The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry into its Origins; and Repercussions in the Case of Hassan Diab

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ABSTRACT

In 1999 Canada's *Extradition Act* came into force. Its objectives included facilitating Canadian cooperation with the impending International Criminal Court as well as with international war tribunals, for example concerning Rwanda, and the former Yugoslavia. It also sought to improve Canada's ability to respond to requests from states that operate under civil law. The subsequent high success rate in securing extraditions has arguably been at the cost of adequate consideration of human rights issues. Critics argue that the role of extradition judges is akin to that of a 'rubber stamp.'

The case of Hassan Diab reflects *par excellence* the shortcomings of the *Act*, and proceedings and processes associated with it. Arrested in 2008 in connection with the bombing near a synagogue in Paris in 1980, the proceedings stretched over six years. Following extradition to France in 2014, Diab was subject to over three years of incarceration. He was finally released in January of 2018 and was able to return to Canada. Despite this lengthy deprivation of liberty, Hassan Diab had never been charged. Meanwhile, during his release, French prosecutors continued to seek its termination and have Diab brought to trial in France.

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In addition to providing some information about Hassan Diab's case, this article reviews how the legislation was presented in Parliament in 1998-99. Of note is how the lowering threshold of evidence involved was glossed over, and justified, by officials in their presentations and rationales. Arguably the information provided lends support for calls for a public inquiry into Diab's case, including a detailed review and reform of the legislation.

Keywords: extradition; evidence; record of the case; innocence; threshold; manifestly unreliable; Supreme Court; Hassan Diab; *Ferras*; Canadian Senate

> [I]t would be a grave injustice to extradite me for a crime that even the evidence shows I did not commit. My life has been turned upside down because of unfounded allegations and suspicions. I am innocent of the accusations against me. I have never engaged in terrorism…I am not an anti-Semite. I have always been opposed to bigotry and violence.[1]
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> - Hassan Diab, 13 April 2012

> 'There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial'…I found the French [handwriting] expert report convoluted, very confusing, with conclusions that are suspect…the case presented by 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.[2]
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> - Justice Robert Maranger, 6 June 2011

> The guilt or innocence of the person sought is not a relevant consideration in the extradition context.[3]
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> - Justice Minister, Rob Nicholson, 4 April 2012

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1 Hassan Diab, "Hassan Diab Press Conference, Ottawa, April 13, 2012" (13 April 2012) at 00h:04m:19s (in response to Justice Minister Rob Nicholson's agreeing to the extradition surrender order for Hassan Diab on April 4), online (video): *YouTube* <www.youtube.com/watch?v=Ht-SEs-OGfg&feature=youtu.be> [perma.cc/5LHB-FBW2].

2 *Attorney General of Canada (The Republic of France) v Diab*, 2011 ONSC 337 at paras 11, 121, 191 [*Diab*] citing *United States v Anderson*, 2007 ONCA 84 at para 28 [emphasis added].

3 Letter from Justice Minister, the Honourable Rob Nicholson to lawyer Donald Bayne responding to submissions concerning the possible surrender of Hassan Diab to France, (4 April 2012) at 27.

I. Introduction: Issues About The Rationales For Canada's *Extradition Act*, 1999

From his arrest on November 13, 2008 until the present (August 2019), the treatment of Canadian citizen and sociology professor Hassan Diab, as facilitated by a request from French authorities under Canada's *Extradition Act* of 1999, has bewildered many socio-legal observers. Principles of fundamental justice have often seemed absent with an emphasis on Canada's diplomatic commitment to international legal cooperation taking precedence. The deck seems stacked in favour of the requesting country while the rights of the person sought, as reflected in Hassan Diab's case, are minimized.

In an effort to illuminate issues concerning extradition in the Canadian context this narrative provides a brief summary of events concerning Hassan Diab's case to date. In addition, and stimulated by Diab's case, my objective is to provide a retrospective on the origins of the 1999 *Act*, which enabled the scenario experienced by Diab to ensue. I document rationales for the legislation as presented by Department of Justice officials in the late 1990s. I also highlight early concerns about the legislation expressed by advocates, practitioners, and scholars. These included expressions of serious concern about lowering the threshold of evidence against persons sought that was embodied in the *Act*, and the potential that this dropping of the evidence bar involved for potential human rights violations against persons sought. Arguably the case of Hassan Diab reflects, *par excellence*, the validity of the concerns of these early commentators.

By examining historical discussions introducing, and responding to, the 1999 legislation, it is hoped that this article will provide support for a meaningful review of the *Extradition Act* and the implementation of reform, in particular concerning the low evidentiary threshold it embodies. Arguably, a need exists for an increased role of judges in weighing the evidence. Another aspiration is to encourage further socio-legal scholarly attention on what has been a neglected topic.

II. THE EXTRADITION OF HASSAN DIAB (2014); HIS DETENTION IN FRANCE; HIS RELEASE (2018) AND THE AFTERMATH

On November 13, 2014 – following a total of six years of extradition proceedings – the Supreme Court of Canada announced its refusal to grant leave to appeal in the extradition case of Dr. Hassan Diab. Less than 23 hours later, Hassan Diab was removed from his cell at the Ottawa Carleton Detention Centre. He was taken to Montreal and put on a flight to France. Diab was subsequently incarcerated at Fleury-Mérogis Prison, located within a southern suburb of Paris.

The context of the extradition was the allegation by French authorities that Diab was the primary suspect in a bombing directed at a synagogue on rue Copernic in Paris, on October 3, 1980. The bombing resulted in four deaths and the injuries of at least forty other people.

On January 12, 2018, the lead *juge d'instruction*, Jean-Marc Herbaut, together with his deputy Richard Foltzer, issued a final order of release. This followed eight previous calls for release by Justice Herbaut along with three other judges. No charges had been laid. The ruling in January 2018 reiterated previous evidence that Hassan Diab had been not in Paris, but in Beirut taking exams at the time of the bombing. Further exonerating evidence included Diab's fingerprints, palm prints, and a physical description, none of which matched those of the suspect. In the view of the judges, there was insufficient evidence to proceed to trial.[4] Hassan Diab was released from Fleury-Mérogis Prison on the same day. He arrived back in Ottawa in the early hours of Monday January 15, 2018.

Although no charges had ever been laid, and despite arguably incontrovertible evidence of Hassan Diab's innocence, both prosecutors in France and lawyers representing some Copernic victims and their families

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[4] Chris Cobb, "Updated: French courts drop terror allegations against Ottawa prof Hassan Diab", *Ottawa Citizen* (12 January 2018), online: <ottawacitizen.com/news/local-news/french-courts-drop-terror-allegations-against-ottawa-prof-hassan-diab> [perma.cc/E6G7-K4TU] (Chris Cobb provided extensive media coverage of this final order); see also Tu Thanh Ha, "Judges order dismissal of terrorism case against Ottawa academic jailed in France", *Globe and Mail* (12 January 2018), online: <www.theglobeandmail.com/news/national/judges-order-dismissal-of-terrorism-case-against-ottawa-professor-jailed-in-france/article37589093/> [perma.cc/NZ2R-4PSB]; see generally Justice for Hassan Diab, online: <www.justiceforhassandiab.org> [perma.cc/T26W-FUQF].

continued to appeal his release and to press for a trial. A decision on these matters was scheduled for July 6, 2018. However, on that date the matter was re-scheduled for October 26, 2018. At that time, the French Court of Appeal's decision was yet again postponed. Instead the French judges ordered another review of the handwriting analysis which had been used to extradite Diab. The review was to be concluded by February 15, 2019.[5] As of August, 2019, no further information about the status of the review, nor of any prosecutorial efforts to re-ignite the case, had been made publicly available.

Over 10 years after his arrest in 2008, and in the absence of charges or meaningful evidence, Hassan Diab and his family continued to go through this nightmarish ordeal

The case of Hassan Diab merits close attention for a variety of reasons, but chiefly because this case offers unique insights into extradition law in Canada. These insights arise in part because of the protracted length of the proceedings, and the intense litigation involved every step of the way. Although extradition law is intended to be a straightforward and expeditious process, the legal proceedings in this instance stretched from November 13, 2008, through to November 14, 2014. From Hassan Diab's point of view, however, the stress actually began back in the fall of 2007. At that point, he had been told by a French journalist (Jean Chichizola of *Le Figaro*), who had travelled to Ottawa, that he was the primary suspect in the synagogue bombing case. From the outset, Hassan Diab asserted his innocence, his lack of anti-Semitism, and his generally pacifist stance. With the names 'Hassan' and 'Diab' being relatively common in the Arab world, he believed that this was a case of mistaken identity.

The initial extradition decision by Justice Robert Maranger in Ottawa was issued on June 6, 2011. In his judgement, Justice Maranger commented on the unusual length of the extradition hearing. In his words:

> The jurisprudence at the appellate level is replete with reminders that an extradition hearing in Canada is meant to be an expeditious, summary process…This proceeding was anything but expeditious or summary…Once the person 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,

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5 Michelle Zilio, "French court delays appeal decision in Hassan Diab case, orders new handwriting analysis", *Globe and Mail* (26 October 2018), online: <www.theglobeandmail.com/politics/article-french-court-delays-appeal-decision-in-hassan-diab-case-orders-new/> [perma.cc/U42A-2QQX].

> sometimes weeks; the result was a protracted, at times acrimonious, extradition case that spanned more than two years.[6]

After the initial extradition, it was another ten months before the Justice Minister signed the surrender order (on April 4, 2012); and just over two years more before the Ontario Court of Appeal released its decision upholding both the extradition committal and the Minister's surrender order (on May 15, 2014). The final part of the process involved an application by Dr. Diab's lawyers for leave to appeal to the Supreme Court of Canada. Relevant documents were submitted on August 11 and on September 22, 2014. As noted, it was on November 13, 2014, that the Supreme Court's decision not to grant leave was announced, so terminating the extradition process. As is customary, the Canadian Supreme Court did not provide any reasons for its decision not to hear the case.

A. Mainstream Media Coverage of the Hassan Diab Extradition Case

In addition to the notable length of the extradition proceedings concerning Dr. Hassan Diab, his case is also unusual for the amount of public attention that it garnered. In part this was due to ongoing, and often in-depth, media reporting on the case, notably by journalist Chris Cobb of the *Ottawa Citizen*. In late 2014 Cobb observed that, since the passage of the *Extradition Act* in 1999, there had been about 100 cases per year, for a total of about 1,500 cases between 1999 and 2014. About 90% of these cases involved requests from the United States of America to Canada.[7]

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6 *Diab*, *supra* note 2 at paras 14-15.

7 Chris Cobb, "Canada's extradition law: A legal conundrum", *Ottawa Citizen* (15 November 2014), online: <ottawacitizen.com/news/local-news/canadas-extradition-law-a-legal-condundrum> [perma.cc/5WPN-654X] (citing extradition lawyer Gary Botting as stating that only 5 of the approximately 1,500 extradition requests during the period 1999 to 2014 had been rejected. Data provided by the Department of Justice in the spring of 2018 suggested that about 90% of extradition requests received between 2007 and 2017 that led to an arrest resulted in extradition); see Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform", *Ottawa Citizen* (30 May 2018), online: <www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289> [perma.cc/86MK-K7FR]; see also Sean Fine, "The overlap of law and politics: Meng Wanzhou's extradition explained", *Globe and Mail* (27 January 2019), online: <www.theglobeandmail.com/canada/article-the-overlap-of-law-and-politics-meng-wanzhous-extradition-explained/> [perma.cc/NEM6-CFRM]. In general, there is limited statistical information concerning requests, arrests, and extraditions in connection with the *Extradition Act*. Hopefully more data will become available given

While the media do provide some information (especially in high profile cases such as that involving pro marijuana activist Marc Emery and, more recently and currently, concerning that of Huawaei executive Meng Wanzhou) it has been rare for extradition cases to get such prolonged and detailed media attention as has been seen in relation to Hassan Diab.

Following Hassan Diab's extradition, the media in Canada continued to report on the progress (and often lack thereof) of his case in France. Notable in the ongoing reporting has been the observation that it was unclear as to whether the case would actually proceed to trial. In a particularly informative article,[8] as of November 2016, Chris Cobb reported that on three separate occasions in 2016, the French *juge d'instruction* Jean-Marc Herbaut had filed release orders to free Hassan Diab on bail, and that one other judge had also ordered his release. However, on each occasion, these were challenged by prosecutors and overturned by a three-member panel of appellate court judges; the grounding for this included Diab's purported flight risk, and that his release could "disrupt public order."

The first two orders for Hassan Diab's release came in May of 2016. On May 11, the lead investigating judge signed an order in favour of releasing Hassan Diab on bail. In Herbaut's opinion, Dr. Diab did not pose a flight risk. The prosecution requested an emergency appeal. With that appeal granted, the first release order was overturned on May 13. However, on that same day, another judge who reviews pre-trial detention also ordered release. Pursuant to this, on Saturday, May 14, 2016, Hassan Diab was released in Paris under a form of house arrest with bail conditions. These conditions included electronic monitoring. Yet in contrast to the approximately five and a half years of electronic monitoring that Hassan Diab had endured in Canada prior to extradition, where he had been obliged to pay approximately $2,000 per month to the company involved, in France he was not obliged to pay. Another contrast to Hassan's previous house arrest in Canada was that, in Paris, he was permitted to walk outside

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growing calls for transparency in this domain.

8 See Chris Cobb, "'Consistent evidence' suggests Ottawa academic did not commit 1980 terrorist bombing, French judge says", *Ottawa Citizen* (13 November 2016), online: <ottawacitizen.com/news/local-news/consistent-evidence-suggests-ottawa-academic-did-not-commit-1980-terrorist-bombing-french-judge-says> [perma.cc/WB47-NB2F]. Throughout the extradition process in Canada, and during the early stages of Hassan Diab's incarceration in France, the lead *juge d'instruction* had been Marc Trevidic. In the fall of 2015, Trevidic had been obliged to step down owing to a ten-year limit on anti-terrorist judges' eligibility to hold the position and Herbaut then assumed the lead role.

unaccompanied for three hours every day. In Canada, Dr. Diab had only been permitted to leave his home in the company of a surety.

The second release order appears to have taken French prosecutors by surprise; this is how Hassan Diab's release was able to occur. Even still, on Friday, May 20, 2016, in communicating with his supporters in Ottawa from Paris via Skype, Diab cautioned them that re-incarceration was imminent, as prosecutors were once again opposing his release and were likely to be successful.

This proved to be the case and on Tuesday, May 24, 2016, he returned to Fleury-Mérogis Prison. Notably, despite prosecutors' again opposing his release on grounds including an alleged flight risk, and that his release could pose a threat to "public order," Hassan Diab's release had been entirely without incident.[9]

Chris Cobb further observed in a November 2016 article that Herbaut's calls for release were becoming more pointed. The *juge d'instruction*'s two release orders issued on October 27 were partly based on information he had gathered during a recent trip to Lebanon, and his interviews with contemporaries of Hassan Diab at the time of the bombing. These, plus other pieces of evidence gathered by Justice Herbaut, indicated that Hassan Diab had been in Lebanon studying at a university in Beirut and taking examinations during the period that French authorities claimed that he had been in France. An important component of the evidence gathered by Justice Herbaut was that, as of September 28, 1980, Hassan Diab had accompanied his then girlfriend – Nawal Copty – to the airport in Beirut (as she was going to England for academic reasons). This information was corroborated by Ms. Copty's passport, as well as her father's testimony and passport. This finding was significant, because, according to French

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9 Relevant events were documented by Chris Cobb, "French judge orders terror accused Diab's release", *Ottawa Citizen* (17 May 2016), online: <ottawacitizen.com/news/national/french-judge-orders-terror-accused-diabs-release> [perma.cc/Z6GZ-8NZ2]; see also Chris Cobb, "French appeal court orders Diab back to jail pending trial", *Ottawa Citizen* (24 May 2016), online: <ottawacitizen.com/news/local-news/french-appeal-court-orders-diab-back-to-jail-pending-trial> [perma.cc/7Y4S-HMQ4]. See generally Donald Bayne, "Donald Bayne, Hassan Diab's lawyer, May 20, 2016" (20 May 2016) at 00h:00m:00s, online (video): *YouTube* <www.youtube.com/watch?v=Wt70pRMOGi8> [perma.cc/L2SD-7MJN] (which documents remarks made by Donald Bayne, Hassan's Diab's lawyer in Ottawa, at a support event at the Unitarian Congregation in Ottawa, coinciding with Hassan Diab's temporary release).

prosecutors, their suspect had been present in France from September 20, 1980, through to October 7, 1980.

In light of the evidence contradicting the case against Hassan Diab, the judge ruled that the situation "demand[ed]" his release, and underscored that word in making his point. As quoted by Chris Cobb, the judge stated:

> [T]he fact that there is some doubt about his involvement demands that he should be released without waiting for the outcome of the ongoing investigation…There is no evidence to indicate, or even imply, that these investigations will enable to gather [sic] further incriminating evidence against him.[10]

In short, Herbaut – as the lead investigating judge – had not only repeatedly called for Diab's release, but, as of late fall 2016, was publicly indicating that there may not have been sufficient evidence to proceed to trial. He conceded, however, that there were still outstanding questions about Hassan Diab's passport at the time of the bombing. The passport had been lost or stolen and would turn up in the possession of a militant with links to a terrorist group about one year after the Copernic bombing.

In his *Ottawa Citizen* article of November 13, 2016, Chris Cobb also reported on, and quoted, scathing observations about the ongoing legal saga by members of Hassan Diab's legal defence teams in France and Canada. In Paris, defence lawyer William Bourdon described Hassan Diab's situation as "unprecedented." In his observation:

> After 36 years and since no one else was indicted, the court of appeal is clinging to Hassan Diab. He is detained because of the judges' fear to be accused for laxity in the context of today's fight against terrorism in France. Such a situation would be inconceivable in an ordinary law situation.[11]

In the same article, Ottawa defence lawyer Donald Bayne was cited as having praised judge Herbaut for his stance, and went on to state:

> I never give up hope, but there are divisive right-wing forces in France and an atmosphere of terrorism paranoia…We have put a Canadian in this terrible position and every Canadian citizen at risk. Our courts have failed Hassan Diab at every level through an extradition system that is a shambles of injustice.[12]

As noted, despite *juge d'instruction* Jean-Marc Herbaut's expressed concerns about the weakness of evidence, as well his highlighting of exonerating evidence provided by at least six witnesses, and by the university where Hassan Diab had been taking exams at the time of the bombing, his

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10 See Cobb, *supra* note 8.

11 *Ibid.*

12 *Ibid.*

release order was again challenged by prosecutors and overturned by the same three-member panel of judges at the court of appeal.

During the following months, what had become the equivalent of a lengthy legal ping-pong rally continued. There were further calls for release by Justice Herbaut, as well as several other judges (e.g. in December, 2016, and on two occasions in April, 2017). On each occasion, the orders were again challenged by prosecutors and quashed by the court of appeal. By the end of April, 2017, there had been six calls for Hassan Diab's release by judges.[13] In early May, the sixth release order, which had been supported by two investigating judges, was also quashed by the appellate court.

On July 28, 2017, lead investigating judge Jean-Marc Herbaut issued a notice about ending the investigation. Normal procedure at that stage allows the French defence and prosecution lawyers one month to file their responses. It would then be expected for justice Herbaut to take approximately ten days to render a decision on whether to end the case against Hassan Diab, or alternatively, to commit Dr. Diab to stand for trial. In this instance, however, while the defence made their submissions during the allotted time, the prosecution omitted to do so. Moreover, while a timely submission by the prosecution should have been the norm, there was no legal sanction for the failure to do so.[14]

Another factor that further delayed the case was that, in late September of 2017, *juge d'instruction* Jean-Marc Herbaut received a visit from members of what was initially identified as a "foreign nation," and later more specifically as officials of the Israeli secret service. They were offering support in French efforts to bring charges against Hassan Diab. However, the '*note blanche*' that they provided was later described as providing old, recycled, anonymous and contradictory allegations.[15] Arguably, this event looked like an attempt to put political pressure on French judicial authorities.

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13 Megan Gillis, "Canada must intervene with France on terror accused Diab's behalf, lawyer, wife plead", *Ottawa Citizen* (27 April 2017), online: <ottawacitizen.com/news/local-news/canada-must-intervene-with-france-on-terror-accused-diabs-behalf-lawyer-wife-plead> [perma.cc/CN38-WVSC].

14 Chris Cobb, "Ottawa academic Hassan Diab still in legal limbo in Paris prison", *Ottawa Citizen* (16 October 2017), online: <ottawacitizen.com/news/local-news/ottawa-academic-hassan-diab-still-in-legal-limbo-in-paris-prison> [perma.cc/58ZX-MBH6].

15 Chris Cobb, "French court blocks release of Ottawa academic Hassan Diab for eighth time", *Ottawa Citizen* (15 November 2017), online: <ottawacitizen.com/news/local-news/french-court-blocks-release-of-ottawa-academic-hassan-diab-for-eighth-time> [perma.cc/UWT3-XMVB]; see also Michelle Zilio, "Trudeau urged to intervene in case

Despite this pressure, as of November 6, 2017, a fourth judge had ordered Hassan Diab's release. This represented the eighth release order by four different judges in Paris. Once again, the prosecution immediately filed an appeal. On November 14, 2017, three years after Hassan Diab's extradition to France, the court of appeal again denied his release. Speaking with CBC radio host Piya Chattopadhyay (of *The Current*) several days later, Hassan Diab's Ottawa lawyer Donald Bayne observed that, although French investigating judges repeatedly referred to "corroborated and consistent evidence" of his client's innocence, the situation was, as he described:

> [No]w beyond legal and logical. It's got into into diplomatic and political. You've got a Canadian who has been declared innocent by the investigators in France, and yet he is being held because of the political situation in France. That's not legal. That's political.[16]

In light of this, both Donald Bayne and Hassan Diab's spouse – Rania Tfaily – called upon the Canadian government to assume a more proactive role in seeking Diab's release and return to Canada. During the above segment, a brief clip of an interview with a representative of the French prosecution also re-confirmed that a primary obstacle to their not acceding to Diab's release was their perception that it could pose a threat to "public order."[17]

Here it is important to reaffirm that it was not the prosecution's opinion that Hassan Diab represented a threat to public order himself, but that his release could pose a threat.

In December of 2017, the French prosecution provided investigation judges with written submissions. Although they acknowledged the credibility of evidence concerning Hassan Diab's innocence, and the doubts about allegations against him, they were still asking for a trial.[18] In response,

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of Ottawa Professor jailed in France", *Globe and Mail* (14 November 2017), online: <www.theglobeandmail.com/news/politics/trudeau-urged-to-act-for-jailed-ottawa-professor-in-france/article36983126/> [perma.cc/SA7D-MH6J].

16 Piya Chattopadhyay, "Canadian Hassan Diab remains in prison after French court blocks release for 8th time", *CBC Radio, The Current* (17 November 2017), online: <www.cbc.ca/listen/shows/the-current/segment/14839865> [perma.cc/T9M2-XFAB] (with interviews of Donald Bayne, Rania Tfaily – Dr. Diab's spouse – and a spokesperson for the French prosecution).

17 *Ibid.*

18 Justice for Hassan Diab, Press Release, "French Prosecutor Concedes Credible Evidence Points to Diab's Innocence, but Asks for Trial" (14 December 2017), online: <www.justiceforhassandiab.org/press-release-2017-12-14> [perma.cc/WML6-XTKX] [Justice for Diab].

the investigating judge reissued a notice concerning his intent to close the investigation soon with a decision involving an ending of the case, or alternatively, a referral to trial.

As noted earlier, this decision, by lead *juge d'instruction* Jean-Marc Herbaut and his deputy Richard Foltzer, came on Friday, January 12, 2018. They ruled that there was insufficient evidence to proceed to trial. Hassan Diab was released from Fleury-Mérogis Prison that day. Prosecutors immediately worked towards an appeal, as did lawyers representing some of the victims and their families.

The same day, in a radio interview by Giacomo Panico with Donald Bayne on CBC's *All in a Day*, Bayne explained that the previous release orders had been interim release orders, pending the investigation. However, the release order earlier that day put an end to the investigation. It was a conclusive final judgement that said there was no reliable evidence against Hassan Diab, and that he is innocent. Under the previous release orders, the mere filing of an appeal by the prosecution sufficed to rescind the release order. However, the final order could only be rescinded after an appeal had actually been heard by the court, and if the court came to a different conclusion.

Donald Bayne also reported that Diab's French defence lawyers had observed that such a strong statement of innocence had never been made before by terrorism investigating judges. The Hassan Diab case was unprecedented in France. The program also broadcast Prime Minister Justin Trudeau's quote that "we will be reflecting on possible lessons learned in the coming days and months."[19]

Facilitated by Canadian consular officials in Paris, Hassan Diab arrived back in Ottawa early on Monday, January 15, 2018. His release and return, and the press conference that took place on January 17, received widespread coverage in the media.[20]

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19 Giacomo Panico, Interview with Donald Bayne, "Hassan Diab's charges dropped" *CBC, All in a Day* (12 January 2018), online: <www.cbc.ca/listen/shows/all-in-a-day/segment/15459709> [perma.cc/L3H9-CYZ2].

20 See e.g. the following: "Justice, finally, for Hassan Diab", *Ottawa Citizen* (12 January 2018), online: <ottawacitizen.com/opinion/editorials/editorial-justice-finally-for-hassan-diab> [perma.cc/86N9-FBDK]; Terry Milewski, Interview of Rania Tfaily, *CBC TV, Power and Politics* (12 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/power-and-politics/episode/15460857> [perma.cc/RZG2-97YB]; Carol Off, Interview of Rania Tfaily, *CBC Radio, As it Happens*, (12 January 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/episode/15460565>

While the coverage in the mainstream media of the Hassan Diab extradition case was relatively limited during the extradition proceedings in Canada, dating from the time of his arrest in November 2008 to the Supreme Court's declining the leave application in November of 2014 (except, as noted, by the work of Chris Cobb of the *Ottawa Citizen*, with his work sometimes being picked up by other media outlets), from the spring of 2017 there was growing attention from the CBC, including in their national radio and television outlets. Journalists raised and discussed questions about how an extradition from Canada could have taken place in the face of such flimsy and unreliable evidence. In turn, questions were raised about the content of the 1999 Canadian extradition legislation itself.

Following Dr. Diab's release from the Fleury-Mérogis Prison in Paris and his return to Canada, widespread national coverage continued. As of the spring and summer of 2018, the reporting reflected three major themes. Firstly, there was a focus on the *Extradition Act* and its perceived flaws. Secondly, questions were raised about the potential over-zealousness of some officials in the Canadian Department of Justice in facilitating and supporting French prosecutors in their efforts to gather more incriminating evidence at a point in the proceedings where the case against Hassan Diab

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[perma.cc/ZCT7-V7UQ]; Michael Enright, "We're all at risk – Hassan Diab's lawyer on what's wrong with Canada's extradition system", Interview of Donald Bayne, *CBC Radio, The Sunday Edition* (14 January 2018), Toronto, online: <www.cbc.ca/listen/shows/sunday-edition/episode/15549781> [perma.cc/LTH7-ZD46]; Robyn Bresnahan, Interview of Rania Tfaily, *CBC Radio, Ottawa Morning* (15 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/ottawa-morning/segment/15487870> [perma.cc/6T62-K5H6]; Chris Cobb, "Ottawa academic Hassan Diab is back home, free for first time in a decade", *Ottawa Citizen* (16 January 2018), online: <ottawacitizen.com/news/local-news/ottawa-academic-hassan-diab-is-back-home-free-for-the-first-time-in-a-decade> [perma.cc/MLE4-QEYS]; Terry Milewski & Rosemary Barton, Interview of Donald Bayne and Hassan Diab, *CBC TV, Power and Politics* (17 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/power-and-politics/episode/15494674> [perma.cc/QUH3-9LUH]; Carol Off, Interview of Hassan Diab *CBC Radio, As it Happens* (17 January 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/segment/15494669> [perma.cc/W239-7DUW]; Catharine Tunney, "After years in French prison, Diab is fighting to fix 'lousy' extradition laws", *CBC News* (17 January 2018), online: <www.cbc.ca/news/politics/hassab-diab-talks-terrorism-charges-1.4490927> [perma.cc/4N4N-HKPP]; Chris Cobb, "Exclusive: 'I feel so wonderful,' Diab discusses reuniting with family, release from French prison", *Ottawa Citizen* (17 January 2018), online: <ottawacitizen.com/news/local-news/exclusive-i-feel-so-wonderful-diab-discusses-reuniting-with-family-release-from-french-prison> [perma.cc/54K8-9EU3].

appeared to be in danger of falling apart. Questions were also raised about Canadian prosecutors not providing exonerating evidence to the Canadian extradition judge, Robert Maranger.[21] Thirdly, the coverage post-release focused on calls by Hassan Diab, his lawyers, and his supporters to have a full public inquiry into the case, including an examination of the extradition legislation and processes more generally.

The call for a public inquiry was in contrast to the more modest proposals by Justice Minister Jody Wilson-Raybould who, as of May 29, 2018, informed the British Columbia Civil Liberties Association and Amnesty International that her officials had undertaken a "lessons learned" review of the case. She additionally reported that: "I have also asked for an independent external review of the matter." Hassan Diab and his supporters were strongly of the opinion that an internal review lacked credibility given Justice officials' ties to the existing legislation. It was further thought that an independent external review was insufficient. Their consensus again was that a full-fledged public inquiry with all the powers that would embody (e.g. concerning the attendance of witnesses, and the full disclosure of relevant documents) was what was needed.[22]

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21 One issue is that, on November 21, 2009, following the defence team's discrediting of the original handwriting evidence against Hassan Diab (given that French handwriting experts had used some handwriting samples not even written by Diab), Canadian senior counsel with the International Assistance Group, Claude LeFrançois, sent an urgent memo to France seeking additional handwriting evidence – especially as the handwriting evidence had been a key part of the case. Another issue was that the Canadian prosecution also sought fingerprint evidence from France. This was provided, and as of January 11, 2010, a comparison by the Royal Canadian Mounted Police could not match the prints to those of Hassan Diab. This information was not provided to the Canadian court or defence team. Meanwhile, prosecutor LeFrançois had successfully argued for an adjournment on December 18, 2009, and would do so again on February 8, 2010. With the extradition hearing then set to start on June 14, 2010, prosecutor LeFrançois withdrew the original tainted handwriting evidence and submitted the new version. See David Cochrane & Lisa Laventure, "Canada helped France dig up evidence to extradite Ottawa man later freed on terror charges" *CBC News* (1 May 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-france-terrorism-investigation-1.4614855> [perma.cc/MK3L-QAYS].

22 See e.g. Carol Off, Interview of Donald Bayne, *CBC Radio, As it Happens* (1 May 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/episode/15541492> [perma.cc/5URZ-827E]; David Cochrane & Lisa Laventure, "What more can you lose?", *CBC News* (1 May 2018), online: <newsinteractives.cbc.ca/longform/hassan-diab-extradition-french-prison> [perma.cc/8NAJ-XLCZ]; Anna Maria Tremonti & David Cochrane, "Extradition could happen to anyone, says professor fighting for change in law" (Interviews of Hassan Diab, Donald Bayne & Professor Robert Currie),

On July 5, 2018 Justice Minister Wilson-Raybould announced that Murray Segal, prosecutor and former deputy attorney general of Ontario, had been appointed to conduct the external review. Segal was asked to consider whether Department of Justice officials had followed the law and departmental procedures during the extradition process. What was absent however was any request to examine the extradition legislation itself. Given the limited terms of reference, Hassan Diab declined to participate in what his lawyer Donald Bayne described (on his behalf) as appearing to be "little more than a concerted damage control effort."[23] Once again, Hassan Diab and his supporters demanded a full public inquiry.

B. Social Media and Advocacy Coverage of the Hassan Diab Extradition Case

In addition to substantial coverage in the mainstream media, Hassan Diab's case also presented an unusual groundswell of public support, received over the years during the proceedings in Canada and his imprisonment in France, as well as following his release and return to Canada. Indeed, Hassan Diab's case has arguably been unprecedented in the extradition context in terms of civic expressions of concern, both about his case in particular, and about the broader characteristics of the 1999 legislation.

A factor in bringing public attention to the case has been a highly active campaign to support Hassan Diab conducted through social media. A

CBC Radio, The Current (2 May 2018), Toronto, online: <www.cbc.ca/listen/shows/the-current/segment/15541636 [perma.cc/U2FY-CFUP]; Chris Hall, Interview of Donald Bayne, *CBC Radio, The House* (5 May 2018), Ottawa, online: <www.cbc.ca/listen/shows/the-house/segment/15542356> [perma.cc/5EQF-TCLV]; Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform. Extradited Ottawa professor Hassan Diab to call for a public inquiry", *CBC News* (30 May 2018), Ottawa, online: <www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289> [perma.cc/WHS3-7ZDH]; Alan Neal, Interview of Donald Bayne, *CBC Radio, All in a Day* (30 May 2018), Ottawa, online: <www.cbc.ca/listen/shows/all-in-a-day/segment/15547848> [perma.cc/E7YS-8GRL].

[23] See David Cochrane & Lisa Laventure, "Murray Segal to lead review of Hassan Diab's extradition", *CBC News* (5 July 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-extradition-france-external-review-1.4736033> [perma.cc/2W75-VPT3]; David Cochrane & Lisa Laventure, "Hassan Diab to boycott external review of 2014 extradition to France", *CBC News* (24 July 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france-extradition-1.4758418> [perma.cc/J6K9-AMKT].

primary source in this has been the work of the "Justice for Hassan Diab" support group, and their website: www.justiceforhassandiab.org. Prominent also has been the Facebook page – "Justice for Hassan Diab." Numerous individuals and organizations have offered support. Relevant organizations include Amnesty International, Canada; the International Civil Liberties Monitoring Group; the British Columbia Civil Liberties Association; the Canadian Association of University Teachers; the Canadian Labour Congress; the Canadian Union of Postal Workers; Canadian Unitarians for Social Justice; Comité Justice Sociales des Soeurs Auxiliatrices; the Civil Liberties Association, National Capital Region; the European Group for the Study of Deviance and Social Control; Independent Jewish Voices/Voix Juives Indépendantes – Canada; Ligue des Droits et Libertés; the National Union of Public and General Employees; Union Syndicale Solidaires, France; and the United Jewish People's Order/L'Ordre Uni du Peuple Juif – Toronto.

Early in 2017, an additional social media step was taken with the release of a short documentary – *Rubber Stamped: The Hassan Diab Story*. Copies of the documentary were made available through the Justice for Hassan Diab website and were posted on YouTube.[24]

In light of the onerous extradition process experienced by Hassan Diab in the context of excellent legal support, as well as extensive media and public attention, one of the questions that arises is: what is the nature of the extradition process in Canada, in cases that are beyond the media or public spotlight? As legal scholar Robert Currie has observed, although there can occasionally be media attention to extradition cases both in Canada and internationally, "the extradition process itself is unfamiliar to most practitioners and members of the public."[25] Hassan Diab's extradition lawyer – Donald Bayne – has similarly observed: "[Extradition law] is one of the dark corners of the criminal justice system."[26]

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24 *Rubber Stamped: The Hassan Diab Story*, Documentary (13 minutes), directed by Amar Wala, edited by Andrea Conte, online (video): *YouTube* <www.youtube.com/watch?v=WVv_J7s78Bc> [perma.cc/6S5V-RW5D].

25 Robert J Currie, "Extradition", Joel E. Pink & David C. Perrier, eds, *From Crime to Punishment: An Introduction to the Criminal Law System*, 8th ed (Toronto: Carswell, 2014) at 669. Cases alluded to by Currie include Luka Magnotta in the context of extradition to Canada, and Edward Snowden and Julian Assange in relation to other countries.

26 Chris Cobb, "Extradition being attempted 'under the cover of darkness.' Process worse than that used against Maher Arar: lawyer", *Ottawa Citizen* (3 November 2010), online: <www.meforum.org/campus-watch/18094/extradition-being-attempted-under-the-

In an effort to shed some light on this relatively unknown part of the legal and justice system, I provide below a retrospective analysis of the emergence and implementation of the 1999 *Extradition Act* in Canada. A key issue is how justice officials' emphasis on international cooperation and diplomacy as political considerations arguably went hand-in-hand with the displacement of human rights considerations on behalf of persons being sought for extradition from Canada. In particular, the lowering of the evidentiary threshold in the new legislation carried the potential for excessive intrusions into the liberty rights of persons sought. The failure to adhere to basic principles of fundamental justice would later become apparent in the case of Hassan Diab.

III. CANADA'S *EXTRADITION ACT*, 1999 – RATIONALES PRESENTED BY JUSTICE OFFICIALS

> Indeed, other than as a matter of form, it is difficult to understand why the judicial role has been retained in the new Act, as the extradition judge has little, if anything, to do.[27]
>
> - Anne Warner La Forest, 2002

> Under Canada's extradition law, the duty of a Canadian court and the minister of justice is, first and foremost, to the government seeking an individual. That individual no longer enjoys the rights that are supposed to be accorded everyone else facing the deprivation of their liberty. Canadian standards of evidence disappear, and the case is presumed to be reliable, regardless of how many inaccuracies, errors and contradictions are contained within it. One cannot present evidence to show one's innocence, and the requesting state need not present any evidence of that innocence.[28]
>
> - Matthew Behrens, 2013

Extradition usually[29] involves "the formal rendition of a criminal fugitive from a state [i.e. country] that has custody (the requested state) to a

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cover> [perma.cc/V6AX-D54E] [Cobb, "Extradition being attempted"].

27 Anne Warner La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 at 172.

28 Matthew Behrens, "The Extradition Case of Dr. Hassan Diab", *Canadian Dimension*" 47:5 (15 October 2013), online: <canadiandimension.com/articles/view/the-extradition-case-of-dr.-hassan-diab> [perma.cc/5TTM-49Z9].

29 The word "usually" here is deliberately chosen because, in the case of Hassan Diab, the exact circumstances under which he was sought by the French authorities, including the actual likelihood of him being put on trial (as opposed to only being wanted for questioning), would become a major issue in the period subsequent to Justice

state that wishes either to prosecute or, if the fugitive has already been convicted of an offence, to impose a penal sentence (the requesting state)."[30] As Robert J. Currie further observes, "[i]t is important to note that extradition is geared towards the apprehension and transfer of individuals to face criminal proceedings,"[31] and that it should be distinguished from other forms of involuntary transfers including, for example, deportation, security certificates in Canada, as well as what Currie describes as the "regrettable practices of abduction and 'extraordinary rendition'."[32] Anne W. La Forest similarly observes:

> Extradition is firmly entrenched in the concept of territorial sovereignty. It is an act, usually pursuant to a treaty, under which the executive of one state, the requested state, surrenders a person within its territory to another state, the requesting state, in order to face criminal proceedings in the latter state.[33]

The phenomenon of extradition can be traced back to antiquity.[34] However, it is generally recognized that the 'modern' origins of extradition can be located in Europe, and notably France during the late 1700s and subsequent century. As La Forest observes, major developments of extradition treaties internationally during the mid-19th century overlapped with a growing emphasis on the importance of protecting individual liberties.[35] In Canada, legislation governing extradition from 1877 until the end of the twentieth century was influenced by the British *Extradition Act 1870*.[36] Influences on the British legislation included the "increased movement of persons brought on by colonization and technology."[37] From the outset in Canada, the extradition process had two components, namely:

Maranger's extradition decision (June 2011) and prior to Justice Minister Rob Nicholson's decision to agree to the surrender (April 2012).

30 Robert J Currie, *International and Transnational Criminal Law*, 1st ed (Toronto: Irwin Law, 2010) at 447.

31 Currie, *supra* note 25 at 669-670.

32 *Ibid* at 670.

33 La Forest, *supra* note 27 at 96.

34 See e.g. Christopher L Blakesley, "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History" (1981) 4:1 BC Int'l & Comp L Rev 39 (For scholarly debates about the precise origins of 'modern' legal notions of extradition).

35 La Forest, *supra* note 27 at 97.

36 *Extradition Act 1870* (UK), 33 & 34 Vict, c 52.

37 La Forest, *supra* note 27 at 97.

executive and judicial. Moreover, and as observed by La Forest, the process has been "primarily an executive act."[38]

A watershed in extradition law in Canada arose in 1999 with the passage of a new *Extradition Act*. A variety of concerns and motives were identified as precipitating the new legislation. As described by Eleni Bakopanos, then Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, in presenting the legislation to the House of Commons in 1998,[39] these included the increasing need to be able to respond to transnational forms of crime and criminals. Ms. Bakopanos additionally observed that because of the growing ease of international travel, and with the evolution of technology, transnational crime and criminals rather than being an exception, had now become "the norm."

Another important rationale lay in Canada's international law obligations. According to Ms. Bakopanos there had been calls from international bodies including the United Nations for countries "to put in place a comprehensive, effective and modern process for extradition."[40] By contrast, the then existing legislation as provided in the *Extradition Act* and the *Fugitive Offenders Act* was described by Ms. Bakopanos as "antiquated." She also highlighted the need for Canada to respond to the requirements of international criminal tribunals, especially those concerning Rwanda, and the former Yugoslavia.[41] An objective of the act was to "ensure that Canada is not a safe haven for criminals seeking to avoid justice."[42]

In presenting the legislation an issue that was given prominence was the perception of a need to be better able to respond to, and facilitate, extradition requests from states that involved civil (as opposed to common) law jurisdictions. For Canadian officials there was a strong perception that such were the barriers for civil law jurisdictions in fulfilling the evidentiary

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38 *Ibid.*

39 "Bill C-40, an Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the Immigration Act, and the Mutual Legal Assistance in Criminal Matters Act, and to amend and repeal other acts in consequence", 2nd reading, *House of Commons Debates*, 36-1, No 135 (8 October 1998) at 1605 (Ms Eleni Bakopanos) [Bill C-40 debate].

40 *Ibid* at 1610.

41 *Ibid* at 1605-1630 (where references are made to future "entities," including the then imminent International Criminal Court. In July of 1998, the Rome Statute of the International Criminal Court was adopted by 120 countries and entered into force in July, 2002. The inaugural session of the court took place in July 2003).

42 *Ibid* at 1605.

requirements of Canadian extradition law that requests that might otherwise have proceeded were not being submitted in the first place.[43] As reported by Eleni Bakopanos:

> In the case of a number of requests from countries other than the United States extradition proceedings cannot be instituted. In other instances states are so discouraged by the different hurdles imposed by our current extradition law that they do not even initiate an extradition request. The primary problem is that the current legislation mandates that the foreign states submit evidence in support of their request in a form which meets the complicated requirements of Canadian evidentiary rules.[44]

Within what might be described as this 'comity conundrum' the main impediment perceived as experienced by civil law states were the limits on 'hearsay' evidence being admissible in the context of Canadian extradition hearings. Reportedly, states that were not common law found it "difficult to comply with the requirement of sworn affidavits based upon first-hand knowledge of the events."[45] Further, while difficulties with the evidentiary requirements of sworn statements and the lack of admissibility of hearsay were considered most extreme for civilian states even countries with a closer legal tradition to Canada's were presented as experiencing challenges. In the words of Ms. Bakopanos:

> For countries that do not have a common law system, and for which concepts such as hearsay are unknown, this requirement makes the preparation of a request for extradition a tremendously difficult task, and in some instances an impossible one. Even with countries with a similar legal tradition such as the United States, we have heard on numerous occasions how difficult it is to obtain extradition from Canada. In the context of our other common law jurisdictions such as Great Britain and Australia, Canada's system is viewed as one fraught with difficulties due to the antiquity of our legislation.[46]

A goal of the new legislation was to enhance Canada's ability to comply with its international obligations, and to reaffirm the country's commitment

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43 See e.g. La Forest, *supra* note 27 at 133-134 (where this concern was later described as "amorphous." In presenting the act, no examples were given by Bakopanas. Evidence subsequently provided by experts could only find two decisions where reference was made to extradition requests which failed because of evidentiary considerations, and in one of those cases the information referred to was described as anecdotal.).

44 Bill C-40 debate, *supra* note 39 at 1610.

45 *United States of America v Yang*, 56 OR (3d) 52, [2001] OJ No 3577 at para 24 (citing evidence adduced by the Attorney General in explaining the historical rationales for changes in the 1999 legislation).

46 Bill C-40 debate, *supra* note 39 at 1610.

to 'comity' regarding the legal systems of foreign states. Here, comity refers to the requirement that there should be "respect for the criminal proceedings of the requesting state."[47] The concept also includes a "recognition of differences between the preliminary proceedings in the requesting state and in Canada, and that the extradition procedure in Canada should not have the effect of preventing or hindering the removal of persons in proper cases."[48]

While previous legislation was likewise reliant on the principle of comity the stumbling block lay in the boundaries set upon the admissibility of evidence. Under the prior legislation the process could be compared in some respects to a preliminary hearing whereby the purpose was to determine if an individual for whom extradition was being requested would have faced charges if the alleged offence had occurred in Canada. This purpose can be contrasted with that of a trial process itself. While the latter is concerned with weighing the evidence and determining if it is sufficient to convict the accused, the purpose of the extradition hearing was to decide if a *prima facie* case existed such that it would be appropriate to proceed to trial. It was not up to the extradition judge to investigate the evidence, but rather to decide, with the assumption that if the admissible evidence was correct, if it would suffice for proceeding to the next legal step.

Given the limited role of the extradition judge under the former legislation deference to treaty partners included that witnesses did not have to be produced or cross-examined. However case law provided guidelines concerning the need for evidence to be sworn. Hearsay was not admissible. In this way an effort was made to balance the liberty rights of the accused versus the diplomatic commitment to comity. Or, as La Forest observed, concerning the legislation prior to 1999:

> This approach, which survived scrutiny under the *Canadian Charter of Rights and Freedoms*, and particularly under section 7,[49] represented a careful balance between

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47 La Forest, *supra* note 27 at 98.

48 *Ibid* at 98-99

49 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. (section 7 affirms that: "Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). Cases cited by La Forest supporting this observation include: *Canada v Schmidt*, [1987] 1 SCR 500; *Re Federal Republic of Germany and Rauca*, 1983 CanLII 1774 (ON CA), 41 OR (2d) 225; *United States of America v Cotroni*, [1989] 1 SCR 1469 [*Cotroni*].

> the fugitive's right to a hearing in accordance with fundamental justice and the need of the state to cooperate in international criminal matters.[50]

Arguably, some changes involved in the 1999 legislation shifted this delicate balance in a way favouring the interests of requesting states over the rights of the person sought. At first glance however, this might not have been apparent to those less familiar with the intricacies of extradition law in Canada. But, as will be described below, the 1999 legislation embodied profound changes in the content of extradition law in Canada. In the eyes of critics these changes involved a huge shift away from principles of fundamental justice. The adverse impact of these changes on persons sought for extradition from Canada would clearly be brought to light in the case of Hassan Diab.

Some of the reasons that the extent of changes involved in the 1999 legislation might not have been readily apparent to those less familiar with extradition law is because of the laudatory discourses adopted by officials in their presentations. One aspect of this was the repeated emphasis on how 'antiquated' legislation and processes were being replaced with 'modern' ones. There was also general agreement that the new legislation would greatly facilitate Canada's obligations to international bodies concerned with criminal law including, as previously noted, tribunals concerning atrocities in Rwanda, and the former Yugoslavia, as well as the impending International Criminal Court. Further, and as noted earlier, another dominant theme was to preclude Canada from becoming a 'safe haven' for criminals, and especially those involved in war crimes.[51] Taken at face value each of these reasons for amending the legislation indeed appeared commendable.

Another reason that a profound shift in Canada's extradition legislation might not have been easily obvious is because officials emphasized positive aspects of the continuity between the new and previous legislation. In both the existing and upcoming proceedings there were executive and judicial aspects. Moreover, as Ms. Bakopanos elaborated, under the new legislation:

> [T]he legal standard for extradition would be retained. That is, a Canadian judge will still have to be satisfied that there is sufficient evidence before her or him of the conduct underlying the request for extradition which, if it occurred in Canada,

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50 La Forest, *supra* note 27 at 99.

51 Bill C-40 debate, *supra* note 39 at 1610.

> would justify a trial for a criminal offence. Lawyers like to refer to this as the *prima facie* test.[52]

However, when examined more closely, it can be seen that the new legislation involved a seismic shift in what could be considered as evidence. Such was the extent of this shift that legal scholar Anne La Forest would question why the judicial role had been maintained at all under the new legislation when it allowed judges such a minimal ability to actually do anything.[53] The slackening of the rules around admissible evidence in extradition proceedings would likewise later lead activist critics such as Matthew Behrens to bemoan the lack of rights afforded to individuals such as Hassan Diab in facing extradition proceedings.[54]

IV. General Expressions Of Concern About The Lowering Of Evidentiary Standards In The *Extradition Act*, 1999

> To a certain extent within the criminal defence bar, the prospects of winning at an extradition hearing or in submissions to the minister are largely laughable…Amongst the criminal bar, the chance of winning extradition cases is largely considered a joke.[55]
>
> - Paul Slansky, 17 March 1999

> The notion of surrendering to a foreign state using evidence that is not admissible in a Canadian court is very troubling. The existing process has been accepted by the Supreme Court of Canada as being consistent with principles of fundamental justice.[56]
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> - Anne Warner La Forest, 17 March 1999

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52 *Ibid* at 1615.

53 La Forest, *supra* note 27 at 172.

54 Behrens, *supra* note 28; see also Matthew Behrens, "No evidence? No Problem. What Hassan Diab's extradition and imprisonment in France tells us about Canada's casual relationship with the rule of law", *Canadian Centre for Policy Alternatives* (1 March 2017), online: <www.policyalternatives.ca/publications/monitor/no-evidence-no-problem> [perma.cc/6X5V-PBHJ].

55 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 62 (17 March 1999), "Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act* and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence" (Witness Testimony: Criminal Lawyers' Association of Ontario).

56 *Ibid* (Witness Testimony: Anne W. La Forest, Dean of the Faculty of Law, University of New Brunswick).

Prior to the passage of the *Extradition Act* 1999 officials from the Department of Justice made presentations to members of the House of Commons and its Standing Committee on Justice and Human Rights, as well as to the Senate Standing Committee on Legal and Constitutional Affairs. During these presentations the impending law was praised for significantly updating the extradition legislation, for facilitating Canada in fulfilling its international law and comity obligations, and for preventing Canada from becoming a safe haven for fugitives from international justice. As summed up by Jacques Lemire,[57] senior counsel with the Department of Justice, while making a presentation to the Standing Senate Committee, the legislation "intends to bring Canada into the 21st century by remedying and eliminating cumbersome deficiencies in the current extradition regime."

Mr. Lemire highlighted the difficulties for many states, especially those with civil law systems, in meeting the requirements of Canadian extradition law, and specifically with respect to the provision of sworn affidavits devoid of hearsay. He reiterated that the impending legislation contained a new process for meeting the *prima facie* requirement. In short, what would now be considered adequate in presenting the alleged case against the person sought was a "record of the case."

As had earlier been explained by Parliamentary Secretary Eleni Bakopanos, in speaking to the House of Commons on October 8, 1998, while the legal standard of a *prima facie* case would be continued, what would now be different was the format in which evidence could be presented:

> What would be modified is the form of evidence that could be presented to the extradition judge. This approach addresses the current difficult evidentiary requirement for first person affidavits devoid of hearsay, which is the main problem encountered by states requesting extradition from Canada.
>
> ...
>
> Under the new legislation the judge would admit into evidence documentation contained in a record of the case. The record would contain evidence gathered according to the rules and procedures followed in the requesting state. It may contain a summary of the evidence available prepared by the appropriate foreign

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57 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 60 (10 March 1999), "Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence" (Mr. Jacques Lemire, Legal Counsel, International Assistance Group, Department of Justice Canada).

> judge or official. The evidence may not be in the form of an affidavit and may be unsworn. The objective is to accept the evidence in the form used by the foreign state, provided it is sufficient according to a Canadian extradition judge to demonstrate criminal conduct under Canadian law and to require a trial in the requesting state.[58]

Ms. Bakopanos went on to contend that this record of the case would provide the person sought with a "clearer picture in our opinion" than previously existed where there were "just affidavits on particular elements."[59]

While discussion of the problems with sworn affidavits devoid of hearsay had primarily focused on the difficulties posed for civil law countries, drafters of the new legislation took the opportunity to provide sweeping jurisdiction with respect to records of the case. To again quote Ms. Eleni Bakopanos:

> Following a careful consideration of other options, we concluded that the record of the case should be available to all foreign states irrespective of their legal system.[60]

In short, while the language of "careful consideration" implied caution on the part of justice officials, in practice the new legislation involved a major relaxing of the standards of evidence that needed to be adhered to by *all* requesting states.

One of the first sources of critique of the new legislation came during the deliberations of the House of Commons Standing Committee on Justice and Human Rights. On November 17, 1998, Michael Lomer and Paul Slansky of the Ontario Criminal Lawyers' Association provided a submission and discussed the planned changes. Among their concerns was that the evidentiary bar in extradition proceedings was being substantially lowered. As expressed by Mr. Lomer: "You've taken the [evidentiary] bar and dropped it on the ground."[61] In his view the proposed legislation could in part be seen as a "wish list" for the government lawyers that had drafted it. In turn, both of the lawyers were concerned that the legislation did even less to ensure accountability of the case against the person sought than the then existing legislation. They also raised the dangers of unsworn evidence,

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58 Bill C-40 debate, *supra* note 39 at 1615 [emphasis added].

59 *Ibid* at 1620.

60 *Ibid* at 1615 [emphasis added].

61 House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 36-1, No 98 (17 November 1998) at 1100 (Mr. Michael Lomer).

and the possibility that this could put the accountability, reliability and responsibility of evidence in jeopardy.

Within this context, Michael Lomer highlighted the possibility that a person sought might be vulnerable to an allegation from an "unnamed person." In summing up his concerns he stated: "You need to have evidence as opposed to rumour…what you have presently is a virtual guarantee of non-reliability."[62]

In retrospect Mr. Lomer's concerns could be seen as prophetic in relation to the case of Hassan Diab. Much of the evidence against Diab was derived from 'intelligence' sources that were not fully known, not only to the defence, but also to the investigating authorities in France themselves. Moreover, there was no guarantee that at least some of the 'evidence' had not been acquired through torture. In connection with this Professor Kent Roach of the University of Toronto's Faculty of Law, and an expert on anti-terrorism law and national security, was called upon as an expert by Hassan Diab and the defence. Professor Roach testified on November 24, 2010.

As reported by Andrew Seymour of the *Ottawa Citizen*[63] Professor Roach testified about the dangers of "unsourced and uncircumstanced" intelligence particularly where it could have been derived from torture. He further raised concerns about the French authorities "cherry picking" pieces of intelligence that supported their case while ignoring others that did not support it. Thus, the worries expressed by Michael Lomer in face of the impending legislation in 1998 found expression in the case of Hassan Diab that would commence in Canada about a decade later.

On March 17, 1999, lawyer Paul Slansky reiterated these points to the Senate Standing Committee on Legal and Constitutional Affairs. He strongly questioned whether there was any need for the new legislation. It was the view of the Criminal Lawyers' Association of Ontario that the existing legislation was "working fine" and had withstood a variety of constitutional challenges. Moreover, he highlighted that requests for extradition had a very high success rate to the point that extradition laws as then applied could be considered as "practically a rubber stamp – not fully

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62 *Ibid* at 1110.

63 Andrew Seymour, "Terrorism evidence against former Ottawa professor 'unreliable,' court hears", *Ottawa Citizen* (25 November 2010), online (pdf): <www.justiceforhassandiab.org/wp-content/uploads/2010/12/ottawa_citizen_20101124b.pdf> [perma.cc/C8FS-XLMS].

a rubber stamp, but close to it."[64] Indeed Mr. Slansky identified extradition law as being somewhat of a laughing matter among the criminal defence bar, because the prospects of successfully resisting an extradition proceeding were so slim.

When questioned about an apparent discrepancy in his portrayal of existing law as almost a "rubber stamp" yet also being "constitutionally valid" Mr. Slansky repeated that current law was "[p]artially a rubber stamp, yes." With respect to constitutional validity he elaborated on his perspective:

> That is true. It has been upheld as constitutionally valid. I do not necessarily agree with the Supreme Court of Canada's decision that these minimal protections that amount largely to a rubber stamp provide any real protection, however, the Supreme Court of Canada, nevertheless, has said they do. Personally, and as a lawyer, I would like there to be better protection of those rights. However, the Supreme Court has said that you do not need better protection of the rights. Now what little rights there are, are being eliminated, therefore, it is becoming a real rubber stamp.[65]

In arguing that many aspects of the new legislation were unnecessary Paul Slansky observed that:

> There is no evidence of any need in existence and none has been presented in any fashion during the course of these proceedings except bold assertions that there is a need.

In his view there was no evidence that civil law jurisdictions could not meet existing evidentiary requirements of Canadian law, and that, should there be any difficulty, officials from the Department of Justice were available to provide assistance. In Mr. Slanksy's opinion the "purported justification…relating to civil law jurisdictions is a creation…of the Department of Justice…to make their job easier."[66]

Overall Mr. Slansky strongly articulated that the provisions of the new legislation represented a severe blow to the rights of the person sought. He considered that any claims concerning their protection were "purely illusory." He contended that such rights that had existed were being diluted.

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64 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 62 (17 March 1999), "Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence" (Mr. Paul Slansky).

65 *Ibid* (The apparent discrepancy between some of his statements was noted by the Chair of the Committee, the Hon. Lorna Milne).

66 *Ibid*.

In his observation, where the threshold of evidence was concerned, all "indicia of reliability have been removed by this bill."[67]

Another witness before the Senate Committee on the same day, immediately following Paul Slansky's testimony was Anne W. La Forest, then Dean at the Faculty of Law at the University of New Brunswick. On several occasions Dean La Forest indicated her agreement with some of the points made by Mr. Slansky.[68] In particular this concerned his observations and concerns about the reducing of requirements concerning evidence. La Forest pointed out that the existing process had been "accepted by the Supreme Court of Canada as being consistent with principles of fundamental justice." By contrast, she was concerned about the proposed changes and warned that they could result in *Charter* challenges. In her observation one could reasonably argue that once evidence not usually admissible in Canadian legal proceedings was to be admitted under extradition law this involved a change to what had been "recognized and accepted by the Supreme Court of Canada."[69] In expressing these concerns La Forest summed up her position by stating: "An expedited process that is inconsistent with our own *Charter* provisions is problematic for me."[70]

Despite these strong expressions of reservations when Justice Minister the Honourable Anne McLellan appeared before the Senate Standing Committee the next day,[71] she extolled the virtues of the new act. The critics' concerns did not seem to be seen as meriting much attention by her

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67 *Ibid.*

68 *Ibid.* However, while La Forest agreed with many of Mr. Slansky's concerns about lowering the evidentiary bar, her own wording was less strident. In particular, La Forest stated that she did not fully agree with the "rubber stamp" terminology. The reader should also note that La Forest's testimony was far broader than the focus taken here as it also included discussion about extraditions to the USA and related concerns about exposing some of those extradited there to the possibility of the death penalty. Additionally discussed (and this also applies to Mr. Slansky's testimony) was the possible need for a two-tier extradition process, with one set of rules for extraditions between individual states, and another set applying to extraditions to war crimes tribunals and other bodies concerned with international criminal law. In this article however, the focus is primarily on discussions concerning evidence in extradition proceedings involving individual states as this is the issue that would most sharply be thrown into relief in the case of Hassan Diab.

69 *Ibid.*

70 *Ibid.*

71 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 63 (18 March 1999), at 11:35 (Minister of Justice and Attorney General of Canada, Hon. Anne McLellan).

and her officials. Rather, the Minister warned that, under the current system, "there is a real danger…that Canada will become the country of choice for criminals seeking to shield themselves from arrest and prosecution."[72]

Minister McLellan further strengthened her point by observing that "American authorities have noted that, in the case of telemarketing fraud and other forms of complex fraud…our cumbersome extradition law is being used as a shield by those who choose to do that kind of business in Canada." She continued with a provocative observation and question:

> [W]e are seen as a place from which to organize and carry out these kinds of crimes because the extradition process is so cumbersome that foreign states do not even bother to seek extradition. Is that the reputation Canada wants in the new global world?[73]

She then proceeded to provide a very strong narrative about the difficulties being experienced by other countries in securing individuals' extradition from Canada. In her words:

> My officials can provide you with examples of cases in which we have been unable to extradite because of the complexity of these rules…We have heard again and again from those many countries in the world with different legal traditions, where the concept of affidavits and hearsay are unknown yet with legal systems we respect, how enormously difficult and in some instances impossible this task can be.[74]

Unfortunately, the Minister did not identify any specific cases or countries where her observations applied. Instead she continued with her narrative about the allegedly drastic state of affairs:

> Practice demonstrates the problem. Generally, fewer than 10 per cent of requests from countries other than the United States result in surrender following extradition proceedings. That does not even take into account the states that are discouraged by the onerous hurdles imposed by our current extradition law and do not even initiate an extradition request.[75]

Again, and despite the ardent delivery of her point, no examples of the purportedly problematic practice of the extradition law were given by Minister McLellan on this occasion.[76] Given her contention that over 90

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72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.* However in previously speaking with the House of Commons Standing Committee on Justice and Human Rights, on 4 November 1998, the Justice Minister did mention in passing that Japan was one country which "probably" encountered difficulties. In

per cent of requests from countries other than the United States did not succeed it is unfortunate that further information was not provided. Further this claim appeared to have been taken at face value by committee members and no questions were raised about it.

Minister McLellan went on to bolster her point by criticizing the perspective of the Criminal Lawyers' Association of Ontario, and alleging that its members were uninformed. She stated that:

> While the Criminal Lawyers' Association may be of the view that the current system is functioning effectively, their assessment is based solely on those cases that actually come before the courts and not on those that never reach the public domain because a state cannot or, by choice, will not meet Canada's evidentiary requirements.[77]

In fact, Paul Slansky had himself previously worked at the Department of Justice and been involved in the preparation of extradition cases. As of 17 November, 1998, he had testified to the House of Commons Standing Committee on Justice and Human Rights that:

> When I was counsel at the Department of Justice... I was involved in that process and did provide assistance to foreign states in preparing extradition materials. I think Justice officials, in proposing this legislation, have effectively set up a straw man or a complaint that this is not working when in fact it is.[78]

Overall the presentation of the new legislation by the Parliamentary Secretary, the Minister and Department of Justice officials made a compelling case in its favour. The increasing complexity of international, and indeed global crime, the need to update 'antiquated' laws, and the desire to be better able to cooperate with recent and emergent international criminal justice bodies were all strong rationales in its support. Further the alleged limits of pre-existing legislation and its purported barriers to

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presenting to the Committee on the previous day, Justice official Don Piragoff also referenced difficulties with Japan not permitting affidavits being sworn in its jurisdiction concerning the Narita airport bombing in 1985. He recounted that, in that case, witnesses in Japan were brought to Hong Kong where the affidavits were prepared for use in the Canadian case. On November 3, Mr. Piragoff also mentioned that in the case of Charles Chitat Ng, the Department had sent one of their own lawyers to California to assist with the preparation of affidavits. See *Reference Re Ng Extradition* (Can.), [1991] 2 SCR 858; *House of Commons Standing Committee on Justice and Human Rights*, 36-1, Meetings 95 (3 November 1998) at 0920 (Mr. Don Piragoff); *House of Commons Standing Committee on Justice and Human Rights*, 36-1, Meeting 96 (4 November 1998) at 1700 (Ms. Anne McLellan).

77 *Ibid.*

78 Michael Lomer, *supra* note 61 at 1100.

successful extraditions could be seen as detrimental to Canada's diplomatic commitments to comity. Minister McLellan and her colleagues also took pains to point to problems being experienced not just by civil law jurisdictions, but also by common law ones such at the United States. Here, once again the spectre of Canada as a potential haven for transnational criminals was emphasized.

In the initial presentation of the bill to the Senate on December 8, 1998, the Honourable Joan Fraser, as its sponsor, had been similarly persuasive and enthusiastic. She touched on the major themes that would be elaborated on by justice officials. In addition, she emphasized benefits that the new law embodied for persons sought. In the words of Senator Fraser:

> The bill strengthens the guarantees accorded fugitives...The person sought for extradition will have a better view of the case, as they will see a summary of evidence as opposed to just affidavits on particular elements...Bill C-40 is well balanced, because it establishes procedural guarantees and human rights for the fugitive, while making the extradition process more accessible to countries with legal systems and evidence rules that are different from ours....Under no circumstance shall the minister make a surrender order if she or he is satisfied that the surrender would be unjust or oppressive...The safeguards referred to in the legislation are, of course, in addition to the protection provided by the *Canadian Charter of Rights and Freedoms*.[79]

With the presentations of the new legislation being overwhelmingly laudatory, and with such discussions that did take place in both Houses of Parliament tending to focus on issues concerning war criminals, and on matters concerning the possibility of extradited individuals facing the death penalty, the significance of changes being introduced to lower the threshold of evidence were largely overlooked. Meanwhile, such concerns that were raised about the evidentiary threshold being proposed, were, for the most part, given short shrift.

Extradition scholar and practitioner Gary Botting, in his 2004 doctoral thesis – *Executive and Judicial Discretion in Extradition between Canada and the United States* – made important observations about the legislative process

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[79] *Senate Debates*, 36-1, Vol 137, Issue 102 (8 December 1998) at 1530 (Hon. Joan Fraser, whose journalism background included three years (1993-1996) as Editor-in-Chief for the *Montreal Gazette*, joined the Senate on September 17, 1998. She commenced with the Standing Committee on Legal and Constitutional Affairs on October 12. Her speech, as sponsor of Bill C-40, was her maiden speech).

underlying the 1999 *Extradition Act*.[80] He notes that the Act was passed by the House of Commons "without much fanfare." Meanwhile it had been before the Senate Committee on Legal and Constitutional Affairs that the impending legislation had been subject to "intensive hearings." Most significantly, Botting observes what was omitted in the official summary of Bill C-40 as passed on December 1, 1998 that would subsequently be included in Senate considerations:

> What was not said in the official summary was that the considerations for the extradition judge were much reduced, and that the issues for the Minister of Justice to consider were much expanded by the legislation. With the passage of the *Extradition Act*, executive discretion in extradition matters obtained preeminence over judicial discretion even in areas formerly (and traditionally) the domain of the extradition judge, such as receiving evidence of an offence of a political nature, or of situations faced by the accused which breached human rights.[81]

In the Senate Committee's concluding session about Bill C-40,[82] Senator Fraser made a motion to dispense with clause-by-clause consideration of the legislation. Some concerns expressed by two legal members, Senators Grafstein and Joyal, were overridden by the Committee Chair, Senator Lorna Milne. The concerned Senators expressed their dissatisfaction by abstaining from the final vote on the legislation – a matter which will be further discussed after first documenting the expression of concerns about the lowered threshold of evidence in extradition proceedings that emerged more clearly in the years after the implementation of the *Extradition Act*. Bill C-40 received Royal Assent on 17 June 1999. The *Extradition Act* came into force on 1 September 1999.

A. Expressions of Concern about the *Extradition Act*, 1999, Subsequent to its Implementation

> The reality is that Canada has gone further than virtually any other country in facilitating extradition.[83]
>
> - Anne Warner La Forest, 2002

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80 Gary Botting, *Executive and Judicial Discretion in Extradition between Canada and the United States* (Ph.D. Thesis, Faculty of Law, University of British Columbia, 2004) [unpublished] at 197 [Botting, "Thesis"].

81 *Ibid* at 198.

82 *Senate Standing Committee on Legal and Constitutional Affairs*, 36-1, Issue 64 (24 March 1999).

83 La Forest, *supra* note 27 at 140.

> The year 2002 also saw the beginning of shots across the bow of Justice Canada by commentators who were concerned that much of the 'protective' aspect of extradition law and practice had been stripped away by the new legislation, in favour of Canada being seen as a 'leader' in the fight against international and transnational crime.[84]
>
> - Robert J. Currie

In 2002, Anne W. La Forest published an article in the *Queen's Law Journal* aptly titled "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings." Professor La Forest elaborated on her points previously made in the course of Senate Committee discussions preceding the 1999 Act. She meticulously provides an historical overview of the practices underlying the admissibility of evidence prior to the 1999 legislation. She also examines the content of the new legislation and the reasoning behind it.

In the opinion of La Forest, in extradition proceedings "[s]tripped of detail, the question is really one of mediating between the competing values of liberty and comity."[85] Drawing attention to historical similarities between extradition hearings and preliminary inquiries La Forest argues that "[r]ather than being antiquated," the earlier process in extradition hearings "was one more accurately described as creating a practical, workable balance."[86] By contrast, the recent legislation with its 'record of the case' approach would allow for second and even third hand hearsay evidence to be introduced. Here, La Forest's concern centred on issues of reliability. Pointing to the more "onerous"[87] consequences for the person sought in extradition hearings compared to preliminary hearings given that the individual can be surrendered to a foreign jurisdiction (and so beyond the protection of *Charter* provisions), La Forest highlighted the adverse implications for liberty rights of persons sought. This was especially the case given that Canada, unlike civil law states, extradites its own citizens. In La Forest's words:

> [U]nless an exception is shown to be necessary, an extradition hearing to assess whether there is sufficient evidence to establish a prima facie case should not be any less rigorous than the process for assessing whether an individual should be prosecuted in this country except as shown to be necessary. Would anyone claim

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84 Robert J Currie, Book Review of *Canadian Extradition Law Practice* by Gary Botting (2005-2006) 37:1 Ottawa L Rev 163 at 165.

85 La Forest, *supra* note 27 at 172.

86 *Ibid* at 173.

87 *Ibid* at 172.

> that fundamental justice does not mandate any particular evidentiary standards in the context of a preliminary proceeding? How then can that claim be so readily made in the context of extradition, merely because extradition raises considerations of accommodation, reciprocity and comity? These represent important values but their mere invocation should not trump liberty.[88]

As argued by La Forest an individual's liberty should not be removed "without some evidence that is at base reliable."[89] However the provisions of the new legislation were detrimental to this. In her opinion, under the previous legislation, the balance was a "fair" one. While not questioning officials' assertions about the need to facilitate civil law countries and international tribunals, it was her opinion that "there has been an overstatement of the needs of comity and a consequent undervaluing of the liberty interest."[90] Reiterating her earlier observation that "there is little evidence that the earlier approach hindered the extradition process in Canada in any significant way,"[91] La Forest stated:

> I submit that the provisions applicable to admissibility and sufficiency in the new *Extradition Act* are contrary to fundamental justice unless the courts interpret the evidentiary provisions of the new Act so as to re-establish an appropriate balance that allows the extradition judge to protect the liberty of the fugitive by assessing the weight and reliability of the evidence either at the stage of admissibility or in deciding whether there is sufficient evidence to commit the fugitive. Such an approach would accommodate Canada's extradition partners to submit evidence in accordance with their own procedures while ensuring the liberty interest of the fugitive in a manner consistent with Canadian preliminary proceedings.[92]

Another scholar expressing concern about the extradition legislation early in the new millennium was Dianne L. Martin, then an Associate Professor of Law at Osgoode Hall Law School and Director of the Innocence Project at that institution. In her article, "Extradition, the *Charter*, and Due Process: Is Procedural Fairness Enough?"[93] while much of Martin's focus was on the intersection of flaws in the extradition process with those reflected in cases of wrongful conviction in Canada and internationally (especially concerning problems with jail informant evidence) she also repeatedly raised issues about rule of law guarantees and

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88 *Ibid* at 173.

89 *Ibid*.

90 *Ibid* at 174.

91 *Ibid* at 176.

92 *Ibid*.

93 Diane L Martin, "Extradition, the Charter, and Due Process: Is Procedural Fairness Enough?" (2002) 16 SCLR (2d) 161.

sometimes the lack thereof. [94] Describing extradition as "a procedure on the margins of the criminal justice system," she goes on to observe that the extradition process:

> [E]njoys few formally protected due process safeguards, and often concerns cases that challenge any claim to fairness at all. The requesting state needs only to produce, in documentary form, a *prima facie* case. The process relies on the 'good faith of nations' to ensure that the fugitive is not in effect being hijacked with false evidence to face an unfair trial. The fugitive, whose probable guilt is assumed for the purposes of the process, has no right of confrontation, no right to challenge the facts or the witnesses brought against him. These limits render illusory the affirmation by the Supreme Court that extradition proceedings must comply with due process safeguards and will attract constitutional protection, in particular that of section 7.[95]

Martin further observes that only in "extreme circumstances" would the Supreme Court consider whether the extradition process violates rights under the Canadian constitution, as it is assumed that the requesting country will provide a fair trial.[96] Overall, in her view, the extradition process in Canada reflects a condition of "frailty."[97] Martin concludes that the process, and criminal processes more generally, need more attention to substance (notably the reliability of evidence) and to move beyond procedural matters: "Due process must mean more than an appearance of fairness."[98]

Generally in the new millennium with respect to extradition law in Canada there has been what Professor Robert J. Currie of the Faculty of Law, Dalhousie University, in 2006 described as a "lack of serious scholarly inquiry on the issue."[99] A notable exception had been the work of scholar

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94 *Ibid* (Martin focuses in particular on the intersection of issues of due process, extradition and wrongful conviction in the case of Leonard Peltier, extradited from Canada to the USA in 1976 in alleged connection with the murder of two FBI agents the previous year. She also discusses the impact of growing awareness of the possibility of wrongful convictions in the 2001 Canadian Supreme Court decision concerning the extradition of Glen Sebastian Burns and Atiif Ahmad Rafay to the USA where the two had been eighteen years old at the time of the murders and potentially faced the death penalty); see *United States v Burns,* 2001 SCC 7.

95 *Ibid* at 166.

96 *Ibid*.

97 *Ibid* at 179.

98 *Ibid* at 181.

99 Robert J Currie, Book Review of *Extradition Between Canada and the United States* by Gary Botting, 2005, (2006) 19:1 RQDI 349 at 351 [Currie, Book Review of Botting]. Prior to the new millennium scholarly attention was also limited. The major text was

and practitioner Gary Botting. Active in defence proceedings for persons being sought since the early 1990s, in 2005 Dr. Botting published the first edition of his book *Canadian Extradition Law Practice*.[100] Drawing from his previous academic[101] and practical expertise, Botting provides a detailed account of Canadian extradition law both past and present. The book has been described by Currie as a "thorough and useful manual for lawyers practicing in the extradition area."[102] Botting also provides a trenchant critique of the 1999 legislation. Further, while his presentation is thoroughly scholarly and well researched Dr. Botting does not constrain himself to some of the usual tenets of scholarly legal discourse. In short, he does not mince words in pointing to shortcomings of extradition law as viewed from the perspective of a defence lawyer. Nor does he defer to politesse in highlighting some of what might be described as 'doublespeak' in the narratives sometimes reflected in the legislation itself and in the allied discourses of its proponents. As Robert J. Currie describes the book, as much as it is a "standard 'practice manual'," it is additionally "a detailed, section-by-section critique of the *Act* – the tone of which can be described as harsh, if not vitriolic."[103]

As Currie points out, among Botting's key points, and echoing Anne W. La Forest,[104] is that Canada's interest in respecting comity has come to greatly outweigh the emphasis on the rights of the person sought. However,

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Gérard Vincent La Forest's *Extradition to and from Canada* (New Orleans: Hauser Press, 1961). The second edition was published in 1977 by Toronto: Canada Law Book. In 1991 the third edition was authored by La Forest's daughter Anne La Forest – *La Forest's Extradition to and from Canada* (Aurora, Ontario: Canada Law Book). In 2002 Elaine F. Krivel, Thomas Beveridge and John Hayward published *A Practical Guide to Canadian Extradition* (Toronto: Carswell). The first two authors were currently Department of Justice officials, and the third was a former prosecutor with the Department of Justice.

100 Gary Botting, *Canadian Extradition Law Practice* (Markham, Ontario: LexisNexis Canada, 2005). As of 2015, the fifth edition of the book had been published; see also Gary Botting, *Extradition between Canada and the United States* (Ardsley, New York: Transnational Publishers, 2005).

101 Dr. Botting's prior scholarly contributions included his LLM Thesis of 1999: Gary Botting, *Competing Imperatives: Individual Rights and International Obligations in Extradition from Canada to the USA* (LL.M. Thesis, Faculty of Law, University of British Columbia) [unpublished]; for Gary Botting's Ph.D. Thesis of 2004, see generally Botting, "Thesis", *supra* note 80.

102 Currie, *supra* note 84 at 166.

103 *Ibid* at 167.

104 See generally La Forest, *supra* note 27.

Botting expresses his concerns in far stronger language than La Forest, as he describes the Canadian extradition procedure as having become "little short of repressive." In tandem, Currie quotes Botting's contention that:

> Canadian courts from the top down have used the new provisions, in combination with precedents predating the Act, to perpetuate judicial fictions and conceits which constitute dangerous incursions on the liberty interests of anyone caught up in the extradition web.[105]

As of 2007, some of Gary Botting's concerns about the relaxed evidentiary requirements under the 1999 Act appear to have been somewhat allayed pursuant to several important Supreme Court decisions that addressed the matter. In his article "The Supreme Court 'Decodes' the *Extradition Act*: Reading Down the Law in *Ferras* and *Ortega*."[106] Botting reviews the severely constraining impact of the '*Shephard* Test,' the problems with the reduction of the judicial role since 1999, and the potential of then recent decisions for reclaiming some judicial autonomy in considering evidence. Among his concerns was that the legislation as reconstituted under the 1999 Act might open the door for the wrongful conviction of a person sought. In Botting's words:

> The excessive discretionary power of the Minister under the new legislative scheme, combined with new rules of evidence that require judges to commit persons for surrender for extradition wherever the requesting state has formally certified that the evidence summarized in the record of the case is available and sufficient to justify going to trial, may lead to the unjust extradition of persons wrongfully accused of crime in foreign countries. The legislation renders the extradition court's role insignificant: it must rule on the superficial question of whether the commission of a parallel Canadian crime, already identified by specialists in extradition law within the International Assistance Group (IAG) of the Department of Justice, is in fact supported by the summary of evidence.[107]

Looking back historically, Botting identifies the case of the *United States of America v Shephard*[108] as a particular source of "grief" for persons sought and their lawyers "due to its narrowness of vision and its rigid interpretation by extradition judges and courts of appeal."[109] The case involved an

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105 Currie, *supra* note 84 at 167.

106 Gary Botting, "The Supreme Court 'Decodes' the Extradition Act: Reading Down the Law in Ferras and Ortega" (2007) 32:2 Queen's LJ at 446 [Botting, "Supreme Court Decodes"].

107 *Ibid* at 449-450 [emphasis added].

108 *United States of America v Shephard*, [1977] 2 SCR 1067, 30 CCC (2d) 424 [*Shephard*].

109 Botting, "Supreme Court Decodes", *supra* note 106 at 452.

extradition application concerning allegations of "conspiracy to import and distribute narcotics" where "the only substantive evidence was an affidavit by the defendant's co-accused."[110] Further, the affidavit had been provided only after the co-accused had been promised by the United States Attorney's office that charges against him would be dropped in return for testimony.[111]

At the initial hearing at the Quebec Superior Court then Acting Chief Justice Hugessen denied the extradition. The Justice stated: "I do not have before me evidence which would justify the commitment of the defendant for trial if the alleged crime had been committed in Canada."[112] The U.S. application to have this decision set aside was dismissed by the Federal Court of Appeal with Jackett, C.J. stating:

> I agree with the extradition judge that one type of case where an extradition judge should refuse to grant such a warrant is where a trial judge would feel obliged to direct a jury to bring in a verdict of acquittal and I agree, also, that 'where the Crown's evidence is so manifestly unreliable or of so doubtful or tainted a nature as to make it dangerous or unjust to put the accused to his defence on the basis thereof' is such a case.[113]

However, in its turn a majority in the Supreme Court overturned these decisions, and Ritchie J. made what was to become a crucial statement in subsequent extradition proceedings:

> [T]he weighing of evidence…forms no part of the function of…an extradition judge in exercising his powers under *The* Extradition Act.[114]

As Botting documented, his point was affirmed by Anne W. La Forest in her discussion of the case in her 1991 text. As stated by La Forest:

> That case makes it clear that committal must follow if there is any evidence upon which a jury could convict. A judge is not entitled to withdraw a case from the jury merely because the evidence is manifestly unreliable or so doubtful or tainted in nature as to make it dangerous to put to the jury. When presented with such evidence, therefore, the duty of an extradition judge is to commit.[115]

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110 *Ibid.*

111 *Ibid* (citing *Shephard*, *supra* note 108 at 1070).

112 *United States of America v Shephard*, 1974 CarswellQue 261 (1974), 19 CCC (2d) 35 at 40 [*Shephard*, Qc Sup Ct] (cited in Botting, "Supreme Court Decodes", *supra*, note 106 at 452).

113 *United States of America v Shephard*, [1974] 2 FC 210, 20 CCC (2d) 575 at 576 (FCA) [*Shephard*, FCA].

114 *Shephard*, *supra* note 108 at 1088 (cited in Botting, "Supreme Court Decodes", *supra* note 106 at 453.

115 Anne Warner La Forest, *La Forest's Extradition to and from Canada*, 3rd ed (Aurora:

The Supreme Court's decision in *Shephard* has been pivotal in subsequent extradition proceedings and their outcomes. As observed by Anne La Forest in 1991, and again, in 2002,[116] *Charter* challenges to due process matters in extradition proceedings have been "generally unsuccessful." In this context it is important to note that decisions embodied in *Shephard* were by no means clear cut. At the Supreme Court the decision in favour of the accused's extradition was five to four. When the evolution of the case is examined the picture becomes murky. Botting aptly describes the case as a "judicial cliff-hanger."[117] As he elaborates:

> The five to four decision reversed two decisions in the courts below, one of which was a unanimous decision of a three-person panel of the Federal Court of Appeal. In *Shephard*, Marland, de Grandpré, Judson and Pigeon JJ. supported the majority decision written by Ritchie J.; however, the jurisprudential heavyweights of the day, Laskin C.J.C. and Dickson J. (who was soon to become Chief Justice), along with Beetz J., adopted the minority decision written by Spence J. This minority supported the unanimous judgement of the Federal Court of Appeal written by Jackett C.J., with Pratte J. and Hyde D.J. approving. Furthermore, the initial decision of the Quebec Superior Court denying extradition was that of Acting Chief Justice Hugessen. Thus, eight distinguished judges, three of whom were acting in the capacity of chief justices of their respective courts at the time, ruled that Shephard should not be extradited on the evidence before the extradition judge, and only five (albeit the majority of the Supreme Court of Canada) ruled in favour of extradition.[118]

As observed by Botting, the *Shephard* case resulted in "the diminution of the discretionary power of extradition judges."[119] This was reflected in subsequent Supreme Court judgements including the case of *Argentina (Republic) v Mellino,*[120] where Justice La Forest stated:

> [T]he role of the extradition judge is a modest one; absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that

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Canada Law Book, 1991) at 149 (cited in Botting, "Supreme Court Decodes", *supra* note 106 at 453). In a footnote in the article, at 453-454, Botting describes the text as a "classic exposition of extradition in Canada, expanding as it does on the first and second editions of *Extradition to and from Canada* written by Anne La Forest's father, Gerard Vincent La Forest, a justice of the Supreme Court of Canada long regarded as the *doyen* of Canadian extradition law."

116 La Forest, *ibid* at 28; La Forest, *supra* note 27 at 117.

117 Botting, "Supreme Court Decodes", *supra* note 106 at 454.

118 *Ibid* at 454-455.

119 *Ibid* at 455.

120 *Argentina (Republic) v Mellino*, [1987] 1 SCR 536, [1987] 4 WWR 289.

> the evidence establishes a *prima facie* case that the extradition crime has been committed.[121]

In Gary Botting's opinion the extradition process in Canada reached its "true nadir" in the *Wagner* case of 1995 and the decision of the British Columbia Court of Appeal.[122] In this case, observes Botting, the court drew on *Shephard* in "its narrowest possible sense."[123] La Forest's observation pursuant to *Shephard* (i.e. if there is any evidence a jury could use to convict, then a committal must follow) was cited by the court.[124] As Botting recounts, despite the accused (his client) being able to produce a strong alibi, and thereby exculpatory evidence, he was still extradited. Botting's irritation in the case is understandable in light of the revelation that, after his extradition, "Wagner was incarcerated in Washington for three years until he was finally acquitted of all charges."[125]

As Botting's analysis reveals the 1999 *Act* did nothing to alleviate onerous circumstances faced by persons sought. Further he deconstructs the apparently benevolent discourse accompanying, and embodied in, the legislation. Of the *Act* itself he provocatively observes:

> [T]he statute is carefully drafted to appear innocuous, often using multiple qualifiers and double negatives so that it may seem to suggest one thing while actually stating another. For example, a superficial reading of sections 16 to 39, governing the function of extradition judges, would leave the impression that the role and powers of extradition judges have been enhanced compared to what they were under the former *Act*, where in fact their discretionary powers have been significantly reduced. Similarly sections 44, 46 and 47, which govern the powers of the Minister of Justice to refuse extradition might appear to enhance the rights of persons facing extradition by listing protections traditionally accorded to them (such as the political offence exception, the option to prosecute rather than extradite, and protections against double jeopardy). However, these protections are so qualified in the *Act* as to be meaningless in all but the rarest of cases. While the Minister is cast as the guardian of these largely illusory rights and protections,

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121 *Ibid* at para 29 (cited in Botting, "Supreme Court Decodes", *supra* note 106 at 455).

122 *United States of America v Wagner*, 1995 CanLII 1815 (BC CA), 104 CCC (3d) 66 (leave to appeal to the SCC was refused) [*Wagner*]. Gary Botting was himself counsel for the accused in this case.

123 Botting, "Supreme Court Decodes", *supra* note 106 at 456.

124 Wagner, *supra* note 122 at paras 26-27 (citing Anne La Forest, *supra* note 115 at 149-150).

125 Botting, "Supreme Court Decodes", *supra* note 106 at 457 (citing *State v Wagner*, 92 Wn App 1030 (Wash Ct App 1998), (21 September 1998).

> the *Act* expands the discretionary role of the Minister of Justice to initiate, approve and finalize all extraditions at the beginning, middle and end of the process.[126]

According to Botting it was "[o]nly when the *Act* came into effect and was being interpreted and applied in the courts did it become clear that although extradition judges by definition are drawn from the ranks of superior court judges, they no longer had a meaningful judicial function."[127] Here, Botting concurred with Anne W. La Forest's earlier speculation,[128] concerning why the role of the judiciary had actually been retained in the new *Act*, given that they effectively had so little to do. In the context where prior to the 1999 *Act* evidence had to be provided in the form of affidavits that were not subject to cross-examination Botting describes the "solution" of disposing of the need for affidavits in favour of a record of the case to be "draconian."[129]

In the years immediately following the passage of the 1999 *Act*, with respect to the admissibility of evidence, both judges and defence lawyers proceeded with caution, and basic tenets of the legislation remained unchallenged. As Botting records, with officials at the Department of Justice having already examined the contents of each record of the case prior to going to court, extradition judges frequently agreed to extradition requests giving only "a cursory look at the charges."[130] Any effort by the person sought to bring in evidence challenging evidence contained in the record of the case was "typically rebuffed by the judge, on the basis of *Shephard*."[131] As Botting summarizes:

> This combination of factors arising from both the *Act* and the common law led judges to endorse extradition decisions as if they were performing administrative tasks for the Minister. Extradition judges had effectively become an arm of the administration.[132]

Put simply, judges in extradition cases seemed to be paralysed in the early years of the millennium. Although Ministers of Justice had the power to deny extradition in cases where under Section 44 of the Act the Minister is satisfied that "the surrender would be unjust or oppressive having regard

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126 *Ibid* at 458-459.
127 *Ibid* at 461-462.
128 La Forest, *supra* note 27 at 172.
129 Botting, "Supreme Court Decodes", *supra* note 106 at 463.
130 *Ibid* at 469.
131 *Ibid.*
132 *Ibid.*

to all the relevant circumstances," as observed by Botting, Ministers were "rarely" so satisfied.[133] Instead, the emphasis was put on comity and the assumption that the request being made was fair. Overall, in the years immediately following the implementation of the 1999 *Extradition Act* in Botting's observation Ministers seemed to feel "increasingly obliged to honour Canada's international commitments, even where that would undoubtedly have an 'unjust or oppressive' effect."[134]

B. *Ferras* and *Ortega* as a Watershed Concerning Evidence in Extradition Hearings

> Thanks to *Ferras*, extradition judges must henceforth exercise the reasoned discretion expected of them as superior court judges charged with conducting fair, *judicial* extradition hearings in which, for the first time in thirty years, every person facing extradition truly has the opportunity to be 'heard.'[135]
>
> - Gary Botting, 2007

> [T]o deny an extradition's judge's discretion to refuse committal for reasons of insufficient evidence would violate a person's right to a judicial hearing by an independent and impartial magistrate – a right implicit in s. 7 of the *Charter* where liberty is at stake. It would deprive the judge of the power to conduct an independent and impartial judicial review of the facts in relation to the law, destroy the judicial nature of the hearing, and turn the extradition judge into an administrative arm of the executive.[136]
>
> - Chief Justice McLachlin in *Ferras*, 2006

As of 2007 Gary Botting's concerns about the lack human rights of persons sought in extradition cases had been moderated by a new tone of optimism. Fundamental to his shift of perspective were the "new principles"[137] reflected in the *Ferras* and *Ortega*[138] decisions. Through these the role of the extradition judge was upgraded to having a significant part in the actual assessment of evidence. Where comity had taken precedence for decades, and while this would continue, *Ferras* and *Ortega* nevertheless opened the door for the extradition judge to engage in at least a limited

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133 *Ibid*.

134 *Ibid* at 470.

135 *Ibid* at 486 [emphasis in original].

136 *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33 at para 49 [*Ferras*].

137 Botting, "Supreme Court Decodes", *supra* note 106 at 470.

138 *United Mexican States v Ortega*; *United States of America v Fiessel*, 2006 SCC 34 [*Ortega*].

weighing of the evidence. Significantly, in rendering its decision in *Ferras* the Supreme Court cited texts [139] by both Anne W. La Forest[140] and Gary Botting.[141]

In rendering the decision in *Ferras*, Chief Justice Beverley McLachlin offered various rationales.[142] Noting that in *Shephard* the conclusion was that the judge had "no discretion" to refuse to extradite when there was "any evidence, however scant or suspect, supporting each of the elements of the offence alleged," McLachlin was of the opinion that "[t]his narrow approach to judicial discretion should not be applied in extradition matters."[143] In sharp distinction to the decision in *Shephard* the Chief Justice stated there should be "at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law," and that "[b]oth facts and law must be considered for a true adjudication." Correspondingly, it was her opinion that the extradition judge "must judicially consider the facts and the law and be satisfied they justify committal before ordering extradition."[144]

Chief Justice McLachlin repeatedly affirmed that the process in extradition hearings should be in accordance with principles of fundamental justice, including matters concerning the sufficiency of evidence. In her words:

> What fundamental justice does require is that the person sought for extradition be accorded an independent and impartial judicial determination on the facts and the evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition. This basic requirement must always be respected; a person cannot be extradited on demand, suspicion or surmise: *Glucksman*. If the combined provisions of the Act reduce the judicial function to 'rubber stamping' the submission of the foreign state and forwarding it to the Minister for committal, then s. 7 is violated.[145]

In short, it was McLachlin's view that judicial consideration of the evidence should be a core component of the extradition hearing. As she stated, for the person sought to have a "fair" hearing the extradition judge

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139 *Ferras*, *supra* note 136 at para 41.

140 See La Forest, *supra* note 27.

141 Gary Botting, *Extradition Between Canada and the United States* (Ardsley, NY: Transnational Publishers, 2005) at 8.

142 See Botting, *supra* note 106 (for a more detailed and nuanced account and analysis of the decision).

143 *Ferras*, *supra* note 136 at para 47.

144 *Ibid* at para 25.

145 *Ibid* at para 34.

"must be able to evaluate the evidence, including its reliability, to determine whether the evidence establishes a sufficient case to commit." Further, in interpreting section 29(1) of the *Extradition Act*, the Chief Justice noted that the extradition judge is required to make an assessment of "whether admissible evidence *shows the justice or rightness* in committing a person for trial."[146] She continued:

> It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot 'justify committal.' The evidence need not convince an extradition judge that the person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that *could go to trial* in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.[147]

At several points Chief Justice McLachlin elaborates on circumstances where the extradition judge can refuse an extradition request. These include where the evidence is "insufficient," for example "where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial."[148] Extradition could also be refused in cases where 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."[149] Further, and again in marked contrast to *Shephard*, she stated:

> 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 in an extradition hearing concluded that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1). Yet under the current state of the law in *Shephard*, it appears that the judge is denied this possibility.[150]

Chief Justice McLachlin also voiced concern about limits on judges arising from *Shephard* because "the committal becomes the final judicial

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146 *Ibid* at para 46 [emphasis in original].
147 *Ibid* [emphasis in original].
148 *Ibid* at para 50.
149 *Ibid* at para 54.
150 *Ibid* at para 40.

determination that sends the subject out of the country."[151] By definition, once extradited the person sought is beyond the purview and protection of the Canadian *Charter of Rights and Freedoms*. The seriousness of this consideration would later become painfully evident in the case of Hassan Diab. In Canada he was released on bail in the spring of 2009 to the equivalent of house arrest for over five and a half years, and without incident despite onerous conditions. However, when extradited to France in November 2014, he was immediately incarcerated and repeatedly denied bail with, as discussed earlier, one brief exception.[152]

Another important component of *Ferras* concerning evidence was its effort to clarify the ability of the person sought to adduce evidence challenging evidence presented by the requesting state. Section 32(1)(c) of the *Extradition Act* specifies that admissible evidence includes "evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable." As Botting observes, the phrase "if the judge considers it reliable" had previously been a subject of judicial debate.[153]

Noting that "[u]nless challenged, certification establishes reliability,"[154] McLachlin sought to clarify the ability of the person sought to challenge the "sufficiency of the case" including "the reliability of certified evidence." She elaborated:

> 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 of the evidence presented at the hearing.[155]

In short, the *Ferras* decision strongly affirmed the ability of the extradition judge to engage in a limited weighing of the evidence, and the ability of the person sought to challenge the evidence against them, and to adduce evidence on their behalf. As approvingly observed by Botting, this was "precisely the opposite of the view taken by Ritchie J. in *United States v*

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151 *Ibid*.

152 See generally miscellaneous sources, *supra* note 9.

153 Botting, "Supreme Court Decodes", *supra* note 106 at 480.

154 *Ferras*, *supra* note 136 at para 52.

155 *Ibid* at para 53.

Shephard thirty years earlier.[156] As Botting also observes an important component of the *Ferras* decision was to make a distinction between the role of provincial court judges in preliminary inquiries and that of judges in extradition hearings.[157] With regard to the former as of the late 1970s provincial court judges in preliminary inquiries often relied upon *Shephard* to support the contention that their role did not involve weighing evidence but rather was simply "to determine whether there was evidence against the accused on every element of an alleged crime sufficient to put before a jury."[158] By contrast, Chief Justice McLachlin was of the opinion that such a limited role of the judge should not apply in extradition cases, especially in light of the fact that extradition cases, by definition, could result in the person sought losing their constitutional rights if removed from Canadian jurisdiction. Recognizing the limited role for the extradition judge suggested by *Shephard*, she offered a contrary opinion:

> The effect of applying this [*Shephard*] test in extradition proceedings… is to deprive the subject of any review of the reliability or sufficiency of the evidence. Put another way, the limited judicial discretion to keep evidence from a Canadian jury does not have the same negative constitutional implications as the removal of an extradition judge's discretion to decline to commit for extradition. In the latter case, removal of the discretion may deprive the subject of his or her constitutional right to a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty.[159]

In making this observation the Supreme Court differentiated between the role of judges in preliminary inquiries, and those in extradition hearings, and in manner that gave more latitude and discretion to extradition judges. Where in the decades prior to *Ferras* the role of the extradition judge had become akin to a "rubber stamp"[160] the Court now directed that "the majority view in the pre-*Charter* case of *Shephard*…should be modified to conform to the requirements of the *Charter*."[161]

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156 Botting, "Supreme Court Deodes", *supra* note 106 at 482.

157 See generally La Forest, *supra* note 27 (for further discussion of similarities and differences between preliminary inquiries and extradition hearings).

158 Botting, "Supreme Court Decodes", *supra* note 106 at 482-483.

159 *Ferras*, *supra* note 136 at para 47 [emphasis in original].

160 *Ibid*.

161 *Ibid* at para 49.

The *Ferras* decision also commented on observations made in the *Ortega* appeals,[162] where the issue was not the reliability of evidence, but rather where "there is no evidence at all."[163] McLachlin stated:

> A showing that the evidence actually exists and is available for trial is fundamental to extradition. The whole purpose of extradition is to send the person sought to the requesting country for trial. To send the person there to languish in prison without trial is antithetical to the principles upon which extradition and the comity is supports are based.[164]

Buoyed by the decisions in *Ferras* and *Ortega*, Gary Botting described the "new authority" of extradition judges as representing "a radical departure by the Supreme Court from standard Canadian extradition law practice."[165] Both cases involved the Supreme Court considering the first challenges to the constitutionality of provisions of the 1999 *Extradition Act* concerning evidence. While the sections of the *Act* that were challenged were upheld as constitutional the reading down of the law by the Supreme Court, stated Botting, particularly in the case of *Ferras* "will have a major impact on the way extradition hearings are conducted in the future."[166] As stated in *Ferras*, a decision to commit "[m]ost fundamentally…depends on a judicial process conducted by a judge who has the discretion to refuse to commit the subject for extradition on insufficient evidence."[167]

As approvingly commented by Gary Botting, the decisions embodied in *Ferras* established a "new standard for extradition proceedings on a number of fronts." Extradition judges had latitude and discretion in judicially considering the evidence. Within this, as highlighted by Botting, the person sought had an opportunity to challenge the evidence against them and to adduce their own evidence, and so, finally have a true opportunity to have their voice "'heard.'"[168] Certainly, and in stark contrast to the limits implied for judges after *Shephard*[169] thirty years earlier, it seemed to have been clarified that extradition judges had the ability to take action judicially, as opposed to being some kind of rubber stamp for decisions of the executive.

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162 *Ortega*, *supra* note 138.

163 *Ferras*, *supra* note 136 at para 55.

164 *Ibid* [emphasis added].

165 Botting, "Supreme Court Decodes", *supra* note 106 at 484.

166 *Ibid* at 485.

167 *Ferras*, *supra* note 136 at para 55.

168 Botting, "Supreme Court Decodes", *supra* note 106 at 486.

169 See generally *Shephard*, *supra* note 108.

V. POST-*FERRAS:* A REVIVAL OF CAUTIOUS PERSPECTIVES ON EVIDENTIARY THRESHOLDS FOR EXTRADITION

> Canada's *Extradition Act* (S.C. 1999 c. 18) is perhaps the least fair statute ever to be passed into Canadian law.[170]
>
> - Gary Botting, 2011

> The Supreme Court's attempt to reverse the conversion of the extradition judge to a 'rubber stamp' in the *Ferras* case was ultimately unsuccessful, and the Court appears to have doubled down on this in its recent judgements by making it virtually impossible for the individual sought to challenge the reliability of the requesting state's evidence.[171]
>
> - Robert J. Currie, 2019

Gary Botting's enthusiasm about the prospects of the *Ferras* decision opening up a new era in the extradition process, and one where it would be possible to put more emphasis on protecting the human rights of persons sought, would soon be replaced by a distinctly sombre perspective. Around the time of the appearance of Botting's 2007 article,[172] several cases in Ontario – *Thomlison*[173] and *Anderson*[174] – provided cautious interpretations of *Ferras*. Their approach was to focus on the term 'manifestly unreliable' as imposing a strict test, with *Shephard* otherwise applying. While the case of *Graham*[175] that same year involved the British Columbia Court of Appeal extradition judges being able to take a more holistic approach in considering the evidence, overall nothing like the impact of *Ferras* that Botting had envisaged materialized. The continuing restrictive perspective on the part of extradition judges would have a major impact in Hassan Diab's case. While extradition judge Robert Maranger had serious concerns about the case and key handwriting evidence on which it turned[176] he ordered the extradition.

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170 Gary Botting, "Canada's Extradition Law: The Least Fair Act on Earth", *Prism Magazine* (17 June 2011), online (pdf): <justiceforhassandiab.org/wp-content/uploads/2013/10/extrad_botting_prism_magazine_2011617.pdf> [perma.cc/JU8M-YQXV] [Botting, "Least Fair Act"].

171 Robert J Currie, "Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform" (2019) (unpublished report on the colloquium, held on 21 September 2018) [manuscript received from the author] at 2.

172 See Botting, "Supreme Court Decodes", *supra* note 106.

173 *United States of America v Thomlison* (2007), 216 CCC (3d) 97 (ONCA) [*Thomlison*].

174 *United States of America v Anderson* (2007), 218 CCC (3d) 225 (ONCA.) [*Anderson*].

175 *United States of America v Graham* (2007), 222 CCC (3d) 1 (BCCA) [*Graham*].

176 *Diab, supra* note 2 at para 21.

Indeed, it was Maranger's ruling in Diab's case that prompted Botting's scathing description of the 1999 *Extradition Act* as the least fair act in Canada, and even on earth.[177]

In Hassan Diab's case Justice Maranger's favouring of the *Thomlison* and *Anderson* interpretations over those reflected in *Graham* would prove the equivalent of a legal death knell for a potential end to the case. Efforts by Hassan Diab's legal team to highlight discrepancies between *Thomlison* and *Anderson* on one hand, and *Graham* on the other, as well as their ripple effects across the country over the next seven years, was a key component in their leave to appeal to the Supreme Court. Their basic question was:

> Does *United States of America v Ferras* require an extradition judge to refuse committal when, on a review of the sufficiency of the whole of the evidence she concludes that there is not a plausible case upon which a reasonable jury, properly instructed, could safely convict – as held by the British Columbia Court of Appeal – or is her function restricted to determining whether there is any evidence on each essential element of the offence that is not 'manifestly unreliable' – as held by the Ontario Court of Appeal?[178]

With leave to appeal being denied, the question remained unanswered.

VI. Conclusion: The Need To Revisit And Reform Canada's *Extradition Act*

> You hang around here [the Senate] long enough and you get to see an amazing number of bills where the lawyers in the Justice Department have assured us six ways from Sunday that a bill was *Charter*-compliant, and then it gets to the courts and, whoops, it's not.
>
> The first and most, to me, embarrassing example of this that I recall was a bill presented by the Chrétien government on extradition, which Senator Joyal will recall, and I was chagrined by it because I was its sponsor and I believed the lawyers in the Department of Justice. Senator Joyal and then Senator Grafstein explained to me that I was wrong. I thought, "No, no, the Justice people, they know."
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> Senator Joyal and Senator Grafstein were right, and the Justice Department was not.
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> ...

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177 Botting, "Least Fair Act", *supra* note 170.

178 Marlys A Edwardh, Daniel Sheppard & Donald B Bayne, Factum of the Appellant (Diab), submitted to the Supreme Court of Canada (11 August 2014), at para 26(a), online (pdf): <www.justiceforhassandiab.org/wp-content/uploads/2015/06/Diab-SCC-Leave-Application-2014-08-11.pdf> [perma.cc/X85J-98DH].

> I'm not attacking the integrity of the Justice Department, but I am saying there is a demonstrated history here of their, on occasion, being wrong.[179]
>
> - Senator Joan Fraser, 8 June 2016

Returning to discussions of Bill C-40 prior to its implementation in 1999 there are several points that are important to remember. Most of the attention was given to firstly, issues involving war criminals, and secondly, issues concerning the possibility of individuals being extradited to a possibility of facing the death penalty and what Canada's stance on this (including the Minister of Justice's ability to seek assurances to the contrary) should be.

Given these two preoccupations issues of the threshold of evidence in extradition cases more generally tended to be overlooked. Moreover when some witnesses before the Committee (including lawyers from the Ontario Criminal Lawyers' Association, and Dean Anne Warner La Forest) did raise concerns, they did not receive much attention. Further the concerns of the two Ontario lawyers (Paul Slansky and Michael Lomer) were dismissed in a rather disparaging tone by the then Minister of Justice, Anne McLellan.

That said, there were several members of the Senate Committee who expressed reservations about the impending legislation.[180] Again, while their focus was primarily directed at issues concerning war criminals, and extradition in the context of potential death penalty issues, they did also touch on matters concerning the quality and reliability of evidence being proposed.

One Senator that expressed reservations about the bill was Jerry Grafstein. He wanted the Committee to take "another few days" to examine material provided by Amnesty International, and to sit down and discuss with them. He also raised the possibility of further discussion with the Criminal Lawyers' Association. Senator Grafstein recommended that more input be received from extradition law practitioners. He stated:

> In addition, we should hear from some practitioners. There was one outstanding practitioner, Eddie Greenspan, who was unavailable because he was otherwise engaged in court matters, but he has undertaken to appear three weeks today, if in fact that was open to the committee. I would be very interested in hearing what he has to say. I spoke to him on the telephone, and one of his concerns, I believe, is

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179 *Senate Debates*, 42-1, No 150 (8 June 2016) at 2010 (Hon. Joan Fraser).

180 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 64 (24 March 1999).

> substantive. I want the committee to have the opportunity to share those views, as well.[181]

Unfortunately, no information was provided about the substance of Eddie Greenspan's concerns. It is disappointing that the Committee did not make time to receive his input as, in light of his extensive legal experience, including extradition matters, Greenspan's contribution would surely have been invaluable.

In the event Senator Graftsein abstained from voting on the clause by clause and on agreeing that the Bill be reported to the Senate. Senator Serge Joyal also abstained from voting. While his focus was on war criminals he also expressed a preference to have heard from more expert witnesses.

Given the consensus of other members of the Committee that there was nothing sufficiently problematic to prevent the matter from concluding,[182] the Bill's sponsor, Senator Joan Fraser, moved that:[183] "the committee dispense with clause by clause consideration of Bill C-40, the extradition act, and Bill C-40 be reported to the Senate without amendment."

One wonder what improvements to the legislation could have ensued if the concerns raised the by witnesses Slansky, Lomer and La Forest has been given more attention, if Eddie Greenspan had been given an opportunity to testify, and if the issues mentioned by three legal members of the Standing Committee had been taken more seriously.

The objective of this paper has been to provide a retrospective on the legislative emergence of Canada's 1999 *Extradition Act*. Stimulated by related and disconcerting aspects of the lengthy proceedings endured by Dr. Hassan Diab the focus has been on issues of the troublesomely low threshold of evidence embodied in the law.

Another objective has been to provide support for efforts at seeking a meaningful review of the *Act* and the implementation of needed reforms. In this context Hassan Diab, his lead lawyer Donald Bayne, and their

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181 *Ibid*.

182 However, Senator John Bryden, while stating he did not wish to delay the proceedings or abstain from voting, did offer the cautionary observation: "This bill relies on the extradition process, albeit an expedited process. Some of my colleagues and myself are concerned about the evidentiary rules and the issues of jurisdiction. Our concern is whether the summary of the proceedings received, upon which the decision will be based, and the exercise of discretion may not be even too expeditious." Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 64 (24 March 1999) [emphasis added].

183 *Ibid*.

supporters, especially since Diab's release and return to Canada in January 2018, have been calling on the government to convene a public inquiry, and one that would involve a re-consideration of the legislation.[184] While there are debates about whether public inquiries are the most effective means in facilitating legislative and related reforms,[185] there seems to be a broad and growing consensus that reforms of the *Extradition Act*, and associated policies and procedures, are needed. In concluding this paper, a preliminary effort will be made to facilitate identification of some relevant issues.

In recent efforts to constructively contribute to the reform process itself extradition scholar Robert J. Currie, Professor of Law at the Schulich School of Law, Dalhousie University, has emerged as a leader. While Professor Currie had followed Hassan Diab's case from the outset, and had engaged with related issues in the course of his academic activities, it was on July 27, 2017, that he felt compelled to more publicly express his observations on the case and the law. He did this through an op-ed published in the *Ottawa Citizen* entitled "Repatriate Hassan Diab and reform our unbalanced extradition law."[186] Since that time Currie has worked with others knowledgeable about extradition (as practitioners, scholars, and human rights activists) in identifying specific issues and areas for reform as illustrated in the case of Hassan Diab, as well as in extradition cases more generally. Events facilitated by Currie included a colloquium at Dalhousie University in September 2018,[187] and a one-day workshop at the Human Rights Research and Education Centre, University of Ottawa, in February of 2019.

Toward reforming extradition legislation and practices in Canada the overarching issue that should arguably be considered is the need to bring all stages of the process more into conformity with principles of fundamental

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184 See e.g. *supra* notes 22 & 23.

185 For examples see Gerard J Kennedy, "Public Inquiries' Terms of Reference: Lessons from the Past – And for the Future" (2018) 41:1 Man LJ 317; see also Justice John H Gomery, "The Pros and Cons of Commissions of Inquiry" (2006) 51:4 McGill LJ 783.

186 Robert J Currie, "Currie: Repatriate Hassan Diab and reform our unbalanced extradition law", *Ottawa Citizen* (27 July 2017), online: <ottawacitizen.com/opinion/columnists/currie-repatriate-hassan-diab-and-reform-our-unbalanced-extradition-law> [perma.cc/6YGC-VA4X].

187 See Currie, *supra* note 171. Access to Professor Currie's report, as well as attendance at the University of Ottawa workshop in February, 2019, greatly facilitated the author's understanding of the need for extradition law reform in Canada.

justice as reflected in Section 7 of the *Charter of Rights and Freedoms*. [188] In turn this means that attention needs to be given to the balance between the requirements of comity and the need to protect the human rights of persons sought. As matters stand the latter have been displaced in favour of the former. Related to this the presumption embodied in the *Act* that evidence presented in the record of the case (including unsworn allegations and unsourced intelligence) is 'reliable' effectively discards the presumption of the innocence of the accused which is more generally a feature of the Canadian criminal law system. Detrimental consequences for persons sought in extradition cases are further exacerbated by the lack of meaningful disclosure (including exculpatory evidence) available to the defence, by the inability to cross-examine witnesses, and by limits on the accused's ability to present evidence in their defence.

Also, as matters stand the *Extradition Act* is overwhelmingly framed in favour of facilitating the Crown's interests in efficient and expeditious proceedings, and against the individual's interest in a fair process. It is arguably unacceptable that summary and expeditious proceedings are accomplished at the expense of due process, basic fairness, and transparency. More safeguards are needed to facilitate persons sought in fighting extradition cases, especially when the case against them is weak. In particular, the defence's ability to demonstrate evidence as 'manifestly unreliable' has proven to be an almost unattainable goal.

In advancing reform a key area for consideration is that of the role of the judiciary. It should not be reduced to the role of a 'rubber stamp.' The efforts reflected in *Ferras* to counter this tendency need to be reconsidered, and judges should have a more meaningful ability to *judge* if extradition is legally sustainable.

It will not be sufficient to only reform the law. Attention also needs to be paid to the mandate and roles of the International Assistance Group within the Department of Justice. Advocates and critics have remarked on instances of apparent over-zealousness on the part of justice officials. As observed by Currie:

> Years of concern about extradition has gone unheard, and at times been actively combatted, by the federal crown and in particular Justice Canada's International Assistance Group (IAG), which is charged with overseeing all extraditions. All of this came to a head with the case of Dr. Hassan Diab, extradited to France on the basis of dubious evidence....Diab was imprisoned for over three years in solitary

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[188] See the *Charter*, s 7, *supra* note 49.

> confinement in a maximum-security prison – only to be released without having being formally committed for trial when it became clear to the French courts that there was no case.[189]

Arguably the policies and practices of the International Assistance Group need to clarified, monitored, and made accountable. More information, including statistics, should be made available on extradition cases in Canada. Similarly, Ministerial decisions regarding surrender should be publicly reported and accessible.

Finally, at all stages of the process a primary consideration is that the process should not continue unless it is abundantly clear that surrender is being sought for trial purposes, and not merely for the purposes of investigation, as occurred in the case of Hassan Diab. When Diab's legal team sought to bring this up with the Ontario Court of Appeal the court's response was to baldly state:

> The record in this case clearly demonstrates that the appellant, if extradited, will not simply languish in prison.[190]

As Hassan Diab would learn to his great personal and emotional cost, this legal pronouncement was incorrect. It is understandable that as of the summer of 2019 Dr. Hassan Diab and his supporters' efforts to seek a public inquiry, and to influence reform of the Canadian *Extradition Act* were ongoing.

VII. POSTSCRIPT

> I think for Hassan Diab we have to recognize, first of all, that what happened to him should never have happened. This is something that obviously was an extremely difficult situation to get through for himself and his family, and that's why we've asked for an independent, external review to look into exactly how this happened and make sure this never happens again.[191]

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189 Currie, *supra* note 171 at 3. Currie also refers to the recent *Badesha* case, *India v Badesha*, 2018 BCCA 470 at para 77 ("where the British Columbia Court of Appeal characterized the IAG's conduct as 'subterfuge' and stated that it had 'a very serious adverse impact on the integrity of the justice system.'") [emphasis added]; Concerning International Assistance Group zealousness in Hassan Diab's case see *supra* note21.

190 *France v Diab*, 2014 ONCA 374 at para 176.

191 Prime Minister Justin Trudeau (in response to a question submitted by David Cochrane of the CBC), "Reporters focus on Trump, tariffs, pot, immigration & climate at Trudeau Session-end news conference" (20 June 2018) at 00h:04m:50s, online (video): *YouTube* <www.youtube.com/watch?v=gs1nV1f0nR0> [perma.cc/NYZ2-RJ5R].

-Prime Minister Justin Trudeau, 20 June 2018

> Instead of [what the Prime Minister promised] the government retained a career prosecutor to conduct a behind closed doors review with no transparency in the process… with the result that this is a report that excuses all of the conduct of the Department of Justice IAG [International Assistance Group] lawyers who did this case. It defends the lack of disclosure of evidence of innocence. It endorses all of the troublesome aspects of the current extradition law and system in Canada…There's no answers here….[T]his is a recipe for continuing disaster and wrongful extradition.[192]
>
> -Donald Bayne, 26 July 2019

In late July 2019 Hassan Diab's, his lawyer Donald Bayne's, and their supporters' calls for a public inquiry into the case, including a meaningful reform of the 1999 *Extradition Act*, received added momentum. This momentum was prompted by the release of prosecutor and former deputy attorney general of Ontario Murray Segal's report – *Independent Review of the Extradition of Dr. Hassan Diab*.[193] The report had been submitted to the Department of Justice in late May, but was not publicly released until July 26 2019.

As mentioned earlier[194] the announcement of an 'independent external review' by the Minister of Justice had been met with scepticism by Hassan Diab and his lawyer Donald Bayne. Of particular concern was that Segal's 'Terms of Reference'[195] were far too narrow, focusing primarily on whether justice officials had followed legal and departmental procedures during the process, and without a clear mandate to address the need for reform of the extradition law itself, or the desirability of a public inquiry with greater investigative powers. Unfortunately, while expectations were low, the

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192 CBC Politics, "Hassan Diab and lawyer discuss report on his extradition" (26 July 2019) at 00h:05m:51s, 00h:07m:01s, online (video): *CBC News* <www.cbc.ca/news/politics/hassan-diab-extradition-france-1.5226033> [perma.cc/6QHA-6TZ5] [Bayne, "Press Conference"]. Additional speakers at the Press conference were Hassan Diab, and Justin Mohammed, Human Rights Law and Policy Campaigner with Amnesty International, Canada.

193 Murray D Segal, *Independent Review of the Extradition of Dr. Hassan Diab*, (Ottawa: Department of Justice, May 2019), online (pdf): <assets.documentcloud.org/documents/6217872/Segal-Report-Final.pdf> [perma.cc/4PN9-8DKZ]].

194 *Supra* notes 22 & 23.

195 Canada, Department of Justice, "Independent Review of the Extradition of Dr. Hassan Diab: Appendix A – Terms of Reference" (last modified 26 July 2019), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/p6.html> [perma.cc/D4KJ-XQ5N].

content of the Murray Segal's report was even more dismaying for critics than originally anticipated. In his opening statement[196] at the press conference on the day of the report's release Donald Bayne stated: "I regret to say that this is indeed a profoundly disappointing report." He later[197] commented that when he and Hassan Diab first viewed the report the previous day they had been "shocked."

The main source of Hassan Diab's and Donald Bayne's consternation was that the Segal report read more as a mouthpiece for the perspectives of justice officials rather than an objective or neutral inquiry into the process of Hassan Diab's extradition. As expressed in Dr. Diab's opening remarks at the press conference:

To say that the Segal report is a disappointment is a gross understatement. It's a one-sided report. Its purpose is not to provide transparency or accountability, or to prevent future miscarriages of justice. Rather its purpose is to absolve the Department of Justice from any accountability and to shield senior officials at the Department from further scrutiny.

From the outset we asked for an independent and transparent public inquiry into my wrongful extradition. We boycotted the external review because we believed that it would amount to a whitewash exercise. It is profoundly upsetting to see our concerns and fears materializing.[198]

At the core of Donald Bayne's and Hassan Diab's concerns was Murray Segal's acceptance of the Department of Justice International Assistance Group lawyers' omission to disclose fingerprint evidence pointing to Diab's innocence to the original extradition judge Robert Maranger, and to the defence team.[199] As observed by Donald Bayne,[200] the discretion held by Canadian prosecutors to disclose this information could have had a significant impact on the initial extradition decision. In his view if Justice Maranger had been provided with the lack of any evidence whatsoever connecting prints taken from Hassan Diab with those gathered from the suspect by French police, it would have been "relevant" in the Canadian judge's perspective on the handwriting evidence that had tipped the judicial balance in favour of extradition.

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196 Bayne, "Press Conference", *supra* note 192 at 00h:03m:25s.

197 *Ibid* at 00h:21m:20s.

198 *Ibid* at 00h:00m:30s.

199 Cochrane & Laventure, *supra* note 21.

200 Bayne, "Press Conference", *supra* note 192 at 00h:39m:22s – 00h:40m:40s.

In examining Murray Segal's report one area where he provides some useful insights concerns the lack of information available from the Department of Justice with respect to basic questions about extradition processes in Canada. The difficulties in accessing information about many aspects of extradition in Canada have been remarked upon earlier,[201] and some of Murray Segal's comments and questions on related matters are highly pertinent. As he observes:

> Currently, the public has very little access to information about the Minister's surrender decisions in individual cases, like Dr. Diab's, or even more generally. There is a dearth of statistical information about the extradition requests Canada receives. How many requests are made each year? From which countries? In how many of these cases is an authority to proceed issued? What factors does the Minister consider in deciding whether to issue an Authority to Proceed? Of the cases in which an Authority to Proceed is issued, how many pass the judicial phase? In what percentage of cases where the person sought is ordered committed for extradition does the Minister order surrender? What are the most common reasons the Minister refuses to surrender someone for extradition? How frequently does the Minister seek assurances when ordering surrender? What types of assurances are sought?[202]

Mr. Segal continued:

> The absence of any publicly available information about these matters may fuel public ignorance and, potentially, suspicion of the Canadian extradition system. The Department of Justice should consider providing public access to statistics about extradition cases, the policies and procedures that guide decision-making by counsel within the IAG, and summaries of the Minister's decisions.[203]

Overall Murray Segal's report appears to be guided by two principal preoccupations that have already been alluded to. The first of these is to demonstrate support for the work on the Hassan Diab case undertaken by justice officials, while discrediting any views (notably those of Hassan Diab, his lawyer Donald Bayne, and their supporters) to the contrary. His second preoccupation involves emphasizing the need for more education about the extradition process itself. While this theme initially appears benign, a closer look (as will be undertaken later below) reveals that the target of Mr. Segal's aspirations for education are far from in harmony with those of human rights activists and reformers who are concerned about Canada's extradition law and processes.

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201 *Supra* note 7.

202 Segal, *supra* note 193 at 107.

203 *Ibid.*

In Mr. Segal's unwavering approval for the work and conduct of justice officials he emphasizes what he characterizes as their "ethical" approach in Hassan Diab's case. The Department of Justice counsel, he says, "acted in a manner that was ethical and consistent – both with the law and IAG practices and policies." He further states that his "conclusion" in this regard is based on a "firm factual foundation."[204] Related statements by Mr. Segal include that the Assistance Group counsel "advanced the case ethically and with skill and considerable drive,"[205] and that "[o]f course in advancing a case for extradition, counsel for the Attorney General must act ethically and fairly – as they did in Hassan Diab's case."[206]

By contrast, while Mr. Segal recognizes that Hassan Diab's defence counsel were "talented and dedicated,"[207] as well as "knowledgeable,"[208] their concerns about certain aspects of the case are given short shrift by him. As Mr. Segal states: "I have concluded that none of the criticisms lodged against the Department of Justice counsel have any merit."[209] With the defence's central concern focusing on the Canadian prosecutors' omission to disclose fingerprint evidence pointing to the exoneration of Hassan Diab (with numerous samples linked to the alleged bomber failing to provide any match) Mr. Segal takes pains to emphasize that, unlike the requirement that full disclosure be provided in Canadian criminal trials,[210] this obligation does not apply in extradition cases.[211] Dismissing the concerns of the defence Mr. Segal reiterated:

> [N]either the requesting state, nor counsel for the Attorney General acting on the requesting state's behalf, are required to disclose all relevant evidence. They need only disclose that evidence on which they rely in seeking extradition.[212]

However Mr. Segal appears to concede that defence concerns about the matter are worth at least some consideration as his recommendations include that:

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204 *Ibid* at 8.
205 *Ibid* at 14.
206 *Ibid* at 82.
207 *Ibid* at 5.
208 *Ibid* at 13.
209 *Ibid* at 8.
210 *R v Stinchcombe*, [1991] 3 SCR 326.
211 Segal, *supra* note 3 at 28. Cases cited by Mr. Segal in support of this are *United States v Dynar*, [1997] 2 SCR 462 and *United States of America v Kwok*, 2001 SCC 18.
212 *Ibid*.

> Counsel for the Attorney General in advancing a case for extradition should consider sharing evidence – particularly relevant and exculpatory or potentially exculpatory evidence – even when they are not required of obligated to do so.[213]

For his part, defence lawyer Donald Bayne found this to be "a surprising recommendation." This was because, in his view, "[t]hey already have that discretion. It's called ethics. It's called doing the right thing."[214]

With respect to Murray Segal's second preoccupation with the need for more education about extradition in the Canadian context he elaborates by stating:

> Chief among the lessons I learned conducting this review is that the world of extradition is poorly understood and information about how Canada's extradition system works is difficult to access. Significant and sustained efforts should be made to illuminate Canada's extradition process and increase its transparency. I believe these efforts could contribute to greater respect for and confidence in our extradition system.[215]

Mr. Segal correctly observes that there has been a dearth of information about, and understanding of, extradition law and processes in Canada. Segal is further correct in his observation that this also applies in legal communities as "many lawyers in Canada are not familiar with the extradition process."[216] As previously noted Professor Robert J. Currie - a long- standing expert on extradition law in Canada - has also commented on the lack of familiarity both among practicing lawyers and the public,[217] and lawyer Donald Bayne has described related law as one of the "dark corners"[218] of Canada's legal system.

Murray Segal's encouragement of greater transparency as it might contribute to the system being held in higher public regard gives rise to important issues. At a minimum his call for more education acknowledges that, as matters currently stand, at least in relation to Hassan Diab's case, the work of officials at the Department of Justice is perceived as vulnerable to criticism and some remedial action seems to be needed. One of the complicating factors here is that while observers of extradition law and processes in Canada across a spectrum (ranging from unquestioning

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213 *Ibid* at 124.

214 Bayne, "Press Conference", *supra* note 192 at 00h:34m:12s.

215 Segal, *supra* note 193 at 9.

216 *Ibid* at 75.

217 Currie, *supra* note 25.

218 Cobb, "Extradition being attempted", *supra* note 26.

approval[219] to relentless questioning including about the content of the law itself[220]) are united in agreeing that education is needed, a deep schism is evident concerning what the content of it should be.

In seeking to advance understanding of the current legislation and system Murray Segal's commentary reflects an unswerving support for the extradition world as is. While he acknowledges that Hassan Diab's extradition and subsequent imprisonment in France were "troubling,"[221] this does not prompt Segal to engage in any meaningful examination of how the human rights of persons sought could potentially be better protected in the extradition context.

To the contrary an effort to get the message out that matters of innocence or guilt are not a consideration in the current extradition world appears to be at the heart of Murray Segal's mission. In seeking to "dispel misconceptions"[222] about extradition Mr. Segal repeatedly reminds the reader that the process is not a trial. All that is needed is that the requesting country, with the assistance of Canadian prosecutors, establish that a *prima facie* case exists against the person sought. As described by Mr. Segal prosecutors have a more limited role in extradition cases than in domestic criminal trials,[223] and considerations of culpability are extraneous. In highlighting his key point about the irrelevance of innocence or guilt Mr. Segal's remarks include the following:

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219 Prominent here are justice officials. As reported by Murray Segal: "[C]ounsel representing the Attorney General at the extradition hearing and those representing the Minister take the view that the current Canadian extradition system is fair and working well." The only caveat to this identified by Segal is the view of officials that the system "could benefit from improvements to increase efficiency." *Supra* note 193 at 74.

220 As Murray Segal observes Hassan Diab and his supporters had questions not only about International Assistance Group lawyers having possibly "overstepped" their role, but they also "have criticized the current state of the law and argue strenuously that the rights and interests of individuals sought for extradition have been sacrificed at the altar of expediency and comity." Segal, *supra* note 193 at 11 & 76.

221 *Ibid* at 14.

222 *Ibid* at 17.

223 In Murray Segal's words: "[B]efore a trial in Canada, Crowns must consider whether there is a reasonable prospect of conviction. They also have an obligation to evaluate the strength of their case at all stages of the proceedings. These types of considerations are not relevant to counsel for the Attorney General in extradition proceedings." (*supra* note 193 at 82).

> In deciding whether to extradite someone, the guilt or innocence of the person sought is not a concern.[224]
>
> ...
>
> It is not the Minister's role to review the findings of the committal judge, to consider whether there is sufficient evidence for extradition, or determine the guilt or innocence of the person sought for extradition.[225]
>
> ...
>
> At the extradition stage, guilt or innocence is not a relevant issue.[226]
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> ...
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> [T]he core purpose of extradition is not to decide a person's guilt or innocence.[227]
>
> ...
>
> The extradition judge's role is 'not to determine guilt or innocence'. Nor is that the role of the Minister in deciding the issue of surrender. The ultimate guilt or innocence of the fugitive is not the concern of the Canadian executive or judiciary.[228]
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> ...
>
> [T]he Minister does not consider the issue of guilt or innocence in making the surrender decision.[229]

On one occasion when repeating this point Murray Segal refers to the perspective of a person sought who declares their innocence. He states:

> [T]he guilt or innocence of the person sought for extradition is not a live issue at any of the three stages of the extradition proceedings. For an individual facing extradition who wishes to proclaim their innocence, this is a difficult concept to accept.[230]

This statement by Mr. Segal is arguably very difficult to fathom. He seems to be chagrined that a person who is potentially (or even actually) innocent has trouble with the reality that – as Canadian extradition law currently stands – this is simply not a consideration. While the irrelevance of guilt or innocence in Canada's extradition context may be factually correct in the strictly legal context, it is hard to see how this can be justified

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224 *Ibid* at 17-18.

225 *Ibid* at 20.

226 *Ibid* at 28.

227 *Ibid* at 79.

228 *Ibid*, citing *United States of America v* MM, 2015 SCC 62 at para 62; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 844; and *Philippines (Republic) v Pacificador*, (1993), 83 CCC (3d) 210 (Ont CA) at 222 (leave to appeal to SCC refused [1993] SCCA No 415 (SCC)).

229 *Ibid* at 111.

230 *Ibid* at 75 [emphasis added].

from any perspective that values human rights, and indeed ethics, in dealing with suspects.

In his report Murray Segal accurately observes that "[f]or many, Dr. Diab's case is disconcerting…because the law was applied faithfully and nevertheless produced a troubling result."[231] Unfortunately his report does not remedy the situation. According to David Cochrane of the CBC in a phone conversation on the day of the report's release Murray Segal "acknowledged that none of his recommendations would have been likely to prevent Diab's extradition in the first place."[232]

In light of this Hassan Diab's wry comment that the report "came just to justify all the actions of the people at the Department of Justice as if I did not exist"[233] is understandable. For his part Donald Bayne questioned the standard and reliability of evidence considered acceptable in the extradition context, and opined that "the standard is too low. Anything goes in an extradition. And you can't defend yourself."[234] Bayne further lamented "by and large the recommendations are cosmetic, and serve to further streamline the expedition of the system rather than the protection of Canadians."[235]

While Hassan Diab and Donald Bayne had questions and concerns about how the case was handled by justice officials, they both (as did their supporters) remained adamant that the fundamental issue was the underlying legislation. As emphasized by Hassan Diab: "*The Extradition Act* itself is the problem."[236]

It is hoped that this article can contribute to future discussions and resolutions, especially with respect to the unsatisfactorily low threshold of evidence that currently applies in Canadian extradition proceedings.

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231 *Ibid* at 77.

232 David Cochrane, "'Whitewash': Hassan Diab attacks report concluding government acted properly in his extradition case", *CBC News* (26 July 2019), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-extradition-france-1.5226033> [perma.cc/L66Y-85Z2].

233 Bayne, "Press Conference", *supra* note 192 at 00h:27m:42s.

234 *Ibid* at 00h:09m:41s.

235 *Ibid* at 00h:33m:25s. However Mr. Bayne did continue by identifying one "useful" recommendation by Mr. Segal, namely that when expert reports are involved they should be provided in their entirety to the defence, rather than just a summary of conclusions.

236 *Ibid* at 00h:29m:25s.