesting state. It seems to me that that exercise would be no different than, for example, imposing the principled approach analysis to the admissibility of hearsay evidence contained in the ROC. That would clearly offend the statute. An extradition hearing has its own specific rules of evidence, whereby evidence is admitted even if it would not be admitted under Canadian law.

102. Furthermore, the person sought proposes that I find as a fact based on the evidence they presented that the French expert was biased, unqualified, and used improper methodology, thus rendering her report manifestly unreliable.

103. A judge in the context of an extradition is restricted in the approach he or she can take in the analysis of the evidence in relationship to what is contained in the ROC. In *USA v. Anderson, supra*, the Court of Appeal indicated the following:

> 28. … *U.S.A. v Ferras*, does not envision weighing competing inferences that may arise from the evidence. It does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable. Nor does it call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition in cases that appear to the extradition judge to be weak or likely to succeed at trial.

104. In this particular case, to arrive at a conclusion that the French expert was biased necessitates choosing between competing inferences. The argument for

making the finding rests largely on the interpretation of specific words contained in the report, namely the mandate provided by the investigating magistrate, i.e. “demonstrate whether Hassan Diab wrote all or part of the hotel card”, and the use and meaning of the word “presumption”.

105. In this case the person sought argues that the use of these words constitutes clear and compelling evidence of bias on the part of the expert. Counsel for the Attorney General submits that the words and language used in the report are subject to different interpretation. They say, for instance, that the words “whether wrote all or part” allows for the possibility of not having been the author as a response by inference. They also submit that the word “presumption” has a number of possible meanings including “evidence lending probability to belief” which could negate or substantially reduce any finding of bias.

106. The arguments presented by both sides have merit. I may not approve of some of the language used in the mandate given to Ms. Bisotti because it arguably raises the appearance of bias. However, to conclude that the expert was biased necessitates making a specific choice between meanings attributable to certain words. I would be weighing competing inferences. I would be performing the work of the trier of fact. It is the stuff of a trial.

107. The same problem arises when being asked to determine the issue of whether or not Ms. Bisotti is a qualified expert in handwriting analysis. The evidence presented on behalf of Hassan Diab advocates the proposition that her curriculum vitae shows a lack of continuing education, particularly when compared to the amount of continuing education each of the three experts testified they perform on an annual basis. They also interpreted her curriculum vitae as not disclosing sufficient information to justify a finding that she was qualified.

108. On the other hand, counsel for the Attorney General argued that one could easily interpret the curriculum vitae as showing that Ms. Bisotti has 17 years experience in this field, that she has been qualified to testify in the courts of France 15 times, and that she has prepared hundreds of reports in this area. The argument is that there is sufficient evidence to allow for a finding that she is a qualified expert.

109. The simple truth is regardless of what I might find, to arrive at any conclusion necessitates the weighing of competing inferences, the choosing between what the witnesses for Mr. Diab say is required to be qualified, and juxtaposing that to the basic language in the curriculum vitae. I once again would find myself unavoidably engaged in the work of a trial judge.

110. With respect to the issue of methodology, each of the experts, in no uncertain terms testified that the methodology used by the expert from France was flawed and

totally unreliable. They testified that document examination had a universal methodology and that this particular French expert simply did not know how to use the appropriate methods.

111. The three experts for Mr. Diab acknowledged that they had no experience whatsoever with handwriting evidence in the Republic of France. It was suggested that without having specific knowledge about what takes place in France, these experts can be of little assistance with respect to the accepted methodology in that country.

112. While I found that the three experts' evidence on appropriate methodology was convincing in that it appeared to be the logical approach to comparing handwriting, I cannot necessarily conclude that their criticisms respecting methodology related exclusively to the report of Ms. Bisotti. There were a total of three reports submitted in the area of handwriting comparison by three different French experts: Ms. Barbe-Prot, Ms. Marganne and Ms. Bisotti. The Diab experts criticized the methodology employed by all three. It seems to me that this leaves room for the possibility that the Republic of France does have a different approach/methodology in relationship to handwriting comparison analysis.

Meaning of Manifest Unreliability

113. The post *Ferras* cases that interpreted the meaning of "manifest unreliability" are instructive. In *United States of America v. Thomlison, supra,* the Ontario Court of Appeal described "manifest unreliability" in the following manner at para. 45:

> Unlike the situation that existed post *Shephard, Ferras* now authorizes extradition judges to assess the availability and quality of the evidence that can legitimately be included in the "some evidence" basket for sufficiency purposes. In my view, that enables them to discard evidence that is not realistically available for trial and/or evidence that is manifestly unreliable, i.e. evidence upon which it would clearly be dangerous or unsafe to convict.

114. In the case of *United States of America v. Hulley* (2007), 72 W.C.B. (2d) 510 (B.C.S.C.), Cullen J. offered the following at para. 35: "The standard of manifest unreliability is a stringent one. Manifest is defined in the *shorter Oxford dictionary* as "evident to the eye, mind or judgment; obvious."

115. In *Germany (Federal Republic) v. Bushati* (2007), 79 W.C.B. (2d) 160 (Alta. Q.B.) at para. 29 the court framed the issue as meaning evidence that would cause the judge to take the case away from the jury. In *USA v Molesti,* [2010] O.J. No. 4755 (S.C.) at paras. 20-21, manifestly unreliable evidence was described as attracting the complete rejection of the evidence.

116. It seems to me that manifest unreliability in the context of an extradition case would mean evidence that is so devoid of reliability that it should be rejected out of hand when considering the issue of committal. It is evidence that is so unreliable

that it is not worthy of consideration by the trier of fact. A high threshold attaches to the categorization of evidence that may be called “manifestly unreliable.”

117. Thus, the question I have to ask myself is whether the evidence presented by the three experts on behalf of Mr. Diab has demonstrated that the French expert opinion is evidence that should be completely rejected.

118. The Bisotti report has been shown to be based on some questionable methods and on an analysis that seems very problematic. The use of two completely separate signatures, i.e. Hassan Diab’s and an illegible fictitious signature, as a means of doing handwriting comparison analysis seems illogical. The “A”s and the “N”s in the vast majority of the known samples show evidence of retracing, while the same letters on the hotel card show no retracing. This seems to me to be an important difference that is not discussed in her report.

119. On the other hand the report describes as a significant identifier # 5 “the slopes and slants within words”. To my eye, this feature clearly exists in the known samples and on the hotel card. The experts for Mr. Diab called it a class characteristic. On the basis of her report the French expert would not agree with this view.

120. 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.

121. I found the French expert report convoluted, very confusing, with conclusions that are suspect. Despite this view, I cannot say that it is evidence that should be completely rejected as "manifestly unreliable".

122. Furthermore, to come to this opinion respecting the French report, I had to choose between the points of view of the experts presented by Mr. Diab over the French expert. That is the job of the trier of fact. The bottom line is that very strong criticism, coupled with competing inferences from other experts, does not render another expert's opinion manifestly unreliable in the context of an extradition.

123. The Bisotti report is presumptively reliable; it is a report prepared by someone who appears to be a qualified expert from the Republic of France. Although it is in a field of expertise commonly referred to as a "pseudoscience" it is nonetheless a soft science that Canadian courts have long recognized as an admissible form of expert evidence. The complaints levied against the report and its findings, when all is said and done, go to the ultimate reliability of the opinion, which is a matter for trial.

124. If the only available conclusion derived from the ROC and the evidence from the three experts presented on behalf of the person sought was that the French expert was biased, unqualified, and used improper methodology in every respect, then a finding of manifest unreliability would be possible. However, the evidence heard at this hearing did not support such an unequivocal finding.

125. Finally, perhaps the clearest way to describe manifestly unreliable evidence is to provide an example. In truth at one point in time it may have existed in this case. This would be in relation to the first two handwriting reports. If I had found as a fact that these two experts had used the wrong known handwriting to arrive at their conclusions respecting the authorship of the hotel card i.e. (Nawal Copty's instead of Hassan Diab's) that would have amounted to, as the Court in *Michaelov*, *supra*, put it "problems inherent in the evidence, problems that undermine the credibility of the source of the evidence or a combination of both factors" that render the evidence manifestly unreliable.

126. The application to exclude the report of Ms. Bisotti on handwriting comparison from the ROC is denied.

Issue #3 Is There Sufficient Evidence for a Committal Order

127. The final issue to be determined is whether the ROC contains sufficient evidence to warrant an order committing the person sought to stand trial in the Republic of France.

128. The representations of counsel require a consideration of the following questions: What is the test for committal and the role of the extradition judge in applying that test? What is the evidence that can be taken from the ROC? Is an order of committal warranted?

What is the test and role of the extradition Judge in deciding committal?

129. Mr. Justice Doherty wrote that *Ferras* "turned a jurisprudential page in the law of extradition." (*USA v. Anderson, supra*, para. 26)

130. There was disagreement as to the precise nature of that page in this case. The parties could not agree on the appropriate test for committal or the role of the judge in applying that test. Counsel for Mr. Diab proposed that the language in *Ferras* indicates that the test to decide the issue of committal is comparable to the "unreasonable verdict/conviction" test. Counsel for the requesting state strongly disagreed with that proposition.

131. The unreasonable verdict test was stated in the Supreme Court of Canada case of *R v. Yebes,* [1987] S.C.J. No. 51 at para. 23:

> Therefore, curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then, *Corbett* is the governing case and the test is "whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered".

132. In R. *v. Biniaris*, [2000] S.C.J. No. 16 the Supreme Court of Canada elaborated on the test at para. 36:

> That formulation of the test has both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyze and, within the limits of appellate disadvantage, weigh the evidence.

133. The proposition advocated on behalf of Mr. Diab is that the extradition judge review the evidence in the same manner that an appellate court reviews a trial decision and asks the question: Could this evidence or lack of evidence lead to an unreasonable conviction? This suggestion clearly implies that the extradition judge will necessarily become engaged in the weighing of evidence when deciding whether or not to commit the person to trial.

134. This view of the test for committal attributed to the *Ferras* case was first suggested by the British Columbia Court of Appeal in *USA v. Graham*, [2007] B.C.J. No.1390 (C.A). In that case Justice Donald offered the following interpretation:

22 As I understand the respondent's argument and the cases on which it relies, the extradition judge can now reject manifestly unreliable or unavailable evidence (which *Shephard* did not allow), but if there remains reliable and available evidence on each element of the offence in question, then the judge must commit on the presumption of sufficiency arising from the certification by the requesting state. That is, in my respectful opinion, a reductionist interpretation of *Ferras* and does not give full scope to the reasoning in that case.

23 … the *Ferras* approach demands more; it demands a judicial appraisal of the case to ensure that there is a "plausible case" and that the subject is not committed in a case where "it would be dangerous or unsafe to convict, and the case should not go to a jury". (para. 54)

…

25... Rejecting unreliable or unavailable evidence is part of the picture but not the whole picture. The more important aspect of *Ferras* is in the discretion not to commit on an insufficient case.

…

29 The assessment of sufficiency involves a holistic appraisal of the case.

…

30 I find myself in respectful disagreement with the statement in *Anderson* where Doherty J.A. said for the Court of Appeal, at para. 28:

> … *U.S.A. v. Ferras*, *supra*, does not envision weighing competing inferences that may arise from the evidence. It does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable. Nor does it call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. <u>There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.</u> [Emphasis original.]

31 My difficulty with that way of putting the limit of discretion is that there are <u>degrees</u> of weakness and extradition judges should not be put off

> their task of assessing for sufficiency by a dictum that mere weakness is not enough. I agree that it is not enough. It may be more helpful to speak in terms of the test for reviewing verdicts for unreasonableness on appeal or for directed verdicts…
>
> 32 In summary, *Ferras* stands for the proposition that extradition judges now have the discretion to disregard evidence shown to be unreliable or unavailable and in respect of the evidence that remains, to determine by an assessment of the evidence, including a limited weighing of the evidence, whether it is sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada.

135. Despite the forceful representations by counsel for the person sought it seems to me that this is an issue that has been decided in this province by the Ontario Court of Appeal in *USA v. Thomlison, supra,* and *USA v. Anderson, supra*.

136. In *Thomlison,* Justice Moldaver provided the Ontario Court of Appeal's analysis of what changes to the law of extradition have resulted from *Ferras,* at paras. 45 and 47:

> 45 In the end, when *Ferras* is read as a whole and against the backdrop of the s. 7 *Charter* issue - namely, the propriety of depriving persons of their liberty and security, by forcibly removing them to another country to stand trial on the basis of evidence that is either unavailable and/or manifestly unreliable - I am satisfied that the newly-acquired authority conferred on extradition judges is limited in the manner suggested by the respondent. Unlike the situation that existed post *Shephard*, *Ferras* now authorizes extradition judges to assess the availability and quality of the evidence that can legitimately be included in the "some evidence" basket for sufficiency purposes. In my view, that enables them to discard evidence that is not realistically available for trial and/or evidence that is manifestly unreliable, i.e. evidence upon which it would clearly be dangerous or unsafe to convict. It does not allow extradition judges to refuse to commit

> where there is “available and reliable” evidence in the “some evidence” basket upon which a reasonable jury, properly instructed, could convict.
>
> …
>
> 47 To summarize, I am satisfied that if there is some evidence, that is available for trial and not manifestly unreliable, on every essential element of the parallel Canadian crime, upon which a jury properly instructed, could convict, the test for committal will have been met. In that regard, it matters not whether of the case against the person sought is “weak” or whether the prospect for conviction “unlikely”. The ultimate question of guilt or innocence is for the trial court in the foreign jurisdiction.

137. In the recent Ontario Court of Appeal decision of *USA v. Michaelov, supra* at para. 56, the role of the extradition judge is once again described using the more restrictive language:

> The nature of extradition proceedings, the limited role of the extradition hearing judge and the circumscribed weighing of evidence permissible under *Ferras* make it clear that the task of the extradition hearing judge does not involve weighing competing inferences, determining whether evidence is actually reliable or evaluating the relative strength of the case advanced by the extradition partner.

138. While I certainly believe that the British Columbia Court of Appeal's interpretation of *Ferras* as described by Justice Donald has merit, I am bound by our Court of Appeal's interpretation, which is simply not the interpretation advocated by counsel for Mr. Diab; it is not an “unreasonable verdict” test. Furthermore, the

language of the Ontario Court of Appeal in my view, has not expanded the role of the extradition judge to the extent articulated by Justice Donald in *Graham*.

139. I would state the test in the following terms: Is there evidence in the ROC that is available for trial and not manifestly unreliable, upon which a reasonable jury, properly instructed, could convict? It contemplates a two-stage process. The court determines firstly whether or not evidence in the ROC is available for trial or is manifestly unreliable, then considers the remainder of the evidence in determining whether or not to commit the person sought.

140. In relationship to the extradition judge's role in the application of the test, specifically the extent he or she is permitted to weigh evidence in the ROC, once evidence is found available for trial and not manifestly unreliable, the permissible weighing is limited to circumstantial evidence.

141. In an extradition case involving circumstantial evidence the judge must weigh the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the requesting state is asking the court to draw. This weighing however is limited; the judge does not ask whether he or she would conclude that the accused is guilty nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence if believed, could reasonably support an inference of guilt. Findings of ultimate reliability and

credibility are clearly outside of the legitimate domain of the extradition judge: see *R v. Arcuri,* [2001] 2 S.C.R. 828 paras. 23, 29-30.

142. In my view, our Court of Appeal does not contemplate the extradition judge analyzing or weighing the evidence that remains in the ROC to determine whether or not it would be dangerous to convict upon that evidence. The only question to ask at this stage is whether a properly instructed jury acting reasonably could convict on that evidence.

The Evidence in the ROC

143. 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. (This was referred to by counsel for Mr. Diab as "intelligence")

144. The court allowed expert testimony on the dangers of using "intelligence" as evidence from Professor Kent Roach, (see exhibit 9 C.V. and report of Professor Roach and *Canada (A.G.) v. Diab, supra,*). This evidence was proffered in support of the position that "intelligence" is manifestly unreliable as evidence and should be excised from the ROC.

145. The following excerpts from the ROC are examples of the so called "intelligence" referenced by Professor Roach:

- "the Palestinian terrorism lead was referred to swiftly in the course of the investigation. The crime squad, in fact, received information from foreign sources that mention the case as follows: Report of the crime squad dated December 4, 1980." (p.36 ROC)

- "according to the DST(Direction de la Surveillance du Territoire)… The PFLP-special operations instigated and executed the Rue Copernic attack." (p.38 ROC)

- "the DST obtained very specific information on the very identities of the perpetrators of the attack, the role played by each of them in its preparation and commission and their modus operandi… 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 ROC)

146. Ultimately, the issue of what use could be made of this type of material and whether or not it was manifestly unreliable evidence was not argued. This is because counsel for the Attorney General opted not to rely upon those parts of the ROC that could be categorized as "intelligence", thereby rendering the issue moot.

147. 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 not evidence.

148. The ROC was consequently shortened, with those parts not to be relied upon for the issue of committal encased in bold black ink.

Uncontroverted Evidence and Admissions

149. There was some unequivocal evidence in the ROC as well as certain admissions made by on behalf of Mr. Diab. These allow the court to state that the Republic of France has established the following:

- On October 3, 1980 a bombing took place in Paris, France.
- A synagogue was the target and it was an anti-Semitic terrorist act.
- Four people were killed.
- Over 40 people were injured.
- There was a great deal of property damage.
- A fictitious person known as Alexander Panadriyu was one of the persons responsible for the bombing.
- The conduct alleged in the ROC corresponds to the Canadian offences of murder, attempted murder and mischief.
- The Hassan Naim Diab sought by the Republic of France for the purposes of being prosecuted for the 1980 Paris bombing, is the Hassan Naim Diab that is before this court.

150. The question that remains is: What evidence is there in support of the proposition that Hassan Diab was Alexander Panadriyu, and consequently one of the perpetrators of this terrorist act?

151. The reduced version of the ROC (with the agreed upon material removed from the courts 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.

The Passport

152. The ROC establishes that on October 8, 1981, Italian authorities at Rome airport seized from Ahmed Ben Mohammed, a Republic of Lebanon passport in the name of Hassan Naim Diab, born in 1953 in Beirut, with the date of issuance of May 10, 1980.

153. The Republic of France obtained a copy of the passport from the Italian authorities, and with the assistance of a translator were able to determine that it contained the following entries: an exit stamp from Beirut dated August 22, 1980, a Spanish visa issued September 17, 1980; an entry stamp into Spain dated September 18, 1980; an exit stamp from Spain dated October 7, 1980; an Algerian visa issued October 5, 1981; and an exit stamp from Beirut dated October 8, 1981.

154. The ROC also establishes that Hassan Diab applied for a new Lebanese passport on May 17, 1983. When asked by Lebanese authorities about what happened to his May 10, 1980 passport he told them he lost his passport in April 1981.

155. Counsel representing the person sought submitted that this evidence supported the inference that Hassan Diab was not in France at the time of the bombing i.e. he was in Spain between September 18, 1980 and October 7, 1980, while the bombing occurred on October 3, 1980.

156. It was submitted by counsel for the Attorney General that there were potentially negative inferences to be drawn from the manner that Hassan Diab dealt with the Lebanese authorities when he renewed his passport. There is evidence in the ROC that seems to contradict representations he made to the Lebanese authorities. For example, his father gave a statement that he left Lebanon in October 1981. Furthermore, the passport itself records entries that document his travel after April 1981.

157. The passport is a physical piece of evidence. Which speaks for itself. When examined in isolation as a single piece of evidence, all that it can be said to establish is that Mr. Diab traveled to Spain, a country neighboring France, from Lebanon before the bombing and returned to Lebanon from Spain after the bombing.

158. Absent the “intelligence” and speculation previously contained in the ROC, the passport standing alone becomes a relatively innocuous piece of evidence. At its highest it supports the proposition that the opportunity existed for Mr. Diab to travel to Paris during the relevant time frame.

Membership in the PFLP

159. The ROC contains evidence that supports the proposition that in and around the time of the bombing, Hassan Diab was a member of the Popular Front for the Liberation of Palestine.

160. The Republic of France obtained statements from former friends of Mr. Diab, namely, Youcef El Khalil and Sana Salhab on two separate occasions. The ROC explains that the statements were taken under oath in March of 1988 in Nice, when the two were being questioned at that time in relation to information concerning an Arab political prisoner support group. The second occasion was on October 10, 2008 in Lebanon and was pursuant to letters rogatory obtained in connection with the Rue Copernic investigation.

161. Sana Salhab listed Hassan Diab as a former member of the PFLP in her 1988 statements. “She was then asked if she knew members of the PFLP… She listed as former members:-Hassan Diab.”(p.59 ROC).

162. Youcef El Khalil is quoted as saying “in my conversations with a Hassan Diab, it seemed to me that indeed he was a member of the PFLP though I have no proof in this respect.” This was taken during the October 10, 2008 questioning. (p.60 ROC).

163. The information obtained from these two witnesses, particularly Sana Salhab, offer some proof that Mr. Diab was a member of the PFLP.

164. 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.

165. 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.

Eyewitness descriptions of Panadriyu

166. There are several eyewitness descriptions of the fictitious Alexander Panadriyu provided by people who were said to have come into contact with him during the month of September 1980. The movements and actions of Panadriyu at that time were said to involve the purchase of the motorcycle, staying at the Celtic Hotel, using a prostitute while staying at the hotel, and being stopped and questioned over the theft of a pair of pliers.

167. The persons that would have come into contact with him included: the owner and employees of the motorcycle shop, the employees of the Celtic Hotel, the prostitute, the floor walker who stopped him for the theft of a pair of pliers and the police officers who questioned him in this regard. There was a fairly wide divergence of descriptions offered by the various witnesses.

168. The ROC provides the specific descriptions of each.

- Motorcycle shop descriptions: Jean-Michel Bosquet, the owner of the shop, described him as: 1m65- 1m68 in height, about 25 years of age. He was very thin, had a thin mustache around his mouth extending to his chin, rather short brown hair and was wearing a light brown leather jacket. Pierre Vassiviere, a salesman, described him as: a person with European features, speaking French poorly with a foreign accent, about 1.65m tall, slim build and about 28 or 30 years old. He had a thin mustache that went down the corner of the lips and wore small rectangular glasses. He had rather long straight hair that was blonde with darker colored locks. Patrick Calvo, an employee, described him as: about 1.65m in height, thin build, rather long blonde hair, a stone hairstyle, wearing a thin mustache going down the lips. He spoke French with an accent, he could not specify whether he wore glasses.

- Celtic Hotel descriptions: Raymond Maccario, a receptionist at the hotel, described him as: European features, but Mediterranean, brown colored skin, 40-45 years old, about 1m70, medium build, short brown hair. He could remember his facial features but believes he did not wear a beard mustache or glasses. He spoke French without an accent and paid in French francs. Romayne Broome, a receptionist at the hotel, indicated that he did not appear old but she could not describe him. Angela Calabri, a prostitute who had sexual relations with Panadriyu at the hotel, described him as: a man of about 30 years of age, about 1m70 tall, normal build. She thought he was an Arab. She

could not pinpoint his accent, he had rather straight black hair, rather short but thick. He had brown eyes. He was not wearing glasses.

- Theft of pliers and descriptions: Philippe Gruselle, the floorwalker at the store, described him as: about 20 year's old, height about 1m70, a slim build, unkempt, messy mid length light brown hair, and a dirty appearance. He did not recall a beard or mustache. He had glasses in a shape he did not recall. He had a rather thin face. Jean-Pierre Bozant, a police officer, used the following descriptions: he wore square rimmed glasses, short brown hair, chestnut brown color, his eyebrows were very prominent, the eyebrows were darker than the hair, the face was angular, the eyes dark, he was about1m70 maximum, slim build. Jean-Claude Leborgne, a police officer, described him as: about 25 years old, between 1m65-1m70 in height, medium build, rather thin though not puny, dark brown or black hair, rather thick hair that did not cover his neck. He did not remember a mustache or beard, he had a dark complexion and a thin face and did not wear glasses. Bernard Gobert, a police officer, described him as: 1m70-1m75, slim build, 25 to 27 years old, dark chestnut brown hair that went to the base of the neck, slightly over the forehead. Did not remember a mustache or glasses. Serge Autechaud, police officer, described him as: 1m70, rather thin with dark chestnut brown hair, of Mediterranean stock. Denis Labbe, a police officer, described him as: having a small mustache, eyes were deep black, sharp featured face. He was short stature 1m68 normal build for his height.

169. The ROC indicates that over a dozen people purportedly came into contact with the fictitious Panadriyu, each offering in some cases very different descriptions. Some of the witnesses indicated a mustache while others did not, some indicated glasses while others did not, and the receptionist at the hotel seems to be describing somebody completely different from the person described by the

prostitute. The witnesses from the motor cycle shop describe blonde hair, while the other witnesses described chestnut brown or black hair.

170. Counsel representing Mr. Diab suggested that the inference that should be drawn from this particular evidence is that the person at the motor cycle shop and the Celtic Hotel were in fact two different people. That certainly is a plausible argument based on the stark differences in the descriptions offered by the various witnesses.

171. At its highest, the vast majority of the descriptions support the proposition that Panadriyu was a male between 25 and 30 years of age, 1m65-75 tall, with a slight build. This evidence, standing alone, provides very little evidence of identification.

Composite sketches/photographs of Diab

172. The ROC contains a series of composite sketches that are attached as d-documents (exhibits) and form part of the case put forward by the requesting state. They were based upon witness descriptions of both Alexander Panadriyu and Joseph Mathias.

173. The ROC also provides photographs of Mr. Diab, taken at various times in his life, some close in time to the date of the bombing. These are also attached as d-documents (exhibits) and form part of the ROC.

174. The sketches of Panadriyu were based upon descriptions provided by some of the witnesses who were said to have come into contact with him on September 23, 1980. Jean Michel Bosquet, Pierre Vassiviere and Patrick Calvo from the motorcycle shop provided descriptions that resulted in composite drawings d-861 and d-862: see appendix 5 of Exhibit 32.

175. There was a third composite sketch of Panadriyu based on the descriptions of the police officers who dealt with him regarding the theft of the pliers on September 27, 1980: see appendix 7 Exhibit 32.

176. The ROC also contains a sketch of Joseph Mathias based upon descriptions provided by persons who worked at the car rental agency, where he rented a vehicle on September 26/29 1980: see appendix 6 Exhibit 32.

177. There are a number of photographs of Mr. Diab referred to as d-documents that form part of the ROC. These include: a photo from his May 1980 passport; April 8, 1987 from his immigration file; May 2, 1987 from his university records; November 30, 1993 from his Canadian passport; December 9, 1994 from his immigration file; and May 8, 1995 from his US immigration file: see appendix 15 and 16 Exhibit 32.

178. When one compares the photographs to the composite sketches, there is arguably a resemblance to some of the photos. To my eye, it is more apparent in

photographs 6 and 7 of appendix 15, and to some extent in the photograph located at appendix 16 of Exhibit 32.

179. In relation to the sketches and whether they bear any resemblance to Mr. Diab, the ROC also references a statement provided by Youcef El Khalil who was Mr. Diab's close friend in the 1980s (p. 61 ROC):

> "When the bombing happened, I was in the United Kingdom. It is only on my return to Beirut, while paging through Paris-Match that I came across the composite drawing of an individual resembling Hassan Diab.….They later discuss with him during our meeting in Beirut the same year the extent of negative repercussions of such attacks on the Palestinian cause and the deplorable image portrayed in the media. It is deliberately, however, that I avoided bringing up the resemblance between him and the composite drawing published in Paris-Match as I did not want to interfere in what was not my business."

180. It was fairly pointed out by counsel representing Mr. Diab that the newspaper article in question contained three composite drawings, one of which was of Joseph Mathias. It is unclear from the statement of this witness exactly which sketch he was referencing.

181. Finally, in relationship to the photographs and identification evidence, the supplemental to the ROC contains an updated statement from Philippe Gruselle, the floorwalker at the store where the pliers were said to have been stolen by Panadriyu. He was shown a series of 33 photographs of "people of interest to the investigation." Nine of the photographs were of Hassan Diab. He was said to

indicate that seven of these nine photographs " showed similarities with the cutting pliers thief ": see p.8-9 of the supplemental ROC.

182. The composite sketches, photographs, and statements from witnesses in this respect are 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.

Handwriting Comparison Evidence

183. The Bisotti report was filed pursuant to a supplemental ROC delivered by the requesting state on May 31, 2010. It is a 36 page expert report offering handwriting evidence comparing known samples of Mr. Diab's handwriting to words written on the Celtic Hotel card, and to a signature located at the bottom of a police report in relationship to the pliers theft.

184. The report concludes that there is "a very strong presumption with regards to Hassan Diab as the author of the notes Panadriyu, Alexander, Lanarca, Cyprus, technician." These were the words that were said to have been transcribed on the Celtic Hotel card on September 22, 1980 by the fictitious Alexander Panadriyu. The report further concludes that there is "a presumption with regards to Hassan Diab as the author of the signature" located at the bottom of the report.

185. This evidence, if accepted, provides a reasonably strong circumstantial link between Hassan Diab and Alexander Panadriyu.

Is a Committal Order Warranted?

186. In response to this specific question the only disputed matter is whether the ROC discloses evidence of a *prima facie* case identifying Mr. Diab as a party who engaged in the alleged conduct specified in the request for extradition.

187. The question to be asked is as this: Is there sufficient evidence in the ROC identifying Mr. Diab as one of the bombers, upon which a properly instructed jury, acting reasonably, could return a verdict of guilty.

188. 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.

189. The evidence that tips the scale in favor of committal is the handwriting comparison evidence. Once found to be reliable for the purposes of extradition i.e. not manifestly unreliable evidence, the question became whether a jury considering

the handwriting evidence together with the other evidence in the ROC, could find as a fact that Mr. Diab was Alexpander Panadriyu and thus one of the persons responsible for the bombing. The short answer is yes. Consequently, when all is said and done, a committal order is warranted.

190. The Bisotti report was subjected to very detailed analysis and examination during the course of these proceedings. It is the key evidence linking Mr. Diab to the crime. Although I could not conclude it was manifestly unreliable, it was nonetheless highly susceptible to criticism and impeachment.

191. 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. However, it matters not that I hold this view. The law is clear that in such circumstances a committal order is mandated: see *Anderson, supra*, at para. 28; *Thomlison, supra*, at para. 47.

192. Therefore, the application for committal is granted. Hassan Diab is ordered 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.

Conclusion

193. This was a difficult case. It required an extraordinary amount of time to litigate. It was bitterly contested. Counsel represented their clients with passion and skill. They clearly believed in their respective causes. However, the heated exchanges between counsel and the appeals to emotion did at times serve to distract from the responsibility at hand.

194. The case required numerous rulings in advance of the extradition hearing. The hearing itself included the unusual step of hearing testimony from expert witnesses. It also included three separate *Charter* applications. In hindsight, at times it appeared to take on the characteristics of a criminal trial.

195. The fact remains that this was never meant to be a trial, or a hearing regarding the guilt or innocence of Mr. Diab. Canada signed an extradition treaty with the Republic of France, who suspect that Mr. Diab is responsible for a heinous crime. They have presented a *prima facie* case against him which justifies his having to face a trial in that country. It is presupposed, based on our treaty with

France, that they will conduct a fair trial, and that justice will be done. This decision stands for that proposition, nothing more nothing less.

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The Hon. Mr. Justice Robert L. Maranger

Released: June 6, 2011

CITATION: Attorney General of Canada (Republic of France), 2010 ONSC 337
COURT FILE NO.: 12838 and 12796

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ATTORNEY GENEARL OF CANADA on behalf of the Republic of France

Applicant

- and –

HASSAN NAIM DIAB

Respondent

REASONS FOR DECISION

Maranger J.

Released: June 6, 2011