Legal Brief:

The Case of Dr. Hassan Diab

April 2016

Table of Contents

1. Introduction

Dr. Hassan Diab is a Canadian citizen of Lebanese birth. He has no criminal record anywhere in the world. He holds a Ph.D. degree in sociology from Syracuse University, and is a respected and accomplished scholar who taught at various universities in Canada and the United States.

In November 2008, when Dr. Diab was teaching at Carleton University and the University of Ottawa, he was arrested on behalf of France for suspected involvement in a bombing outside a Synagogue on Rue Copernic in Paris in 1980. In November 2014, he was extradited to France after the Supreme Court of Canada refused to hear his appeal. Dr. Diab is currently placed in pretrial detention in a prison near Paris, where he may remain for two or more years while the investigating magistrate (*juge d'instruction*) decides whether to bring his case to trial.

Dr. Diab was described by the Canadian extradition judge, Justice Robert Maranger, as "*a very well-liked individual*" who "*has a great deal of support in both the immediate community, and to some extent nationwide. Many of his friends and colleagues from Carleton University and elsewhere have provided unrelenting support*." Character evidence from individuals in Canada, the United States and U.K. was filed in both the Ontario Superior Court and Ontario Court of Appeal testifying to Dr. Diab's "*non-violent*" and "*humanist*" nature: He never held any anti-Semitic views (that a synagogue bombing would presumably require), he was described as "*a gentleman and a scholar*", as "*conscientious and dependable*", and as "*a peace loving man, a devoted teacher*". Petitions in support of Dr. Diab have been signed by thousands of individuals and organisations across Canada, the United States, the U.K. and beyond, concerned about the injustices in his case.

2. An "Exceptional" Extradition Case

The Record of the Case (ROC) submitted by France, on which the extradition request was based, was exceptional, being anchored in unsourced, uncircumstanced, anonymous, secret "*intelligence*", most of it foreign intelligence. The extradition judge found that "*The ROC in this instance was unusual*" (A.G. Canada (France) v. Diab, 2011 ONSC 337). He continued, observing that the ROC:

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

During the extradition hearing, the extradition judge heard expert evidence "*on the dangers of using 'intelligence' as evidence*". In the face of this expert evidence, counsel for France "*opted not to rely upon those parts of the ROC that could be categorized as 'intelligence', thereby rendering the issue moot. This approach also resulted in removing from the court's consideration components of the ROC that could be construed as argument, speculation, and analysis, and <u>not evidence</u>*" (emphasis added). However, the "*intelligence*" has not been disavowed by the French authorities for use at a French trial, and remains in the dossier in France. It is important to note that unsourced, uncircumstanced, intelligence is regularly used as evidence in French terrorist trials. In this case, the intelligence is the heart of the French case against Hassan Diab, apart from the "*weak*" and "*suspect*" handwriting opinion.

With the "*intelligence*" and sheer argument removed, the extradition judge found that the ROC could support committal only on the basis of the highly disputed handwriting report of Ms. Bisotti. The other items of evidentiary value in the ROC could not make out, individually or collectively, a *prima facie* case justifying committal for extradition under s. 29. The judge found that "*The first four aforementioned components taken from the ROC, namely, the passport, the PFLP membership, the eyewitness descriptions, and the composite sketches/photographs, whether taken individually or viewed as a whole, would not be sufficient to justify committing Mr. Diab to trial in the Republic of France… The evidence that tips the scale in favour of committal is the handwriting comparison evidence*". Although he found that he could not exclude the handwriting evidence as manifestly unreliable, the judge stated this evidence "*was nonetheless highly susceptible to criticism and impeachment*", and was "*convoluted, very confusing, with conclusions that are suspect*". He also stated:

> "*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 <u>a weak case</u>; the <u>prospects of conviction in the context of a fair trial, seem unlikely</u>*" (emphasis added).

The extradition case of Dr. Diab turned entirely on the "*suspect*" handwriting opinion: "*The evidence that tips the scale in favour of committal is the handwriting evidence*". (This was the assessment also of counsel for France: In submissions on the case, counsel stated as follows, "*On sufficiency, it's a very narrow question – and Your Honour has already adverted to this – the narrow issue on sufficiency is whether or not there's prima facie evidence that Mr. Diab is the Alexander Panadriyu whose actions are set out in the Record of the Case, and at the end of the day, that inference turns or falls on the handwriting evidence*". Counsel for France repeated this submission in final argument, conceding that, "*If we had lost the handwriting evidence, I fairly concede, we would be facing an uphill battle. There's no doubt in my mind*".)

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

Because in France the unsourced intelligence will be able to be adduced as evidence in seeking to convict Dr. Diab, and because of the France's treatment of the disputed, "*problematic*" and "*suspect*" handwriting opinion evidence, in the absence of effective and enforceable assurances, a fair trial commensurate with the principles of fundamental justice will not occur. Guaranteeing a fair trial in accordance with fundamental justice is therefore critical.

3. Trial in France: Use of Intelligence as Evidence

The French case against Hassan Diab is anchored centrally around unsourced, uncircumstanced, bald and conclusory, anonymous intelligence that the French authorities received in 1999. No one – not even the French investigating magistrate – knows the sources of the intelligence or its reliability. A French Neo-Nazi group initially claimed responsibility for the Rue Copernic attack. However, the French authorities abandoned that track and focused on the Popular Front for the Liberation of Palestine-Special Operations (PFLP-SO) following the receipt of the anonymous intelligence.

In his letters Rogatory (January 7 and June 5, 2008) on behalf of the French Ministry of Justice, the former investigating magistrate, Mr. Marc Trevidic, wrote that the early evidence and intelligence (1980–1999) was not helpful in building a case against Hassan Diab: "*These shreds of information were very vague and absolutely unusable, nothing allowed investigators to put a name to the Lebanese person known only by the first name Hassan*."[1] The turning point in the case was the 1999 intelligence from an unknown, unidentified source. This is the intelligence the investigating magistrate describes as unknown and unknowable to the parties to the French judicial proceedings, as to sources or circumstances.

It is well-recognized and by now a matter of public record that in trials involving allegations of terrorist acts, France uses unsourced, uncircumstanced, anonymous intelligence as evidence in seeking to obtain a conviction.

3.1. Reports by Human Rights Watch

Human Rights Watch has for the past 30 years been one of the international community's most reliable and respected independent organizations dedicated to defending and protecting human rights throughout the world.

In four successive reports (June 2007, July 2008, March 2010, June, 2010) Human Rights Watch (HRW) has focussed direct and explicit attention on the French practice in terrorism trials of using unsourced, uncircumstanced intelligence as evidence to prosecute and convict. This practice, says HRW, undermines the right to fair trial, denies fundamental justice in compromising the rights to know and challenge the case and threatens complicity in torture and contravention of the absolute international ban on the use of material sourced by torture in "*any proceedings*."[2]

In its July 2008 report entitled "*Preempting Justice – Counterterrorism Laws and Procedures in France*", Human Rights Watch noted that "*Intelligence material, including information coming from third countries*" (as in the Diab case) is often at the heart of terrorist investigations – "*Indeed, most if not all investigations are launched on the basis of intelligence*

[1] International Letters Rogatory January 7, 2008, (Additional Information and new elements), Sgd Marc Trevidic, et al, Paris, June 5, 2008 at p. 21
[2] Human Rights Watch, June, 2007; July, 2008, March, 2010; June, 2010

information."[3] HRW further reported its findings about the use in French investigations and prosecutions of unsourced, uncircumstanced intelligence as follows:

- "*… the prominent use of intelligence material in judicial investigations, in the context of the close links between judges and the intelligence services, raises concerns about procedural fairness and reliance on evidence obtained from third countries where torture and ill-treatment are routine*."

- "*… the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons*."

- "*The ease with which sensitive intelligence material is put to use in judicial proceedings without compromising intelligence sources and methods is the pride of French counter terrorism officials …*"

- "*Not only can unsourced intelligence reports be entered into the case file (and subsequently used at trial), investigating judges may authorize any number of investigative steps, including arrests, on the basis of intelligence information alone*."

- "*Because intelligence agents "cannot be obligated to reveal their sources", defendants face "difficulties … in effectively responding to or challenging intelligence material*."

- "*French [intelligence] services normally receive a refined product, in the form of a summary or simply a tip-off, from a foreign intelligence service, rather than the raw intelligence*."

- "*In practice, judicial control over this phase is non-existent. As Bruguière explained, investigating judges receive information only from the DST, not directly from third-country sources: 'They're the ones who do the interfacing [with other intelligence services], and they don't tell us where they got the information … We don't know whether the methods used were human or technical, or [even whether] the information comes from a third country…' … 'There is no judicial control over the intelligence services. … The origin of the intelligence is not important, and we don't always know it.' Under these circumstances, it is difficult to see how the investigating judge can exercise any control over the legitimacy of the methods used and the veracity of the information obtained when determining whether to open an official investigation or authorize certain investigative steps*."[4]

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

[3] Preempting Justice – Counterterrorism Laws and Procedures in France; Human Rights Watch; July, 2008, p. 3
[4] Preempting Justice, supra, pp. 10, 19, 33, 34, 35, 36, 39, 40

and Recommendations on France", HRW reported that "*Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations.*"[5]

In June 2010, HRW again publicly reported on the use by France of intelligence as evidence in its prosecution of terrorist suspects.[6] It pointed to the danger, in using as trial evidence intelligence from unknown original sources and emanating from unknown circumstances, of becoming complicit in torture:

- "*This memorandum provides an overview of Human Rights Watch's concerns and recommendations on France, submitted to the United Nations Committee Against Torture … Our comments are focused primarily on counterterrorism measures that the government has introduced which we believe breach Convention [Against Torture] standards.*"[7]

- "*Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations. Our research indicates that there is insufficient judicial verification of intelligence material in terrorism investigations. In practice, security services provide prosecutors and specialized investigating judges with information they have obtained through intelligence-gathering methodologies, including cooperation with third countries with poor records on torture. Investigating judges may then order any number of investigative steps, including arrests, on the basis of this intelligence, without exercising any control over the legitimacy of the methods used to obtain the information.*"[8]

- "*As the [UN] Committee made clear in P.E. v. France, states have a positive obligation 'to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.' The absence of any mechanism or requirement on the part of investigative judges to verify whether the information was obtained under any form of ill-treatment is a breach of that obligation, because the information constitutes evidence for the purposes of a judicial investigation.*"[9]

[5] Human Rights Watch Concerns and Recommendations on France; March 11, 2010; p. 6
[6] June, 2010, Human Rights Watch, No Questions Asked, p. 45
[7] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 1
[8] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 6
[9] Human Rights Watch Concerns and Recommendations on France; March 11, 2010, supra, p. 6; and U.N. Committee Against Torture, Decision: P.E. v. France CAT/C/29/D/193/2001 (Dec. 19, 2002, para. 6.3)

- "*Foreign torture intelligence is used to identify terrorism suspects on national territory, launch police and surveillance operations and, in some cases, to initiate judicial investigations leading to arrests and prosecution.*"[10]

- "*In practice, however, France appears all too willing to set aside this principled approach.* [The international condemnation of torture and absolute proscription of the use of material derived from torture]. … *Insufficient verification by judicial authorities of information coming from the intelligence services leads to the use by the judiciary of foreign torture material, both at the investigative phase and at trial.*"[11]

- "*… the role of intelligence material in the judicial process is clear and troubling. Most if not all terrorism investigations are launched by judges on the basis of information collected by intelligence services, including through relations with similar services in foreign countries. The lack of effective judicial control over intelligence information received from security services, the operational use of such information to open official investigations and detain people, and the use of torture evidence at trial all undermine the rule of law and the absolute prohibition on torture.*"[12]

- Martin Scheinin, the UN Special Rapporteur on human rights while countering terrorism, reports that "*States that receive information obtained through torture or inhuman and degrading treatment are <u>complicit</u> in the commission of internationally wrongful acts.*"[13] (emphasis in original).

The French case against Hassan Diab is anchored centrally around unsourced, uncircumstanced, bald and conclusory, anonymous intelligence assertions of his alleged guilt. The comments, above, by HRW in its many reports on France, repeat and confirm what the investigating magistrate in the Diab case conceded in his Letters Rogatory – parties to French terrorist trials know neither the sources nor circumstances of the "*intelligence*" offered as evidence to gain conviction. This undermines the right to fair trial, denies fundamental justice in compromising the rights to know and challenge the case and threatens complicity in torture and contravention of the absolute international ban on the use of material sourced by torture.

3.2. Home Office / Jacqueline Hodgson Study

In 2006, the United Kingdom Home Office commissioned Professor Jacqueline Hodgson, the U.K.'s foremost expert on the French legal system, to conduct empirical research into the

[10] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 1
[11] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 45
[12] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 48
[13] June, 2010, Human Rights Watch, No Questions Asked, supra, p. 13

functioning of the French terrorist trial system, including meetings in Paris with various officials and members of the judiciary dealing with counter-terrorism policy and investigations. In her report entitled "*The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office*" [14], Professor Hodgson states that "*the features of counter-terrorism investigations in France*" involve the use of "*exceptional procedures*", in particular the use of intelligence: "*Intelligence plays a key part in these investigations*", and "*intelligence can be 'judicialized' when it is produced under the supervision of a magistrat and so be made admissible as evidence.*"[15] The juge d'instruction works closely with the DST and "*almost all counter-terrorism cases will be investigated by the juge d'instruction.*"[16] So extensive is the use of and reliance on intelligence in terrorism cases and investigations that "*The danger is that such an enquiry becomes an intelligence gathering operation clothed in the legitimacy of a focused judicial investigation.*"[17] When intelligence is gathered (i.e. by the DST), it is "*converted*" into evidence in terrorism cases by the intelligence officials reporting their information to the juge d'instruction who then includes it in the trial dossier as evidence.

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

- "*How is the reliability of this intelligence evidence to be tested? Magistrats recognise that they are unable to determine the reliability of intelligence as they do not know the name of the informant, nor are they able to look behind the information. They rely upon professional trust, subsequent evidence obtained and claims that it would not be in the interests of officers to provide unreliable information.*"[18]

- "*As noted above, in reviewing the instruction process, the courts can only take account of the dossier and cannot enquire into the process by which evidence is obtained and developed.*"[19]

---

[14] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, p. 6
[15] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, supra, p. 4
[16] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, supra, pp. 4, 18 - 38
[17] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, supra, p. 27
[18] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, supra, p. 42
[19] Hodgson; The Investigation and Prosecution of Terrorist Suspects in France: An Independent Report Commissioned by the Home Office, November 2006, supra, p. 44

Professor Hodgson's finding that the French courts do not know or inquire as to the sources or circumstances of the judicialised intelligence that forms part of the case against the terrorist suspect is confirmed by the former juge d'instruction in the Diab case. Mr. Trevidic writes, in Letters Rogatory to the Canadian extradition court on January 7, 2008, and June 5, 2008,[20] that "*Nevertheless, as for reasons of confidentiality and security of the sources, the examining magistrate and different parties to the proceedings have not to know the origin of the information.*" The intelligence used as evidence to prosecute Dr. Diab remains unsourced, uncircumstanced, anonymous and secret – to the accused, even to the investigating magistrate and, ultimately, to the trial court.

The Home Office in 2006-2007 led a study into the French system relating to the investigation and prosecution of terrorist suspects. The resulting 2007 Home Office Report, entitled "*Terrorist Investigations And The French Examining Magistrate's System*" [21], details the findings of the Home Office concerning French terrorism trials and the use of unsourced, uncircumstanced, anonymous intelligence as evidence to prosecute and convict.

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

> "*Other forms of intelligence or sensitive information can be introduced as evidence by 'judicialising' the material. The intelligence is summarised, without revealing sources or methodology, and produced as a police statement. This is then submitted to the examining magistrate during the investigation and included in the dossier of evidence. French law also provides a clearly defined basis for secrecy and the need to protect secrets.*
>
> *The police report may say, for example, that there is intelligence to show that X was in contact with Y. However, no party, including the examining magistrate, the defence lawyer or the trial judge can probe the information underpinning the report. During the trial, Counsel for the defence may challenge the facts in a report by seeking to prove that his client was not at a certain address at a certain time, for example, but he cannot challenge the information on which the report is based. However, the report does not have the value of proof: no statement is made on its reliability.*

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

[21] Terrorist Investigations And The French Examining Magistrates System; Home Office, U.K., July 2007, p. 1

> *This demonstrates the confidence placed in the intelligence by the judiciary. In reality, the examining magistrate can never be fully confident about the validity of the information without having access to the methodology or the raw intelligence. However, in practice any particular concerns tend to be resolved through regular communication and the professional trust which exists between the DST and the examining magistrate*."[22]

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

3.3. Testimony of Stéphane Bonifassi

Stéphane Bonifassi is a recognized expert in French law and procedure and an experienced trial lawyer who was admitted to the Paris Bar in 1991. Mr. Bonifassi has held distinguished positions in the Paris Bar, the International Bar Association (co-chair of the Business Crime Committee) and has served as President of the Criminal Law Commission of the Union Internationale des Avocats. Writing on May 23rd, 2011, about "*The Use of Intelligence in Criminal Cases, and More Specifically in Terrorist Cases*", Mr. Bonifassi gives an informed and experienced account of the use of unsourced, uncircumstanced intelligence as evidence in French criminal/terrorist trial proceedings. Mr. Bonifassi notes that:

- "*As a consequence of this free proof system, there is no distinction under French law between evidence and intelligence*".

- "*It is common practice for intelligence filed in 'proces-verbaux' or 'rapports' to be read at trial by the judge*".

- "*As a result, intelligence will be accepted as a sound source of information by prosecutors and investigating judges and will give a basis for the indictment of suspects*."

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

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

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

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

- No effective challenge at trial may be mounted to the intelligence offered as evidence of guilt because there is "*no access to the source of intelligence*".[23]

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

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

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

3.4. Testimony of Wesley Wark

Dr. Wesley Wark, the eminent and respected Canadian intelligence expert and National Security advisor, analyzed the French Record of the Case against Dr. Diab. His Expert Witness Report: *In the Matter of the Request by France for the Extradition of Hassan Naim Diab From Canada for Prosecution*[24] details his findings. Consistent with all the other authorities, Dr. Wark

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

[24] Wark, Wesley; EXPERT WITNESS REPORT: In the Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution

noted that the case against Hassan Diab was built on unsourced, uncircumstanced intelligence presented in conclusory form from secret sources and secret intelligence assessments. Dr. Wark notes that the "*very specific information*" asserted in the 1999 intelligence received (from an unidentified source(s)) "*brought the investigation back to life*", after the early intelligence (1980 – 1999) was "*unfruitful*". Dr. Wark notes, however, that "*no indication whatsoever is provided of the provenance of the 1999 material. We know nothing about the source or sources of this information, not even whether it was generated by the DST itself from collection methods under its control or came from a foreign service*."[25]

By way of overview, Dr. Wark notes the following about the French case against Hassan Diab:

> "*Overall, it is a story of a 28-year intelligence manhunt, that went 'cold' for long periods of time, and that was heavily dependent on secret, foreign sources of information, the original provenance of which remains entirely unknown. … The first phase of the investigation relied entirely, it would appear, on intelligence of unknown provenance from two foreign sources, one named as the BKA, the other unnamed. … The French record offers absolutely no illumination about the source(s) of the new 1999 intelligence. … We have no way of knowing where this 1999 information came from, how it was obtained and in what circumstances it came into the possession of the DST. … It could have come from anywhere*."[26]

Dr. Wark continues about France's case against Hassan Diab that "*The French intelligence case, on the record provided of a 28-year intelligence manhunt, rests on secret processes for collection and assessment and on secret information that can be probed perhaps but cannot be properly tested. Intelligence is asserted here as evidence but intelligence is not the same as evidence. … The accumulated layers of secret information of unknown provenance and of secret intelligence assessment of unknown quality and outcomes … cannot be peeled back. The French intelligence case is presented in conclusory form …*".[27]

These "*accumulated layers of secret information of unknown provenance*" form the core of the French case against Dr. Diab and will all be accepted and used – absent effective and sufficient assurances being received from France – as evidence in seeking to convict Dr. Diab during a French criminal/terrorism trial. Dr. Wark observes that the French counter-terrorism investigation and trial process is exceptional and intelligence-driven: "*The investigating*

[25] Wark, supra, pp. 24; 26
[26] Wark, supra, pp. 31; 32
[27] Wark, supra, p. 33

magistrates in the French system have unusual powers, with no parallel in the Anglo-Saxon world of justice. … These investigating magistrates become, in effect, a kind of intelligence service themselves. … A second unique feature of the French system of counter-terrorism was the close relationship that developed between the investigating magistrates and the DST." Noting that the French system then 'judicializes' intelligence into evidence for use in French trials, Dr. Wark states that "*What is being 'judicialized' in this way in the French system are secrets derived from intelligence work.*"[28]

Dr. Wark notes the prevalence of foreign intelligence in the French ROC: "*The apparent reliance on foreign sources of intelligence for major leads in the Rue Copernic bombing is especially striking in the French record. Foreign sources of intelligence, even from trusted allies and partners, are often impervious to challenge and testing by the receiving intelligence service, as a foreign partner will go to great lengths to protect the sources and methods used by its own intelligence community.*"[29] Who is the foreign service?; from whom or what service did the foreign service receive the intelligence before passing it on to the French?; was mistreatment or torture involved? These questions have no answer at the proposed French trial based on this unsourced, uncircumstanced intelligence.

Dr. Wark is clearly knowledgeable about the use of judicialized intelligence in French terrorism trials and also about the international criticism of such a practice. Not only does French judicialization of the intelligence not solve the "*endemic intelligence problems*,"[30] the French use of unsourced, uncircumstanced intelligence as trial evidence to prosecute and convict is both "*dangerous*" and makes the investigating magistrate "*complicit in intelligence errors*."[31] In the final analysis, as Dr. Wark explicitly states, the use of such intelligence material at a proposed French trial would "*be manifestly unjust*.

3.5. Testimony of Kent Roach

Professor Kent Roach is Canada's leading academic writer/teacher on the use of intelligence as evidence and the international perspective on this issue. Professor Roach has

[28] Wark, supra, at pp. 38; 41
[29] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 35
[30] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 42
[31] Wark; "In The Matter of the Request by France for the Extradition of Hassan Naim Diab from Canada for Prosecution", supra, p. 42

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

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

Dr. Roach gave expert evidence on the "*differences between intelligence and evidence*", on the "*problems associated with reliance on secret intelligence as a means to impose legal consequences on individuals*" and on the "*dangers of miscarriages of justice caused by the use of intelligence that is manifestly unreliable or of unknown reliability*" as well as "*the dangers of reliance on evidence that can never be produced at trial and exposed to adversarial challenge and the full application of rules relating to the burden and quantum of proof and the basic rules of evidence because of the need to protect the secrecy of intelligence sources, methods and promises of secrecy given to foreign agencies*."[32]

Dr. Roach's evidence was that intelligence is a product made up of opinion, hearsay and secrecy: *"Secrecy has been an essential attribute of intelligence. … Secrecy is essential both to protect the sources and methods of the intelligence agency and promises of secrecy made to*

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

other agencies that share intelligence. The secrecy of sources and methods also means that it may be impossible to know how information was obtained even if the method used could affect the reliability of intelligence."[33] Intelligence and evidence have "*competing norms and assumptions*,"[34] such that "*there are many instances where it is impossible to use intelligence as evidence both because of principled concerns about ensuring the secrecy of intelligence sources and methods and because the reliability of the intelligence will be unknown and unknowable or suspect enough to make it unsafe to rely upon for the purposes of imposing significant legal consequences on individuals.*"[35] In addition, Professor Roach noted, "*a recurring problem that has been revealed in the post 9/11 era is the difficulty of knowing whether intelligence was obtained under circumstances, including torture or threats, that cast doubt on the reliability of the intelligence.*"[36]

In his report and oral evidence, Professor Roach detailed the objectionable, unsourced intelligence offered as evidence in the ROC. In addition to insuperable problems of secrecy, lack of sources, lack of circumstances, inability to test or challenge, and potential for complicity in torture, Professor Roach noted the "*problem of tunnel vision or confirmation bias*"[37] evident in the ROC, with its attendant dangers of discounting disconfirming evidence (like the fingerprint, palm print and physical description exclusions of Hassan Diab which will be discussed below) and filling evidentiary gaps with assumptions or sheer speculation, many of these features noted by the extradition judge in his review of the ROC.

Professor Roach discussed in detail as well jurisprudence in Canada (*Abdelrazik*) and Europe (*Kadi*) that confirmed that unsourced, uncircumstanced intelligence offered as evidence in bald, conclusory form (precisely as in the Diab case but also the Arar and Iacobucci Inquiry cases) is unacceptable, is simply not evidence. Citing *Abdelrazik*, Professor Roach stated that "*bald, unsourced assertions cannot be taken at face value because their reliability is not known. … Unsourced conclusions of unknown reliability cannot and should not be used as evidence to impose serious legal consequences on people.*"[38] Mr. Justice Zinn, writing the decision in

[33] Kent Roach Report; Proposed Evidence, pp. 5 & 6
[34] Kent Roach Report; Proposed Evidence, supra, p. 9
[35] Kent Roach Report; Proposed Evidence, supra, p. 11
[36] Kent Roach Report; Proposed Evidence, supra, p. 12
[37] Kent Roach Report; Proposed Evidence, supra, p. 18
[38] Kent Roach Report; Proposed Evidence, supra, p. 17

Abdelrazik, called this "*no evidence*".[39] The European Court of Justice came to the same conclusion in *Kadi*[40]: unsourced, uncircumstanced intelligence assertions that can in no meaningful way be challenged may not be relied upon without constituting a breach of fundamental rights. Professor Roach gave evidence that the bald, unsourced, uncircumstanced intelligence assertions of Dr. Diab's alleged involvement in the Copernic bombing were "exactly" like those decried by the Canadian and European courts in *Abdelrazik* and *Kadi*.

Professor Roach concluded his report[41] stating that intelligence may be offered as evidence only when fully and accurately sourced and circumstanced in order to provide a real and effective opportunity to confront and challenge the material. In his oral evidence,[42] Professor Roach confirmed that in the absence of such full sourcing and circumstancing, in the absence of such effective opportunity to challenge, it is "*impossible*" to use intelligence as evidence without denying fundamental justice.

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

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

3.6. Intelligence as Evidence "Simply Unacceptable"

It can be seen from all of the foregoing that France regularly uses in its criminal/terrorism trials unsourced, uncircumstanced, anonymous, secret intelligence as evidence against the accused. The ROC in its own terms and content demonstrates the heavy reliance by France upon unsourced sheer intelligence in attempting to make a case against Dr. Diab. The ROC

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

summarizes (as it must under s. 33 of the *Extradition Act*) "*the evidence available to the extradition partner for use in the prosecution*." France therefore offers in the case of Hassan Diab, unsourced intelligence as "*evidence available*" to be used in France to prosecute Dr. Diab at a French trial. In the absence of effective and sufficient assurances from France that none of this intelligence material will be used in the prosecution of Dr. Diab at a French trial, the only reasonable conclusion to draw from all of the evidence, information and authorities available is that unsourced, uncircumstanced intelligence – although disavowed in the Canadian extradition proceeding – will be used by France in prosecuting and seeking to convict Dr. Diab. Intelligence material identified by the extradition judge as "*not evidence*", will be used as evidence in France at the French trial of Dr. Diab.

There is a developing worldwide consensus, notwithstanding the use by France of unsourced, uncircumstanced, anonymous and secret intelligence as criminal trial evidence, that it is contrary to the principles of fundamental justice and simply unacceptable to use such material as evidence to prosecute and convict. In Canada, the use of such material as evidence is seen as a violation of the *Charter*. A trial in which such material is used to prosecute and seek conviction is therefore "*unjust or oppressive*".

The principles of fundamental justice require that the person accused have a real and effective opportunity to know the case he/she has to meet and a real opportunity then to meet the case. Meeting the case involves a realistic opportunity to challenge, test and refute the case disclosed, including the evidence on which the case to be met relies. In this case, key "*evidence*" on which France relies is actually unsourced, uncircumstanced, anonymous and conclusory intelligence assertions, representing untraceable layers of opinions and analysis of unknown intelligence analysts formed from original raw intelligence in unknown form from unknown sources in utterly unknown circumstances. The intelligence in this case, as Dr. Wesley Wark notes, "*could have come from anywhere*".[43] In no meaningful sense can Dr. Diab "*know*" the case he has to meet and in no real or effective way can he challenge, test and refute such material. Real and effective challenge of this material, which France asserts is "*available*" to be used as evidence to prosecute Dr. Diab, and which the ROC demonstrates is the core of the French case, is impossible. A trial using such material to prosecute Dr. Diab would therefore be

[43] Wark, supra, p. 32

in violation of Section 7 of the *Charter*, contrary to the principles of fundamental justice and unjust or oppressive.

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

3.7. Aggravating Factor: Manipulation of the Intelligence

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

On November 12, 2008, France presented materials to the Superior Court of Ontario in an *ex parte* application that it represented to be both true and reliable. *Ex parte* applications attract a very high duty of candour.[44] The *ex parte* application relied on Letters Rogatory from Mr. Trevidic, the same French official who only 29 days later – on December 11, 2008, certified the Record of the Case. The Letters Rogatory were delivered to Canada under the seal of the Ministry of Justice of France and set out "Statements of Facts" in the Copernic bombing case. In these Letters Rogatory, Mr. Trevidic set out what he claimed the secret, unsourced 1999 intelligence received by the DST stated. This is what Mr. Trevidic represented the intelligence said:

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

> "*It may be recalled that at the time the terrorist attacks, particularly of Palestinian origin, were very frequent in Europe and that border controls were particularly tightened.*
>
> *Activists who were still unknown to the specialized services had it in their own interest to cross borders with their real identity papers and use false documents only after they entered in the concerned country.*
> *With this reasoning, it was perfectly logical that Hassan DIAB entered France with his real passport, left in the same way, and used the false passport in the name of PANADRIYU to operate on French territory.*"[45]

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

This one example confirms what all the authorities, Canadian and international, say, that unsourced, uncircumstanced, bald and conclusory intelligence assertions of secret provenance are unreliable and unacceptable as evidence, that a trial in which they are used to prosecute a person breaches fundamental justice, that they are untestable and breach the "*venerated*" principles of knowing and having a meaningful opportunity to challenge the case. These flatly contradictory versions of the 1999 intelligence graphically demonstrate why a trial based on such intelligence material would be unjust or oppressive. No Canadian should have been surrendered to be tried on such material.

4. Flawed Handwriting Evidence

The extradition case of Dr. Diab turned entirely on the "*suspect*" handwriting opinion: "*The evidence that tips the scale in favour of committal is the handwriting evidence*". (This was

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

the assessment also of counsel for France: in submissions on the case, counsel stated as follows, "*On sufficiency, it's a very narrow question – and Your Honour has already adverted to this – the narrow issue on sufficiency is whether or not there's prima facie evidence that Mr. Diab is the Alexander Panadriyu whose actions are set out in the Record of the Case, and at the end of the day, that inference turns or falls on the handwriting evidence*".

Once the objectionable intelligence was disavowed, the case for extradition committal turned entirely on handwriting evidence: "*The evidence that tips the scale in favour of committal is the handwriting evidence*."[46]

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

Dr. Diab offered the evidence of international handwriting experts who reviewed the Marganne and Barbe-Prot reports and whose reports detailed the unreliability of those two opinions for a multitude of reasons, one of which was that the French "*experts*" had failed to notice that the supposed 1993 writings of Hassan Diab used for comparison with the hotel card actually included a number of documents written by Dr. Diab's wife. Writings by her were identified by the French "*experts*" as matching the printing done in 1980 by the 40–45 year old man who registered as Panadriyu. When the defence expert evidence was all ruled admissible by the extradition judge, France sought a lengthy adjournment of the extradition proceedings (causing the collapse of the fixed proceeding date) and then disavowed entirely reliance on the Marganne and Barbe-Prot reports for the purpose of the Canadian extradition proceedings. In the face of defence expert evidence, France disavowed reliance on handwriting opinion evidence it had offered as available and reliable evidence from 2008 to 2010.

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

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

- "*A clear instance of manifest unreliability in the context of expert evidence in an extradition hearing would be where it has been demonstrated that the opinion is founded on erroneous facts such as using the wrong known handwriting when doing the handwriting comparison.*"[47]

- "*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.*"[48]

The obvious serious problem that remains, however, is that these two manifestly unreliable handwriting opinions (based on a totally different person's comparison handwriting), while disavowed here in Canada, remain in the trial dossier as evidence available to be used in a trial in France. As was emphasized by the Supreme Court of Canada in *Trochym* and *Charkaoui I*, trial on unreliable evidence is contrary to fundamental justice and fairness: "… *evidence that is not sufficiently reliable is likely to undermine the fundamental fairness of the criminal process.*"[49] A trial that in any way relies upon these two manifestly unreliable handwriting opinions would be unfair, unjust and oppressive.

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

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

In allowing the Bisotti handwriting opinion to remain part of the ROC (in a ruling February 18, 2011) and to form the basis for a committal order (June 6, 2011), the extradition judge nevertheless made the following key findings about this evidence. He found that, having heard the evidence of the three defence experts, "*Each expert has, in no uncertain terms, provided scathing criticism of the French evidence*."[50] Earlier the extradition judge had noted that "*Propping up this report* [the Bisotti report] *is a task that's pretty difficult. I mean, you had*

[47] Reasons for Decision, Maranger, J., February 18, 2011, para. 13
[48] *A.G. Canada (France) v. Diab*, supra, para. 125
[49] *R. v. Trochym*, supra, at para. 27
[50] Reasons for Decision, Maranger, J., February 18, 2011, para. 7

three experts essentially torch the report."[51] He stated that he found the Bisotti handwriting opinion to be "*very problematic, very confusing, with conclusions that are suspect*."[52] The extradition judge added that Mme. Bisotti's opinion was in a field he identified as a "*pseudoscience*"[53] and further observed that "*the three experts have certainly caused the Court to wonder about the reliability of the Bisotti report.*"[54] The judge agreed that "*the appearance of bias*"[55] was also arguably raised by the Bisotti opinion. Justice Maranger found further that "*The Bisotti report has been shown to be based on some questionable methods and on an analysis that seems very problematic.*"[56] The expert evidence offered by Dr. Diab he found had substantially undermined the Bisotti handwriting opinion: "*The evidence presented on behalf of the person sought has largely served to substantially undermine the French report; it has been shown to be evidence that is susceptible to a great deal of criticism and attack.*"[57] Finally, the extradition judge noted that the case on which he was committing Dr. Diab, based on the Bisotti "*pseudoscience*" opinion, was weak, with conviction at a fair trial unlikely: "*…the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely.*"[58]

It follows from Justice Maranger's findings that only in an unfair trial will Dr. Diab's conviction become likely. Therefore, a fair trial must be ensured. A fair trial will be a trial without reliance on unsourced, uncircumstanced intelligence, without reliance on "*manifestly unreliable*" handwriting opinions (Marganne, Barbe-Prot), and with full and fair trial court consideration of the important defence expert evidence that the extradition judge found had substantially undermined the Bisotti opinion and shown it to be "*very problematic*", "*suspect*" and based on "*questionable*" methodology. This important defence expert evidence, however, will not receive full consideration in the French trial process, leaving the suspect Bisotti report (and the unreliable Marganne and Barbe-Prot reports) essentially unchallenged. This will constitute a breach of the principles of fundamental justice because, as the Supreme Court of

[51] Transcript of Proceedings, February 15, 2011, p. 29
[52] Reasons for Decision, Maranger, J., February 18, 2011, para. 14
[53] Reasons for Decision, Maranger, J., February 18, 2011, para. 14
[54] Reasons for Decision, Maranger, J., February 18, 2011, para. 16
[55] *A.G. Canada (France) v. Diab*, supra, para. 106
[56] *A.G. Canada (France) v. Diab*, supra, para. 118
[57] *A.G. Canada (France) v. Diab*, supra, para. 120
[58] *A.G. Canada (France) v. Diab*, supra, para. 191

Canada has found, it is "*unacceptable*"[59] not to permit meaningful challenge of the case against the accused: *"Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and a opportunity to meet the case*."[60] The only way for Dr. Diab to challenge the unreliable and suspect handwriting evidence proposed to be used at trial against him is with expert handwriting evidence that is fully and fairly considered against the flawed French evidence. This will not happen in the French trial process.

Justice Maranger committed Dr. Diab based on the Bisotti handwriting opinion, despite his many and obvious misgivings about the reliability and bias of that evidence. His rationale for committal was to presume that at a French trial the defence expert handwriting evidence that had so significantly revealed the unreliability of the Bisotti opinion would receive (as in Canada) full and fair consideration. He presumed that the French trial court would equally consider and weigh the defence expert evidence along with the Bisotti report and, assuming that (i.e. a fair consideration of all the evidence), would be "*unlikely*" to convict. In other words, at a fair trial, the Bisotti opinion, fully considered against Dr. Diab's expert evidence, would not likely stand up to justify a conviction. The extradition judge reasoned that full consideration of these "*competing opinions*" was "*the stuff of trial*" and that the "*very strong competing inferences*" (the defence expert evidence) would be seen, when fully and fairly considered, to demonstrate "*serious weaknesses*" in the French handwriting opinion evidence.[61]

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

The evidence of Stéphane Bonifassi was put before the extradition judge. Mr. Bonifassi, the recognized expert in French law and procedure, explains that only experts on a list set up by the French Courts of Appeal or Cour de Cassation have standing as experts in French trial courts. Further, he explains, it is the juge d'instruction (Mr. Trevidic) who selects what expert reports to enter into the trial dossier for trial court consideration. Only those reports receive full trial court consideration. Experts offered by the accused person, by contrast, are viewed with "*extreme*

[59] *R. v. Trochym*, supra, at para. 55
[60] *Charkaoui v. Canada (Citizenship and Immigration)*, supra, at para. 61
[61] Reasons for Decision, Maranger, J., February 18, 2011, paras. 15, 16, 17

suspicion" and trial courts are often "*extremely critical*" of defence expert evidence. For these reasons, Mr. Bonifassi explains, Dr. Diab will not be able effectively to challenge the suspect Bisotti report or manifestly unreliable Marganne and Barbe-Prot reports. In his report Mr. Bonifassi says specifically the following:

- "*Expert witnesses as is the case in Mr. Diab's file are requested by investigating judges.*"
- "*They most often appoint experts that are registered in a list set up by the various Courts of Appeal or by the Supreme Court (Cour de Cassation).*"
- "*Courts are often extremely critical of parties appointed experts when they depose against the findings of a judge appointed expert.*"
- Defence experts "*are considered with extreme suspicion by the judges in charge of the case.*"
- "*Furthermore, such defense appointed expert will not be in a position to access the original documents but only the copies supplied by the judge. This situation will place such expert in a disadvantageous position compared to the judge appointed expert.*"
- "*For all the foregoing reasons, there will be little way to efficiently challenge the 'expertise' made by the investigating judge experts and most notably the handwriting expertise.*"
- "*I am aware that this outline will be remitted to the Court in charge of Mr. Diab's case. I believe this outline is a fair account of the way party appointed experts are considered by the French criminal system.*"[62]

The evidence of Jacqueline Hodgson, the U.K. expert on the French criminal trial process, is to the same effect. In her report commissioned by the U.K. Home, Office Professor Hodgson discusses "*French criminal procedure*" and explains that the credibility of trial evidence in France depends on whether it comes from the parties or the juge d'instruction (the investigating magistrate – in the Diab case Mr. Trevidic): "*And finally, the credibility of evidence at trial will depend upon whether it is regarded as the prosecution case, the defence case, or the product of a judicial investigation.*"[63]

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

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

- "*In France, great emphasis is placed upon written evidence. … The evidence collected during the investigation is placed in the case dossier … which then forms the centrepiece of the trial, the central point of reference from which the judge will question the accused. In most instances the evidence of witnesses will be accepted in written form, with no need for live testimony.*"[64]

- "*…The defence has no real opportunity to participate in the pre-trial investigation. This is extremely significant given the importance attached to written evidence gathered during the pre-trial phase and the lack of testimony at trial. As noted above, when comparing French criminal procedure with that in England and Wales, the diminished role enjoyed by the defence in France is part of the fundamental difference in the two procedures.*"[65]

- "*The defence lawyer, in contrast, as an avocat, is very much a professional outsider; she has neither the professional status nor the ideology of the magistrat* [the juge d'instruction] … *It is very difficult for the defence to play any part in the investigation, or to have any impact on the construction of the dossier.*"[66]

- "*Historically, the pre-trial investigation was the most important stage in inquisitorial procedure, the trial serving almost as a formality confirming the earlier findings. Whilst the trial has taken on a different form with both the procureur and defence lawyers playing a more active part, during the instruction, the emphasis continues to be on obtaining and evaluating all the relevant information during the pre-trial, rather than the trial phase. In this way, the instruction characterises most strongly the inquisitorial roots of French criminal procedure, where issues are selected and debated not by the prosecution and defence at trial but by a judge during a pre-trial investigation.*"[67]

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

[64] Hodgson, supra, p. 10
[65] Hodgson, supra, p. 10
[66] Hodgson, supra, pp. 15 & 21
[67] Hodgson, supra, p. 26

able to challenge effectively the highly flawed French handwriting evidence, even with the evidence of renowned international experts.

- "*The centrality of the case dossier at all stages of the criminal process and the lawyer's dependence upon the juge d'instruction as the investigator upon whose evidence the court will base its decision, means that outright challenge and confrontation would be inappropriate and the establishment of a wholly separate defence case risky. In England and Wales, the defence may seek to dispute evidence produced by the police by bringing their own witnesses to contradict the prosecution case. To do this within an inquisitorial procedure (without channelling such claims through the pre-trial enquiry) where investigations are understood to be judicially supervised, is to challenge the integrity of the judiciary itself. Furthermore, in its subsidiary role, the status of the defence in France as a party to the proceedings is inferior to that of the magistrat and the lawyer is trusted less than the (judicially supervised) police. This places a clear constraint on her ability to engage in any form of proactive defence.*"[68]

Professor Pierre Margot is one of Europe's leading forensic scientists. Dr. Margot is the chair of Forensic Science at the University of Lausanne. He has been called as an expert forensic witness in France. He and his colleague, Dr. Raymond Marquis, handwriting expert for the Institut de Police Scientifique (IPS), have reviewed the Bisotti report in detail and concluded that its handwriting opinions are unreliable, being based on flawed methodology and the product of a biased approach. The report of Professor Margot and Dr. Marquis was not available to the extradition Judge during the course of the committal hearing.

Professor Margot and Dr. Marquis state that "*The methodology for handwriting comparison is universal*" and "*ENFHEX recommendations correspond to this universal approach*." Mme. Bisotti "*refers to ENFHEX methodology that she claims to have followed.*"[69] But Mme. Bisotti failed to apply proper ENFHEX methodology – repeatedly and glaringly – and her conclusions are therefore clearly unreliable: the methodology employed by Mme. Bisotti "*does not correspond to the standard approach such as the one recommended by ENFHEX, and it leads to unreliable conclusions.*"[70]

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

"28. *Ms Bisotti claimed to have followed the ENFHEX methodology, which corresponds to the accepted universal approach in forensic handwriting examination. The recommendations of the ENFHEX indeed include a list of*

[68] Hodgson, supra, p. 33
[69] Margot/Marquis, supra, p. 6
[70] Margot/Marquis, supra, p. 8

references that are recognised worldwide in this field. However, numerous methodological flaws were highlighted in the report of Ms Bisotti, which clearly demonstrate that the followed approach does not correspond to the accepted universal procedures regarding this area of expertise.

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

30. *Next to handwriting methodological problems, it must be considered that the questions of the mandate were leading questions, leaving no possibility for the expert to give a balanced opinion taking into account the possibility that someone else than Mr Diab wrote the questioned entries. These numerous and serious flaws undoubtedly lead to state that the conclusions given by Ms. Bisotti in her report cannot be reasonably considered as reliable.*"[71]

The report of Professor Margot and Dr. Marquis explicitly concludes that the manifestly incorrect methodology employed by Mme. Bisotti renders unreliable her handwriting opinion(s): "*This does not correspond to the standard methodology recommended in the field of forensic handwriting examination. In this respect and due to several other serious flaws, the conclusions of Ms Bisotti's report cannot be considered to be reliable*."[72]

Drs. Margot and Marquis also explain in their "*Review of Expert Report in the Extradition Procedure Against H. Diab*" (consistent with the evidence of Stéphane Bonifassi, the

[71] Margot/Marquis, supra, p. 13
[72] Margot/Marquis, supra, p. 15

French legal expert) that defence expert evidence is not regarded equally in French trials with expert evidence generated by the juge d'instruction; indeed, it isn't treated as expert evidence at all but merely as an "*allegation*", a submission by the defence. Drs. Margot and Marquis confirm that no effective challenge at trial to the flawed and unreliable Bisotti opinion may be mounted through the adduction of defence expert handwriting evidence: "… *any report submitted by parties is not received by the courts in the form of an expert opinion but as any other allegation made by a party. It does not have the value of the official court appointed expert …*"[73]

In the unique circumstances of Dr. Diab's case, where the case for committal rested entirely on "*very problematic*" and "*suspect*" handwriting opinion evidence that defence expert evidence substantially undermines and exposes as highly susceptible to "*criticism and attack*", but that attack will not be accommodated in the trial process in France. The proposed trial of Dr. Diab on such flawed evidence that cannot effectively be challenged by Dr. Diab is an unacceptable affront to the principles of fundamental justice. To ensure a fair trial in France, it is imperative that a trial in France not rely on the manifestly unreliable, disavowed Marganne and Barbe-Prot reports, and that defence expert handwriting evidence be fully, fairly and equally considered with the Bisotti opinion. As with the unsourced intelligence, so too with the flawed handwriting opinion evidence: inability effectively to test and challenge at trial makes such a trial "*unacceptable*".

5. <u>Exculpatory Evidence</u>

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

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

  "*The second point is that the palm prints that were taken from DIAB did not match those provided to the RCMP by the DST (DCRI).*"[74]

[73] Margot/Marquis, supra, p. 5
[74] RCMP Disclosed Task Report Project 2007-5009, November 21, 2008

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

- The "*Alexander Panadriyu*" who registered at the Hotel Celtic in September, 1980, was a 40-45 year old man. At that time Hassan Diab was 25 years old. Such a difference excludes Hassan Diab, as was decided by the Supreme Court of Canada in *Chartier*.[75]

6. Summary

The extradition case of Dr. Hassan Diab – an extradition case built around intelligence (not evidence) and set out in a lengthy, "disconnected", "not easy to read", and "unusual" ROC – came down to a disputed piece of opinion evidence in a field (handwriting analysis) described by the extradition judge as a "pseudoscience" and identified as "very problematic" and "highly susceptible to criticism and impeachment".

For the purposes of the Canadian extradition proceedings, France disavowed reliance on any of the unsourced, uncircumstanced intelligence set out in the ROC. However, in France, the intelligence will be used and accepted as evidence at Hassan Diab's trial, as a "*sound source of information by prosecutors and investigating judges*." Because such "evidence" cannot be effectively challenged at trial, there is every likelihood Hassan Diab will be prosecuted and convicted based on such "evidence".

The extradition judge, Justice Robert Maranger, noted in his Reasons for Decision that "*the prospects of conviction in the context of a fair trial, seem unlikely*."[76] The judge's comment was in the context of a case (ROC) that excluded the intelligence. Only in the context of an unfair trial, where secret, unsourced, uncircumstanced intelligence is used to prosecute and convict will Dr. Diab's conviction become likely. This is contrary to the *Charter*, to the principles of fundamental justice. It is simply unacceptable.

Given the circumstances of Dr. Hassan Diab's case, Canada must seek the release of Dr. Diab and his return to his home and family in Canada. Short of releasing Dr. Diab, at the very least, In order for a fair trial commensurate with the principles of fundamental justice to occur, Canada must receive fully effective and binding assurances from the appropriate authorities in

[75] *Chartier v. Quebec (A.G.)* [1979] SCJ No. 56
[76] *A.G. Canada (France) v. Diab*, supra, para. 191

France that (a) no unsourced, uncircumstanced intelligence be used as evidence to prosecute Dr. Diab (i.e. all of the material disavowed in the ROC plus any other such material in France's possession), (b) that the reports and evidence of Mme. Marganne and Mme. Barbe-Prot (disavowed by France in the Canadian extradition proceedings) not be relied upon in any way at trial, (c) that the defence expert evidence and reports of Brian Lindblom, Robert Radley, John Paul Osborn, Pierre Margot and Raymond Marquis receive full, fair, and equal consideration at trial as the report of Mme. Bisotti, and (d) that the exculpatory scientific palm print and distal fingerprint evidence receive consideration by the trial court. In the absence of such effective assurances, Dr. Hassan Diab should be released and allowed to return to his home in Canada.

For more information:

Hassan Diab Support Committee
diabsupport@gmail.com
http://www.justiceforhassandiab.org