AP2001/016
AP2002/017

IN THE COURT OF APPEAL
FOR THE
NORTHWEST TERRITORIES

IN THE MATTER OF AN APPEAL FROM THE COMMITTAL ORDER DATED SEPTEMBER 6, 2001;

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA DATED JULY 31, 2002;

B E T W E E N:

WALTER LOTHAR EBKE

(Applicant/Appellant)

- and -

THE FEDERAL REPUBLIC OF GERMANY
and
THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA

(Respondents)

APPLICANT/APPELLANT'S FACTUM

PART I - STATEMENT OF FACTS[1]

A) Introduction

1. The Federal Republic of Germany has requested the extradition of Walter Lothar Ebke (hereinafter "the appellant") in relation to allegations that between 1985 and 1993 he was a member of a terrorist association and, further, that he participated in a bombing and an attempted bombing in Berlin in 1987 and 1991, respectively.

[1] The facts summarized herein pertain to both the appeal of the committal order and the judicial review of the surrender decision of the Minister of Justice. They are drawn from the material that was before the extradition judge at the committal hearing and from the material that was before the Minister of Justice.

2.

3. Extradition proceedings against the appellant commenced with the issuance of a provisional arrest warrant by the Honourable Mr. Justice Vertes on May 18, 2000. The appellant was arrested in Yellowknife that same day. He spent thirty two days in custody before being released on bail with stringent conditions.

Warrant of Apprehension dated May 18, 2000
Appeal Book (Judicial Review), pages 419-21

1.The extradition hearing took place before Vertes J. over a number of days in 2000 and 2001. Vertes J. ruled on several procedural and substantive matters including a challenge to the constitutionality of ss. 32(1)(a), 32(1)(b), 33 and 34 of the *Extradition Act* (S.C. 1999, c.18). He also ruled on whether the test for committal pursuant to s.29(1) of the *Extradition Act* had been met. In reasons for judgment released on February 23, 2001, Vertes J. held that the evidentiary scheme in the new *Extradition Act* was constitutional. In reasons for judgment released on September 6, 2001, Vertes J. ordered the appellant's committal for surrender on all charges listed in the authority to proceed.

Reasons for Judgment released September 6, 2001
Appeal Book, Volume II, pages 651-701
Order of Committal dated September 6, 2001
Appeal Book (Judicial Review), pages 115-17

1.On July 31, 2002, the Minister of Justice ordered the appellant's surrender on all charges for which his extradition was sought.

Letter from the Minister of Justice dated July 31, 2002
Appeal Book (Judicial Review), pages 104-12
Order of Surrender dated July 31, 2002
Appeal Book (Judicial Review), pages 113-14

1.By Notice of Appeal dated September 6, 2001, the appellant appeals against the committal order. By Notice of Application for Judicial Review dated August 30, 2002, the appellant seeks judicial review of the Minister's surrender decision.

Notice of Appeal dated September 6, 2001
Appeal Book, Volume II, pages 478-81
Notice of Application for Judicial Review dated August 30, 2002
Appeal Book (Judicial Review), pages 100-03

B) Background to the Extradition Request

1.According to the record of the case submitted in support of the extradition request, the Federal Republic of Germany seeks the appellant's extradition in respect "investigation proceedings of the Attorney General at the Federal Court of Justice [. . .] because of suspicion of the crime of membership in a terrorist organisation in coincidence with the jointly committed crime of causing an explosion and the attempted causing of an explosion by explosives." Three specific offences are listed in the German arrest warrant that was issued by a judge of the German Federal Court of Justice on March 9, 2000, to wit:

a) being a member of an association whose aim and activities are directed toward committing criminal acts causing public danger pursuant to sections 306 to 308 and section 311 of the German Penal Code;
b) jointly causing an explosion using explosives on the night of February 5/6, 1987 in Berlin, thus endangering third party's property of considerable value;
c) jointly attempting to cause an explosion using explosives, and thus to

endanger third party's property of considerable value on January 15, 1991 in Berlin.

Exhibit 7 - Arrest Warrant
Appeal Book, Volume II, pages 472-73

1.The German investigation into the appellant's possible involvement in these offences can be traced back to March 28, 1995, when a quantity of illicit commercial explosives was stolen from a cellar rented by one Tarek Mousli. When the explosives came to the attention of the Federal Public Prosecutor's Office (*Bundesanwaltschaft*, BAW), an investigation was launched into their possible connection to a series of bombings allegedly carried out by a now disbanded political group known as the "Revolutionary Cells" (*Revolutionäre Zellen*, RZ). During the 1970's through the early 1990's, the Revolutionary Cells had claimed responsibility for numerous attacks on property using explosives and arson, justifying the actions as being in pursuit of the group's political aims.

2.

3.Mousli was one of the main targets of the police investigation that ensued from the discovery of the explosives. He was eventually arrested in May 1999 on charges related to storage of the explosives. After being released, he was rearrested in November 1999 on charges relating to his membership in a terrorist organization (i.e. the Revolutionary Cells). It was alleged that as a member of the group, Mousli had participated in an explosives attack on the building of the Central Social Relief Office of Asylum Seekers (ZSA) on February 6, 1987, and in the shootings of two government officials in 1986 and 1987. In late 1999, Mousli chose to avail himself of the Crown Witness Regulation (CWR), a program under which lighter sentences, financial support and witness protection were granted to people charged with serious crimes if they incriminated others and cooperated in their prosecution. (The program was ended by the German Parliament in December 1999, because of concerns about the integrity and reliability of evidence obtained under the CWR. Mousli offered his cooperation just before the program was to end.) As a result, he obtained a suspended sentence on the charges that were pending against him, significant financial assistance and witness protection.

4.

5.According to Mousli, he and the appellant became friends in the early 1980's. In 1985 they were recruited to join the Berlin cell of the Revolutionary Cells. (Material tendered by the requesting state indicated that the Revolutionary Cells organization was made up of a number of semi-autonomous sub-groups. The appellant had no connection whatsoever to many of the activities of the Revolutionary Cells described in the supporting material, these having been carried out by other cells at times when the appellant is not even alleged to have been a member of the Berlin cell.) Mousli alleges that the appellant aided in the shooting of one Harald Hollenberg on October 28, 1986; that he aided in the shooting of one Dr. Karl Korbmacher on September 1, 1987; that he aided in the bombing of the Central Social Relief

Office for Asylum Seekers in Berlin on the night of February 5/6, 1987; and that he participated in some fashion in the bombing of the "Victory Column" (the *Siegessaule*) on January 15, 1991. (Mousli himself had left the group when this last incident occurred and did not participate in it.) Mousli further alleges that all these activities were carried out under the auspices of the Revolutionary Cells.

6.

7.Prosecution for the Hollenberg and Korbmacher shootings is barred by the expiry of limitation periods. As a result, the requesting state only seeks the appellant's extradition for the purpose of further investigation into the allegations of jointly causing an explosion on the night of February 5/6, 1987; attempting to cause an explosion on January 15, 1991; and being a member of a terrorist organization or association between 1985 and 1993. The latter allegation is further particularized by reference to offences related to arson and the use of explosives. There is no reference to any offence involving acts of violence directed against persons (e.g. the offences committed in the attacks on Hollenberg and Korbmacher).

General Legal Declaration of Michael Bruns dated June 21, 2000
Appeal Book (Judicial Review), pages 186-200

C) The Ongoing Proceedings in Germany

1.Mousli's uncorroborated allegations are also the cornerstone of the trial of five other individuals who he alleges were also members of the Revolutionary Cells and participated in many of the same incidents as the appellant. The trial of Axel Haug, Sabine Eckle, Matthias Borgmann and Harald Glöde. began on March 22, 2001, but was aborted when the prosecution sought to join a fifth accused, Rudolf Schindler. Trial proceedings against all five commenced on May 17, 2001, and are still continuing. Until relatively recently, none of the accused had been granted bail despite repeated requests. On January 18, 2002, Rudolf Schindler and his wife, Sabine Eckle, were granted bail with the prosecutor's consent after Schindler made a detailed admission of guilt to the Court. Schindler's statement refutes and contradicts Mousli's allegations on a number of material points.

2.

3.The German prosecution has been criticized by human rights advocates and international observers. Of particular concern are the apparent political motivation of the proceedings, the circumstances under which Mousli's cooperation was obtained, the prosecutor's failure to make full and timely disclosure, the conduct of the police, the conditions under which the accused were detained pending trial, the repeated denials of bail and the length of time the proceedings are taking.

4.

D) The Appellant's Personal Circumstances

1.The appellant was born in Germany on October 30, 1953. He is a German citizen. The appellant has lived in Canada on a full-time basis since April 1996. He first visited Canada as a tourist in 1984. He visited Canada again in 1993 and 1995. He obtained landed

immigrant status in early 1996. He is married to Agnes Billa. The appellant does not have a criminal record in Canada or in Germany.

2.

3.The appellant resides in the City of Yellowknife where he co-owns and operates Back Bay Boat Bed and Breakfast. He is also the sole proprietor of Lothar's Workmanship Solutions, a business in which he performs general carpentry as well as boat-building and repair. While living and working in Yellowknife, the appellant has earned an excellent reputation as a business person and member of the community. His original application for bail and his later application for bail pending appeal, both opposed by counsel for the requesting state, drew strong community support in the form of affidavits, letters and petitions. The appellant continues to enjoy the support of his community.

4.

5.

PART II - GROUNDS OF APPEAL

1.The appellant raises three main grounds in his appeal against the committal order and his application for judicial review of the surrender decision:

a) The extradition judge erred in concluding that ss. 32(1)(a), 32(1)(b), 33 and 34 of the *Extradition Act* did not contravene s.7 of the *Canadian Charter of Rights and Freedoms*.

b) The extradition judge erred in committing the appellant into custody to await surrender on all the offences listed in the authority to proceed.

c) The Minister of Justice committed reviewable error by ordering the appellant's unconditional surrender on all the offences in respect of which extradition was requested.[1]

[1] The appellant abandons the ground of appeal relating to the extradition judge's denial of an application for a stay of proceedings.

PART III - POINTS OF LAW

A) The Constitutional Challenge

1) Introduction

1.In 1999, a new *Extradition Act* came into force in Canada.[2] The request for the appellant's extradition has proceeded in accordance with the procedures and rules of admissibility set out in the new Act. As a preliminary application, the appellant challenged the constitutionality of certain key evidentiary provisions in the Act. The appellant contended that these provisions were an unjustifiable infringement of the rights guaranteed by s.7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and, as such, should be struck down. Vertes J. upheld the constitutionality of the new provisions in a reasons for judgment released on February 23, 2001. Subsequently, the Court of Appeal for Ontario rejected a similar challenge to the new legislation in *United States of America v. Yang*.

Reasons for Judgment released February 23, 2001
Appeal Book, Volume III, pages 446-76
United States of America v. Yang (2001), 157 C.C.C. (3d) 225 (Ont. C.A.)

2) The Statutory Provisions

1.The new *Extradition Act* effected a number of significant changes in the procedures governing extradition and the rules of evidence applicable at an extradition hearing. It is to the latter that the appellant's constitutional challenge is directed. Briefly, s.32(1) makes admissible in an extradition hearing, in addition to evidence that would otherwise be admissible under Canadian law, the documents in a "record of the case" certified pursuant to s.33 of the Act, documents submitted in conformity with the terms of an extradition agreement and evidence adduced by the person sought for extradition. The latter evidence is admissible provided that it is relevant to the tests for committal set out in s.29(1) of the Act and the extradition judge considers it reliable. All of this evidence is admissible "even if it would not otherwise be admissible under Canadian law." The only exception (which has no application here) is s.32(2), which stipulates that evidence "gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted." Section 33 of the Act outlines the mandatory and optional content of the record of the case. Section 34 makes a document admissible whether or not it is sworn or affirmed. Sections 35, 36 and 37 deal with proof of signatures, translations and identity, respectively. Evidence admissible under the Act is to be considered by the extradition judge in determining whether that evidence satisfies the test for committal set out in s.29(1) of the Act, even if, as noted above, that evidence would not otherwise be admissible under Canadian law.

2.

3.The record of the case is at the heart of the constitutional challenge. Its nature and contents are described in s.33 of the Act as follows:

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[2] Bill C-40 - Royal Assent June 17, 1999.

33. (1) The record of the case must include

(a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and

(b) in the case of a person sought for the imposition of a sentence,

(i) a copy of the document that records the conviction of the person, and

(ii) a document describing the conduct for which the person was convicted.

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(3) A record of the case may not be admitted unless

(a) in the case of a person sought for prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) For the purposes of this section, a record of the case includes any supplement added to it.

1.Evidence tendered on the constitutional challenge indicated that Parliament enacted these new rules of evidence and made other changes to the procedure governing extradition in part in order to ameliorate the difficulties that had arisen from time to time in the past when a requesting state, whose legal system may differ from ours, tried to comply with Canadian domestic evidentiary requirements. Evidence tendered also indicated that this has been a common problem encountered in extradition proceedings in other countries, especially where one state has a common law tradition and the other is based in the civil law. A particular problem was that non-common law countries found it difficult to comply with the requirement of sworn affidavits based on first-hand knowledge of the events capable of

providing proof of a *prima facie* case. There was also evidence that the United States, with whom Canada transacts most of its extradition business and whose legal system is similar to ours in many respects, found the Canadian rules requiring first-hand affidavits cumbersome.
2.
3.The genesis of the new rules of evidence is summarized succinctly by Rosenberg J.A. in *United States of America v. Yang*:

> The scheme in the new *Extradition Act* originates in negotiations between the law ministers of the Commonwealth. In 1986, the Government of Australia proposed the abolition of the *prima facie* test within the Commonwealth scheme for rendition. Canada, in particular, was opposed to this suggestion, which would have abolished any judicial assessment of the sufficiency of the request. Accordingly, in 1989 at a meeting in New Zealand, Canada proposed that the *prima facie* test be retained but that the requesting state could rely upon a record of the case. The record of the case would contain a recital of the evidence. Thus, there would be no requirement for affidavits containing first-hand accounts. Further, the recital of the evidence could be based upon evidence admissible in the requesting state and not necessarily admissible in the requested state. This proposal would bring the Commonwealth more in line with the scheme for extradition as set out in the *European Convention on Extradition* and the United Nations *Model Treaty on Extradition*. The law officers of the Commonwealth adopted Canada's proposal.
>
> *United States of America v. Yang*, *supra*, at 240

1.The appellant challenges the new rules of evidence on the basis that it is contrary to the principles of fundamental justice to treat the certification of the record of the case as a sufficient condition for the admissibility of its contents even if those contents would not otherwise be admissible under Canadian law (s.32(1)). The appellant also contends that it is contrary to the principles of fundamental justice to allow for the admission of documents whether or not they are solemnly affirmed or under oath (s.34).
2.

3) Extradition Law and the *Charter*

1.The committal hearing has a direct impact on the liberty and security interests of the person whose extradition has been requested. If the test under s.29(1) of the Act is met, the extradition judge "shall order the committal of the person into custody to await surrender." The committal order is also a necessary precondition for the matter coming before the Minister of Justice for his or her decision on surrender. If made, the surrender order entails the forced removal of the person sought from Canada, his or her further incarceration in the requesting state, a criminal trial and the threat of punishment if ultimately found guilty of the offence.
2.
3.The Supreme Court of Canada has confirmed repeatedly that the *Charter* applies to extradition proceedings in the sense that the treaty, the extradition hearing in Canada and the exercise of the executive discretion to surrender the person sought all must conform to the requirements of the *Charter*. With respect to the judicial phase of the extradition process, the

majority held in *United States of America v. Dynar*:

> The *Charter* does therefore guarantee the fairness of the committal hearing. The Minister's discretion in deciding to surrender the fugitive may also attract *Charter* scrutiny. In both instances, s.7 of the *Charter*, which provides that an individual has a right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice, will be most frequently invoked. It is obvious that the liberty and security of the person of the fugitive are at stake in an extradition proceeding. The proceedings must therefore be conducted in accordance with the principles of fundamental justice: [references omitted].
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> *United States of America v. Dynar* (1997), 115 C.C.C. (3d) 481 at 522 (S.C.C.)
> *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193 at 212-14 (S.C.C.)

1.The level of protection afforded to a person sought for extradition is shaped by the context and purpose of the extradition hearing. As Arbour J. held in *United States of America v. Cobb*:

> The principles of fundamental justice guaranteed by s.7 vary according to the context of the proceedings in which they are raised: [references omitted]. Where the issues before the courts involve a liberty and security interest, s.7 is engaged and requires that the proceedings be conducted fairly. Accordingly, although the committal hearing is not a trial, it must conform with the principles of procedural fairness that govern all judicial proceedings in this country, particularly those where a liberty or security interest is at stake.
>
> [. . .]
>
> Section 7 permeates the entire extradition process and is engaged, although for different purposes, at both stages of the proceedings. After committal, if a committal order is issued, the Minister must examine the desirability of surrendering the fugitive in light of many considerations, such as Canada's international obligations under the applicable treaty and principles of comity, but also including the need to respect the fugitive's constitutional rights. At the committal stage, the presiding judge must ensure that the committal order, if it is to issue, is the product of judicial fairness.

Similarly, the majority held in *Kindler v. Canada*:

> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, if founded on the concepts of reciprocity, comity and respect for the differences of other jurisdictions.
>
> This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.

In addition to the need to meet Canada's international obligations, the principles of fundamental justice that govern a committal hearing are also shaped by the fact that the

committal hearing does not result in a final determination of guilt or innocence.

> *United States of America v. Cobb* (2001), 152 C.C.C. (3d) 270 at 284-85 (S.C.C.)
> *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 at 51 (S.C.C.)
> *United States of America v. Dynar*, *supra*, at 523-25

1.As a result of the unique context and purpose of the law of extradition, significant limitations on due process rights in the extradition hearing have been upheld. Even under the former regime, the requesting state could rely solely on documentary evidence, the person sought had no right to require *viva voce* evidence or the opportunity to cross-examine foreign witnesses and had limited rights to call evidence on his or her own behalf. Similarly, the right to disclosure of evidence from the requesting state is significantly attenuated compared to the right to disclosure in a domestic criminal proceeding. In such circumstances, other safeguards for the liberty and security interests of the person sought assume a heightened significance. It is submitted that foremost among these safeguards was the traditional role of the extradition judge.

2.

4) The Traditional Role of the Extradition Judge in Protecting the Person Sought

1.The role of the extradition judge has repeatedly been described as a modest one, defined and circumscribed by statute. Yet this role, modest as it is, has also repeatedly been described as being critical to the protection of the liberty interests of the person sought. The role of the extradition judge in assessing the evidence adduced in support of the extradition request and determining whether the person ought to be committed for extradition is the essence of his or her function. As La Forest J. held in *United States of America v. McVey*, the most important feature of the law of extradition to protect the liberty of the person sought "is the requirement that there be *prima facie* evidence that the act charged would constitute a crime in Canada. This specific matter, about which judges are most competent, is the task assigned to a judge by the *Extradition Act*." La Forest J. goes on to observe that this

> critical function for the liberty of the subject is assigned by the *Extradition Act* to an extradition judge under a procedure similar to a preliminary inquiry. This is a matter the judge is more competent to do. To expedite the procedure and minimize expense, however, depositions are to be admitted in evidence in lieu of witnesses at the hearing when properly certified and authenticated (art. 10(2)). For their validity, we thus rely on the fairness and good faith of judicial and political authorities of the requesting state.
>
> *United States of America v. McVey* (1992), 77 C.C.C. (3d) 1 at 15, 17, 20 (S.C.C.)

1.It is submitted that the traditional function of determining the admissibility of and, under the test in *United States of America v. Sheppard*, assessing the value of the evidence tendered in support of an extradition request is so deeply ingrained in Canadian jurisprudence and is so

important for counterbalancing the significant limitations on the rights of the person sought for extradition that it is a requirement of fundamental justice in the extradition context. As has been said repeatedly of the extradition judge under the former Act, he or she plays a central role in the protection of the liberty and security interests of the individual in extradition proceedings. The essence of that function was the reception and assessment of evidence going to the satisfaction of the double criminality requirement. In turn, the evidentiary threshold applicable to that determination is predicated upon the admissibility of evidence in accordance with domestic rules of evidence. It is submitted that any diminution of that function lessens the extradition judge's capacity to protect the liberty and security interests of the person sought for extradition. The rules of evidence under the new Act do so in a way that is contrary to the principles of fundamental justice.

2.

5) The Rules of Evidence and Extradition

1.Like many other treaties, the *Treaty between Canada and the Federal Republic of Germany concerning Extradition* identifies the documents that must be submitted in support of a request for extradition (Article XIV). The treaty also provides that these documents shall be admitted in evidence in extradition proceedings if signed by a competent judge or officer and sealed with the seal of the Federal Minister of Justice of the requesting state (Article XV). These rules govern the form of the evidence. Traditionally, however, the content of the material supporting the extradition request had to be admissible under Canadian rules of evidence. In *McVey*, the Supreme Court observed: "Put simply, s.18(1)(b) [of the former Act] tells us that the extradition judge's duty is to commit a fugitive accused of an extradition crime, if such evidence is produced as would <u>according to the law of Canada</u> justify his or her committal" (emphasis in original). And in *Dynar*, the Court said: "It is true that the fugitive is entitled to be committed only on the basis of evidence that is legally admissible according to the law of the province in which the committal hearing takes place." Accordingly, while material that complied with the Treaty would be received, it would be edited (at least notionally) to comply with the Canadian rules of evidence. So for example a document containing inadmissible hearsay may be admitted but its contents would be edited to excise evidence that would not be admissible under Canadian law.

United States of America v. McVey, supra, at 11
United States of America v. Dynar, supra, at 528
United States of America v. Adam (May 17, 1999) (Ont. C.A.) [unreported]
United States of America v. Giannini (April 8, 1994) (Ont. C.A. in chambers) [unreported]
United States of America v. Masini (September 20, 1995) (Ont. Gen. Div.) [unreported]
La Forest, *La Forest's Extradition to and from Canada* (3rd ed.) at 151-61

1.The standard of proof operable at the judicial phase of extradition proceedings under both the old Act and the new one is that set out in *United States of America v. Sheppard*, namely:

> . . . whether or not there is any evidence on which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction (emphasis added).

Under the old Act, it was the Canadian rules of evidence that determined admissibility. Now admissibility is determined by s.32(1) of the new Act. The central question raised in this challenge to the new legislation is whether it is consistent with the principles of fundamental justice to permit the committal decision to be made on the basis of evidence that may not otherwise be admissible under Canadian law.

> *United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.)
> *Re Skogman and the Queen* (1984), 13 C.C.C. (3d) 161 at 169-71 (S.C.C.)
> La Forest, *La Forest's Extradition to and from Canada* (3rd ed.) at 148-61

1.Under the *Sheppard* approach, the extradition judge is prohibited from assessing the quality of the evidence adduced, or weighing the evidence once it has been found to be admissible. Assessment of the ultimate reliability of the evidence is the sole function of the trier of fact. It is important to maintain the distinction, however, between assessing the ultimate reliability of evidence and determining whether a threshold level of reliability has been met in deciding upon the admissibility of evidence. While a justice presiding over a preliminary inquiry may not engage in the former, the latter is an inherent part of the discharge of his or her function. In holding in *R. v. Hynes* that a preliminary inquiry justice does not have jurisdiction to exclude evidence under s.24(2) of the *Charter*, the majority remarking on the power of preliminary inquiry justice to make other kinds of rulings on the admissibility of evidence, quoted the following passage from *R. v. Seaboyer*:

> The *Criminal Code* restricts the task of the preliminary inquiry judge to determining if there is a sufficient case to warrant prosecution. While evidentiary rulings may be made in the course of discharging this function, they have no effect on the outcome of the trial or the accused's guilt or innocence. To discharge the function of determining if there is sufficient evidence to warrant committal it is sufficient to accept the rules of evidence as they stand; the rights of the accused do not require more at this stage (emphasis added by McLachlin C.J.).

Later McLachlin C.J. observed: "The justice evaluates the admissible evidence to determine whether it is sufficient to justify requiring the accused to stand trial.". And further:

> The preliminary inquiry justice, in assessing the sufficiency of the Crown's case, may rule on the admissibility of evidence. Section 542(1) of the *Code* expressly includes statements made by the accused in the evidence that the Crown may call at a preliminary inquiry. The traditional rules governing the admissibility of evidence apply. Most notably, the preliminary inquiry justice may refuse to admit statements of the accused to persons in authority if they were not made voluntarily.

> *R. v. Hynes* (2001), 159 C.C.C. (3d) 359 at 374-78 (S.C.C.)
> *Monteleone v. The Queen* (1987), 35 C.C.C. (3d) 193 at 197-98 (S.C.C.)

1.Historically, the committal hearing in the extradition context has been equated with the domestic preliminary inquiry. This has been so not only with respect to the procedures followed but also the very test that must be met each proceeding before the matter is permitted to move on to the trial stage (whether in Canada or abroad). As Estey J. observed with respect to the preliminary inquiry in *Re Skogman and The Queen*:

> The purpose of a preliminary inquiry is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process.

Doherty J.A. addressed the analogy between the preliminary inquiry and the committal hearing in *Pacificador v. Philippines (Republic of)*, noting:

> Both serve as screening devices. They are designed to ensure that persons are not placed in jeopardy where their accuser cannot show that there is a case to answer. Both procedures also preserve to the appropriate authority the ultimate adjudication of the allegations. Viewed in this light, s.18(1)(b) [of the former Act] strikes a balance between the need to assist other countries who seek vindication of their laws and the need to protect individuals in Canada from baseless or arbitrary surrender to foreign jurisdictions.

After quoting the discussion in *Schmidt* concerning the role of the extradition hearing in protecting the liberty of the person sought, Doherty J.A. continued:

> This language suggests to me that some judicial assessment of the validity of the allegation must be a prerequisite to extradition. It equally suggest that the assessment presented by s.18(1)(b) is entirely appropriate.
>
> When s.18(1)(b) is viewed in combination with the other features of the extradition process, it can be seen as providing a measure of protection for the fugitive against unwarranted demands for the return of the fugitive to the foreign country. At the same time, the comprehensive scheme of which s.18(1)(b) is a part, provides full recognition of Canada's international obligations and societal interests in having those accused of crimes in foreign jurisdictions returned to those jurisdictions for trial. The evidentiary standard demanded by s.18(1)(b) is appropriate to the task assigned to the judiciary.
>
> *Re Skogman and The Queen, supra*, at 171
> *Pacificador v. Philippines (Republic of)* (1993), 83 C.C.C. (3d) 210 at 223-24 (Ont. C.A.)

1.Until the enactment of the new *Extradition Act*, it was also the case that while extradition judges, like preliminary inquiry justices, could not concern themselves with the ultimate reliability of the evidence, they did apply the traditional rules of evidence. It is submitted that these rules have as part of their principled rationale a concern for reliability. Further, the need for a minimum threshold of reliability to be met before evidence may be admitted is a principle of fundamental justice. It is submitted that Vertes J. and the Court of Appeal for Ontario erred in concluding otherwise.

R. v. B.(K.G.) (1993), 79 C.C.C. (3d) 257 at 285-94 (S.C.C.)

R. v. Starr (2000), 147 C.C.C. (3d) 449 at 525-35 (S.C.C.)
R. v. Oickle (2000), 147 C.C.C. (3d) 321 at 345-55 (S.C.C.)
Reasons for Judgment released February 23, 2001
Appeal Book, Volume III, page 466
United States of America v. Yang, supra, at 244-51

1.While the extradition judge applying the *Sheppard* test is prohibited from considering the reliability of evidence once it has been found to be admissible, the rules of evidence provide an assurance that evidence that is received at the committal hearing meets a minimum threshold of reliability. Given the low standard of proof under the *Sheppard* test and the limited due process rights for persons sought for extradition, if the *Sheppard* test is to provide any protection at all, the evidence must be assessed to be admissible according to the ordinary rules of evidence. Indeed, the *Sheppard* test itself is premised on this. The requirements of the material in support of the extradition request being in the first person, sworn or affirmed, certified, authenticated and subject to other domestic rules of evidence all afforded the extradition judge the assurance that the evidence being received met a minimum threshold of reliability and could, therefore be relied upon. It is submitted that this prerequisite is a principle of fundamental justice in any proceeding in which liberty and security of the person are at stake.

Re United States of America and Smith (1984), 10 C.C.C. (3d) 540 (Ont. C.A.)
Government of the Republic of Italy v. Piperno (1982), 66 C.C.C. (2d) 1 at 11-14 (S.C.C.)
Netherlands (Kingdom) v. Clarkson (2000), 146 C.C.C. (3d) 482 at 489-93 (B.C.C.A.)
Re Wong Shue Teen and the United States of America (1975), 24 C.C.C. (2d) 501 at 504-05 (Fed. C.A.)
La Forest, *La Forest's Extradition to and from Canada* (3rd ed.) at 151-61

6) The New Regime and the Principles of Fundamental Justice

1.As outlined above, the rules of admissibility under the new *Extradition Act* change both the form and the substance of the evidence that may be considered at the extradition hearing. With respect to form, the hearing may be conducted on the basis of what could be little more than a letter from a foreign prosecutor. With respect to content, s.32(1) states expressly that the requesting state may rely on evidence even if it would not otherwise be admissible under Canadian law (as long as it was not gathered in Canada). As Rosenberg J.A. observed in *United States of America v. Yang*:

> it is apparent that various types of evidence that would not be admissible at a Canadian trial are admissible at the extradition hearing. In particular, hearsay is admissible although it would not meet a common law or statutory exception and would not meet the necessity and reliability requirements set out by the Supreme Court in cases such as *R. v. B.(K.G.)* [citations omitted], and *R. v. Smith* [citations omitted]. Thus, as I will describe below, the record of the case in the appellant's case consists entirely of second- or third-hand hearsay that would probably not be admissible in a Canadian trial. The impugned provisions would also permit the admission of character or opinion evidence at the extradition hearing although such

> evidence might not be admissible at a Canadian trial.
>
> In the result, the extradition hearing has moved very far from the typical Canadian trial or preliminary inquiry where the judge, by applying the common law and statutory rules of evidence based on the paradigm of trial by the law jury, performs a gatekeeper function to keep potentially unreliable and prejudicial evidence away from the trier of fact.
>
> *United States of America v. Yang, supra,* at 234-35

1.As Vertes J. observed, the record of the case in the case at bar contains "hearsay, character evidence, unqualified opinion evidence, and other forms of evidence that would not ordinarily be admissible in domestic Canadian proceedings." It is, however, admissible under the new Act. And as admissible evidence, the extradition judge must consider whether it meets the *Sheppard* test even if it could never do so in the context of a domestic preliminary inquiry.

Reasons for Judgment released February 23, 2001
Appeal Book, Volume III, page 452

1.It is submitted that the notion of "evidence" has become so attenuated as to be essentially unrecognizable and the extradition judge's role is reduced to one not far removed from a rubber stamp. The efficacy of the hearing as a screening mechanism and the crucial role of the extradition judge in protecting the liberty of the person sought are essentially lost.[3]

2.

3.It is submitted that the certification requirements do not answer these concerns. Pursuant to s.33(3)(a) of the Act, a judicial or prosecuting authority of the requesting state must certify that the evidence summarized or contained in the record of the case is "available for trial" and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner.

It is to be noted that the certification may be in either form. With respect to the manner in which the evidence was gathered, it is submitted that this cannot be any kind of meaningful assurance of reliability, particularly for requesting states that do not share our legal traditions. As for the sufficiency of the evidence to justify prosecution, it bears repeating that the certification need not be in these terms. That it can be, however, appears to be the point upon which the decision of the Court of Appeal for Ontario in *Yang* turned. "Put simply,"

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[3] It is interesting to note that in introducing Bill C-40 for Second Reading on October 8, 1998, Eleni Bakopanos, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, explained to the House of Commons that with the adoption of the record of the case method of presenting evidence, "the legal test would not change. What would change, however, is the form in which that evidence would be acceptable in a Canadian court" (House of Commons Debates, October 8, 1998, p.9005) [Respondent's Record, Volume II, Tab 1]. This is arguably a more conservative view of the changes effected by the legislation than has been judicially adopted.

Rosenberg J.A. wrote, "if we are prepared to countenance a trial of persons, including our own citizens, in jurisdictions with very different legal systems from our own, it is open to Parliament to design an extradition procedure that, with appropriate safeguards, accommodates those differences."

United States of America v. Yang, supra, at 245

1.The appellant's fundamental contention (which, however, neither Vertes J. nor the Court of Appeal for Ontario accepted) is that the rules of evidence that traditionally applied at the extradition hearing are among the fundamental "safeguards" that cannot constitutionally be removed from the process.

2.

3.When Bill C-40 was introduced for Second Reading, Eleni Bakopanos advised the House of Commons:

> This record of the case would be certified by appropriate authorities in the requesting state and accompanied by certain assurances in relation to issues such as the availability of the evidence, its sufficiency for prosecution purposes or its accuracy.
>
> The notion of a record of the case is consistent with the recent Supreme Court of Canada decision on hearsay in which the supreme court [sic] abandoned the strict formalism of the hearsay rule to adopt a more flexible standard based on necessity and circumstantial guarantee of trustworthiness.
>
> In some respects, therefore, the existent evidentiary requirements for a Canadian extradition hearing are more formalistic and onerous than those for a Canadian trial.

It is respectfully submitted that these comments beg the key question. While the certification process may be a trustworthy indication of what the evidence is, it hardly assures us that the evidence itself is trustworthy.

House of Commons Debates, October 8, 1998, p.9005

Respondent's Record, Volume II, Tab 1

1.The appellant acknowledges that defining the principles of fundamental justice in any given context requires striking the appropriate balance between the interests of the individual and the interests of the state. In the extradition context, this entails a balancing of the individual's interests against, among other considerations, the principle of comity and the need for Canada to be able to fulfil its international obligations. It is submitted that the following considerations are germane to determining whether Parliament has struck the right balance. First, many of the difficulties inherent in the previous regime could be and were alleviated by relaxing the rules governing the form of the evidence. Second, most of Canada's extradition business is transacted with countries (most notably, the United States) that share the same legal traditions, including rules of evidence substantially similar to ours. It was surely unnecessary to abrogate the rules of evidence to facilitate the processing of extradition requests from these countries. Third, the requirement that evidence gathered in Canada must

satisfy Canadian rules of evidence and the requirement that evidence adduced by the person sought must be judged reliable put the person sought at a relative disadvantage compared to the requesting state and suggest that the primary motivation for the changes was administrative expediency. Fourth, Parliament chose to retain one feature of the previous regime — the prima facie case requirement — that had attracted particular complaint and, presumably, will continue to be problematic for some countries.[4] Fifth, even if the traditional rules of admissibility were retained, it need not be the case that all of the requesting state's evidence be admissible according to Canadian rules of evidence. As long as there is some evidence admissible under these rules that meets the *Sheppard* test, committal may be ordered. Finally, the principles of reliability that underlie Canadian rules of evidence are inextricably connected to the truth-seeking function of the criminal trial process. Surely Canada has no obligation to facilitate a prosecution that does not pursue this goal.

2.

7) Section 1 of the *Charter*

1.In the court below, the respondent did not rely on s.1 of the *Charter* and no evidence was led going to its various elements. Rather, it was the respondent's position that no violation of the principles of fundamental justice had been made out. This was also the position of the Department of Justice in *Yang*.

2.

8) Remedy

1.It is submitted that the appropriate remedy is to declare ss. 32(1)(a), 32(1)(b), 33 and 34 of the *Extradition Act* of no force or effect pursuant to s.52 of the *Constitution Act, 1982.*

2.

B) THE ORDER OF COMMITTAL

1) The Legal Framework

1.The Federal Republic of Germany has requested the appellant's extradition pursuant to the terms of the *Treaty between Canada and the Federal Republic of Germany Concerning Extradition* (C.T.S. 1979 No. 18).

2.

3.Article II of the Treaty provides as follows:

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[4] This requirement is contained in the *Treaty between Canada and the Federal Republic of Germany Concerning Extradition* in any event. Article XIV(2)(b) of the *Treaty* requires that an extradition request be accompanied by, *inter alia*, "such evidence as, according to the law of the requested state, would justify the arrest and committal for trial of the person claimed if the offence had been committed in the requested state." The *Treaty* also addresses the forms evidence in support of an extradition request may take (Articles XIV(4) and XV). Reading these provisions together, Vertes J. concluded that "for purposes of the request for extradition, the evidence must conform to Canadian law, whereas for purposes of the extradition hearing the evidence only needs to conform to German law." It is submitted that this confuses questions of the form of the evidence with questions of its content.

(1) Extradition shall be granted only in respect of any act or omission that constitutes an offence set out in the Schedule, provided that such act or omission is a criminal offence punishable under the law of both Contracting Parties.

(2) Extradition shall only be granted in respect of an offence for the purpose of

(a) prosecution, where the offence is punishable under the law of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year;

[. . .]

(3) Subject to paragraph (2) extradition shall also be granted in respect of any attempt to commit, conspiracy to commit or participation in an offence.

[. . .]

(5) The fact that an offence is described differently by the law of the Contracting Parties shall be irrelevant if the act or omission can be subsumed within the substance of any offence set out in the Schedule.

By virtue of Article XXIX, "offence" for the purpose of the treaty means any act or omission referred to in paragraphs (1) or (3) of Article II. The Schedule referred to in paragraph (1) of Article II lists thirty specific offences or types of offences. It also includes "[a]ny other offence for which extradition may be granted under the laws of the Contracting Parties."

1.Article XIV of the Treaty provides, *inter alia*, as follows:

(1) The request for extradition shall be in writing and shall be accompanied by

(a) all available information concerning the description, identity and nationality of the person claimed;

(b) a description of the offence in respect of which extradition is requested including the date and place of its commission unless this information appears in the warrant of arrest or in the sentence; and

(c) the text of all provisions of the law of the requesting state applicable to the offence.

(2) A request for extradition for the purpose of prosecution relating to a person charged with an offence or convicted by reason of contumacy shall, in addition to the documents required by paragraph (1), be accompanied by

(a) a warrant of arrest issued by a judge of the requesting state; and

(b) such evidence as, according to the law of the requested state, would justify the arrest and committal for trial of the person claimed if the offence had been committed in the requested state.

[. . .]

1.The Treaty also incorporates the principle of speciality. Article XXII provides as follows:

> (1) A person who has been extradited under this treaty shall not be prosecuted, punished or detained with a view to carrying out a sentence for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom except where
>
> (a) the state which surrenders him consents; or
>
> (b) having had the opportunity to lawfully leave the state to which he was surrendered, he has not done so within thirty days of his final discharge from custody or, having left, he has returned to that state. A discharge under an order of parole or probation which does not restrict the freedom of movement of the person extradited shall be deemed equivalent to a final dicharges.

Paragraphs (2) and (3) describe the means by which a request for consent is to be made. Article XXII then continues:

> (4) Instead of the offence for which he was extradited, the person extradited may be prosecuted or sentenced for a different offence, provided that it is based on the same facts as were set out in the request for extradition and supporting documents and that it is an offence referred to in Article II.

1.In *United States of America v. McVey*, La Forest J. explained the significance of the principle of specialty (in that case, as set out in Article 12(1) of the *Treaty on Extradition between the Government of Canada and the Government of the United States of America*) as follows:

> In short, [the person surrendered] can only be prosecuted by the requesting state for the offence for which his surrender was made. Anglin J. made this abundantly clear in *Buck v. The King* (1917), 29 C.C.C. 45 at p.55, 38 D.L.R. 548 at pp. 577-8, 55 S.C.R. 133, where, in dealing with the offences for which a person who had been extradited to Canada could be prosecuted, he stated:
>
> > . . . "the offence for which (the accused) was surrendered" means the specific offence with . . . which he was charged before the Extradition Commissioner [in the surrendering state] and in respect of which that official held that a *prima facie* case had been established and ordered his extradition, and not another offence or crime, though of identical legal character and committed about the same time and under similar circumstances.
>
> *United States of America v. McVey, supra*, at 21

1.By virtue of Article XXVIII of the Treaty, except where the treaty otherwise provides, "proceedings with regard to provisional arrest, extradition and transit shall be governed solely

by the law of the requested state." The domestic law of Canada includes not only the *Extradition Act* but also the common law and the *Charter*. Indeed, as noted above, the entire extradition process is subject to the *Charter* in that the treaty, the extradition hearing in Canada and the exercise of executive discretion to surrender the person sought all must conform to the requirements of the *Charter*.

Schmidt v. The Queen (1987), *supra*, at 211-14
United States of America v. Burns (2001), 151 C.C.C. (3d) 97 at 118 (S.C.C.)
United States of America v. Cobb, supra, at 281-82

1.The prerequisites for extradition set out in the Treaty correspond to various provisions in the *Extradition Act*. Section 3 of the Act states:

> 3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on or enforcing a sentence imposed on the person if
>
> (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and
>
> (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,
>
> (i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and
>
> (ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.
>
> (2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.
>
> (3) Subject to a relevant extradition agreement, the extradition of a person who has been sentenced to imprisonment or another deprivation of liberty may only be granted if the portion of the term remaining is at least six months long or a more severe punishment remains to be carried out.

1.The foundation of the committal stage of the extradition process is the authority to proceed issued by the Minister of Justice pursuant to s.15 of the Act. Section 15 provides as follows:

> 15. (1) The Minister may, after receiving a request for extradition and being satisfied that the conditions set out in paragraph 3(1)(a) and subsection (3)(3) are met in

respect of one or more offences mentioned in the request, issue an authority to proceed that authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person under section 29.

[. . .]

(3) The authority to proceed must contain

(a) the name or description of the person whose extradition is sought;

(b) the name of the extradition partner; and

(c) the name of the offence or offences under Canadian law that correspond to the alleged conduct of the person or the conduct in respect of which the person was convicted, as long as one of the offences would be punishable in accordance with paragraph 3(1)(b).

[. . .]

1.The test for committal into custody to await surrender is set out in s.29 of the Act. It provides as follows with respect to a person who is sought for prosecution:

29. (1) A judge shall order the committal of the person into custody to await surrender if

(a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner;

[. . .]

(2) The order of committal must contain

(a) the name of the person;

(b) the offence set out in the authority to proceed for which the committal is ordered;

(c) the place at which the person is to be held in custody; and

(d) the name of the extradition partner.

(3) A judge shall order the person discharged if the judge does not order their committal under subsection (1).

(4) The date of the authority to proceed is the relevant date for the purposes of subsection (1).

[. . .]

1.The Minister's authority to decide surrender is set out in ss. 40-48 of the Act. The principle of specialty is now enacted in s.40(3), which provides:

> (3) The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

1.Finally, as Vertes J. observed in his ruling on the constitutional challenge, under s.3(1) of the *Extradition Act*, "a person may be extradited from Canada in accordance with this Act and a relevant agreement on the request of an extradition partner" (emphasis added by Vertes J.). Vertes J. held that this entails that the terms of the applicable treaty are relevant in addition to the specific legislative provisions. "The important point", Vertes J. held, "is that these proceedings must comply with the provisions of both the Act and the treaty so that if one imposes more restrictive requirements than the other then those are the ones that must be satisfied. If, on the other hand, the requirements are similar, then that may aid to interpret the aims and objectives of the statutory provisions."

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2) The Double Criminality Requirement Generally

1.Several of the treaty and statutory provisions set out above articulate the double criminality requirement. It is submitted that this requirement — that the act or conduct charged in the requesting state and for which extradition is sought be a crime in both the requesting state and in Canada — is a fundamental component of the legal regime governing extradition.

2.

3.The principle is stated explicitly in Article II(1) of the Treaty and s.3(1)(b) of the *Extradition Act*. The clear import of these provisions is that a person may not be extradited from Canada unless it appears that the conduct charged, if it had taken place in Canada, would have amounted to a crime under the laws of this country. The rationale of the principle has been described by I.A. Shearer in *Extradition in International Law* (1971) as follows:

> The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity, which underlies the whole structure of extradition, and in part on the maxim *nulla poena sine lege*. For the double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a state is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. So far as the principle of reciprocity is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make

> demand. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behaviour, and suicide.

In short, as the majority of the Supreme Court of Canada held in *Kindler v. Canada*, "We will not extradite for acts which are not offences in this country." Similarly, La Forest J. held in *United States of America v. Lepine* that the underlying reason for the principle of double criminality is "that no one in Canada shall be surrendered for prosecution outside this country for behaviour that does not amount to a crime in this country." As Cory and Iacobucci JJ. expressed the same point in *United States of America v. Dynar*:

> One of the most important functions of the extradition hearing is the protection of the liberty of the individual. It ensures that an individual will not be surrendered for trial in a foreign jurisdiction unless, as previously mentioned, the Requesting State presents evidence that demonstrates on a *prima facie* basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada.

United States of America v. McVey, supra, at 28
Kindler v. Canada (Minister of Justice), supra, at 51
United States of America v. Lepine (1994), 87 C.C.C. (3d) 385 at 391 (S.C.C.)
United States of America v. Dynar, supra, at 521

1.It is submitted further that, as the Supreme Court held in *United States of America v. Allard and Charette*, "a fugitive may only be extradited if the act of which he is charged was a crime recognized in Canada at the time it was committed." This aspect of the double criminality principle is considered further below.

> *United States of America v. Allard and Charette* (1991), 64 C.C.C. (3d) 159 at 164 (S.C.C.)

1.Under the *Extradition Act*, responsibility for ensuring that the double criminality requirement is met falls upon both the Minister of Justice and the judge before whom the committal hearing is held. Looking only at the committal hearing for the moment, the Supreme Court of Canada has recognized this hearing as crucial for the protection of the liberty of the person sought for extradition. La Forest J. held in *Schmidt v. The Queen*:

> as Laskin J. noted in *Commonwealth of Puerto Rico v. Hernandez* [citations omitted], concern for the liberty of the individual has not been overlooked in these rather special proceedings. That is why provision is made in the treaties and in the *Extradition Act* to ensure that, before the discretion to surrender can be exercised, a judicial hearing must be held for the purpose of determining whether there is such evidence of the crime alleged to have been committed in the foreign country as would, according to the law of Canada, justify his or her committal for trial if it had been committed here. If so, the judge commits the fugitive for surrender, and the Executive may then exercise its discretion to surrender; if not, he or she is discharged

> (s.18 of the Act). The hearing is similar to a preliminary hearing, the presiding judge being ordained by s.13 of the Act to hear the case in the same manner, "as nearly as may be", as at a preliminary hearing for a crime committed in this country.
>
> The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless *prima facie* evidence is produced that he or she has done something there that would constitute a crime mentioned in the treaty if committed here.

In *McVey*, the extradition judge's role in determining whether double criminality is present characterized as a "limited, but critically important" function. Indeed, if the new rules of evidence are constitutional, the extradition judge's responsibility for protecting the liberty of the person sought now rests almost entirely on the determinations of double criminality and the sufficiency of the evidence under s.29(1) of the Act.[5]

Schmidt v. The Queen, *supra*, at 208-09
United States of America v. McVey, *supra* at 526
United States of America v. Dynar, *supra*, at 521

1.Section 29(1) of the new *Extradition Act* directs the extradition judge to consider the conduct of the person sought. This codifies the common law interpretation of s.18(1) of the former Act, the predecessor to s.29(1). As La Forest J. explained in *McVey*, a case concerning an extradition request from the United States under the former Act:

> The trial judge in the United States, of course, deals with the offence under the law of that country. The identity of that offence can be determined by reference to the text of that law supplied with the requisition. The extradition judge in Canada, on the other hand, is concerned with whether the underlying facts of the charge would, *prima facie*, have constituted a crime listed in the treaty if they had occurred in Canada. That is what is meant by saying that double criminality is conduct-based. The courts of both countries deal with the offence under their own law, the law in which they are versed, but each must ascertain whether under that law the facts support the charge.
>
> *United States of America v. McVey*, *supra*, at 21-22

1.Similarly, in *United States of America v. Lepine*, La Forest J. held that what s.18(1)(b) of the former *Extradition Act* mandated the extradition judge to determine is

> whether the evidence produced establishes a *prima facie* case that would justify committal for trial "<u>if the crime had been committed in Canada</u>" (emphasis added [by La Forest J.]). *McVey* has held that the determination of an extradition crime is conduct based. The question to be asked, then, is whether, if the impugned acts or conduct had been committed in Canada, they would constitute a crime here: [references omitted].

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[5] The extradition judge is also a court of competent jurisdiction for the purpose of granting *Charter* remedies related to that court's functions under the *Extradition Act*: see what is now s.25 of the Act and *United States of America v. Kwok*, *infra*, at 242-56. The Supreme Court has also recognized that the extradition judge has the jurisdiction to control the process of his or her court and to preserve the integrity of proceedings therein: see *United States of America v. Cobb*, *supra*, at 285-91

United States of America v. Lepine, supra, at 391

1.Section 29(1)(a) of the *Extradition Act* now makes the authority to proceed main point of reference for the extradition judge's inquiry. The extradition judge must ask: Is there evidence admissible under the Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed? Nevertheless, it is submitted that the conduct charged by the requesting state cannot be ignored. It is submitted that it is only by having reference to the conduct charged in the requesting state that the extradition judge can determine whether the evidence presented in support of the extradition request meets the test for committal while also ensuring that the principle of double criminality affords the requisite protection to the liberty of the person sought.

2.

3.The extradition judge is not concerned with whether the conduct charged in the requesting state is an offence there. This is to be presumed. But he or she must determine whether the act or conduct charged would be an offence in Canada if it had been engaged in in Canada. This is the essence of the double criminality test.

4.

5.Courts have consistently held that the offence charged by the requesting state need not bear the same name as or be described in a manner identical to a comparable Canadian offence. This principle is recognized expressly Article II(5) of the *Treaty between Canada and the Federal Republic of Germany Concerning Extradition* and in s.3(2) of the *Extradition Act*. Variations in how an offence is defined or characterized in law will not defeat extradition provided that the conduct underlying the charge would be an offence in Canada. As La Forest J. observed in *McVey*, "it is the essence of the offence which is important." It is sufficient if the acts constituting the offence in the requesting state would also amount to a crime in Canada if committed here. Thus, for example, extradition may be granted for the offence of engaging in a continuing criminal enterprise even though it has no analogue in Canadian law when the conduct alleged to constitute the offence (e.g. large-scale trafficking in a narcotic) would be a crime under Canadian law if the conduct had taken place here: see *United States of America v. Whitley*.

Re McVey, *supra*, at 39-40
Cotroni v. Attorney-General of Canada, [1976] 1 S.C.R. 219 at 222
United States of America v. Whitley, [1996] 1 S.C.R. 467, aff'g (1994), 94 C.C.C. (3d) 99 (Ont. C.A.)
La Forest, *La Forest's Extradition To and From Canada* (3rd ed.) at 70-71

1.It is submitted further that, as Proulx J.A. held in *United States of America v. Tavormina*, it is necessary "to make a distinction between the facts which generate the conduct charged in

the accusation and the circumstances surrounding the commission of the act charged." Only the former may be considered in determining whether the evidence presented meets the test for committal.

United States of America v. Tavormina (1996), 112 C.C.C. (3d) 563 at 569-70 (Que. C.A.)
United States of America v. Manno (1996), 112 C.C.C. (3d) 544 at 550, 552-60 (Que. C.A.)
Contra: *United States of America v. Drysdale* (2000), 71 C.R.R. (2d) 133 (Ont. S.C.J.)

1.This distinction is illustrated by the facts of *Tavormina*. As Proulx J.A. explained:

> In the case under discussion, the respondent is charged in the United States with participating in two distinct conspiracies, the first concerning the possession of cocaine for the purposes of distribution, and the second concerning *its* importation into the United States. In the context of the extradition proceedings, the requesting state attempted to use the evidence of his participation in the first in order to infer his participation in the second. As I pointed out, paragraphs 25 and 27 of the affidavit of Mauricio Reyes go into detail about the involvement of the respondent in the conspiracy to possess for the purposes of trafficking. His presence at the Days Inn Motel in Florida, his meeting with Engel and Reyes, the instructions from Manno that he had to wait for the arrival of the shipment, his undertaking to come back and take possession of the merchandise later, etc. are the facts in evidence which support the fugitive's committal on the charge of conspiracy to possess for the purposes of distribution, because the "facts underlying the charge" disclose the commission of a Canadian offence, namely conspiracy to possess for the purposes of trafficking: this issue was moreover settled by the committal order rendered by the extradition judge.
>
> That being said, I do not believe that the double criminality rule permits an extradition judge to base his decision on evidence of certain conduct and to order the fugitive committed for surrender to the foreign state when this evidence has nothing to do with the conduct charged in the accusation for which is extradition is sought.
>
> In other words, although specific acts can, on occasion, indirectly support other charges, one must keep in mind that they must be analyzed having regard to the conduct alleged in the accusation. The link or connection of relevance is essential. If one were to charge an accused with participating in a robbery, the evidence which indicates that, at the time of his arrest, he was in possession of counterfeit money is far from relevant. Although this evidence may establish the commission of a crime under Canadian law, it has no connection with the charge which weighs against him in the foreign state and for which his extradition is sought. It would be unfair, even illogical, to use such evidence to order the committal of a fugitive for a specific crime knowing quite well that the evidence of this crime is non-existent and that he will be discharged on this charge after being deprived of his liberty for an undetermined period of time. The role of the extradition judge is exactly that, to protect the fugitive against this kind of injustice.

United States of America v. Tavormina, *supra*, at 569-70

1.Alternatively, if this approach is no longer valid under the new Act, then it is submitted that responsibility for ensuring that there is a "link or connection of relevance" now rests with the

Minister of Justice, particularly in the drafting of the authority to proceed.[6] This submission is developed below. But it remains the appellant's primary submission that the extradition judge must have regard to the conduct charged in the requesting state and that the principles developed under the old Act remain valid. It is submitted that these principles are of particular significance in the case at bar for two reasons. First, it is submitted that the essence of the offence of membership in a terrorist organization does not correspond to any criminal offence under Canadian law. Second, the authority to proceed lists Canadian offences that can only correspond to conduct which the requesting state either is not prosecuting or cannot prosecute because of limitation periods and with respect to which, therefore, the requesting state is not seeking extradition. To demonstrate these points, it is necessary to turn to the authority to proceed.

2.

3) The Authority to Proceed and the Committal Decision

1.On November 28, 2000, the Minister of Justice issued an authority to proceed which listed the following offences as corresponding to the alleged conduct in respect of which extradition is sought:

1) Aggravated assault upon Harald Hollenberg contrary to section 268 of the *Criminal Code*; and

2) Conspiracy to commit aggravated assault upon Harald Hollenberg contrary to section 465(1)(c) of the *Criminal Code*; and

3) Aggravated assault upon Dr. Karl Gunter Korbmacher contrary to section 268 of the *Criminal Code*; and

4) Conspiracy to commit aggravated assault upon Dr. Karl Gunter Korbmacher contrary to section 465(1)(c) of the *Criminal Code*; and

5) Placing an explosive substance with intent to destroy or damage the property of the Central Social Relief Office for Asylum Seekers (ZSA) contrary to section 81(1)(c) of the *Criminal Code*; and

6) Conspiracy to place an explosive substance with intent to damage or destroy the property of the Central Social Relief Office for Asylum Seekers (ZSA) contrary to section 465(1)(c) of the *Criminal Code*; and

7) Placing an explosive substance with intent to destroy or damage property, to wit: the Siegessaule column contrary to section 81(1)(c) of the *Criminal Code*; and

8) Conspiracy to place an explosive substance with intent to destroy or damage property, to wit: the Siegessaule column contrary to section 465(1)(c) of the *Criminal Code*; and

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[6] See in this regard the comments of Dambrot J. in *United States of America v. Drysdale*, *supra*, at 158-59.

9) Possession of an explosive substance for the benefit of, at the direction of or in association with a criminal organization contrary to section 82(2) of the *Criminal Code*; and

10) Participation in the activities of a criminal organization contrary to section 467.1 of the *Criminal Code*.

In his decision released on September 6, 2001, Vertes J. ordered committal in respect of all ten offences listed in the authority to proceed. It is respectfully submitted that in doing so, Vertes J. erred in several respects.

Authority to Proceed dated November 28, 2000
Appeal Book, Volume I, pages 1-2
Reasons for Judgment dated September 6, 2001
Appeal Book, Volume II, pages 682-700
Order of Committal dated September 6, 2001
Appeal Book (Judicial Review), pages 115-17

a) The Criminal Organization Offences and s.29(4) of the *Extradition Act*

1.Vertes J. held that s.29(4) of the *Extradition Act* permitted him to order committal, should the evidence warrant it, on the two criminal organization offences in the authority to proceed even though the conduct allegedly engaged in by the appellant occurred between 1985 and 1993 and the criminal organization offences were not enacted in Canada until 1997. As noted above, s.29(4) of the *Extradition Act* states: "The date of the authority to proceed is the relevant date for the purposes of subsection (1)." In effect, Vertes J. held that s.29(4) has reversed the decision of the Supreme Court of Canada in *United States of America v. Allard and Charette* and changed substantially the double criminality requirement. It is respectfully submitted that this conclusion cannot be supported.

2.

3.First, there is no indication that this was Parliament's intention. If this was the purpose of s.29(4), it could have been stated much more clearly.[7] It is submitted that it is presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices. As Fauteux J. held in *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*:

> a Legislature is not presumed to depart from the general system of law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

[7] In *United States of America v. Quintin*, [2000] O.J. No. 791 (S.C.J.), the decision relied upon by the requesting state and Vertes J., Dambrot J. observed that the provision "is perhaps not as clear as one might wish" (at para. 107). Similarly, Vertes J. found that the provision "is not as clear as it could be, or perhaps should be" (Reasons for Judgment released September 6, 2001, Appeal Book, Volume II, page 699).

Similarly, in *R. v. T.(V.)*, L'Heureux-Dubé J. held:

> [W]hile it is open to Parliament . . ., subject to over-arching constitutional norms, . . . to change the law in whatever way it sees fit, the legislation in which it chooses to make these alterations must be drafted in such a way that its intention is in no way in doubt.

Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610 at 614
R. v. T.(V.) (1992), 71 C.C.C. (3d) 32 at 42-43 (S.C.C.)
R. v. McIntosh (1995), 95 C.C.C. (3d) 481 at 504-05 (S.C.C.)
Sullivan, *Driedger on the Construction of Statutes* (3rd ed.) at 368-69

1.Second, as Cory and Iacobucci JJ. held in *R. v. Gladue*: "the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament." In this respect it is significant that, while s.29 of the *Extradition Act* effects certain procedural changes, it otherwise leaves the substance of the test for committal unchanged from the old Act and judicial interpretations of it.[8] Moreover, the double criminality principle is also stated elsewhere in the Act and there is nothing to indicate there that it bears this new meaning. For example, s.3(1)(b) of the Act identifies one of the prerequisites to extradition as being that "the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada" by certain maximum terms of imprisonment. Nowhere does the Act say that any date other than when the conduct is alleged to have occurred is to be considered under s.3(1) in determining whether that conduct would have constituted an offence in Canada. The terms of the Treaty are to the same effect. It is submitted that Vertes J.'s interpretation of s.29(4) creates an obvious inconsistency between s.29(4) and other parts of the statute (which also incorporates the terms of the Treaty).

R. v. Gladue (1999), 133 C.C.C. (3d) 385 at 397-98 (S.C.C.)
Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 at 26

1.Alternatively, it may be that Vertes J.'s interpretation of s.29(4) is the only one it can reasonably bear.[9] As LeBel J. observed in *R. v. Fink* with respect to the process of statutory

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[8] Some indication that this was Parliament's intent in enacting this provision may be found in the remarks of Eleni Bakopanos when Bill C-40 was introduced for Second Reading. She advised the House of Commons: "Under the new bill the 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, would justify a trial for a criminal offence. Lawyers like to refer to this as the prima facie test" (House of Commons Debates, October 8, 1998, pp. 9004-05) [Respondent's Record, Volume II, Tab 1].

[9] Vertes J. did not find the alternative interpretation suggested by counsel for the appellant compelling: see Reasons for Judgment released September 6, 2001, Appeal Book, Volume II,

interpretation:

> The interpreter looks first at the purpose of the statute as this Court held in the well-known and oft-cited *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 (see also *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26). Given this overriding principle, if there is ambiguity, the interpreter then looks for an interpretation that will save the law rather than render it unconstitutional. However, if no reasonable interpretation that is consistent with the purpose and wording of the Act can be found, the statute will be held invalid. In the course of such an analysis, courts must remember that constitutionality is presumed and that invalidity must be shown. Nevertheless, ambiguity may not be artificially created in order to save a statute.
>
> *R. v. Fink* (2002), 167 C.C.C. (3d) 1 at 39-40 (S.C.C.)
> *Bell ExpressVu Limited Partnership v. Rex*, *supra*, at paras. 26-30

1.If Vertes J. is correct that Parliament did seek to change the double criminality rule with the enactment of s.29(4) of the *Extradition Act*, then it is submitted that the provision is unconstitutional because it infringes s.7 of the *Charter*. It is submitted that it is a principle of fundamental justice that, as set out above, no one may be extradited from Canada for conduct which, had it occurred in Canada, would not have been a criminal offence. Moreover, if adopted, Vertes J.'s interpretation of s.29(4) yields the untenable result that a person could be committed into custody to await surrender even though he or she was not extraditable under either the Act or the Treaty because, at the time it occurred, the conduct was not an offence in Canada. There is no compelling justification for such a limitation on the rights guaranteed by s.7 which could make this one of those rare cases where a violation of s.7 is justifiable under s.1 of the *Charter*. It is submitted further that the appropriate remedy pursuant to s.52 of the *Constitution Act* and s.24(1) of the *Charter* is to sever s.29(4) from the remainder of s.29.[10]

2.

3.On the basis of the foregoing, it is submitted that Vertes J. erred in committing the appellant for extradition on the two criminal organization offences listed in the authority to proceed. These committals should be set aside on the ground of a wrong decision on a

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pages 696-97.

[10] The constitutionality of s.29(4) was not challenged in the proceedings below. It was only near the conclusion of submissions on committal that counsel for the requesting state first urged this interpretation on Vertes J.: see Appeal Book, Volume II, pages 390-91. Counsel for the appellant had been proceeding on the basis that *Allard and Charette* was still the law. In reply to the suggestion from counsel for the requesting state, counsel for the appellant did offer a number of reasons why the requesting state's interpretation could not be correct, including considerations under the *Charter*: see Appeal Book, Volume II, pages 406-09. It was, however, only in his reasons for judgment released on September 6, 2001, that Vertes J. adopted the interpretation urged by the requesting state: see Appeal Book, Volume II, pages 695-99.

question of law pursuant to s.53(a)(ii) of the *Extradition Act*.

4.

b) The Offence of Membership

1.It is submitted that the essence of the conduct charged in the requesting state under s.129a is membership or association. No such offence is recognized in Canadian law. It is submitted that the evidence of the conduct underlying the s.129a offence cannot support committal on any of the offences listed in the authority to proceed.

2. **c) The Shootings**

3.As stated above, the appellant cannot be prosecuted for his alleged involvement in the 1986 shooting of Hollenberg or the 1987 shooting of Dr. Korbmacher because prosecution is now barred by the expiry of limitation periods. As a result, the requesting state is not seeking the appellant's extradition for any offence substantially similar to the offences in relation to Hollenberg and Dr. Korbmacher set out in the authority to proceed. Moreover, while the shooting incidents are described in the context of the narrative setting out the appellant's alleged activities in connection with his membership in the Revolutionary Cells, the offence of membership in a terrorist organization is particularized in the material submitted in support of the extradition request by reference only to offences related to arson and the use of explosives. There is no reference to any offence involving acts of violence against persons (e.g. the offences committed in the attacks on Hollenberg and Dr. Korbmacher) even though such offences could be incorporated into the membership offence.[11] Applying the distinction drawn in *Tavormina* between "the facts which generate the conduct charged in the accusation and the circumstances surrounding the commission of the act charged" and following the "link or connection or relevance" between the evidence and the conduct charged, it is submitted that there is no basis upon which the appellant could be committed for surrender on any of the offences listed in the authority to proceed relating to Hollenberg or Dr. Korbmacher. The committal order in respect of these offences should be set aside on the ground that it is unreasonable or cannot be supported by the evidence or on the ground of a wrong decision on a question of law pursuant to s.53(a)(i) and (ii), respectively.

4.

d) The Explosives Offences

1.The appellant concedes that the four offences in the authority to proceed relating to the use of explosives against the Central Social Relief Office for Asylum Seekers and the Siegessaule column correspond to conduct charged in the requesting state and, subject to the constitutional challenge to the evidentiary provisions in the *Extradition Act*, also concedes that there is sufficient admissible evidence to warrant committal for surrender in relation to these offences.

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[11] See Exhibit 7 - Arrest Warrant (Appeal Book, Volume II, pages 472-73, 482-83) and the General Legal Declaration of Michael Bruns dated June 21, 2000 (Appeal Book (Judicial Review), pages 186-200.)

2.

4) Conclusion

1.For the foregoing reasons, the appellant respectfully submits that Vertes J. erred in committing him for surrender on all the offences listed in the authority to proceed. The committals on all offences except those in relation to the use of explosives against the Central Social Relief Office for Asylum Seekers and the Siegessaule column should be set aside.

2.

3.Alternatively, if, contrary to the appellant's primary position, the extradition judge is required to ignore the foreign charges and may only consider the Canadian offences listed in the authority to proceed, then the appellant submits that it falls to this Honourable Court, in the exercise of its powers of judicial review over the Minister of Justice, to determine whether the authority to proceed issued in the case at bar was in compliance with s.15 of the *Extradition Act*. Specifically, do the offences listed therein "correspond to the alleged conduct" in respect of which extradition has been requested? This submission is developed below.

4.

C) THE APPLICATION FOR JUDICIAL REVIEW

1) The Scope and Standard of Judicial Review under the *Extradition Act*

1.The appellant has applied pursuant to s.57 of the *Extradition Act* for judicial review of the surrender decision of the Minister of Justice. The surrender decision is the culmination of the discharge of the Minister's responsibilities in the extradition process. The Minister is responsible for the implementation of extradition agreements, the administration of the *Extradition Act* and dealing with requests for extradition. The Minister must determine whether a foreign request for extradition or for the provisional arrest of a person meets the statutory and treaty prerequisites and, if so, for launching a process that can have profound implications for the liberty of the person sought. The Minister must be satisfied that the conditions in s.3(1)(a) of the *Extradition Act* are met before issuing an authority to proceed. Once the judicial phase has concluded with an order for committal, the matter returns to the Minister for his decision on whether the statutory and treaty prerequisites for surrender have been met.

1.The application for judicial review is brought with respect to the surrender order. It is submitted, however, that the decision to authorize the application for a provisional arrest warrant and the framing of the authority to proceed are legal pre-conditions to the ultimate surrender decision and can be reviewed by this Honourable Court in an application for judicial review of the surrender decision. Otherwise these executive acts are immune from judicial review.[12]

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[12] Vertes J. held that the extradition judge has no review or appellate jurisdiction over the Minister's decisions on whether the requirements of s.3(1) of the *Extradition Act* are satisfied

2.

3.Pursuant to s.57(6), on an application for judicial review, this Honourable Court may

(a) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to do or has unreasonably delayed doing; or

(b) declare invalid or unlawful, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister referred to in subsection (1) [i.e. the surrender decision made under s.40].

1.Pursuant to s.57(7) of the *Extradition Act*, the grounds for granting such relief are those enumerated in s.18.1(4) of the *Federal Court Act*, namely that the Minister has

(a) acted without jurisdiction, acted beyond his jurisdiction or refused to exercise his jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that he was required by law to observe;

(c) erred in law by making a decision or an order, whether or not the error appears on the face of the record;

(d) based his decision or order on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

1.In addition, the Minister is required to respect the constitutional rights of the person sought for extradition in deciding whether to exercise his discretion to surrender the person to the

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before issuing an authority to proceed and on whether to authorize the Attorney General to apply for a provisional arrest warrant: see Reasons for Judgment dated September 6, 2001, Appeal Book, Volume II, pages 661-62. In the course of submissions, Vertes J. had indicated that he "would be hard-pressed to think of a situation where one could not raise on the Court of Appeal that the very foundation for the entire process was defective in that the purpose for which extradition was sought was not prosecution. I mean, it's sort of, sort of the first premise. And I would think the entire -- the Court of Appeal would have jurisdiction to set aside the minister's decision or the committal decision of the extradition judge on that basis that no matter which way it got before the Court of Appeal. I mean, I can't see how that, that decision, the decision to issue an authority to proceed, for example, is insulated forever, because if the minister's decision to surrender is subject to judicial review, the surrender can only be done within the parameters of the statute and the constitution. If they could not, if the Court of Appeal is precluded from considering whether indeed it was for the purpose of extradition [or] some ulterior purpose, then the minister's decision is contrary to law" (Appeal Book, Volume I, pages 235-36). Counsel for the requesting State appears to have taken the position that the objection to the arrest warrant raised by the appellant before Vertes J. was properly a matter for this Honourable Court instead (Appeal Book, Volume I, page 345).

requesting state. In the event that the ministerial decision to surrender were to violate the *Charter* rights of the person sought, this Honourable Court is the "court of competent jurisdiction" in which the claim of a constitutional infringement is to be taken up. This Honourable Court has an original jurisdiction to receive evidence relevant to an alleged *Charter* violation, to determine whether a *Charter* violation has occurred and, if one has occurred, to grant the appropriate and just remedy.

United States of America v. Kwok (2001), 152 C.C.C. (3d) 225 at 256-62 (S.C.C.)

1.The standard of review of the Minister's decision has been set to give due deference to the exercise of executive discretion in the discharge of Canada's international obligations. Even so, where the Minister has violated the constitutional rights of the person sought or otherwise erred in law, has denied the person sought procedural fairness, has acted arbitrarily, in bad faith or for improper motives, or has made a decision that is plainly unreasonable, the reviewing court is entitled to intervene. These grounds of review are codified in s.57(7) of the new Act. Moreover, while ministerial decisions are generally owed curial deference, much less deference is required for decisions concerning the violations of constitutional rights.

Schmidt v. The Queen, *supra*, at 215
Kindler v. Canada, *supra*, at 55 per McLachlin J. (as she then was); at 13-14 per La Forest J.
United States of America v. Whitley (1994), 94 C.C.C. (3d) 99 at 108-110 (Ont. C.A.); aff'd (1996), 104 C.C.C. (3d) 447 (S.C.C.)
United States of America v. Burns, *supra*, at 118-19
Pacificador v. Canada (Minister of Justice) (2002), 166 C.C.C. (3d) 321 at 337-39 (Ont. C.A.)

2) The Decision to Authorize the Application for a Provisional Arrest Warrant

1.Upon receipt of a request for the appellant's extradition, the Minister authorized the Attorney General pursuant to s.12 of the *Extradition Act* to apply for a provisional arrest warrant in respect of the appellant. Section 12 states:

> 12. The Minister may, after receiving a request by an extradition partner for the provisional arrest of a person, authorize the Attorney General to apply for a provisional arrest warrant, if the Minister is satisfied that
>
> (a) the offence in respect of which the provisional arrest is requested is punishable in accordance with paragraph 3(1)(a); and
>
> (b) the extradition partner will make a request for the extradition of the person.

1.By diplomatic notes dated May 1, 2000, and May 3, 2000, the Federal Republic of Germany had requested the "provisional arrest of Walter Lothar Ebke in view of his possible

extradition." Under both the Act and the Treaty, a person's extradition may be requested for one of two purposes: for the purpose of prosecuting the person or for the purpose of imposing or enforcing a sentence in respect of the person. Clearly the request in the case at bar is not for the purpose of imposing or enforcing a sentence. The request must therefore be for the purpose of prosecuting the appellant. It is submitted that the Minister erred in determining that this was the case. On the contrary, it is submitted that the request was for the purpose of effecting the appellant's transfer to the requesting state so that further investigations into his suspected involvement in certain offences could be pursued. It is submitted that the requirements of the Act and the Treaty were not met and, further, that the decision to seek the appellant's arrest on the grounds then available resulted in a violation of the appellant's rights under ss. 7 and 9 of the *Charter*.

2.

3.The original request for extradition was supported by the German Warrant of Arrest dated March 9, 2000. It is apparent on the face of that document that the requesting state seeks the appellant's detention "pending further investigations", that the appellant is "strongly suspected" and "urgently suspected". The prosecutor's summary of the case speaks of the matter as "investigation proceedings against Walter Lothar Ebke because of suspicion."

Exhibit 7 - Arrest Warrant
Appeal Book, Volume II, pages 460-61, 472-73

1.The provisional arrest warrant was issued on May 18, 2000. The certification of the record of the case that was prepared subsequently does speak of the purpose of the request as being "for prosecution". It is submitted that this statement, which simply tracks the requirements of s.33(1) of the Act, does not assist for two reasons. First, it was not before the Minister when the original decision was made to seek the appellant's arrest. Second, in any event its probative value is lessened not only by the conflicting statements elsewhere in the supporting materials but also by the fact that, even as of May 22, 2001, no charges against the appellant had been filed in the German court. It is submitted that the weight of the evidence indicates that the appellant is wanted merely for investigation and only on the basis of suspicion.

Exhibit 11 - Record of the Case
Appeal Book, Volume II, pages 587-88
Exhibit 12 - Affidavit of Martin Rubbert
Appeal Book, Volume II, pages 646-50

1.It is submitted that this is not a purpose that the law of extradition is intended to serve. As reflected in s.3(1) of the *Extradition Act*, the extradition process serves as a mechanism for removing someone from Canada to a foreign jurisdiction "for the purpose of prosecuting the person or imposing a sentence on or enforcing a sentence imposed." While there may be no need for a prosecution actually to be commenced in the requesting state before extradition proceedings can be launched in Canada, it is submitted that prosecution must be imminent or, at least, intended. If that is not demonstrated, extradition proceedings, which entail a

significant deprivation of liberty, ought not to be engaged.

2.

3.This argument was made before Vertes J. as part of an application for a stay of proceedings. Vertes J. rejected the argument, holding as follows:

> On this issue I agree with counsel for the Attorney General. It would not be warranted to conclude, merely from an examination of the wording of the German documents, that Ebke is wanted just for investigation purposes. More importantly, this is not an issue that is within my statutory mandate as the extradition judge to decide. In my opinion, any determination as to the "purpose" for the extradition request or the request for the arrest warrants rests with the Minister. There is nothing, in the Act or otherwise, to suggest that the extradition judge has jurisdiction to determine whether someone is a person sought for the "purpose of prosecution" or to review the decision of the Minister in this regard.
>
> *Reasons for Judgment released September 6, 2001*
> *Appeal Book, Volume II, pages 661-62*

1.Assuming that Vertes J. is correct in this regard, it is submitted that it therefore falls to this Honourable Court to determine whether the Minister erred in approving the initiation of the extradition proceedings on the basis of the material before her and, in any event, whether the appellant's arrest on the basis of mere suspicion and for the purpose of further investigation infringed ss. 7 and 9 of the *Charter*. In the circumstances, the only appropriate and just remedy is a stay of the extradition proceedings.

2.

3) The Authority to Proceed

1.As described above, on November 28, 2000, the Minister of Justice issued an authority to proceed in respect of the appellant pursuant to s.15 of the *Extradition Act* If, contrary to the appellant's submissions above, the extradition judge must limit him or herself to the authority to proceed and may not consider what conduct has actually resulted in charges in the requesting state, then it is submitted that it is incumbent upon the Minister to draft the authority to proceed in a way that accurately and fairly reflects the alleged conduct in the requesting state in respect of which extradition is sought. To paraphrase Proulx J.A.'s comments in *Tavormina*, although the evidence may establish the commission of one or more crimes under Canadian law, it would be "unfair, even illogical" to list Canadian offences in the authority to proceed which have no connection with the charges that weigh against a person in the foreign state and for which his extradition is sought. Here, as noted above, the authority to proceed lists Canadian offences which correspond to conduct which the requesting state either has not charged or cannot charge because of the expiry of limitation periods. Given the central role of the authority to proceed, these offences have no place therein. If it is no longer for the extradition judge to screen out such charges and protect a person sought from the injustice that would flow from committal upon them, then this role

must be performed by the Minister at the outset of the extradition process. It is submitted that the Minister failed to do so here and this tainted the entire proceeding that followed. The surrender decision should therefore be set aside.

2.

4) The Membership in a Terrorist Organization Offence

1.In *United States of America v. Drysdale*, Dambrot J. observed that "while the rule of double criminality is preserved by the new Act, the extradition judge is not its sole guardian. The extradition judge has a modest role to play in ensuring that the rule is respected. The minister has a significant role. In the end, the appellate courts have the final word."

United States of America v. Drysdale, supra, at 156-57

1.It is submitted that in ensuring that the rule of double criminality is respected, the Minister must have regard to s.3(1)(b) of the Act as well as, in the case at bar, Article II(2)(a) of the Treaty. As developed above, it is submitted that, whatever may be import of s.29(4) of the Act for the extradition judge, the rule of double criminality that the Minister must apply has not been modified by the new Act. In particular, the principle in *Allard and Charette* that a person "may only be extradited if the act of which he is charged was a crime recognized in Canada at the time it was committed" still applies. Accordingly, it is submitted that the Minister erred in law in ordering the appellant's surrender on the offence under s.129a of the German Code because the acts of which the appellant is charged in respect of that offence were not a crime recognized in Canada at the time they were committed.

United States of America v. Allard and Charette, supra, at 164

5) The Political Offence Exception

1.The extradition request is based in part on the allegation that between 1985 and 1993 the appellant was "a member of an organization whose aim and activities are directed toward committing criminal acts causing public danger pursuant to sections 306 to 308 and section 311 of the German Penal Code." As particularized, the activities of the organization in which the appellant is alleged to have been involved are directed toward committing offences relating to arson and causing explosions. If proven, membership in such an association is an offence contrary to section 129a of the German Penal Code. That provision states in part:

> (1) Whoever sets up an organization whose purpose or activity consists in the commission of:
>
> 1. murder, manslaughter or genocide (sections 211, 212 or 220a)
>
> 2. criminal acts directed against person freedom in the cases of Section 239a or Section 239b or
>
> 3. crimes falling under Section 305a or crimes endangering the public falling under Sections 306 to 308, 310b Subsection 1, Section 311 Subsection 1, Section 311a Subsection 1, Sections 312, 315 Subsection 1, Section 316b Subsection 1, Section 316c Subsection 1 or Section

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or whoever participates as a member in such an organization shall be punished by imprisonment of between one and ten years.

(2) If the perpetrator is a ringleader or supporter, imprisonment of not less than three years shall be imposed.

(3) Whoever supports or recruits for an organization described in Subsection 1 shall be punished by imprisonment from six months to five years.

General Legal Declaration of Michael Bruns dated June 21, 2000

Appeal Book (Judicial Review), pages 195-98

1.Section 44(1)(b) of the *Extradition Act* states that, among other things, the Minister shall refuse to make a surrender order if the Minister is satisfied that the request for extradition is made for the purpose of punishing the person by reason of their political opinion. In addition, s.46 of the *Extradition Act* states in part as follows:

(1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

. . .

(c) the conduct in respect of which extradition is sought is a political offence or an offence of a political character.

(2) For the purpose of subparagraph (1)(c), conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party is obliged to extradite the person or submit the matter to its appropriate authority for prosecution does not constitute a political offence or an offence of a political character. The following conduct also does not constitute a political offence or an offence of a political character:

(a) murder or manslaughter;

(b) inflicting serious bodily harm;

(c) sexual assault;

(d) kidnapping, abduction, hostage-taking or extortion;

(e) using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and

(f) any attempt or conspiracy to engage in, counselling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct referred to in any of paragraphs (a) to (e).

1.Finally, Article III of the Treaty provides:

(1) Extradition may be refused if

(a) the offence in respect of which it is requested is considered by the requested state to be a political offence;

or

(b) the requested state considers that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of those reasons.

(2) For the purpose of this treaty, a murder, kidnapping or other wilful assault on the life or physical integrity of a person in relation to whom the Contracting Parties have or the requesting state has a duty according to international law to give special protection shall be deemed not to be a political offence.

1.It is submitted that, as Vertes J. held, the provisions of both the Act and the Treaty must be considered and if they differ, the more stringent conditions must be satisfied before extradition may be ordered. Thus, it is submitted that the Minister erred in holding that he need only consider the terms of the Treaty on the question of political offences.

2.

3.In light of s.46(2)(e) and (f) of the Act, the appellant does not contend that the conduct alleged in relation to the 1987 bombing is a political offence or an offence of a political character. It is submitted, however, that the conduct alleged in relation to the 1991 attempted bombing and the s.129a offence (membership in a terrorist association) are political offences or offences of a political character and, further, that the request for extradition in respect of the latter allegation is made for the purpose of prosecuting the appellant by reason of his political opinion. It is submitted that the Minister erred in declining to refuse surrender in relation to these allegations (assuming for the sake of this argument that the s.129a offence meets the double criminality requirement).

4.

5.Under the Treaty, it is for the Canadian authorities to determine whether the offence in respect of which extradition is requested is a political offence and whether the request for extradition has been made for the purpose of prosecuting or punishing the appellant on account of his political opinion. The jurisprudence as well as ss. 44(1)(b) and 46(1)(c) of the *Extradition Act* suggest that these determinations are to be made by the Minister. These determinations are, of course, subject to judicial review by this Honourable Court.

6.

7.It is submitted that neither s.129a nor the 1991 attempted bombing are excluded from the category of political offences or offences of a political character by either the statute or the treaty. While the attempted bombing of the Victory Column did involve the use of explosives, it is submitted that it nevertheless does not fall within either s.46(e) or (f) of the *Extradition Act* because there is no basis upon which to conclude that, even if it had been

successful, it was carried out in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused. There is no evidence of the property damage that might have been caused and, with regard to the risk to life or safety, it is to be noted that the explosion occurred in the early morning hours during a period when public access to the monument was blocked off because of ongoing renovations. As for the s.129a offence, it does not engage any of the excluded offences.

8.

9.“Political offence” and “offence of a political character” are not defined in the *Extradition Act* or the treaty. Anne Warner La Forest explains the notion of a “political offence” as follows:

> Although the terminology of “political offence” is widespread, a satisfactory definition remains to be formulated. The term embraces two concepts: first, the purely political offence, which is an act directed against the political organization or government of a state and contains no element of common crime; and secondly, what is described in the Act as an offence of a political character, one that is a common crime but is so closely integrated with political acts or events that it is regarded as political.

While La Forest was writing with the previous *Extradition Act* in mind, the distinction she draws still obtains in s.46(1)(c) of the new *Extradition Act*. It is submitted that the 1991 attempted bombing and the s.129a offence fall within one or the other of these sub-categories.

> La Forest, *La Forest’s Extradition To and From Canada* (3rd ed.) (1991) at 83 (references omitted)

1.First, it is submitted that the s.129a offence is a purely political offence. La Forest describes this type of offence as follows:

> The purely political offences create no problem since they are easily identified as being against the security of the state and are generally limited to three categories of acts: treason, sedition and espionage. These are obviously political. As such, they injure only public rights and contain no element of common crime. The perpetrator is motivated by a political purpose. He often acts as an instrument or agent of a political party. Malice or personal vendetta against some individual is not the motivating factor.

It is submitted that this description fits s.129a, at least as it is being applied to the appellant, almost perfectly. Apart from the suggestion that generally only treason, sedition and espionage are so classified, all of the other features identified by La Forest are present here. By definition, s.129a applies only to “membership” in “organizations”. On the requesting state’s own evidence, the Revolutionary Cells was an overtly political group acting against the German government of the time. The appellant’s alleged motivation for being a member of the Revolutionary Cells was also clearly political. The offence of membership — as distinguished from serious substantive offences that might be carried out under the auspices of the organization — at worst injures only public rights and contains no element of common

crime.

> La Forest, *La Forest's Extradition To and From Canada* (3rd ed.) (Canada Law Book, 1991) at 83-84 (references omitted)

1.It is submitted further that additional support for classifying s.129a as a political offence may be found in the fact that it was first introduced in response to a political crisis in Germany in the 1970's, that it is only used against groups espousing political objectives and that it has been used overwhelmingly against left-wing groups critical of the German government. In this connection it should be noted that German law draws a distinction between the offence of membership in a criminal organization (s.129) and the offence of membership in a terrorist organization (s.129a). It is the latter, not the former, that the appellant is "strongly suspected" of having committed.

2.

3.In the alternative, if the s.129a offence is not a political offence *per se*, it is submitted that this can only be because it contains an element of common crime. But even if that is the case, it is submitted that it should still be characterized as an offence "of a political character" and, thus, as falling within s.46(1)(c) of the *Extradition Act*. Similarly, while the 1991 attempted bombing cannot be characterized as a political offence *per se*, it is submitted that it is an offence of a political character. It is submitted that the Minister erred in concluding otherwise.

4.

5.There is no exhaustive definition of what it is to be an offence of a political character but several common themes that emerge from the jurisprudence are present in the case at bar. Crucially, on the requesting state's own evidence, the offences alleged had clear political motives. The organization in which membership is alleged was overtly and expressly dedicated to attempting to force the German government of the day to change its policies on matters of public interest and, indeed, to challenging the government itself. While the appellant concedes that the 1987 bombing is excluded by statute from the category of offences of a political character, this is not the case with the attempted bombing or the s.129a offence. Membership in the Revolutionary Cells was a political act aimed directly at the German government and its policies. It is submitted that the same is true of the attempted bombing of the Victory Column.

6.

7.In the further alternative, if surrender is not precluded by s.46(1)(c) of the *Extradition Act*, the foregoing submissions demonstrate that the Minister nevertheless erred in declining to refuse surrender under s.44(1)(b) of the Act on the basis that the request for extradition is made for the purpose of prosecuting or punishing the appellant by reason of his political opinion. The request in relation to the s.129a offence in particular is not founded on the enforcement of the criminal law in its ordinary aspect but is directed instead to the prosecution and punishment of political opinion.

8.

6) Section 44(1)(a) of the *Extradition Act*

1.Section 44(1)(a) of the *Extradition Act* provides that the Minister shall refuse to make a surrender order if the Minister is satisfied that "the surrender would be unjust or oppressive having regard to all the relevant circumstances." It is submitted that the Minister erred in declining to refuse surrender on this basis. Among the circumstances that the appellant relied on before the Minister to demonstrate that surrender would be unjust or oppressive were his personal circumstances, including the strong community support he enjoys; the dubious nature of the evidence presented in support of the extradition request; and the troubling history of the proceedings against his alleged confederates. In such circumstances, surrender must be refused.

2.

7) The Need for Assurances

1.If, contrary to the foregoing submissions, it was open to the Minister to order the appellant's surrender on some or all of the offences for which extradition has been requested, it is submitted that the Minister erred in declining to make surrender conditional upon charges first being laid in the requesting state and upon receipt of satisfactory assurances from the requesting state that the appellant will not be denied reasonable bail and that he will receive a fair and speedy trial. The history of the ongoing proceedings in Germany raises a serious concern that, if surrendered, the appellant will not be treated fairly and in accordance with the principles of fundamental justice without such assurances. It is submitted that the Minister erred in concluding otherwise.

PART IV - NATURE OF RELIEF DESIRED

1.The appellant respectfully requests the following relief:

(a) with respect to the appeal from the committal order

(i) an order declaring ss. 32(1)(a), 32(1)(b), 33 and 34 of the *Extradition Act* of no force or effect pursuant to s.52 of the *Constitution Act*;

(ii) if necessary, an order declaring s.29(4) of the *Extradition Act* of no force or effect pursuant to s.52 of the *Constitution Act* or an order severing it from the balance of the provision pursuant to s.24(1) of the *Charter*;

(iii) further, or in the alternative, an order setting aside the committal on the criminal organization offences listed in the authority to proceed (s.467.1 and s.82(2) of the *Criminal Code*);

(iv) further, or in the alternative, an order setting aside the committal on all offences in the authority to proceed pertaining to Harald Hollenberg and Dr. Karl Gunter Korbmacher; and

(b) with respect to the application for judicial review

(i) an order staying the proceedings against the appellant pursuant to s.24(1) of the *Charter*;

(ii) in the alternative, an order declaring invalid or unlawful, quashing or setting aside the surrender decision made by the Minister of Justice in respect of all offences for which extradition is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

D A T E D at Toronto, Ontario, this 29th day of November, 2002.

_____
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