bc civil liberties association
L'Association des libertés civiles de la Colombie-Britannique

VIA MAIL

September 12, 2011

The Honourable Robert Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Minister Nicholson:

Re: Hassan Diab

On behalf of the British Columbia Civil Liberties Association, I write further to our letter of October 5, 2010 ("October 2010 Letter") concerning the extradition request made by the Republic of France concerning Hassan Diab, a Canadian citizen. In that letter, we called on you to ensure that Canadian citizens are protected against foreign prosecutions relying on evidence derived from torture and that such evidence stays out of Canadian courts and proceedings.

The BCCLA is the oldest and one of the most active civil liberties organizations in Canada. We have spent almost 50 years working to preserve, defend and extend civil liberties and human rights in British Columbia and across Canada. We have longstanding and extensive involvement in working to ensure that security concerns are balanced with respect for the rule of law and the rights of individuals.

History of Mr. Diab's Extradition

As you are aware, Mr. Diab's extradition is being sought by the French government on charges arising from his alleged involvement with a bombing in Paris on October 3, 1980. Mr. Diab has no criminal record in Canada. He has taught at Carleton University and the University of

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Ottawa. At the time of his arrest at the request of the French government in November 2008, he was a lecturer at Carleton University. Following a protracted extradition hearing, Mr. Diab was ultimately committed for extradition by the Ontario Superior Court in June 2011. Whether Mr. Diab should be surrendered to France, and whether any terms should attach to his surrender, is now a decision that rests with you.

As discussed in our October 2010 Letter, France's case against Mr. Diab consists of, in significant part, "intelligence" information from unidentified sources. Accordingly, one of our concerns is that such unsourced intelligence information could be the product of torture, and that Canadian courts did not have sufficient assurance from France that such information was *not* derived from torture.

As our letter details, the fact that the intelligence is unsourced is troubling in two primary respects.

First, not knowing the source makes it extraordinarily difficult – if not impossible – to test its reliability. There is no way of knowing if the intelligence is derived from human sources or technical sources. We would note that the Federal Court of Appeal, in a judgment delivered by Malone J.A., and in which Rothstein J.A. (as he then was) and Richard J.A. concurred, in *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8, held that it was "obvious" that unsourced hearsay was inadmissible under our law. They laid stress on the fact that the absence of source identification made knowing the case that one had to meet impossible. That amounted to a fundamental denial of natural justice. They asked:

> Notwithstanding that the onus is on Partsource to demonstrate its entitlement to the relief it seeks, in order to respond to the allegation in paragraph 9 of the Bish affidavit, CTC would be required to explore, through cross-examination on the affidavit, the identity of the customers to whom reference is made and, if they are identified, to interview them or otherwise conduct an investigation for the purpose of ascertaining the veracity of the statements attributed to them. This would effectively reverse the onus in the expungement application. This is clearly prejudicial to CTC.

Similar observations have been made in the Supreme Court of Canada in relation to the "reliability" rule adopted for certain hearsay statements. Without providing information as to the source of the evidence and the reliability of that source, the party adducing such evidence impermissibly seeks to substitute the credibility of the person relating the unsourced hearsay for that of the source itself. While our courts have, in recent years, relaxed some aspects of the hearsay rule, none have gone so far as to

accept unsourced hearsay. Such evidence cannot effectively be tested by the party opposite or evaluated by a court, and it amounts to nothing more than rumour.

Second, in this case, there is the added concern that the unsourced intelligence may be information derived from torture, given France's documented willingness to use such information. In our letter, we pointed to recent reports from Human Rights Watch documenting and criticizing France's use of torture evidence in terrorism cases both at the investigatory phase and at trial. Mr. Diab, in his recent submissions to you, outlines in significant detail the French judiciary's failure to implement effective procedural controls to ensure that intelligence is not the product of torture before it is relied upon in proceedings.

In March 2011, the Department of Justice announced that it would no longer be utilizing unsourced intelligence to support France's extradition request. This was a welcome decision, as it meant – at the very least – that evidence potentially derived from torture would not be used in Canadian courtrooms. This does not mean, however, that the unsourced intelligence has been withdrawn from Mr. Diab's case entirely. Absent an undertaking not to do so in a prosecution in its courts, France would still be free to offer the unsourced intelligence as evidence in its prosecution of Mr. Diab, and French courts – if past practice has been any guide – may be perfectly willing to accept such intelligence into evidence, with little regard for whether it was obtained in circumstances violating human rights.

Surrender and Terms

It is well-established that the Minister of Justice is required to consider whether the requesting state's criminal procedures and penalties would violate the principles of fundamental justice when deciding whether – and under what conditions – an individual should be surrendered for extradition. This is a requirement that exists not only under the *Extradition Act*, but also under s. 7 of the *Charter of Rights and Freedoms*. It is based on these principles that, for example, the Supreme Court of Canada has ruled that the Minister of Justice is constitutionally bound to ensure that Canada does not surrender individuals to face the death penalty in foreign jurisdictions.[1] Accordingly, whether French trial procedure comports with principles of fundamental justice is an issue you must take into account when considering Mr. Diab's surrender; indeed, the extradition judge in Mr. Diab's case noted that arguments concerning the fairness of the French trial is "best advanced at the ministerial stage."[2]

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[1] *See United States of American v. Burns*, [2001] 1 S.C.R. 283.
[2] Ruling of Maranger J. dated March 1, 2011.

A prosecution that admits the use of evidence derived from torture violates the principles of fundamental justice. It is trite law in Canada that information obtained by torture or cruel, inhuman or degrading treatment is neither credible nor reliable. As previously detailed in our October 2010 Letter, Canada's domestic law and international legal obligations make clear that information derived from torture has no place in judicial proceedings.

The *Extradition Act* sets out the circumstances under which the Minister must refuse surrender. Section 44(1) reads, in relevant part:

> The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances.

We respectfully submit that France's documented willingness to use unsourced intelligence from international partners known to routinely engage in torture means that you should decline to surrender Mr. Diab for trial in France.

As the Supreme Court of Canada observed in *Canada (Justice) v. Fischbacher*, "where surrender is found to be contrary to the principles of fundamental justice protected by s. 7 of the *Charter*, it will also be unjust and oppressive under s. 44(1)(a)."[3] We submit that, in this case, the requirements of the *Extradition Act* compel you to refuse to surrender Mr. Diab.

If, nonetheless, on the balance of all information you still believe it appropriate to surrender Mr. Diab for trial in France, then we urge that you seek and obtain meaningful legal assurances from France that no evidence derived from torture will be admitted in the case. This means that France must commit to providing adequate procedural safeguards that will ensure no intelligence information used in the case against Mr. Diab was derived from torture (or was potentially derived from torture), or else commit to excluding all unsourced intelligence from Mr. Diab's prosecution entirely.

Seeking and obtaining such assurances is the only way to ensure that Canada maintains its commitment to the elimination of torture, wherever it may take place. It is the only way to ensure that it is not surrendering one of its own citizens to face an unfair trial.

The prohibition against torture requires that all incentive to commit torture be eliminated. Eradicating torture can only happen if countries like Canada

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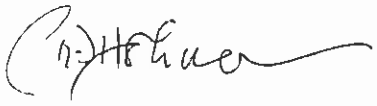
[3] *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at para. 39.

take active steps to make sure that no state benefits from the fruits of torture. In short, we respectfully submit that Canada's conduct should be at all times guided by the standard articulated by Justice Dennis O'Connor at the conclusion of the Arar Inquiry, that "Canada should not inflict torture, *nor should it be complicit in the torture of others.*"[4]

Yours truly,



Robert D. Holmes, Q.C.
President

[4] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006) at 346 (emphasis added).