
Independent Review of the Extradition of Dr. Hassan Diab

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Executive Summary

Dr. Hassan Diab, a 60-year-old Canadian citizen with no criminal record, was living in the Ottawa area and teaching at two Ottawa-area universities when he was extradited to France on November 14, 2014, to face multiple charges of murder, attempted murder and destruction of property. At the time he was surrendered to France, Dr. Diab was married with one young child and a second on the way.

The charges arose from an antisemitic terrorist attack in France on October 3, 1980. A bomb exploded outside a synagogue on Rue Copernic in the city of Paris, killing four people, injuring more than 40 others, and causing substantial damage to buildings in the area.

Despite the seriousness of the charges, Dr. Diab enjoyed the unwavering support of his family and many of his university and other colleagues, who firmly believed in his innocence. That support continued throughout the more than three years Dr. Diab spent detained in a French jail awaiting trial. Ultimately, Dr. Diab was released without a trial. On January 12, 2018, the French judges investigating the case gave their decision discharging Dr. Diab and ordering his release from detention. The French prosecutors appealed. The appeal decision remains outstanding. With the assistance of Global Affairs Canada, Dr. Diab returned to Canada on January 15, 2018.

Many people have expressed discomfort with the fact that Dr. Diab was extradited based on a weak case presented by France, held in detention for over three years and eventually returned to Canada without standing trial.

The Extradition Process in Brief

Dr. Diab's journey through the Canadian extradition system began years earlier. France requested his extradition in November 2008 – 28 years after the bombing. Dr. Diab was arrested in Canada on November 13, 2008, and – almost four months later – was released on very restrictive bail conditions. He was committed for extradition on June 6, 2011, after a lengthy extradition hearing that involved many complex issues.

Throughout the extradition proceedings, Dr. Diab was represented by talented and dedicated defence counsel who challenged most aspects of the case against him. France was represented by Department of Justice (DOJ) lawyers who worked within the International Assistance Group (IAG). IAG counsel are expert in the field of extradition, and they demonstrated their expertise and commitment in the pursuit of

Dr. Diab's extradition. Counsel on both sides represented their respective clients with a great deal of passion and belief in their causes. That passion at times escalated markedly.

France's case against Dr. Diab was circumstantial. It rested primarily on five pieces of evidence:

- a copy of Hassan Diab's old passport, which showed an entry into and exit from Spain close in time to the bombing in France
- witness statements from former friends of Hassan Diab's identifying him as a member of the Popular Front for the Liberation of Palestine
- eyewitness descriptions of a man using the pseudonym Alexander Panadriyu, who was clearly linked to the bombing on Rue Copernic
- composite sketches of Panadriyu and their purported similarity to contemporaneous photographs of Hassan Diab
- a handwriting comparison analysis prepared by a French expert that concluded Hassan Diab was the likely author of a small number of words the fictitious Panadriyu had printed on a hotel registration card.

The handwriting analysis tipped the scales in favour of committal for extradition. French authorities had obtained the analysis on the advice of IAG counsel after defence experts had shown that two earlier handwriting reports relied on by France were flawed.

An extradition hearing is not a trial. Extradition proceedings are meant to be fair but expeditious.

Without the new handwriting analysis, there likely would have been insufficient evidence to justify Dr. Diab's committal for extradition. Even with this evidence, the extradition judge described the case against Dr. Diab as "weak" and the prospects of conviction in the context of a fair trial "unlikely". However, as the judge correctly noted, Canadian law is clear that there is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.

Following the committal hearing, the defence made extensive submissions to the Minister of Justice on behalf of Dr. Diab opposing his surrender to France. Among other grounds, counsel argued that: France was not "trial ready" and therefore Canada had no jurisdiction to extradite Dr. Diab; and Dr. Diab would not be able to obtain a fair trial in France, where unsourced intelligence evidence could be used against him. The Minister of Justice rejected those arguments and, on April 4, 2012, ordered Dr. Diab's surrender.

On May 15, 2014, after a lengthy hearing, the Ontario Court of Appeal dismissed both Dr. Diab's appeal of the extradition judge's decision to commit him for extradition

and his application for judicial review of the Minister's surrender decision. On November 13, 2014, Dr. Diab's application for leave to appeal to the Supreme Court was denied. The next day, Dr. Diab was surrendered to France where he remained, detained, for the next three years.

Concerns about Dr. Diab's Extradition

Dr. Diab's lengthy detention in France and eventual return to Canada sparked widespread debate about both his treatment and Canada's extradition process. On July 5, 2018, the Attorney General of Canada asked me to conduct an external review of Dr. Diab's extradition. My tasks were to assess whether:

- government actors followed the law and DOJ policies and practices in the conduct of this case
- any approaches taken by IAG counsel could be improved
- there were any specific concerns that Canada should address with our foreign partner (France).

Many people have expressed discomfort with the fact that Dr. Diab was extradited based on a weak case presented by France, held in detention for over three years and eventually returned to Canada without standing trial. Dr. Diab, his counsel and his supporters view his case as emblematic of an extradition system that too heavily favours prompt compliance with Canada's international obligations to our extradition partners over the protection of the rights of those sought for extradition.

On the other hand, an extradition hearing is not a trial. Extradition proceedings are meant to be fair but expeditious. Some on the government side suggest that the Diab proceedings were unnecessarily protracted because they took on features of a criminal trial rather than leaving those issues to be addressed in France. In their view, Dr. Diab's case does not reveal any deficiencies in the extradition system. He was legally extradited having been afforded all appropriate procedural protections. The fact that he was not convicted in France does not render the extradition process flawed.

My Review

It is important to point out that my mandate did not include an examination of the *Extradition Act* at large or the law of extradition in Canada. The terms of reference do not direct me to evaluate or make recommendations as to the careful balancing of the broader purposes of extradition with individual rights and interests.

Having reviewed the relevant materials and interviewed many of the parties, I have concluded that none of the criticisms lodged against the DOJ counsel have any merit.

I was asked to examine the particular circumstances of Dr. Diab’s extradition and the conduct of IAG counsel in advancing the case. In this regard, I note that, in addition to the complaints about the extradition system noted above, government lawyers were specifically criticized for the energy they dedicated to advancing what appeared to be a weak case, allegedly withholding exculpatory evidence and making false representations to the extradition judge.

In conducting my review, I received the full cooperation of DOJ counsel and staff. I was also given full access to departmental files, transcripts of the court proceedings and correspondence respecting the Diab extradition.

The fact that counsel in this case operated ethically and within the bounds of the law does not mean there is no room for improvement.

My Conclusions in Brief

Having reviewed the relevant materials and interviewed many of the parties, I have concluded that none of the criticisms lodged against the DOJ counsel have any merit. My conclusion that DOJ counsel acted in a manner that was ethical and consistent – both with the law and IAG practices and policies – is based on a firm factual foundation.

DOJ counsel acted properly in vigorously advancing France’s case. We would expect French authorities to do the same when Canada makes an extradition request. DOJ counsel also complied with their obligations to the extradition judge and their disclosure obligations. I note that, in the course of the extradition proceedings, counsel for Dr. Diab twice brought abuse of process applications relating to the conduct of DOJ counsel (among other grounds). Neither application was successful, and the rulings were not appealed.

Of course, the fact that counsel in this case operated ethically and within the bounds of the law does not mean there is no room for improvement. With the benefit of hindsight, it is apparent that counsel presenting the case

The world of extradition is poorly understood. Significant and sustained efforts should be made to illuminate Canada’s extradition process and increase its transparency.

for extradition could have entertained different approaches to the complex issues of this case, which might have resulted in more expedient and less hotly contested proceedings. Going forward, the Department of Justice should consider adopting policies and procedures that promote both fairness and efficiencies in extradition proceedings – even when these procedures are not strictly required by the law.

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

Overview

Early in the evening of October 3, 1980, a bomb exploded outside a synagogue at 24 Rue Copernic in Paris, France. Four people were killed, more than 40 more were wounded – many very seriously – and the surrounding buildings were severely damaged. This was an antisemitic, terrorist act. The bomb was apparently timed to go off as worshippers celebrating the holiday of Simchat Torah would be leaving the synagogue. It was only because the services ran late that the devastation and loss of life was not greater.

Almost 20 years later – in 1999 – French authorities received certain intelligence information that started to point to Hassan Diab, originally of Beirut, as a possible suspect.

The extradition process unfolded over the course of several years.

However, it was not until 2008 – 28 years after the bombing – that France began working with Canadian authorities to assemble a record to support an extradition request against Dr. Diab, who was then age 55. At that time, Dr. Diab was a Canadian citizen living in the Ottawa area teaching sociology at two Ottawa area universities. He was married to Rania Tfaily and they had one child.

The extradition process unfolded over the course of several years. In November 2008, France made its request for extradition. On June 6, 2011, after a protracted and hard-fought extradition hearing, the Honourable Justice Robert Maranger, of the Ontario Superior Court of Justice ordered Dr. Diab’s committal. On April 4, 2012, after considering extensive submissions by Dr. Diab’s counsel arguing that his surrender would be unjust, the Minister of Justice ordered Dr. Diab’s surrender to France. On May 15, 2014, following a full hearing and after reserving its decision, the Court of Appeal for Ontario dismissed both Dr. Diab’s appeal from committal and his application for judicial review of the Minister’s decision. Leave to appeal to the Supreme Court of Canada was refused and, on November 14, 2014, Dr. Diab was surrendered to France.

In its decision dismissing Dr. Diab’s appeal, the Court of Appeal reasonably concluded that the record before it “clearly demonstrate[d]” that, if extradited, Dr. Diab would not “languish in prison” without trial.¹ Unfortunately, Dr. Diab ultimately spent three and a quarter years in custody in France before he was freed by the investigating

¹*France v. Diab*, 2014 ONCA 374 at para. 176, citing the leading Supreme Court of Canada case, *United States of America v. Ferras*, 2006 SCC 33 at para. 55 [*Ferras*].

magistrates on January 12, 2018. While he was in prison, Dr. Diab missed the birth of his youngest child as well as several birthdays of both his young children.

France’s decision to release Dr. Diab is not publicly available. Some reports in the media suggest that the investigating magistrates determined there was insufficient evidence to refer the matter to trial; other reports indicate that the investigating magistrates found “consistent evidence” that Dr. Diab had been in Lebanon at the time of the bombing. I have not seen the decision and so cannot say with any certainty why Dr. Diab’s matter was not referred to trial. The French prosecutors appealed the decision discharging Dr. Diab. At the time of writing this report, there is no final French judicial decision.

The time Dr. Diab spent in lengthy, difficult pre-trial custody in France raised many questions about the expectations Canada had prior to sending him to France.

With the assistance of officials from Global Affairs Canada, on January 15, 2018, Dr. Diab returned to Canada, his family and freedom.

The Scope of the Review

Dr. Diab’s return sparked widespread public debate about his treatment and his experiences with Canada’s extradition processes. If nothing else, the time Dr. Diab spent in lengthy, difficult pre-trial custody in France raised many questions about the expectations Canada had prior to sending him to France.

Dr. Diab, his supporters, and a number of civil liberties and human rights organizations across Canada raised questions, including, about whether:

- the *Extradition Act* and its interpretation by Canadian courts set too low a threshold for extraditing Canadian citizens
- the lawyers from the International Assistance Group (IAG) within the Department of Justice – who worked with France to advance the extradition case against Dr. Diab – had overstepped their role
- France was “trial ready” when it requested Dr. Diab’s extradition
- intelligence-based information would be used, unfairly, in building a case against Dr. Diab at a French trial.

In response to these public concerns, the former Attorney General, the Honourable Jody Wilson-Raybould, commissioned an external review (for the full terms of reference, see Appendix A).

In brief, my instructions were as follows:

You are to conduct your external review independently of any direction from the Government of Canada and to form your own assessments and conclusions respecting the matters that are the subject of your external review.

1. *Assess whether the law was followed in the conduct of the Diab extradition*
2. *Assess whether there were any particular approaches taken by counsel in the Diab extradition that identify a need to take action to improve or correct the approach that the International Assistance Group (IAG) takes to advisory or litigation files going forward*
3. *Assess whether there are specific concerns that need to be addressed with our foreign partner (France) with respect to the treatment of Dr. Diab once surrendered to France.*

Note: the International Assistance Group (IAG) is a team that operates within the Department of Justice. In Dr. Diab's case, different IAG counsel played different roles throughout the extradition proceedings. Some provided advice to France in forming its extradition request and some acted on behalf of France at the extradition committal hearing. Others provided advice to the Minister in relation to the issue of surrender.

Dr. Diab, his counsel, his supporters and others raised many areas of concern. Some pertained to the unusual circumstances of this matter while others focused on the *Extradition Act*. To be clear, my mandate does not include examining the *Extradition Act* at large. However, to the extent that Dr. Diab's experience implicated the *Act*, I discuss it in this report. When I do so, it is not my intent to exceed my mandate. My emphasis is on responding to the terms of reference and making suggestions for improvement.

The Review Process

To fulfill my mandate, I spoke with many individuals, including those directly involved in Dr. Diab's extradition as well as those able to provide background information and a broader perspective on Canada's extradition system. I am grateful to all those who identified issues and gave generously of their time to meet with me and respond to my inquiries.

The Government of Canada offered complete access to relevant personnel and to documents. As part of the review, I conducted extensive interviews with Department of Justice (DOJ) counsel, managers, decision makers, staff and policy advisors, and I thoroughly reviewed relevant correspondence and the voluminous documentary record compiled for court and for all other aspects of processing France's request for extradition.

I was able to speak with personnel from the Royal Canadian Mounted Police (RCMP) and officials with Global Affairs Canada. I corresponded with interveners who supported Dr. Diab in court proceedings and beyond, including Amnesty International and the British Columbia Civil Liberties Association. I also consulted with academics.

France cooperated by offering the review access to justice officials who provided information about the workings of the French justice system, including how extradition requests are handled before making a request of a foreign country. However, one significant constraint is that I have not had access to any of the French courts' decisions or orders. I understand that all proceedings prior to trial are confidential in France, although brief accounts of Dr. Diab's journey before the French courts made their way into the media. Under freedom of information legislation, records relating to Dr. Diab's contact with Canadian consular staff while he was detained in France were released to a Canadian national newspaper, but Dr. Diab did not consent to my reviewing that material. Again, brief accounts of such records made it into the media.

Both the terms of reference and common sense would drive me to hear from Dr. Diab, members of his family and his talented, knowledgeable legal counsel. I would have liked nothing more.

Despite my expressed desire to hear directly from Dr. Diab and his lawyers, Dr. Diab – as is his right – decided he would prefer not to meet or contribute. He and his supporters, including various human rights and civil liberties organizations, expressed the view that a review was an inadequate substitute for a royal commission or public inquiry.

Although I was not able to speak directly to Dr. Diab or his lawyers, I have worked to understand his perspective. I have paid particular attention to his position as expressed thoroughly and forcefully in court, to the Minister and to the media.

Summary of Findings

Dr. Diab was arrested in Canada, at the request of France, in November 2008. Six years later, in November 2014, following complicated and protracted extradition proceedings, he was surrendered to France. Throughout the extradition proceedings in Canada, Dr. Diab was ably represented by counsel, Donald Bayne, and his talented and dedicated co-counsel. France was equally well-represented by DOJ counsel, Claude LeFrançois who was joined at different points by Matthew Williams and Jeffrey Johnston – all members of the IAG and experienced litigators.

Was the law followed? Were IAG counsel's approaches appropriate?

Yes.

Having reviewed the lengthy and complex history of this case, I have concluded that the Department of Justice and its lawyers in the International Assistance Group followed the law in the conduct of Dr. Diab's extradition to France. IAG counsel acted in accordance both with the law and with the practices of the DOJ.

IAG counsel advanced the case for extradition ethically and with skill and considerable drive. At each stage of the proceedings, counsel for Dr. Diab provided a vigorous, thoughtful and thorough defence.

The committal hearing was lengthy and complex. The Honourable Justice Maranger of the Ontario Superior Court of Justice provided careful reasons for ordering committal, which were responsive to the issues raised by the parties. The Minister, after receiving and considering Mr. Bayne's full and powerful submissions in opposition, gave lengthy reasons for ordering surrender. The Court of Appeal addressed each of the grounds advanced by Dr. Diab and the intervenors and, after reserving its decision, dismissed Dr. Diab's appeal against committal for extradition and his application for judicial review of the Minister's decision to order surrender in detailed reasons. An application for leave to further appeal to the Supreme Court was denied.

Although Dr. Diab's extradition and long detention in France and his subsequent return to Canada without facing trial in France was troubling, it was not – as some have suggested – the product of unethical or inappropriate conduct on the part of IAG lawyers.

Although Dr. Diab's extradition and long detention in France and his subsequent return to Canada without facing trial in France was troubling, it was not – as some have suggested – the product of unethical or inappropriate conduct on the part of IAG lawyers. To the contrary, IAG counsel who worked on Dr. Diab's extradition are experts in their field who are dedicated to their task and who acted in accordance with their professional and ethical obligations.

Are there opportunities for improvement?

Yes.

Although the law was followed, Dr. Diab and his supporters, as well as human rights and civil liberties groups, have raised legitimate questions that are important not just to Dr. Diab, but to all Canadians. What can we learn from his case?

Chief among the lessons I learned conducting this review is that the world of extradition is poorly understood and information about how Canada's extradition

system works is difficult to access. An extradition hearing is not a trial. Extradition proceedings are meant to be fair but expeditious. However, given the complexity of the issues related to international cooperation to fight crime and the importance of adequately protecting the liberty interests of persons, like Dr. Diab, sought for extradition, it is extremely challenging for the extradition process to meet its goal to be expeditious and efficient.

The world of extradition is poorly understood and information about how Canada's extradition system works is difficult to access.

Based on my review of this case, I make two broad sets of recommendations: one

designed to make Canada's extradition process more transparent – for the public and for individuals personally caught up in extradition proceedings; and the other designed to promote both fairness and efficiency in extradition proceedings.

My suggestions are not intended to be criticisms. They are ideas for exploration, consideration and consultation. They are intended to spark more discussion about how to improve Canada's extradition process.

How the Report is Organized

My report is organized as follows:

Part A briefly summarizes the law relating to extradition in Canada. Recent high-profile extradition cases have resulted in more public attention on this area of law. My strong sense, however, is that extradition law is generally not well understood by the public. My summary cannot entirely remedy that concern; however, I hope my overview will help put what happened in this case in context.

Part B sets out in detail the chronology of the lengthy extradition proceedings in Dr. Diab's case. I review the essential facts at each stage of the proceedings, describing the approach of IAG counsel and summarizing the judicial and ministerial decisions that ultimately resulted in Dr. Diab's extradition to France. Throughout Parts A and B of the report, I highlight issues of concern and potential areas for improvement.

- **Part C** is my analysis, response and conclusions in respect of the three areas identified in the terms of reference. I expand on the potential concerns and areas for improvement identified in Parts A and B and make recommendations.
- The **Appendices** include the terms of reference and press release (Appendix A), a timeline (Appendix B) and a summary of the recommendations (Appendix C).

Part A: Extradition Law and the Extradition Process in Canada

It is my sense that many of the criticisms and frustrations with both the extradition process and the role of IAG counsel in the Diab case were the results of misperceptions about Canada's extradition law.

In examining the Diab case, I found there was little public information available from government sources, such as public websites, about how extradition works. As a result, the public does not have a good or accurate view of what extradition is, the laws governing the process, how hearings are conducted, the role of the extradition partner, the role of Department of Justice counsel, the judge and the Minister.

When tough questions emerge in the midst of a case, the traditional reluctance of Crown counsel and Justice officials to comment takes over. The lack of publicly available material on the Justice website may contribute to an incomplete narrative. That requires a solution.

Improving what is generally available on the DOJ website is an easy fix. DOJ spokespersons could then refer to or incorporate that information when responding to questions about the process. Careful, timely responses, through a Departmental spokesperson, may go a long way to educate the public and dispel misconceptions. Certainly, in this matter, unanswered criticisms may have unnecessarily fuelled questions about whether Dr. Diab's case had been handled properly and whether IAG counsel had abused their office. To be clear, they hadn't, but when an opposite view is not fully addressed, it can contribute to a different impression.

To put what happened in the Diab case and my findings and recommendations in context, it is important for readers of this report to understand extradition law and the extradition process in Canada. This section of my report provides a brief overview of:

The public does not have a good or accurate view of what extradition is, the laws governing the process, how hearings are conducted, the role of the extradition partner, the role of Department of Justice counsel, the judge and the Minister.

- the extradition process where a person is wanted for purposes of prosecution by another country²
- the evidence required for extradition (the record of the case)
- the restrained role of extradition judges and the process for challenging the record of the case
- disclosure in extradition proceedings.

1. The Extradition Process

Extradition is a form of international assistance. Canada's obligation to extradite individuals arises out of its treaty obligations implemented under the *Extradition Act* ("the Act").³ The *Act* gives Canada the legal basis on which to extradite persons who are sought by an "extradition partner" either for prosecution or to impose/enforce a sentence. The *Act* contains a schedule that designates certain states as extradition partners. In Dr. Diab's case, France was the extradition partner ("the requesting state"), and it sought Dr. Diab's ("the person sought") extradition for the purpose of prosecution.

Basic Principles of Extradition

Reciprocity and Comity

Reciprocity, comity and respect for differences in other jurisdictions are foundational to the effective operation of the extradition process.⁴ The case law recognizes that Canada must honour its obligations to its extradition treaty partners, in part, because Canada relies on its partners to ensure individuals who commit crimes in our country are extradited back to face justice here.

There is a mutual trust between treaty partners in each other's criminal justice systems.

Moreover, there is a mutual trust between treaty partners in each other's criminal justice systems. Extradition is based on a presumption that, if extradited, the person sought will have a fair trial in the requesting country to determine his or her guilt. This is one of the central reasons why the extradition process is meant to be efficient and expeditious. In deciding whether to extradite someone, the guilt or innocence of

² My summary of the extradition process is based on material provided to us by the Department of Justice's Guide on evidentiary requirements for seeking extradition from Canada (2015), Justice Canada.

³ *Extradition Act*, S.C. 1999, c. 18.

⁴ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at p. 844 [*Kindler*].

the person sought is not a concern: that is a question that will be determined in the requesting state if extradition is ordered

At the same time, the case law recognizes that our extradition proceedings must also protect the liberty interests of the person sought. “International comity does not require the extradition of a person on demand or surmise.”⁵ That means that unless the requesting state can show there is a *prima facie* case – that is, there is some evidence which, if believed, is capable of establishing the person sought committed the alleged offence – the person should not be extradited.

Double Criminality

The principle of double criminality is also aimed at protecting the rights of individuals sought for extradition. This principle dictates that a person cannot be surrendered for extradition if the alleged conduct for which they are sought does not amount to a crime in Canada. Put another way, Canada should not extradite a person to face punishment in another country for conduct that would not be criminal in Canada.

Key Stages of the Canadian Extradition Process

In Canada, extradition is a three-stage process. The *Act* divides responsibility for these three phases between the Minister of Justice and the courts. The Minister of Justice determines whether extradition proceedings should be started and how they will end, making extradition a largely executive function that is political in nature, as will be explained later. In the middle, there is the judicial phase where a judge determines whether there is sufficient evidence to justify committal.

The three key stages to Canada’s extradition process are described here:

Stage 1 - Issuance of “Authority to Proceed”

Once a request for extradition has been made, the Minister of Justice must first determine whether extradition should proceed. When the Minister of Justice is satisfied that the foreign state’s extradition request meets the relevant treaty requirements, a document – called an Authority to Proceed (ATP) – is issued on behalf of the Minister of Justice and authorizes the commencement of extradition proceedings in Canada. The Authority to Proceed contains the name of the person whose extradition is sought and the name of the extradition partner. It also lists the offence or offences under Canadian law that would correspond to the conduct alleged against the person or the conduct in respect of which the person was convicted, as the case may be. The Authority to Proceed is similar to an information

⁵ *Ferras, supra* note 1 at para. 21

or indictment in a domestic Canadian criminal proceeding. The Minister of Justice or designate provides the authority to commence extradition proceedings in court.

With the exception of decisions on surrender pursuant to s. 40(1) of the *Act*

(discussed below), the IAG has delegated authority to exercise all the powers of the Minister under the *Act*. The IAG reviews and coordinates all extradition requests made either by or to Canada. In practice, the Minister is generally not personally

The IAG reviews and coordinates all extradition requests made either by or to Canada.

involved in the review or approval of extradition requests going ahead or the issuance of the ATP. Although the Minister may be advised of requests once made or soon after they are made, the review is conducted on behalf of the Minister by officials within the IAG.

Stage 2 – Extradition Hearing

When an Authority to Proceed is issued, an extradition hearing (also known as a committal hearing) is held before the Superior Court of the province where the person sought is located. This is the *judicial* phase of the extradition proceedings. An evidentiary hearing is held in which the extradition judge must decide the following issues when (as in the Diab case) the person is being sought for prosecution:

- whether the conduct alleged against the person would justify their committal for trial on the corresponding Canadian offence(s) listed in the Authority to Proceed, had the alleged conduct been committed in Canada; and
- whether the person appearing before the extradition judge is the person sought by the extradition partner.

At the extradition hearing, the requesting state is represented by counsel for the Attorney General. These lawyers work within the Federal Department of Justice. Unusually, in Dr. Diab's case, counsel within the IAG took on this role. Typically, IAG counsel act in an advisory capacity and DOJ counsel in the various regional offices across Canada, who specialize in litigation and who are not members of the IAG, represent the requesting state at the

IAG counsel took on a litigation role in Dr. Diab's case because of their familiarity with the file, their fluency in French, their litigation experience and because the extradition hearing took place in Ottawa, where the IAG is located.

extradition hearing. IAG counsel took on a litigation role in Dr. Diab's case because of their familiarity with the file, their fluency in French, their litigation experience and because the extradition hearing took place in Ottawa, where the IAG is located.

If a *prima facie* case is not made out that the person sought committed the offence set out in the Authority to Proceed, the extradition judge discharges the person and the proceedings are over (subject to an appeal by the Attorney General). If a *prima facie* case is made out, the extradition judge orders committal. The matter then moves to the surrender phase. In some instances, a person arrested pursuant to a request for extradition, will consent to committal and move straight to the surrender phase.⁶

Stage 3 - Surrender Decision

This stage is often referred to as the *executive* phase of the extradition proceedings. If the extradition judge orders the committal of the person sought for extradition, Canada's Minister of Justice must then personally decide whether to order the person's surrender to the extradition partner in accordance with section 40 of the *Extradition Act*. This decision is primarily political and the Minister has significant discretion. That said, surrender must not violate the *Charter*⁷ or be contrary to the provisions of the *Act*. Sections 44 to 47 of the *Act* provide several grounds on which the Minister may or must refuse surrender. The Minister's decision involves weighing different factors, including Canada's treaty obligations, the person's constitutional rights and humanitarian considerations.

The extradition judge in the committal phase and the Minister in the surrender phase have distinctly different functions. It is not the Minister's role to review the findings of the committal judge, to consider whether there is sufficient evidence for extradition, or determine the guilt or innocence of the person sought for extradition. That said, some courts have recognized that there may be exceptional

Where surrender is contested, special counsel in the IAG's office, assigned to support the Minister, prepares a legal memorandum for the Minister's consideration.

circumstances where a person sought for extradition provides such compelling exculpatory evidence that the Minister must consider it in making the surrender decision. These circumstances are limited to situations where the person sought for extradition demonstrates: (1) evident weakness in the requesting state's evidence;

⁶ See s. 70 of the *Act*.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [the *Charter*].

and (2) surrender will cause the individual serious hardship in presenting his or her defence at trial in the requesting state.⁸

In some cases, the person sought may consent to their surrender.⁹ Where surrender is contested, special counsel in the IAG's office, assigned to support the Minister, prepares a legal memorandum for the Minister's consideration. That memorandum includes: a description of the extradition request; the circumstances of the alleged offence and person sought; a history of the proceedings, including the extradition hearing; a description of any submissions made on behalf of the person sought opposing surrender; and any other information relevant to the Minister's decision, including, potentially, information obtained from the requesting state.

The test for refusing surrender on s. 7 grounds is a strict one, and only precludes surrender in cases of a "very exceptional nature" where surrender to the requesting state would "shock the conscience" of Canadians.

The *Act* provides that the Minister, having considered all relevant circumstances, must refuse to make a surrender order if satisfied that surrender would be "unjust or oppressive" or if the request is made for an improper purpose enumerated in the *Act* (e.g. because of race, religion, ethnic origin).¹⁰ The case law establishes that surrender must also be refused where it would violate s. 7 of the *Charter*, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. However, the test for refusing surrender on s. 7 grounds is a strict one, and only precludes surrender in cases of a "very exceptional nature" where surrender to the requesting state would "shock the conscience" of Canadians.¹¹

Extradition also engages s. 6 of the *Charter*, the right to remain in Canada. The Supreme Court has found that the extradition of a Canadian citizen is a *prima facie* infringement of section 6 of the *Charter* but will generally be justified under s. 1 of the *Charter* as a reasonable limitation of the right to remain in Canada.¹² The

⁸ *U.S.A. v. Lucero-Echegoyen*, 2013 BCCA 149 at paras. 20–32; *United States of America v. Lopez-Turatiz*, 2014 BCCA 39 at paras. 31-42.

⁹ See s. 71 of the *Act*.

¹⁰ See s. 44(1)(a) and (b) of the *Act*.

¹¹ *Kindler*, *supra* note 4 at pp. 849-850; *United States v. Burns*, 2001 SCC 7 at paras. 66-69; *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at p. 522.

¹² *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469.

Minister's assessment of whether the infringement of the s. 6 right of the person sought is justified under s. 1 involves a determination of whether Canada should defer to the interests of the requesting state or prosecute the individual in Canada. In cases where there is no jurisdiction to prosecute the offence in Canada, s. 6 considerations play a limited role in the Minister's decision.¹³

Provided the Minister applies the correct legal test and does not otherwise err in law or contravene the principles of natural justice, the decision that surrender would not be contrary to the *Charter* or the provisions of the *Act* is entitled to considerable deference.¹⁴

France and Canada are treaty partners.

Who is an “Extradition Partner”?

“Extradition partners” include:

- countries with which Canada has an extradition agreement (bilateral treaties or multilateral conventions)
- countries with which Canada has entered into a case-specific agreement
- countries or international criminal courts whose names appear in the Schedule to the *Extradition Act*.

France and Canada are treaty partners.

Appeal Rights

Both the person sought and the Attorney General have a right to appeal the committal or discharge order of the Superior Court judge to the applicable provincial court of appeal. The person sought also has a right to apply to the applicable provincial court of appeal for a judicial review of the Minister's surrender decision. The appeal and judicial review are often heard together.

A decision of the court of appeal may be appealed to Canada's highest court, the Supreme Court of Canada, with leave of that Court.

¹³ The extradition treaty between Canada and France provides that neither country is bound to extradite its own nationals. While Canada will surrender its citizens to a requesting state, where appropriate, France will not. It will, however, consider prosecuting a French citizen domestically for a crime committed elsewhere.

¹⁴ *Canada v. Schmidt*, *supra* note 11 at p. 523; *Lake v. Canada*, 2008 SCC 23 at paras. 17, 34-41.

2. Evidence Required for Extradition (the Record of the Case)

As noted above, the second stage of the Canadian extradition process is judicial. The extradition hearing involves an assessment of the evidence presented in court against the person sought for extradition.

In the case of a person who is sought for prosecution, a requesting state must provide Canada with the following evidence:

- evidence that is available to the requesting state to prosecute the person for the offence(s) for which he/she is wanted. This evidence is necessary for the extradition judge to determine whether the alleged criminal conduct would constitute an offence in Canada if it had been committed in our country
- evidence demonstrating that the person appearing before the extradition judge is:
 1. the person whose extradition is sought by the requesting state (to be proven on a “balance of probabilities” – that is, it is more probable than not that the person before the court is the person sought for extradition); and
 2. the person who committed the alleged criminal conduct (on a *prima facie* standard – that is, there is “some evidence” linking the accused person to the crime).

The extradition hearing involves an assessment of the evidence presented in court against the person sought for extradition.

Summary of the Evidence of Criminal Conduct

The evidentiary process most commonly used when seeking extradition from Canada is the Record of the Case (ROC) format (see section 33 of the *Extradition Act*).

Prior to 1999, the *Act* required that evidence in support of an extradition request be in sworn form and admissible according to the laws of Canada.¹⁵ That sometimes produced a very cumbersome process with attendant delays. In 1999, in a partial response to criticisms, including those from extradition partners, Canada amended the *Act*.¹⁶ The amended *Act* aimed to modernize and streamline Canada’s extradition procedure. Among other things, it was intended to make the judicial process of

¹⁵ *Extradition Act*, R.S.C 1985, c. E-23.

¹⁶ See, e.g. remarks of the Honourable Anne McLellan, then Minister of Justice and Attorney General of Canada, Don Pirogoff, then General Counsel, Criminal Law Policy Section, Department of Justice, and Jacques Lemire Counsel, International Assistance Group, Department of Justice at the Standing Committee on Justice and Human Rights, November 4, 1998, available online: <http://www.ourcommons.ca/DocumentViewer/en/36-1/JURI/meeting-96/evidence>

extradition more accessible to some of Canada's extradition partners, particularly civil law countries, who previously had difficulty complying with Canadian evidentiary rules such as, for example, those relating to hearsay.

In a case like *Dr. Diab's*, where the person is being sought for prosecution (as opposed to being sought to serve a previously imposed sentence), the ROC is a summary of the evidence available to the requesting state to prosecute the person. For example, the ROC includes summaries of the relevant portions of witness statements, forensic and other reports, the fruits of intercepted communications and other information.

When requesting states use the ROC format, they do not need to include the sworn statements/depositions of witnesses, actual reports (including forensic reports) or every aspect of the investigative file. The requesting state may attach documentary exhibits to the ROC (e.g. a report central to the case); however, copies of original evidence are not required. A detailed summary of the contents of the statements, reports and other documents – the key evidence against the person sought – is all that is required subject to the necessary certification from a responsible authority discussed below.

In a case like Dr. Diab's, where the person is being sought for prosecution (as opposed to being sought to serve a previously imposed sentence), the ROC is a summary of the evidence available to the requesting state to prosecute the person.

The ROC may also include a summary of relevant evidence gathered in Canada and shared with the requesting state. Unlike evidence collected in and presented by the requesting state, evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

Identification Evidence

In addition to summarizing the evidence in support of the extradition offence(s), the requesting state must include identification evidence in the ROC. This evidence must satisfy the extradition judge that the person before the court is the person sought by the extradition partner.

Certification

To be admissible in a Canadian court, the ROC must be certified in accordance with Canada's *Extradition Act*.

In the case of a person sought for prosecution, a judicial or prosecuting authority in the requesting state, who is familiar with the case, must certify that the evidence summarized or contained in the ROC is:

- available for trial; and
- is either (1) sufficient under the laws of the requesting state to justify prosecution or (2) was gathered according to the law of the requesting state.

The investigating judge in France certified that the evidence contained in the ROC was available for trial and had been gathered according to French law.

The certification of the ROC makes its contents presumptively reliable for the purpose of the Canadian extradition hearing.

In Dr. Diab's case, the investigating judge in France certified that the evidence contained in the ROC was available for trial and had been gathered according to French law.

3. The Restrained Role of Extradition Judges and the Process for Challenging the Record of the Case

United States of America v. Ferras found the ROC method (described above) to be constitutionally sound. The Supreme Court held that the sections of the Act that permit a committal on the basis of an ROC do not violate the right of a person sought under s. 7 of the *Charter* because:

[T]he requirements for committal of s. 29(1), properly construed, grant the extradition judge discretion to refuse to extradite on insufficient evidence such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial.¹⁷

In M.M., the Court held that extradition judges have a restrained role in assessing the reliability of evidence.

¹⁷ *Ferras*, supra note 1 at para. 50.

In *Ferras*, the Supreme Court found that an extradition judge, unlike a judge at a preliminary inquiry, may engage in a limited weighing of the evidence to determine whether there is a “plausible case”. When the evidence summarized in the ROC is so defective or appears so manifestly unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case is considered insufficient for committal.¹⁸ This judicial review ensures that the extradition process does not “deprive the person sought of the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition”.¹⁹ This finding was a significant change from the jurisprudence before *Ferras* which, under the previous version of the *Extradition Act*, restricted the extradition judge’s inquiry to the sufficiency of the evidence.

Following the Supreme Court’s ruling in *Ferras*, the role of the extradition judge in scrutinizing the reliability of the evidence for committal was the subject of some disagreement between provincial appellate courts. The issue was addressed squarely by the Supreme Court in *United States of America v. M.M.*²⁰ where Justice Cromwell, writing for a majority of the Court, provides a helpful review of the extradition process, especially the committal stage.

In *M.M.*, the Court held that extradition judges have a restrained role in assessing the reliability of evidence. They are not to weigh competing inferences that might arise from the evidence. Moreover, the Supreme Court confirmed that extradition judges have no power to deny committal “simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial”.²¹

The starting point is that the requesting state’s certified evidence is presumptively reliable. The person sought may seek to rebut this presumption by demonstrating that the evidence is “manifestly unreliable” and is permitted to adduce evidence to undermine the reliability of

To be admissible, the defence evidence must be relevant to the restrained task of the extradition judge. Evidence that merely invites the extradition judge to assess the credibility of the evidence in the ROC or establishes a basis for competing inferences will not be admissible.

¹⁸ *Ibid.* at para. 54.

¹⁹ *Ibid.* at paras. 40 and 47-49.

²⁰ 2015 SCC 62 [*M.M.*].

²¹ *Ibid.* at para. 71.

the requesting state's evidence. However, meeting this standard of manifest unreliability is difficult because it requires showing fundamental inadequacies or frailties in the material relied on by the requesting state. To be admissible, the defence evidence must be relevant to the restrained task of the extradition judge. Evidence that merely invites the extradition judge to assess the credibility of the evidence in the ROC or establishes a basis for competing inferences will not be admissible.

Similarly, evidence that establishes a defence or attempts to establish an exculpatory account of events (such as an alibi or self-defence claim) will generally be inadmissible "as it does not affect the reliability of the requesting state's evidence".²²

To justify committal, there must be sufficient evidence on the basis of which a reasonable, properly instructed jury could reach a guilty verdict.

There is a limited exception to these general rules. It is possible that exculpatory evidence could meet the high threshold for showing that the requesting state's evidence should not be relied on, where the defence evidence is "of virtually unimpeachable authenticity and reliability". Where such evidence contradicts the ROC, it *could* rebut the presumption of reliability and *could* therefore justify refusal to commit. However, as the Supreme Court made clear in *M.M.*, such situations will be "very rare".²³

Extradition judges play an important but "circumscribed and limited screening function" at the committal phase of the proceedings.²⁴ The role of the judge is to decide whether 1) the person before the court is the person sought; and 2) there is evidence admissible under the *Extradition Act* and available for trial that would justify committal for trial in Canada, had the crime occurred here. To justify committal, there must be sufficient evidence on the basis of which a reasonable, properly instructed jury could reach a guilty verdict.²⁵

4. Disclosure in Extradition Proceedings

In Dr. Diab's case, there was some criticism of counsel for the Attorney General for their approach to disclosure. It has been alleged that both France and DOJ counsel

²² *Ibid.* at para. 84.

²³ *Ibid.* at para. 85.

²⁴ *Ibid.* at para. 36.

²⁵ *Ferras, supra* note 1 at paras. 26 and 46.

improperly held back exculpatory evidence. These complaints raise questions about the relevant duty to disclose in extradition proceedings. Do the disclosure obligations that ordinarily apply to Crown counsel in Canadian criminal proceedings apply to extradition cases? The answer is no.

Persons familiar with the Canadian domestic criminal justice system are aware of the seminal case of *R. v. Stinchcombe*.²⁶ That decision clarified and enshrined the Crown's legal duty to disclose all relevant information to the defence. The Supreme Court has identified this as a principle of fundamental justice under s.7 of the *Charter* that informs all domestic prosecutions. If the prosecutor falls short in this obligation, courts have a supervisory jurisdiction. In the criminal or quasi-criminal context, disclosure responds to the right to make full and fair defence in a Canadian trial.

Do the disclosure obligations that ordinarily apply to Crown counsel in Canadian criminal proceedings apply to extradition cases? The answer is no.

Extradition is a very different process.

Extradition is a creature of the *Extradition*

Act as amplified by treaties and agreements between extradition partners. It is meant to be a fair but expeditious mechanism to determine whether a person should be sent to the requesting state for trial. The extradition proceeding is not meant to be or substitute for a trial. The trial, of course, will be in a foreign country based on that country's laws and the evidence it may have or will collect. At the extradition stage, guilt or innocence is not a relevant issue.

The scope of disclosure demanded by s. 7 of the *Charter* in the context of extradition proceedings is constrained by the limited function of the extradition judge and the Minister under the *Act* and by the need to avoid imposing Canadian notions of procedural fairness on foreign authorities. Therefore, neither the requesting state nor counsel for the Attorney General acting on the requesting state's behalf, are required to disclose all relevant evidence. They need only disclose that evidence on which they rely in seeking extradition.

The Supreme Court of Canada in *United States v Dynar*²⁷ and *United States of America v. Kwok*²⁸ clearly and affirmatively resolved the non-application of *Stinchcombe* disclosure in the extradition setting. In these cases, the Supreme Court made clear that the requesting state and counsel for the Attorney General are not required to disclose their entire case and have no obligation to disclose potentially

²⁶ [1991] 3 S.C.R. 326 [*Stinchcombe*].

²⁷ [1997] 2 S.C.R. 462 [*Dynar*].

²⁸ 2001 SCC 18 [*Kwok*].

exculpatory evidence. The *Act* supports this limited disclosure obligation. Section 33 requires only a summary of the evidence available to the prosecution. The ROC need only disclose – in summary form – sufficient admissible and available evidence to permit a properly instructed jury, acting reasonably, to conclude that the person sought engaged in the alleged conduct in the Authority to Proceed. Nothing more is required. Of course, if something is omitted, there is always the risk that what is in the ROC may fall short of satisfying the extradition judge that extradition should be ordered.

Neither the requesting state nor counsel for the Attorney General acting on the requesting state's behalf, are required to disclose all relevant evidence.

To illustrate the point further, counsel for the Attorney General, who represents the requesting state at committal proceedings in Canada, does not have access to the foreign file. The extradition judge does not have control over the investigating agency or its file (in this case, an independent magistrate in a foreign country). Counsel for the Attorney General also has no control over and may not be privy to what the foreign country may present back home or what avenues it may still be pursuing.

To put it another way, although the IAG is comprised of counsel who are well familiar with their domestic *Stinchcombe* obligations and extradition pertains to criminal matters, extraditions are not criminal prosecutions. IAG counsel are not required to provide – nor could they deliver – *Stinchcombe* disclosure in the many extradition requests that Canada receives every year.

The Supreme Court has confirmed that *Stinchcombe*-type disclosure is also not required at the surrender stage. The Minister has a duty of procedural fairness to present the person sought with adequate disclosure of the case against them and provide a reasonable opportunity for the person to state their case against surrender. These requirements entitle the person sought to disclosure of any materials considered by the Minister in ordering surrender, subject to claims of privilege, as well as “sufficient reasons” for the Minister’s decision to order surrender.²⁹

²⁹ *Sriskandarajah v. United States of America*, 2012 SCC 70 at para. 30 [*Sriskandarajah*].

Part B: The Chronology of the Case

Having a Canadian citizen sit in a foreign jail for over three years only to be released is troublesome. On the other hand, extradition will sometimes result in a person going free. As Canadians, we see our robust justice system result in accused persons being found not guilty. We should not be surprised if that happens in other democratic justice systems. At the same time, we expect that Canadians extradited to foreign countries will not sit in jail for lengthy periods of time without facing trial.

The question is: what can we learn from Dr. Diab's case? Did government actors follow the law? Did they act ethically? Did we do what we could to ensure that a citizen was supported during detention? Did we do what we could to ensure that detention abroad was not going to be prolonged? To obtain answers to these important questions, it is helpful to start with a narrative of the journey that led the French authorities to request Dr. Diab's extradition almost three decades after the tragic bombing occurred.

Having a Canadian citizen sit in a foreign jail for over three years only to be released is troublesome. On the other hand, extradition will sometimes result in a person going free.

1. The Investigation in France

On October 3, 1980 – the Jewish holiday of Simchat Torah – a bomb exploded outside a synagogue at 24 Rue Copernic in Paris, France, killing four, wounding more than 40, and damaging the surrounding buildings.

The investigation in France took place in stages.

The initial investigation, in the immediate aftermath of the bombing, led police to conclude that the bomb had been planted on a motorcycle parked outside the synagogue. The motorcycle, which was traced to a specific dealership, was sold on September 23, 1980, to a man using the pseudonym Alexander Panadriyu. Documents used to buy the motorcycle led investigators to the Celtic Hotel, near Rue Copernic, where Panadriyu had stayed on September 22, 1980.

At the Celtic Hotel, Panadriyu had signed a hotel registration card. Hotel employees who gave statements to police reported that Panadriyu personally completed the registration card. He printed five words on it in block letters: PANADRIYU, ALEXANDER, LANARCA, TECHNICIAN and CYPRUS. There was also a date written on the registration card.

The registration card was given to police who, according to the Record of the Case (ROC), took all normal precautions to have the card examined by their fingerprint department. However, according to the ROC, the examination did not reveal any useable fingerprint traces.

After Dr. Diab's return to Canada in 2018, the CBC reported that, in 2007, the Institut Génétique Nantes Atlantique, a forensic laboratory in France which judicial authorities sometimes use for testing, discovered there *was* a useable print on the hotel registration card. At some point, a print on the card was compared with Dr. Diab's print. It was not a match. It is not clear from media reports when the comparison was done. In any event, the results of the comparison were not included in the ROC or shared with counsel with the IAG of the Department of Justice, the group responsible for fielding and helping to guide foreign requests for extradition and mutual legal assistance. It appears Dr. Diab became aware of the results of this comparison only after he was extradited to France.³⁰

In the course of the investigation, police discovered that the fictitious Panadriyu had been arrested a few days before the bombing for stealing a pair of pliers from a Paris hardware store. He was not charged and therefore was not prosecuted. Panadriyu signed a police report before being released but he was not photographed. The police report was found in archives decades later. After the original ROC was entered in the extradition proceedings, the police report became of significant interest as authorities thought it might contain fingerprints that matched those of Dr. Diab. It did not.

Employees at the dealership where the motorcycle was purchased, employees at the Celtic Hotel, a sex worker who had been with Panadriyu at the hotel, an employee at the hardware store and the police officers involved in the investigation of the theft of the pliers all provided physical descriptions of Panadriyu. Composite sketches of Panadriyu were made based on those descriptions. The various witnesses offered divergent descriptions in terms of Panadriyu's age, hair colour and length, whether or not he wore glasses, and whether or not he sported any facial hair. The Honourable Justice Robert Maranger, who presided over Dr. Diab's extradition hearing, concluded that, at most, the descriptions supported the proposition that Panadriyu was a male between 25 and 30 years of age, about 1.65 to 1.75 metres tall, with a slight build.³¹

³⁰ David Cochrane, Lisa Laventure "France told Canada key evidence did not exist in Hassan Diab terrorism case" *CBC News* (20 June 2018), online: <https://www.cbc.ca/news/politics/hassan-diab-france-evidence-1.4714307>.

³¹ *Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337 at paras. 166-171 [*Diab*, Committal Decision].

A car linked to the plot was found abandoned. It had a palm print on the inside back window. That palm print was compared with Dr. Diab's palm prints, which were taken many years later after he was arrested in Canada. It was not a match.

In October 1981, on the same Jewish holiday, a synagogue in Antwerp, Belgium, was the target of a bombing, which also resulted in loss of life, injuries and property damage. An investigation was undertaken to determine whether there were any similarities between the two attacks.

In 1982, the French intelligence service received information that the buyer of the motorcycle used in the Paris attack was a man named Hassan, and that he had acted on behalf of a splinter group of the Popular Front for the Liberation of Palestine (PFLP).

The initial investigation did not lead to any arrests and, after 1982, it appears the investigation lay dormant for many years.

The second stage of the investigation began in 1999, when the French intelligence service passed on information to investigators from an unnamed source about several people involved in the bombing. This intelligence information identified Hassan Diab as the bomber in both the Rue Copernic and Antwerp attacks.

In 1999, the French also received information that, in October 1981, Italian authorities at a Rome airport seized from Ahmed Ben Mohammed (who was allegedly a member of the PFLP), a Republic of Lebanon passport, issued on May 10, 1980, in the name of Hassan Naim Diab, born in 1953 in Beirut. France obtained a copy of the passport from the Italian authorities and were able to determine that it contained the following entries:

- an exit stamp from Beirut dated August 22, 1980
- a Spanish visa issued September 17, 1980
- an entry stamp into Spain dated September 18, 1980
- an exit stamp from Spain dated October 7, 1980
- an Algerian visa issued October 5, 1981
- an exit stamp from Beirut dated October 8, 1981.

The French theory was that Dr. Diab travelled to and from Spain, shortly before and after the bombing, using his own passport but entered and exited France using a false document. The ROC also established that Hassan Diab applied for a new Lebanese passport on May 17, 1983. When Lebanese authorities asked what had happened to his May 10, 1980 passport, he told them he had lost it in April 1981.

French authorities came to learn that Dr. Diab was living in Canada. The interest in Dr. Diab at this next stage is described below.

2. The Pre-Arrest Involvement of the Canadian Authorities

In October 2007, the French newspaper, *Le Figaro* published an article claiming that 27 years after the bombing on Rue Copernic, the French authorities were on the trail of a suspect in Canada, Dr. Diab. *Le Figaro* reported that the police suspected Dr. Diab, who at the time was a 55-year-old professor teaching in Ottawa after living for many years in the United States, to be the alleged leader of the bombing plot. *Le Figaro* also reported that, at the time of the bombing, Dr. Diab was a member of the PFLP. According to the article, his identity and ties to the Rue Copernic bombing were revealed by German intelligence gathering.

The IAG first learned of France's interest in Dr. Diab through the newspaper article published in Le Figaro.

Dr. Diab was interviewed and told the reporter from *Le Figaro* that he was a victim of mistaken identity. He denied ever belonging to a Palestinian organization.³²

On November 3, 2007, an article in the National Post reported that Dr. Diab, speaking through his then lawyer, René Duval, denied any involvement with the bombing, which he had only learned of when approached by the journalist from *Le Figaro*. Mr. Duval said that Dr. Diab was "open to meeting with French authorities for questioning in Canada, in accordance with the Canadian legal process".³³

IAG counsel specialize in: working with foreign countries in pursuing extradition; obtaining evidence for use at home or abroad; and developing and maintaining relationships with foreign legal systems principally through bilateral and multilateral treaties.

At that stage, France had made no official request to Canada for assistance. Indeed, the IAG first learned of France's interest in Dr. Diab through the newspaper article published in *Le Figaro*. Jacques Lemire, counsel with the IAG, who was stationed in France in 2007 and had been there since 2005, reported the media coverage to his colleagues in Ottawa.

³² Ian Macleod, "Ottawa Man Sought in 1980 Paris Bombing" *Ottawa Citizen* (25 October 2007), online: <https://www.pressreader.com/canada/ottawa-citizen/20071025/281625300942101>.

³³ Ian Macleod, "Synagogue Blast" *National Post* (3 November 2007), online: <https://www.pressreader.com/canada/national-post-latest-edition/20071103/281711200292145>.

IAG counsel, as the name indicates, specialize in: working with foreign countries in pursuing extradition; obtaining evidence for use at home or abroad, including for use in extradition; and developing and maintaining relationships with foreign legal systems principally through bilateral and multilateral treaties.

In Canada, the IAG acts as a central resource with a focus on advice and quality control. The Bureau de l'entraide pénale internationale (BEPI) – a group within the French Department of Justice – is the French equivalent of the IAG. Like the IAG, the BEPI acts as the central authority for extradition matters in France but, unlike the IAG, it does not provide parallel advice and quality control functions. The difference is likely due to the prominent role of judges in gathering evidence for terrorism and other serious cases in France.

Canada's primary extradition partner is the USA; however, because of strong France-Québec connections, special arrangements have been developed to address extraditions with France. In 2003, the IAG created a small virtual "France-Canada" team, which could be drawn together as needed, to facilitate mutual legal assistance and extradition requests between the two countries.

If investigating judges in France wish to review telephone records... they simply request them.

Beginning that same year, Canada and France stationed a liaison person in each other's capital. The liaison role was created in response to difficulties ensuring effective cooperation between the two countries. Canada, for example, had a difficult time obtaining basic documents, such as criminal records, from France. On the other hand, when France made requests of Canada, it also experienced difficulties obtaining the necessary supporting documents. There was a perception that the lack of effective cooperation contributed to lengthy delays in high-profile extradition cases.

The difficulties largely stemmed from differences in the two countries' legal systems. If investigating judges in France wish to review telephone records, for example, they simply request them. French officials making extradition or evidence gathering requests of Canada were not familiar with the process of providing "grounds" for those requests. A significant part of the IAG liaison's role was to explain to French authorities that, to obtain the information or action they wanted in Canada, they needed to provide information and evidence to support their request. Reviewing requests and materials to be included in the ROC and providing suggestions to improve the materials was a regular part of the duties of the IAG liaison in France.

Leading up to and at the time of the Diab extradition proceedings, Claude LeFrançois headed the “France-Canada” team in Canada and Jacques Lemire headed the team in France.

The liaison position was operational. Mr. Lemire’s primary role was to facilitate extradition and mutual legal assistance requests between the two countries.

I understand that the liaison position held by Mr. Lemire at the time of Dr. Diab’s extradition no longer exists. From my review of these proceedings, it is apparent that he played a crucial and helpful role. (In Part C of my report, I explore consideration of reinstating this position.)

Requests for Mutual Legal Assistance

Mutual legal assistance (MLA) is a formal process by which countries share evidence and provide other types of assistance to one another to advance criminal investigations and prosecutions. The

Mutual Legal Assistance in Criminal Matters Act gives Canada the legal basis to obtain court orders at the request of and on behalf of other countries.

France made its first formal request to Canada for assistance in gathering evidence in January 2008. On January 28,

France made its first formal request to Canada for assistance in gathering evidence in January 2008.

2008, the Royal Canadian Mounted Police began surveillance on Dr. Diab in Canada. The surveillance was conducted at the request of France. The goals were to: obtain information on the telephone numbers used by Dr. Diab in Canada; track his movements in the Ottawa area; and seize any discarded evidence to test for palm and fingerprints. Though the surveillance was intended to be conducted surreptitiously, Dr. Diab on several occasions noted that people were following him and contacted the Ottawa police to make complaints. Surveillance continued and increased in frequency until Dr. Diab’s arrest on November 13, 2008.

In March 2008, Mr. Lemire met with Marc Trévidic, the juge d’instruction assigned to Dr. Diab’s case in France. A “juge d’instruction” or investigative judge has no equivalent in Canada. France has an inquisitorial system of law. In such systems, pre-trial investigations into allegations of criminal behaviour may be directed either by a prosecutor or an investigating judge. Allegations relating to terrorism are generally handled by one of a specialized team of investigating judges. The investigative judge is an independent examining magistrate whose role is to investigate alleged offences and make a recommendation for prosecution. The task includes investigating the facts to determine whether they amount to an offence, and investigating to determine who committed the alleged offence.

In his discussions with Judge Trévidic, Mr. Lemire provided guidance on France's requests for mutual legal assistance and also assisted in arranging a trip to Canada in April 2008 for the Judge.

Judge Trévidic, along with other French officials, met with officials from the RCMP and members of the IAG, including Tom Beveridge, a former manager at the IAG, and Claude LeFrançois, head of the France-Canada team at the IAG. This was Mr. LeFrançois's first involvement with the file.

The French officials told the Canadians about their case against Dr. Diab and outlined their evidence.

The meeting lasted for several hours. The French officials told the Canadians about their case against Dr. Diab and outlined their evidence. According to Canadian officials, none of it was overwhelming but the French officials did mention that they had expert handwriting reports.

Shortly after the meeting, it was determined that France would make an extradition request.

On June 5, 2008, the French authorities sent a mutual legal assistance (MLA) request to Canada. The French sought Canada's assistance in gathering Dr. Diab's telephone and email records for the period of October 2007 to January 2008.

In October 2008, the French made a further request for mutual assistance seeking execution of search warrants at Dr. Diab's home, offices and vehicles. This request also included a request for Dr. Diab's palm prints. The palm prints were needed in order to conduct a comparison with the palm print found on a car linked to the bombing. As will be described further below, the comparison did not reveal a match.

The Initial Handwriting Reports

In support of the June 5, 2008, Mutual Legal Assistance Treaty (MLAT) request, the French authorities provided a variety of materials, including two handwriting reports prepared by two handwriting comparison experts: Dominique Barbe-Prot and Evelyne Marganne.

France, through international letters rogatory, had obtained immigration and university files from the USA for Dr. Diab and his then wife, Nawal Copty. Letters rogatory is a long-recognized method by which parties in one country request evidence in another country through court and state channels. The purpose of the letters rogatory was to obtain samples of Dr. Diab's handwriting. Unbeknownst to the French investigators, samples of his then-spouse's handwriting were mixed in with

Dr. Diab's samples. Two handwriting comparison experts, Ms. Barbe-Prot and Ms. Marganne, compared the samples to the handwriting on the Celtic Hotel registration card. Each proffered an opinion as to the probability that Hassan Diab was the individual who filled out the hotel card and, therefore, was Alexander Panadriyu.

On the basis of the materials provided by France, counsel at IAG made an evidence gathering application for Dr. Diab's telephone and email records on September 11, 2008 and an application for the required search warrants on November 12, 2008. The handwriting reports of Ms. Barbe-Prot and Ms. Marganne were attached to the affidavit of the RCMP Sergeant Robert Tran sworn in support of the evidence gathering applications.

3. An Overview of Dr. Diab's Extradition Proceedings in Canada

On November 7, 2008, Canada received the official request for Hassan Diab's arrest for the purpose of extradition to France to face charges related to the Paris bombing.

The extradition proceedings that followed were protracted.

Dr. Diab was arrested in Canada on November 13, 2008, and detained until his release, on very strict bail conditions, on March 31, 2009.

The Authority to Proceed – the first stage of the extradition proceedings – was issued on behalf of the Minister of Justice on January 15, 2009.

The original Record of the Case (later supplemented) referred to and appended the reports of the two French handwriting experts.

Justice Maranger presided over the second stage of the proceedings: the extradition hearing. At this committal stage of the proceedings, the handwriting on the hotel registration card turned out to be the key piece of evidence. The original ROC (later supplemented) referred to and appended the reports of the two French handwriting experts, Ms. Barbe-Prot and Ms. Marganne. While the handwriting reports did not have to be attached to the ROC, their existence would have been shared with the defence, in any event, as part of a transmission of evidence to France under the MLA framework that governs partner states requesting other partners to secure evidence abroad. When mutual legal assistance is being sought, the information gathering process is confidential; however, once the evidence has been obtained and Canada is seeking to send it to the requesting state, the affected party must be informed, subject to the decision of the sending hearing judge in the particular circumstances of a case to decide otherwise.

Defence counsel for Dr. Diab sought time to investigate potential evidence to try to undermine the reliability of the two handwriting reports, and secured a number of opinions from leading experts in the field. The defence experts concluded that the two French experts had mistakenly relied on, in part, some handwriting samples that belonged to Dr. Diab's former spouse. The presiding Judge ruled that the defence reports were admissible and permitted some of the defence handwriting experts to testify. At the urging of counsel for the Attorney General, the investigating judge in France requested a new handwriting report. The new report, authored by Anne Bisotti, also from France, concluded that there was a strong presumption that Dr. Diab was the author of the words on the registration card. Reliance on the two original impugned reports was withdrawn.

Defence counsel for Dr. Diab sought time to investigate potential evidence to try to undermine the reliability of the two handwriting reports.

The defence launched two unsuccessful abuse of process applications in which they, among other grounds, unsuccessfully raised the counsel for the Attorney General's tactics and posture regarding the process of securing the replacement report. An abuse of process application, where successful, permits a judge to stay the proceedings, or provide another favourable remedy, such as the exclusion of evidence, if the applicant establishes that state misconduct compromised the fairness of the court proceedings or otherwise impinged on the integrity of the justice system.

Despite the length and complexity of the judicial proceedings, the issues at the extradition hearing were ultimately limited in scope. The supplemented ROC provided compelling circumstantial evidence that the fictitious Alexander Panadriyu was one of the parties responsible for the bombing. It also established that Panadriyu stayed at the Celtic Hotel in the city of Paris and filled out a hotel registration card in late September 1980. It also alleged that he had signed a police report when he was arrested for the theft of a pair of pliers in and around the same time frame.

The issue of committal ultimately turned on whether there was sufficient evidence within the ROC, as supplemented, to support the proposition that Dr. Diab was the man posing as Panadriyu. To that end, the new handwriting analysis was the crucial link. Justice Maranger, in his reasons for decision committing Dr. Diab for extradition, held:

The evidence that tips the scale in favour of committal is the handwriting comparison evidence. Once found to be reliable for the purposes of extradition i.e. not manifestly unreliable evidence, the question became whether a jury considering the handwriting evidence together with the other evidence in the ROC, could find as a fact that Mr. Diab was

Alexander Panadriyu and thus one of the persons responsible for the bombing. The short answer is yes. Consequently, when all is said and done, a committal order is warranted.

The evidence that tips the scale in favour of committal is the handwriting comparison evidence.

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

The fact that I was allowed to scrutinize the report to the degree that I did, together with the lack of other cogent evidence in the ROC, allows me to say that the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely. However, it matters not that I hold this view. The law is clear that in such circumstances a committal order is mandated: see Anderson, supra, at para. 28; Thomlison, supra, at para. 47.

Therefore, the application for committal is granted. Hassan Diab is ordered committed into custody pursuant to s. 29(1)(a) of the Extradition Act for the corresponding Canadian offences contained in the authority to proceed to await a decision on surrender.³⁴

The executive stage followed committal. On April 4, 2012, the Minister of Justice, after considering extensive submissions made on Dr. Diab's behalf by his counsel, Donald Bayne, ordered Dr. Diab's unconditional surrender to France. Dr. Diab's appeal to the Court of Appeal was dismissed and his application for leave to appeal to the Supreme Court denied. He was extradited to France on November 14, 2014.

A more detailed description of Dr. Diab's journey through the executive and judicial phases of extradition is set out below.

³⁴ *Diab*, Committal Decision, *supra* note 31 at paras. 189-192.

4. The Arrest, Bail Hearing, and Authority to Proceed

On November 7, 2008, Canada received the official request for Hassan Diab's arrest for the purpose of extradition to France. The French evidence in support of its request for provisional arrest included the following:

- Ms. Barbe-Prot's and Ms. Marganne's handwriting analyses comparing the handwriting on the hotel registration card completed by "Panadriyu" on October 2, 1980 and "known handwriting samples" of Hassan Diab;
- comparison of police sketches of the suspect made at the time of the bombing and contemporaneous photographs of Hassan Diab; and
- evidence from several sources (some unnamed) to the effect that Hassan Diab was a member of the PFLP and one of several members who committed the bombing on Rue Copernic.

Dr. Diab was arrested at France's request pursuant to a provisional arrest warrant issued under the *Extradition Act* on November 13, 2008. His fingerprints and palms prints were taken by the RCMP in Ottawa. On the same day, search warrants were issued and executed at his residence, offices and vehicles.

Within a week, the palm prints taken from Dr. Diab in Canada were compared to those provided to the RCMP by French officials, which were found on the inside back window of a car implicated in the bombing preparation. They were not a match.

Bail Proceedings

Dr. Diab was held at the Ottawa Carleton Detention Centre. He had a bail hearing on November 20 and 21, 2008. Mr. LeFrançois of the IAG, who had assisted France with its mutual legal assistance requests and who is fluently bilingual, was assigned to Dr. Diab's case. He acted for the Attorney General, on behalf of France, throughout the committal proceedings.

The Court held that Dr. Diab was entitled, pursuant to s. 125(2) of the Courts of Justice Act (Ontario), to have the materials relied on by the Crown translated into English and ordered a new bail hearing.

At the bail hearing, counsel for the Attorney General tendered a package of material prepared by France that contained the allegations against Diab. The materials were in French. Dr. Diab requested an English hearing. The Crown had prepared a summary of the materials in English, but the summary was not made an exhibit at the bail hearing.

On December 3, 2008, Dr. Diab was ordered detained. At the time of his initial bail hearing, Dr. Diab was represented by Maître René Duval. Me. Duval spoke to the media and told reporters that Dr. Diab was innocent and had been in Lebanon,

studying at university, at the time of the bombing.³⁵ To the best of my knowledge, this theme was not pursued subsequently during the Canadian extradition process.

In December, Dr. Diab retained new counsel, Donald Bayne of Ottawa. Mr. Bayne contacted counsel at the IAG and requested that, because Dr. Diab was not fully fluent in the French language, all materials to be submitted to the Court in support of the extradition be translated into English.

On February 24, 2009, Dr. Diab successfully applied to a single judge of the Court of Appeal for an order setting aside the decision made at the initial bail hearing. The Court held that Dr. Diab was entitled, pursuant to s. 125(2) of the *Courts of Justice Act* (Ontario), to have the materials relied on by the Crown translated into English and ordered a new bail hearing.

The terms of the release were extremely restrictive. Among other things, the conditions of the bail required Dr. Diab, at his own considerable expense, to wear an electronic ankle bracelet until he was sent to France years later.

A second bail hearing was conducted before Justice Maranger of the Ontario Superior Court who ordered Dr. Diab's release on March 31, 2009, after almost four months in Canadian custody. The Attorney General's application to review the bail at the Court of Appeal was dismissed. Dr. Diab remained on bail until he was surrendered to France in 2014. The terms of the release were extremely restrictive. Among other things, the conditions of the bail required Dr. Diab, at his own considerable expense, to wear an electronic ankle bracelet until he was sent to France years later. There were no issues of non-compliance with the bail terms during the lengthy extradition proceedings.

In addition to being a Canadian citizen, Dr. Diab also retained his Lebanese citizenship. Neither Canada nor France has an extradition treaty with Lebanon.

Formal Request for Extradition

In accordance with the Canada-France extradition treaty, France had 45 days from Dr. Diab's arrest on November 13, 2008 to make a formal request for extradition and to provide complete supporting materials.

Judge Trévidic consulted with both Messrs. Lemire and LeFrançois as he prepared the ROC that supported the formal request for extradition.

³⁵ Dale Anne Freed, "Canadian held in Paris synagogue bombing" *Toronto Star* (14 November 2008): https://www.thestar.com/news/canada/2008/11/14/canadian_held_in_paris_synagogue_bombing.html.

Judge Trévidic drafted the material in the ROC and then Mr. Lemire reviewed it and made suggestions before it was officially provided to Canada. It was critical for Mr. Lemire that each of the judge's "beliefs" included in the ROC be sourced to some piece of evidence. The mere stating of a belief without explaining the source of that belief – though sufficient in France – would not succeed at Canadian extradition proceedings.

The formal request for extradition and the supporting documents from France were received on December 22, 2008.

The mere stating of a belief without explaining the source of that belief – though sufficient in France – would not succeed at Canadian extradition proceedings.

Authority to Proceed

The Authority to Proceed was issued by Tom Beveridge, General Counsel and Director of the IAG, on behalf of the Minister of Justice, on January 15, 2009.

5. The Record of the Case

On January 16, 2009, Dr. Diab's counsel, Mr. Bayne, received a copy of the ROC prepared by the investigating judge, Marc Trévidic, the Vice-President of Investigation at the "Tribunal de Grande Instance de Paris" (Ordinary Court of First Instance of Paris) which, not surprisingly, was in French. Dr. Diab's counsel requested that it be translated into English.

As indicated above, the ROC technique, introduced by the 1999 amendments to the *Extradition Act*, was meant to reduce or summarize the dense amount of original evidence that was necessary under the earlier regime. However, there were countervailing features in Dr. Diab's case. This was a circumstantial case that had taken almost 30 years, with the investigation travelling over continents and partially through the covert world of intelligence agencies, to reach a request for extradition. The original investigation was intense and extensive. In addition, the methodology of an investigating judge in France, and their duty, is to put everything in the case dossier without filtering. An investigating judge's file contains all information collected as well as the theory of the case as it developed over the years. In Dr. Diab's case, that open-ended approach appears to have resulted in an ROC that was unusual and out of the norm.

Justice Maranger described it this way:

It was originally 72 pages of text with a 17-page list of exhibits referred to as "D. documents." These included photographs, a copy of a passport, sketches, expert reports, police reports, maps, photographs

and miscellaneous other documents. It was not easy to read as many of the pages were replete with seemingly disconnected information. The ROC, while providing some conventional evidence, also contained a great deal of argument, hypothesis, conjecture, and references to information received, without describing the source of that information or the circumstances upon which it was received.³⁶

In addition to the features noted by Justice Maranger, the ROC also included intelligence information, some of which was not sourced, and placed significant reliance on two expert opinions in the “soft science” of handwriting comparison analysis.

The methodology of an investigating judge in France, and their duty, is to put everything in the case dossier without filtering.

The unusual nature of the ROC in this matter is understandable given the nature of the investigation at issue and the different legal tradition in France. Nevertheless, what was included in the ROC (and what was left out), has given rise to a number of important questions. How involved should IAG counsel be in the production of the ROC? What approach should be taken in deciding what evidence to include? Should the ROC contain full copies of expert reports or only a summary of an expert’s opinion and findings? I explore these questions in Part C of my report.

The Translation of the Record of the Case

The ROC delivered to Canada was in French, which conformed with the terms of Canada’s extradition treaty with France and the fact that Canada is a bilingual country. When an extradition request is made from a non-English or non-French language country, the treaty agreements generally require that the ROC be provided in the original language and be accompanied by an English translation, which the requesting state has certified has the same value.

Dr. Diab exercised his right to have his extradition hearing conducted in English as he did not have the capacity to defend himself – that is, to understand and respond to the case against him – in French. The ROC was translated into English during the extradition hearing. The issue of translation proved to be thorny and led to delay. Initially, IAG counsel took the position that translation of the materials was not necessarily the responsibility of the Attorney General, but that position was properly abandoned. A translation of the ROC and its appendices was prepared by Government of Canada translation services and provided to Dr. Diab and his counsel.

³⁶ *Diab*, Committal Decision, *supra* note 31 at para. 17.

However, there were various issues, inaccuracies and mistakes in the English version. The presiding judge developed a protocol to resolve contentious phrases that had been translated.

Counsel for the Attorney General took the position that the “evidence” for the purpose of the extradition hearing was the French ROC, in the French language,

The issue of translation proved to be thorny and led to delay.

delivered by the treaty nation. In response, defence counsel raised an issue as to whether the translated version of the ROC would be of equal evidentiary weight as the French document. From a “strictly technical perspective,” the presiding judge agreed with counsel for the Attorney General, but he also ruled that the translated English version would be the one “relied upon, used, argued, defended and cited when a decision is finally made, because this is an English proceeding”.³⁷

Justice Maranger further held that, if issues arose as to the accuracy of a specific translation, it would ultimately be for the Court to determine the meaning to be attributed to the word or phrase. In the unlikely event that the two versions of the ROC had to be juxtaposed one to the other, Justice Maranger held that the original French would be “considered stronger”.³⁸

The translation process was long and difficult. At least five different versions of the translated ROC were produced as additional corrections and revisions were made.

Translation issues arose again with regard to the crucial Bisotti Report. The most contentious area in dispute related to the appropriate English translation of Ms. Bisotti’s ultimate opinion on whether Dr. Diab was the author of the printing on the hotel registration card.

The disputed passage in question read: “...il existe une très forte présomption à l’égard de M. Hassan DIAB comme auteur des mentions... Ce degré de présomption ne peut être chiffré.”

The English translation proposed by counsel for the Attorney General was “...there is a very strong presumption that Hassan DIAB is the author of the notes... The degree of presumption cannot be expressed numerically.”

The translation proposed by counsel for Dr. Diab was “...there is a very strong presumption with regard to Mr. Hassan DIAB as the author of the notes... The degree of presumption cannot be quantified.”

³⁷ Ruling Rendered Orally, Transcript of Proceedings, May 28, 2009

³⁸ Ibid.

Each party obtained partial success. The extradition judge eventually ruled that the translation would read “there is a very strong presumption with regard to Mr. Hassan DIAB as the author of the notes... The degree of presumption cannot be expressed numerically.”

The litigation over translation issues was illustrative of the generally difficult nature of the committal proceedings. Submissions related to the translation of the Bisotti report, for example, took a full day – even though there were relatively few areas in dispute and despite the fact the specific language of Bisotti’s ultimate conclusion played little, if any, role in the extradition judge’s ultimate decision on committal. In Part C of this report, I make recommendations on approaches that might be taken to avoid protracted litigation in respect of translation issues.

6. Defence Efforts to Undermine the Reliability of Evidence in the ROC

The Handwriting Analyses

It was apparent from the beginning of the extradition proceedings that the handwriting analysis reports would be central to the defence efforts. On January 16, 2009, Mr. LeFrançois reported to his colleagues that the defence had requested full colour scans of the documents upon which the handwriting analyses were based. This was no surprise to counsel for the Attorney General who anticipated that the defence would attack the reliability of the French evidence as permitted by the leading case of *Ferras*.³⁹

Throughout February and March 2009, the ROC, including Ms. Barbe-Prot’s and Ms. Marganne’s reports, were translated into English and provided to Dr. Diab and his counsel.

On April 9, 2009, the parties appeared before Justice Maranger to discuss the translation issues described above and to make additional submissions related to the terms of Dr. Diab’s bail, which had been granted on March 31. On that date, Mr. Bayne told the judge he intended to adduce evidence challenging the reliability of the evidence in the ROC and requested six months to carry out the necessary investigations. After hearing defence counsel’s request, counsel for the Attorney General speculated in court that the defence might be attempting to adduce a competing handwriting analysis or something of that nature.

On May 27, 2009, counsel for the Attorney General proposed that dates be set for a hearing at which defence counsel would have to establish that the evidence he

³⁹ *Supra* note 1.

intended to call regarding, for example, the handwriting, was relevant to the extradition proceedings. In the words of Mr. LeFrançois, the defence was obligated to satisfy the committal judge that the proposed evidence was capable of wholly undermining the reliability of the evidence from France. This request was consistent with the leading case law that the role of the extradition judge was not to analyze competing inferences but to ascertain whether the requesting state had made out a *prima facie* case.

In response, defence counsel told the Court that he required more time to gather and perfect the proposed evidence.

Counsel continued to make submissions on this issue on May 28 and June 1, 2009. Counsel for the Attorney General requested that the earliest possible date be set for the extradition and suggested dates in either September or October 2009. Counsel for Dr. Diab suggested that the extradition hearing be set for January, 2010, and proposed that a preliminary evidentiary hearing be set for October 2009 at which time he would be in a position to provide a clear, concise summary of the evidence they intended to call to attempt to undermine the evidence in the ROC.

In the course of the submissions, Mr. Bayne informed the Court that he anticipated being able to adduce evidence confirming that it was impossible for a handwriting expert to properly conclude that the author of the test samples was the same author as the hotel registration card. He further explained that the proposed evidence would destroy the foundation of the expert reports.

In reporting to his colleagues about the day's argument, Mr. LeFrançois correctly guessed, based on Mr. Bayne's remarks, that the defence would adduce evidence that some or all the comparison samples used by the French experts were not written by Dr. Diab.

The procedure followed by Justice Maranger was very much consistent with the approach later recommended by the Supreme Court.

In a ruling given June 2, 2009, Justice Maranger acceded to the defence request. He found that denying counsel the opportunity to investigate and possibly present relevant evidence about the reliability of the information in the ROC would “fly in the face” of the Supreme Court of Canada's statements in *Ferras* concerning a “meaningful judicial determination.” In the “preview” evidentiary hearing, the defence would need to provide a summary of the proposed evidence and demonstrate that – taken at its highest – it was reasonably capable of undermining the reliability of the evidence in the ROC.⁴⁰ The

⁴⁰ Ruling Rendered Orally, Transcript of Proceedings, June 2, 2009.

“preview” hearing was set for the week of October 26, 2009, and the extradition hearing was set to begin on January 4, 2010.

On this point, I note that at the time of Dr. Diab’s case, neither the presiding Judge nor counsel had the benefit of the Supreme Court’s guidance in *M.M. v. United States of America* on the practical issues that arise when the person sought seeks to adduce evidence for the purpose of undermining the reliability of the requesting state’s evidence. Nevertheless, the procedure followed by Justice Maranger was very much consistent with the approach later recommended by the Supreme Court.

In *M.M.*, Justice Cromwell held that before an extradition judge embarks on hearing evidence from the person sought whose purpose is to challenge the reliability of the evidence of the requesting state, the judge may, and generally should, require an initial showing that the proposed evidence is realistically capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability. This showing may be based on summaries or will-say statements or similar offers of proof. Only if the judge concludes that the proposed evidence, taken at its highest, is realistically capable of meeting this standard, should it be received.⁴¹

The defence counsel provided the proposed defence evidence – in the form of expert reports from multiple witnesses – to counsel for the Attorney General in mid-October 2009. On October 15, 2009, after receiving the information, Mr. LeFrançois wrote to Mr. Lemire, explained the contents of the defence handwriting reports, and expressed his view that this evidence was likely to be found admissible as potentially bearing on the question of

The evidence fell into two categories: first, evidence relating to the issue of the handwriting analysis, and secondly, expert testimony with respect to the issue of using “intelligence” as evidence.

whether one of the important pieces of the case from France was “manifestly unreliable”. Given the likelihood of the evidence being admitted, Mr. LeFrançois asked Mr. Lemire to consult with Judge Trévidic and see whether a new handwriting report could be prepared that did not rely on the documents alleged to be penned by Ms. Copty. In a follow-up exchange on October 19, after Mr. Lemire had spoken with Judge Trévidic, Mr. LeFrançois said he was convinced the defence evidence would be admitted.

In light of the timing of the receipt of the materials from the defence, on October 22, 2009, the Attorney General sought and was granted an adjournment of the “preview

⁴¹ *M.M.*, *supra* note 20 at para. 77.

hearing” to determine the admissibility of the proposed defence evidence. That evidence consisted of reports from nine expert witnesses, which were eventually filed as exhibits at the admissibility hearing. The evidence fell into two categories: first, evidence relating to the issue of the handwriting analysis, and secondly, expert testimony with respect to the issue of using “intelligence” as evidence.

In relation to the handwriting analysis, Dr. Diab proposed to tender the testimony of four leading experts in the field. These experts’ reports included very harsh criticism of the French opinion evidence both with respect to methodology and the analysis in Ms. Barbe-Prot’s and Ms. Marganne’s reports. Most importantly, in the view of the extradition judge, the defence experts purported to undermine the factual foundation upon which the

Dr. Diab’s counsel argued that, given this presumption, the person sought ought to be permitted to tender evidence on the possibility that the intelligence material was manifestly unreliable.

French reports were based. The defence experts concluded that some of the handwriting samples presumed to be Hassan Diab’s and used to compare to the hotel registration card were, in fact, someone else’s.

The Use of Intelligence Information

The second category of proposed defence evidence related to issues of using intelligence information as evidence. The ROC prepared by France included references to unsourced information provided to or made available to Judge Trévidic by French Police Services “Direction de la Surveillance du Territoire” (DST), German Federal Police Services (BKA) and other unnamed sources. Some examples include:

- The report of the Crime Squad dated December 4, 1980. The report indicates: “From confidential information coming from German authorities, it was brought to our knowledge that the perpetrators of Rue Copernic were Palestinians who returned to Beirut immediately after the events” ... “It was mentioned that the information contained in this note had been communicated to the DST by various intelligence or foreign security services.”
- “... BKA, for its part, provided the following information at a meeting in Paris with DST: The person who proceeded to buy the motorcycle on which the explosives were placed is a Lebanese national known in Beirut under the assumed name of AMER and whose real name is HASSAN.”
- “Several unfruitful investigations were conducted between 1984 and 1999. In 1999, however, the DST obtained very specific information on the very identities of the perpetrators of the attack, the role played by each of them in its

preparation and commission, and their modus operandi. This information was stated in a report dated April 19, 1999.”

As explained in Part A, pursuant to section 32(1)(a) of the *Extradition Act*, the contents of the ROC are presumptively reliable. Dr. Diab’s counsel argued that, given this presumption, the person sought ought to be permitted to tender evidence on the possibility that the intelligence material was manifestly unreliable.

Defence counsel proposed five different expert witnesses who would testify on the issue of “intelligence” and its unreliability as evidence in the criminal law context. The matter was adjourned to November 30, 2009, for argument.

7. IAG Communication with France

Between the filing of the defence experts reports and the argument on admissibility, counsel for the Attorney General of Canada wrote to France to provide an update on the proceedings. Although Mr. LeFrançois ultimately signed the letter – which was prepared at Judge Trévidic’s request – Mr. Lemire drafted it.

He emphasized the importance of the handwriting evidence for a successful extradition and, in this context, asked whether a further handwriting analysis could be undertaken in France.

When Mr. Lemire first told Judge Trévidic about the defence expert reports and Mr. LeFrançois’s suggestion that France consider obtaining a new report, Judge Trévidic was initially reluctant. He was concerned about possible implications for the case in France and felt that any issues related to the reliability of the two original reports was a matter to be addressed in France, not debated in Canada. After further consideration and reading the defence reports, Judge Trévidic agreed there could be an issue. He conveyed to Mr. Lemire that, to justify his request and get approval for a new report, he would need a formal request from the IAG in Canada.

The November 21, 2009 Letter

In a letter dated November 21, 2009, Mr. LeFrançois wrote that, if admitted, the defence handwriting analysis evidence would jeopardize the reliability of one of the only elements of direct evidence in the ROC. He emphasized the importance of the handwriting evidence for a successful extradition and, in this context, asked whether a further handwriting analysis could be undertaken in France without recourse to the tainted comparison samples.

The letter also made reference to France's request that Canada transmit Dr. Diab's distal fingerprints (prints left by the ends of fingers) for comparison with fingerprints found on Panadriyu's arrest card.

In April 2009, the original arrest form related to Panadriyu's theft of pliers was located in the French archives and tested for fingerprints. Tests done in France showed a match between some of the prints on the arrest form and one of the arresting police officers. The remaining prints on the record could not be identified. France wanted access to Dr. Diab's distal fingerprints to compare them to the prints on the arrest record. A positive match would provide a nearly conclusive link between Dr. Diab and the fictitious Panadriyu.

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Between April and October 2009, Judge Trévidic consulted with Mr. Lemire and Mr. LeFrançois as to how best to obtain Dr. Diab's prints for comparison. Mr. LeFrançois, in turn, consulted with the RCMP to see whether they could obtain the prints surreptitiously, but that option was either not pursued or not successful. Ultimately, after receiving advice from IAG counsel, France made a formal request to Canada on October 12, 2009, to obtain Dr. Diab's distal fingerprints.

In his November 21, 2009 letter, counsel for the Attorney General explained that the defence was very likely to challenge the issuing of an order to send Dr. Diab's distal prints to France. Sending the prints found on the arrest record to Canada might expedite the process. Accordingly, he suggested France send a clear copy of the prints detected in France to Canada so the comparison analysis could be performed here. Counsel advised that the results of the comparison could be extremely persuasive and perhaps even conclusive for the extradition hearing.

Defence counsel had succeeded in presenting a strong position that the handwriting evidence from the two French handwriting experts was manifestly unreliable.

It is clear that defence counsel had succeeded in presenting a strong position that the handwriting evidence from the two French handwriting experts was manifestly unreliable. As noted above, that is a very high threshold. Counsel for the Attorney General were in somewhat uncharted terrain. Although it is not uncommon for IAG counsel to give a requesting state advice about how to bolster its case, such advice is typically given *prior* to filing the ROC

rather than in the midst of committal proceedings and in response to defence evidence that tends to undermine the reliability of the requesting state's certified evidence.

The error by the two experts in relying on incorrect exemplars was significant and, from a practical point of view, undermined confidence in their conclusions. There was discussion in the IAG ranks about whether that was entirely correct and whether there was a way forward that could minimize the damage. Theoretically, this could be accomplished by illustrating that the impugned exemplars formed a very small part of the sample size and that the issue went to weight only and not

threshold reliability. After discussion, the IAG determined that it would be safer to seek out an entirely new handwriting opinion not dependent on tainted samples.

After Dr. Diab's return to Canada in 2018, the media obtained the November 21, 2009, letter and it garnered significant public attention. Mr. LeFrançois was criticized for "directing" the French to get another report as the case for extradition was "falling apart". I find this characterization of the letter to be flawed and the allegations against Mr. LeFrançois to be unfair and undeserved. The job of counsel for the Attorney General in extradition proceedings is to lend their skill and expertise to the carriage of the case and to provide ongoing advice to the requesting state. I discuss the nature and level of advice and assistance provided to France in this case in Part C of this report.

Although it is not uncommon for IAG counsel to give a requesting state advice about how to bolster its case, such advice is typically given prior to filing the ROC rather than in the midst of committal proceedings and in response to defence evidence that tends to undermine the reliability of the requesting state's certified evidence.

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8. Decision on the Admissibility of Defence Evidence

The argument on the defence application to adduce evidence took place over five days beginning on November 30, 2009.

Counsel for the Attorney General opposed the admission of any of the evidence. The Attorney General argued, in respect of the defence handwriting expert evidence, that it merely offered a competing opinion or inference from those presented by the French experts on the issue of who filled out the hotel registration card. The Attorney General also opposed the introduction of any of the expert evidence relating to the issue of the use of “intelligence” in a criminal proceeding.

Justice Maranger held that the defence handwriting evidence, if accepted, could lead an extradition court to conclude that the French experts’ reports were manifestly unreliable.

The committal judge allowed the defence application. Justice Maranger held that the defence handwriting evidence, if accepted, could lead an extradition court to conclude that the French experts’ reports were manifestly unreliable or defective and should be rejected:

This is especially so if the Court were to find that the reports from France are based on an incorrect factual foundation. Although I cannot conclude at this stage that the French reports would be completely rejected at a hearing, the potential for that conclusion in the face of the proposed evidence is a reality.⁴²

The committal judge also held that Dr. Diab ought to be allowed to present evidence on the narrow issue of the use of “intelligence” as evidence because of “the possibility that this type of information could be manifestly unreliable”. Among the concerns raised by the proposed defence evidence about the reliability of intelligence information was the possibility that it could be torture-derived and, therefore, tainted. The Court concluded that it did not require five witnesses to make a determination about the reliability of the intelligence information and found the testimony of Professor Kent Roach on this issue to be the most focused.

Among the concerns raised by the proposed defence evidence about the reliability of intelligence information was the possibility that it could be torture-derived and, therefore, tainted.

Justice Maranger gave a brief oral ruling on December 11, 2009, permitting counsel for the person sought to file the four handwriting analysis reports and call two of those experts to give *viva voce* evidence.

⁴² *Canada (A.G.) v. Diab*, [2010] O.J. No. 298 at para. 10.

Counsel for the Attorney General would be permitted to cross-examine all four witnesses if it wished. Justice Maranger further ruled that the defence could call Professor Roach as an expert on the issue of using intelligence as evidence.

9. Efforts by France to Obtain a New Handwriting Report and Updates to the Court

On December 11, 2009, IAG counsel learned that Judge Trévidic had commissioned a new handwriting report.

The Attorney General's Adjournment Application

One week later, on December 18, 2009, counsel for the Attorney General, on behalf of France, brought an application to adjourn the extradition proceedings, which had been scheduled to begin January 4, 2010. In support of its adjournment application, counsel for the Attorney General argued that France ought to be permitted an opportunity to consider the defence evidence and determine whether it wished to provide further evidence, through a Supplemental Record of the Case – as permitted by section 32(5) of the *Act*. Citing section 4 of the *Act*, counsel further argued that if an adjournment was not granted and Dr. Diab was ultimately discharged, nothing would prevent France reinstating the extradition proceedings from the beginning, if the requesting state later came to possess new and additional evidence.⁴³

The Attorney General argued that France ought to be permitted an opportunity to consider the defence evidence and determine whether it wished to provide further evidence.

Mr. LeFrançois noted that the Attorney General had first seen the defence expert reports in October. In his argument for an adjournment, Mr. LeFrançois noted that the Attorney General opposed the admission of the defence evidence and that the admissibility decision was not a forgone conclusion. Privately he had, of course, expressed concern that the defence handwriting evidence *would* be admitted, and that a new handwriting report from France needed to be considered.

⁴³ Section 4 of the *Extradition Act* provides: For greater certainty, the discharge of a person under this Act or an Act repealed by section 129 or 130 does not preclude further proceedings, whether or not they are based on the same conduct, with a view to extraditing the person under this Act unless the judge is of the opinion that those further proceedings would be an abuse of process.

Justice Maranger granted the adjournment application. The matter was adjourned to February 8, 2010, for an update and potentially to set dates for the extradition hearing.

Discussions between Mr. LeFrançois and Mr. Bayne continued but Mr. LeFrançois took the position that he was not prepared to discuss, even in general terms what, if any, new evidence the French might be filing. To be clear, the French were actively pursuing other avenues including the distal prints and considering interviews unrelated to the prints and handwriting to respond to the presiding Judge's rulings, particularly in relation to the two initial handwriting reports.

Results of the Distal Prints Comparison

On January 13, 2010, Mr. LeFrançois reported to Jacques Lemire and Janet Henchey, the head of the IAG, the results of the distal prints comparison. Six impressions taken from the arrest record were submitted to the RCMP for comparison. Dr. Diab was conclusively eliminated as being the source of four of the six prints. The comparison of the remaining two prints was inconclusive because of the quality of distal impressions obtained from Dr. Diab.

Mr. LeFrançois's immediate reaction was that they should refrain from sharing the information including with France. However, he knew the French would eventually want the results and, indeed, within a matter of days, by January 22, 2010, Judge Trévidic was made aware of the results.

Mr. LeFrançois took the view that, first, the results of the comparison were neither inculpatory nor exculpatory and, second, that he was not required to disclose the results.

Given the results were equivocal, Mr. LeFrançois did not believe the analysis would assist in advancing the extradition request. In addition, Mr. LeFrançois did not want to disclose the results of the comparison to Mr. Bayne prior to the committal hearing. He was concerned that Mr. Bayne would attempt to call defence evidence to show that none of the prints on the arrest record belonged to Dr. Diab, which would make a splash, even if such evidence would not assist in resisting extradition.

Mr. LeFrançois took the view that, first, the results of the comparison were neither inculpatory nor exculpatory and, second, that he was not required to disclose the results – given they were not being relied upon in seeking Dr. Diab's extradition. Mr. LeFrançois was not inclined to provide more disclosure than the law requires where such disclosure could prolong the proceedings unnecessarily and potentially erode gains made in the jurisprudence related to the scope of disclosure obligations in the context of extradition.

Supervising IAG counsel agreed there was no obligation to disclose the results of the distal fingerprint analysis to counsel for Dr. Diab. IAG counsel discussed the ramifications of Mr. Bayne discovering the results *after* the committal hearing and recognized that it was likely to cause significant upset.

On January 27, 2010, Mr. LeFrançois, Jeffrey Johnston, Matthew Williams and a paralegal met to get Mr. Johnston up to speed. Mr. Johnston, another senior counsel within the IAG, had recently been assigned to Dr. Diab's case as the previously assigned IAG counsel, Mr. Williams, was taking a paternity leave. Mr. LeFrançois advised that fingerprint results were not being sent to France at that time and had not been disclosed to the defence. He also reported that the French would be producing a new handwriting report but it would not be ready by February 8th.

The New Handwriting Analysis

On February 5, 2010, the IAG received the *curriculum vitae* of the proposed new handwriting comparison expert, Anne Bisotti.

In court on February 8, 2010, Mr. LeFrançois indicated he was in no better position than in December to advise whether or not additional evidence would be called. A three-week period was set aside in June as a target date for the extradition hearing. The matter was adjourned to March 29, 2010, for a further update.

Until Ms. Bisotti's report was finalized, Mr. LeFrançois could not say whether France would be relying on additional evidence.

On March 19, 2010, Ms. Bisotti was given access to original handwriting samples from Dr. Diab which had been forwarded to the US Embassy in Paris. French authorities told Mr. LeFrançois the report might be ready for April.

When he appeared in Court on March 29, 2010, Mr. LeFrançois reported that "the status has not changed between the last appearance and today". Justice Maranger expressed some concern that counsel for the Attorney General was not able to provide any further information and asked Mr. LeFrançois, as an officer of the court, to elaborate. Justice Maranger did not want to be in a position where, on the eve of the June dates set aside for the continued extradition hearing, new evidence would be introduced that would require a further adjournment. Mr. LeFrançois reiterated that he was not able to describe the nature of the evidence, if any, that might be generated but did say that there was nothing conceivable that could make the June dates unworkable.

On that basis, the matter was adjourned to April 13, 2010 to deal with translation issues and then to June 14, 2010 to start the extradition hearing proper.

In my view, Mr. LeFrançois was placed in a difficult position. The judge, understandably, wanted information about how the extradition proceedings were likely to unfold. Mr. LeFrançois was not in a position to provide assistance on that point. Until Ms. Bisotti’s report was finalized, Mr. LeFrançois could not say whether France would be relying on additional evidence. I discuss my assessment of counsel for the Attorney General’s interactions with the Court on these reporting dates further below in Part C of this report.

The Findings of the Bisotti Report

On May 3, 2010, Mr. LeFrançois received word from Judge Trévidic that the report regarding Diab’s authorship of the printed words on the hotel registration was positive. On the afternoon of Friday, May 7, 2010, Mr. LeFrançois received a copy of the Bisotti report and, on the following Monday morning, May 10, 2010, Mr. LeFrançois advised Mr. Bayne and Justice Maranger of the Bisotti report at a previously scheduled in-chambers meeting.

Ms. Bisotti stated that there is a “very strong presumption with regard to Mr. Hassan Diab as the author” of the printing contained on a hotel guest registration card.

In her report, Ms. Bisotti stated that there is a “very strong presumption with regard to Mr. Hassan Diab as the author” of the printing contained on a hotel guest registration card at the Celtic Hotel situated near the area of the bombing in Paris in 1980.⁴⁴

On May 17, 2010, counsel for the Attorney General formally filed the original French version of the Bisotti report in a Supplementary Record of the Case and withdrew the two earlier handwriting reports. All parties agreed that the June dates, set aside for the committal hearing, had to be cancelled.

On June 4, 2010, the Supplementary ROC and English translation of the Bisotti report were provided to Mr. Bayne.

On June 9, 2010, Mr. Bayne confirmed he would bring an abuse of process application seeking to have the Bisotti report excluded from the extradition hearing.

⁴⁴ In French, the report reads: Il existe une très forte présomption que M. Diab est l’auteur.

10. The Abuse of Process Applications

On August 31, 2010, a hearing of Dr. Diab's application to exclude the Bisotti report was held and, on September 1, 2010, the judge made a ruling dismissing the defence application. Justice Maranger held that:

[W]hile I can express a degree of frustration at the timing of the presentation of a supplemental record, and at the failure to advise the court of the possibility of new handwriting expert evidence, I cannot find that there is any evidence that could support a finding of an abuse of process.⁴⁵

In reaching this conclusion, Justice Maranger noted that: France was entitled, pursuant to the *Extradition Act*, to file a Supplementary Record of the Case and to withdraw reliance on evidence contained in the original ROC; France was not required to withdraw reliance on the original handwriting reports simply because the Court had found defence evidence relating to their reliability to be admissible at the extradition hearing; and, finally, the allegations, taken at their highest, did not amount to a complete failure of due diligence on France's part.

Counsel for Dr. Diab argued that France had, on numerous specified occasions, misrepresented the contents of the ROC to either deliberately manipulate the material to create a falsely inculpatory impression.

In October 2010, a second abuse of process application was filed, this time seeking a stay of the proceedings. Counsel for Dr. Diab argued that France had, on numerous specified occasions, misrepresented the contents of the ROC to either deliberately manipulate the material to create a falsely inculpatory impression or, at a minimum, acted without requisite due diligence in the presentation of its evidence. The abuse application included allegations related to: the intelligence information in the ROC; the non-disclosure of the fingerprint analysis; a lack of diligence in obtaining the Bisotti report; and counsel for the Attorney General displaying a lack of candour with the Court.

The second abuse application was argued between November 8 to 23, 2010. Justice Maranger deferred his ruling on the application to the end of the extradition proceedings. Ultimately, the application for abuse of process was again dismissed in the final ruling, which resulted in a committal for extradition.

⁴⁵ Ruling Rendered Orally, Transcript of Proceedings, September 1, 2010 at para. 15.

11. Admissibility of Defence Experts Challenging the Reliability of the Bisotti Report

From November 24 to December 3, 2010, the Court heard argument on the admissibility of evidence from three defence handwriting experts. The reports of these witnesses were filed as exhibits during the admissibility hearing. These experts variously described the Bisotti report and its conclusions as “patently unreliable”, “wholly unreliable”, and “fatally flawed and lacking in objectivity reliability and accuracy”.

On December 6, 2010, Justice Maranger found the defence evidence admissible on the basis that the expert evidence *could* lead the Court to the conclusion that the Bisotti report was manifestly unreliable – not that it had or necessarily would.

Counsel for the Attorney General contemplated attempting to obtain further evidence from France, including, potentially, a response from Ms. Bisotti to the defence critiques. This course of action was ultimately not pursued. Mr. LeFrançois also reached out to a Canadian

handwriting expert to assist in preparing for the cross-examination of the defence experts but, a day later, decided not to follow through on that approach either.

In email exchanges with his colleagues at IAG, Mr. LeFrançois expressed the view that the goal of the cross-examination of the defence witnesses would be to establish that there is significant latitude left to the professional judgment of

experts in the field of handwriting comparison. The approach of counsel for the Attorney General was to show that the defence experts were simply offering a competing opinion rather than completely undermining the reliability of Ms. Bisotti’s report. Counsel for the Attorney General was aware of the need not to go so far in cross-examining the defence experts so as to “fatally injure” the soft science that is handwriting analysis, and thus open the door to Mr. Bayne arguing that the committal judge should not place any weight on this aspect of the Supplementary ROC.

Justice Maranger found the defence evidence admissible on the basis that the expert evidence could lead the Court to the conclusion that the Bisotti report was manifestly unreliable.

12. The Committal Hearing

Three defence experts, Brian Lindblom, Paul Osborn and Robert Radley, testified in chief and were cross-examined by Mr. LeFrançois on December 13-17 and 20-22, 2010, and on January 4-7, 2011.

Mr. Lindblom criticized the report prepared by Ms. Bisotti as being “extremely confusing” and described certain areas of the report as “incomprehensible”.⁴⁶ He testified that Ms. Bisotti’s approach deviated significantly from established methodologies and that she failed to approach “her assignment in an objective manner”.⁴⁷ Mr. Osborn and Mr. Radley testified similarly.

Arguments on whether the Bisotti report should be excluded as manifestly unreliable were heard over three days on February 9, 10 and 11, 2011.

Bisotti Report is Flawed but not Manifestly Unreliable

On February 18, 2011, Justice Maranger ruled, in brief oral reasons, that the defence had not established that Ms.

Bisotti’s report was manifestly unreliable

and informed counsel that it would not be excluded. Justice Maranger’s full reasons on this issue were included in his final decision on committal. In that ruling, Justice Maranger wrote:

The evidence presented on behalf of the person sought has largely served to substantially undermine the French report; it has been shown to be evidence that is susceptible to a great deal of criticism and attack.

I found the French expert report convoluted, very confusing, with conclusions that are suspect. Despite this view, I cannot say that it is evidence that should be completely rejected as “manifestly unreliable”.⁴⁸

The Court held that, in the context of an extradition, very strong criticism, coupled with competing inferences from other experts, does not render another expert’s opinion manifestly unreliable. In relation to the criticisms of the methodology employed by Ms. Bisotti, Justice Maranger noted that it was possible that in France there might be a different approach or methodology in relation to handwriting comparison analysis.⁴⁹

The Court held that, in the context of an extradition, very strong criticism, coupled with competing inferences from other experts, does not render another expert’s opinion manifestly unreliable.

⁴⁶ Transcript of Proceedings, December 13, 2010 at p. 1088.

⁴⁷ Transcript of Proceedings, December 14, 2010 at p. 1344.

⁴⁸ *Diab*, Committal Decision, *supra* note 31 at paras. 120-121.

⁴⁹ *Ibid.* at paras. 112 and 122.

13. Charter Application for Exclusion of Bisotti Report

Following Justice Maranger’s ruling that the Bisotti report would not be excluded on the basis that it was manifestly unreliable, counsel for Dr. Diab filed an application to have it excluded pursuant to s. 24(2) of the *Charter*. That application was heard on February 28, 2011. Mr. Bayne argued that there remained an “avenue through which evidence may be

He submitted that Dr. Diab would not be able to effectively challenge the ultimate reliability of the Bisotti report because of trial procedures in France.

excluded [...] for reasons of fairness” based in part on Justice Maranger’s finding that the report was suspect. He submitted that Dr. Diab would not be able to effectively challenge the ultimate reliability of the Bisotti report because of trial procedures in France. Justice Maranger dismissed the application on March 1, 2011. He held that he had no jurisdiction to examine the fairness or unfairness of France’s trial procedures but noted that, if committal was ordered, these issues could be raised at the ministerial phase of the extradition proceedings.⁵⁰

14. Decision on Committal

As noted above, the ROC in this case was unconventional. It contained argument, analysis and references to information that did not identify the source of the information or the circumstances in which it was provided. This information was referred to by counsel for Dr. Diab as “intelligence”. The Court allowed Professor Kent Roach to testify as an expert on the dangers associated with using “intelligence” as evidence.

The ROC in this case was unconventional.

Ultimately, the issue of how intelligence evidence could be used and whether it was manifestly unreliable was not argued because counsel for the Attorney General opted not to rely on those parts of the ROC that could be categorized as “intelligence”, argument, speculation and analysis. The decision not to rely on this information was made late in the proceedings, just prior to the final arguments on committal. Counsel for the Attorney General determined that, after the defence failed to have the Bisotti report excluded, it would not rely on the “intelligence” information in the ROC.⁵¹

⁵⁰ Ruling Rendered Orally, Transcript of Proceedings, March 1, 2011.

⁵¹ Transcript of Proceedings, March 1, 2011, at pp. 7, 11-20.

Final arguments on committal were heard between March 7 and 9, 2011. Justice Maranger reserved his decision on committal. Before the decision was released, Mr. Bayne brought an application to adjourn the decision date to allow him to perfect an application to reopen the proceedings and tender new evidence specifically as to the methodology used in France for handwriting comparison. The proposed new evidence would go to the issue of whether the Bisotti report should be excluded as “manifestly unreliable”.

Counsel for the Attorney General determined that, after the defence failed to have the Bisotti report excluded, it would not rely on the “intelligence” information in the ROC.

On May 26, 2011, Justice Maranger denied the application and held that the proposed new evidence would not change his earlier ruling in relation to the reliability of the Bisotti report.⁵²

On June 6, 2011, Justice Maranger released his reasons dismissing the second abuse of process application and ordering Dr. Diab’s committal for extradition to France. In his thorough and detailed decision, Justice Maranger described the protracted nature of the extradition proceedings, the evidence contained in the original and supplementary ROCs, and the parties’ arguments.

In relation to the abuse of process argument, Justice Maranger rejected the defence argument that a requesting state has a duty to put forward all information, whether inculpatory or exculpatory, in the ROC. The Judge accepted the proposition, advanced by counsel for the Attorney General, that in an extradition case there is “no responsibility upon a requesting state to provide full disclosure of all of its evidence”.⁵³

The central issue in dispute at committal was whether the ROC, as supplemented, disclosed evidence of a *prima facie* case identifying Hassan Diab as a party who engaged in the alleged conduct specified in the request for extradition. It was conceded that the evidence in the ROC established a sufficient connection between the person who went by the alias Panadriyu and the bombing. What remained in dispute was whether the ROC contained sufficient evidence to suggest that Hassan Diab was Panadriyu.

To support its argument that a *prima facie* case had been made out, counsel for the Attorney General pointed to five pieces of evidence: Hassan Diab’s passport, which

⁵² Ruling Rendered Orally, Transcript of Proceedings, May 26, 2011.

⁵³ *Diab*, Committal Decision, *supra* note 31 at para. 49 citing *Federal Republic of Germany v. Krapohl* (1998), 1998 CanLII 1355 (ONCA) at paras. 14-17.

showed an entry into and exit from Spain close in time to the bombing in France; witness statements from former friends of Hassan Diab’s identifying him as a member of the PFLP; eyewitness descriptions of Panadriyu; composite sketches of Panadriyu and their purported similarity to contemporaneous photographs of Hassan Diab; and Ms. Bisotti’s handwriting comparison analysis.

The importance of Ms. Bisotti’s report to the case for committal was evident to all involved.

The importance of Ms. Bisotti’s report to the case for committal was evident to all involved. Counsel for the Attorney General was aware that if the report had been found to be manifestly unreliable and excluded from consideration, the case for committal would have been demonstrably weaker. Indeed, in his submissions to the Court, Mr. Johnston referred to the report as a “smoking gun”. Counsel for the Attorney General did not overestimate the importance of the report.

Justice Maranger concluded that the first four components of the evidence, even taken together, would not be enough to justify committing Dr. Diab to trial in France. The evidence that tipped the scales in favour of committal was the handwriting comparison analysis.

The judicial phase of the extradition proceedings took approximately 90 days of court time, making it one of the longest extradition hearings in Canadian history.

Justice Maranger concluded that the Bisotti report was “convoluted, very confusing, with conclusions that are suspect” but not manifestly unreliable:

The fact that I was allowed to scrutinize the report to the degree that I did, together with the lack of other cogent evidence in the ROC, allows me to say that the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely. However, it matters not that I hold this view. The law is clear that in such circumstances a committal order is mandated.⁵⁴

At the end of his decision, Justice Maranger commented on the length and bitterly contested nature of the extradition proceedings.

The judicial phase of the extradition proceedings took approximately 90 days of court time, making it one of the longest extradition hearings in Canadian history. Counsel

⁵⁴ *Diab*, Committal Decision, *supra* note 31 at para. 191.

on both sides demonstrated zealous advocacy and represented their respective clients with skill and passion. Indeed, after the committal decision was released, superiors at the DOJ were understandably complimentary of the efforts of counsel in seeing the proceedings through to a committal decision. At the same time, as Justice Maranger noted, the heated exchanges between counsel and “appeals to emotion” at times served to distract from the task at hand. Justice Maranger managed these complex and challenging proceedings deftly and with incredible skill, dedication and patience. In Part C, I raise the possibility of introducing formal case management powers for judges hearing extradition cases to provide them with additional tools for focusing these proceedings and managing the expectations of all involved.

15. Submissions to the Minister and Decision to Order Surrender

On August 24, 2011, Mr. Bayne made written submissions to the then-Minister of Justice, the Honourable Rob Nicholson, opposing Dr. Diab’s surrender to France. Mr. Bayne argued that surrender would be unjust and oppressive and that Dr. Diab’s *Charter* rights would be infringed by surrender to face trial in France. More specifically, Bayne argued that the French proceedings would be based – at least in part – on unsourced and unknown intelligence reports and that such intelligence may have been obtained through torture. Mr. Bayne further argued that intelligence reports of the kind contained in the ROC would be impervious to challenge at a trial in France. Finally, Mr. Bayne argued that, at a trial in France, Dr. Diab would be unable to meaningfully challenge the French handwriting reports – which Justice Maranger found to be suspect.

Mr. Bayne argued that surrender would be unjust and oppressive.

Mr. Bayne argued that, in France, defence evidence, including expert evidence, is not given the same weight as that given to expert opinions included in the case dossier prepared by the investigating judge. In making these submissions, Mr. Bayne relied on reports from Stéphane Bonifassi, a French lawyer, and Professor Jacqueline Hodgson, who examined the French legal system in an independent report prepared for the United Kingdom Home Office.

Following receipt of Mr. Bayne’s initial submissions to the Minister, Jacqueline Palumbo, counsel at IAG, summarized those submissions and forwarded the summary and original submissions to the Minister. Ms. Palumbo’s role was to advise the Minister and provide him with legal advice on issues relating to his surrender decision. A copy of the summary was provided to Mr. Bayne.

On receipt of the summary, Mr. Bayne wrote to Ms. Palumbo and complained that the summary did not fairly, fully or accurately describe the submissions made on

behalf of Dr. Diab. Mr. Bayne's letter was provided to the Minister. All submissions received by Mr. Bayne from that point on were forwarded to the Minister without a summary. I understand that this is now standard practice. Owing at least in part to Mr. Bayne's objections in this case, advisory counsel at IAG no longer summarize for the Minister the submissions made on behalf of the person sought. Instead the submissions are sent to the Minister for consideration without a summary.

In response to Mr. Bayne's submissions, Ms. Palumbo also sought information from France on the use of "intelligence" in French trials and on the ability of accused individuals in France to challenge evidence in the case dossier. On November 16, 2011, counsel provided a memorandum to the Minister based on information received from the French authorities about the French legal system and the rights available to the accused at various stages of the investigative and trial process. This memorandum made clear that the investigation of Dr. Diab was ongoing in France and that no decision had yet been made as to whether Dr. Diab would face a trial in France. According to the memorandum, such a decision could not be made until Dr. Diab was in France and had been given an opportunity to provide a statement.

Mr. Bayne was given a copy of the memorandum about the French legal system. In response to this information, Mr. Bayne made further submissions to the Minister, dated January 26, 2012, in which he argued that – given that the *Extradition Act* permits extradition for the purposes of prosecution, not investigation – the Minister had no jurisdiction to

Owing at least in part to Mr. Bayne's objections in this case, advisory counsel at IAG no longer summarize for the Minister the submissions made on behalf of the person sought.

surrender Dr. Diab for extradition because the French were not yet trial-ready. Mr. Bayne, again relying on opinion evidence from Mr. Bonfassi and Professor Hodgson, argued that Dr. Diab, if surrendered, would be detained in France for an "extended" period pending the completion of the investigation and a decision whether to discharge Dr. Diab or refer the case to trial. Mr. Bonifassi estimated that this process would take a year or more.

On March 16, 2012, Ms. Palumbo provided the Minister with a lengthy legal memorandum in relation to the Minister's decision in respect of surrender. This is the ordinary process by which the Minister makes a decision. Counsel prepares a detailed memorandum for the Minister providing a review of the issues raised by the person sought, a response to the issues raised, and a legal opinion as to whether surrender should be ordered and whether any assurances should be sought. This is legal advice and, therefore, a copy of the memorandum is not provided to the person sought.

The Minister reviews the materials filed on behalf of the person sought and makes a decision informed by the advice from department counsel and staff within his or her office. Once the Minister makes a decision, the reasons for the decision are typically drafted by the IAG counsel, who has been supporting the Minister, for review and approval by the Minister. The reasons are then sent to the person sought. The reasons for surrender by the Minister are generally not publicly accessible and little information about the nature of the Minister's decision-making process is available. In Part C of this report, I include some thoughts on the desirability of greater transparency in this aspect of extradition proceedings.

Having considered the submissions made on Dr. Diab's behalf, the Minister concluded that Dr. Diab would receive a fair trial in France.

On April 4, 2012, the Minister ordered Dr. Diab's unconditional surrender to France. Having considered the submissions made on Dr. Diab's behalf, the Minister concluded that Dr. Diab would receive a fair trial in France and that his surrender would not be contrary to the *Extradition Act*, the Treaty or the *Charter*.

16. Appeal of Committal and Judicial Review Application

Dr. Diab appealed both Justice Maranger's decision to order committal for extradition and the Minister's surrender order. Dr. Diab was represented on appeal by Mr. Bayne, joined by other prominent co-counsel.

Amnesty International, the Canadian Civil Liberties Association and the British Columbia Civil Liberties Association all intervened in the case. The CCLA supported Dr. Diab's argument that Justice Maranger's interpretation of *Ferras* and the test for manifest unreliability led to incorrect and unconstitutional results. Amnesty International argued that the Minister must refuse extradition when there is a real risk that evidence obtained by torture would be admitted at the foreign trial. The BCCLA submitted that, if the person sought can establish a "plausible connection" between the evidence against him and the use of torture, the Minister must either rebut that connection based on specific information or else satisfy themselves that the evidence will not be used against the person sought.

Amnesty International, the Canadian Civil Liberties Association and the British Columbia Civil Liberties Association all intervened in the case.

On May 15, 2014, after a lengthy hearing and after reserving its decision, the Court of Appeal dismissed the appeal and judicial review giving thorough reasons.⁵⁵ The Court held that Justice Maranger correctly applied the test for committal. Having concluded that the Bisotti report was not manifestly unreliable, Justice Maranger did not err by not further analyzing the evidence to decide if it would be dangerous or unsafe to convict on all of the evidence in the record of the case.

In relation to the ministerial decision, the Court of Appeal found that the Minister had reasonably concluded that French authorities had taken steps that were consistent with the commencement of a prosecution against Dr. Diab. The Court held that section 3(1) of the *Extradition Act*, requiring that extradition be reserved for the “purpose of prosecuting the person” is satisfied where a process is initiated that could lead to trial and if the person sought is more than a mere suspect. A trial of that person need not be inevitable. The Court of Appeal concluded that: “[t]he record in this case clearly demonstrates that [Dr. Diab], if extradited, will not simply ‘languish in prison’”.⁵⁶

The Court held that Justice Maranger correctly applied the test for committal.

The Court further held that it was “beyond debate that torture-derived evidence may not be used in legal proceedings and cannot be relied upon by a state seeking extradition or being asked to extradite”.⁵⁷ Although the Minister’s decision did not expressly state that he was satisfied that torture-derived evidence would not be used, it was apparent to the Court of Appeal that he was indeed so satisfied, and that the surrender of Dr. Diab “would not shock the conscience of Canadians”.⁵⁸

Dr. Diab sought leave to appeal to the Supreme Court of Canada raising two principal issues. The first related to the role of the extradition judge in assessing the sufficiency of evidence for committal: is the extradition judge’s role restricted to deciding whether there is some evidence on each essential element of the offence that is not manifestly unreliable, as the Court of Appeal decided? Or is the task of the extradition judge broader? Is the judge required to review all the evidence to determine whether there is a plausible case on which a reasonable, properly instructed jury, could safely convict? The second issue related to whether surrender to face a criminal trial in

⁵⁵ *France v. Diab*, *supra* note 1.

⁵⁶ *Ibid.* at para. 176.

⁵⁷ *Ibid.* at para. 234.

⁵⁸ *Ibid.* at para. 275.

which intelligence reports would be used as evidence violates the s. 7 rights of the person sought.

Dr. Diab's application seeking leave to file an appeal with the Supreme Court of Canada was dismissed on November 13, 2014. The next day, Dr. Diab was extradited to France where he would remain until January of 2018.

17. The Proceedings in France

Following his extradition, Dr. Diab was detained at Fleury-Merogis prison (near Paris) after he unsuccessfully applied for bail. The investigating magistrate met with Dr. Diab on the day of his arrival in France and Dr. Diab was formally placed under investigation ("*mis en examen*").⁵⁹ He chose not to speak with the judge at that time.

Once an individual is formally placed under investigation, the French criminal process generally proceeds as follows. During the investigative period, the magistrate meets with witnesses and reviews evidence. The person under investigation is given access to the magistrate's investigative file. If the person under investigation chooses to speak with the magistrate and makes reference to exculpatory evidence, the magistrate is required to investigate the defence evidence. Ultimately, after considering all of the prosecution evidence, any available defence evidence and the submissions of the prosecution and defence, the investigating magistrate will assess the evidence and reach a conclusion on whether to send the case to trial or discharge the person under investigation. The decision on whether to discharge or refer the matter to trial is subject to appeal.

If the person under investigation chooses to speak with the magistrate and makes reference to exculpatory evidence, the magistrate is required to investigate the defence evidence.

The proceedings conducted by the investigating magistrate are governed by the "*secret de l'instruction*"; a rule that maintains complete confidentiality of the proceedings. The magistrate provides full access to the contents of the investigative file to both the prosecution and the person under investigation, but the public does not have access to any of the evidence or the decisions at this stage of the proceedings.

⁵⁹ In a civil law country, like France, before an individual can be *mis en examen* (officially placed under investigation), that individual must make a first appearance before the *juge d'instruction* and be given an opportunity to make a statement. There is no equivalent requirement in Canada or other common law countries.

For this reason, little information is available about the specifics of Dr. Diab's detention in France, the investigation conducted following his extradition, the decision to discharge him rather than refer the matter to trial, or the grounds of appeal. None of the French judicial decisions are publicly available. What is known and summarized below is largely taken from snippets of decisions that have appeared in Canadian media reports.

Dr. Diab's supporters started a website that offered periodic updates on his status.⁶⁰ On April 27, 2015, the site reported that Dr. Diab could be expected to remain in prison for up to two years while awaiting a decision about whether his case would be brought for trial. On the same day, the site reported that Dr. Diab claimed that he was not in France at the time of the bombing.

Little information is available about the specifics of Dr. Diab's detention in France, the investigation conducted following his extradition, the decision to discharge him ...

A year after he was extradited, Dr. Diab remained in custody. An editorial published in the *Globe & Mail* on November 9, 2015, reported that Dr. Diab could remain in custody for a further two years while the investigation against him continued.⁶¹

On May 14, 2016, approximately 18 months after he was extradited, Dr. Diab was granted bail, with electronic monitoring. The release order was made by the investigating judge. The prosecutors successfully appealed the release decision and, after just 10 days on bail without incident, Dr. Diab was returned to a French prison. In France, Dr. Diab was represented by William Bourdon. According to Mr. Bourdon, the appellate court mentioned the risk of flight as a reason to overrule the decision to release.

On October 27, 2016, approximately two years after being surrendered, Dr. Diab was again ordered released. According to a news release issued by Dr. Diab's supporters, the investigating judge stated there was "consistent evidence" suggesting Dr. Diab was in Lebanon at the time of the 1980 bombing.⁶² That release order was

⁶⁰ <http://www.justiceforhassandiab.org/news>.

⁶¹ Gerald Caplan, "Canada must demand fair investigation by France in case of Hassan Diab" *Globe & Mail* (9 November 2015), online: http://www.justiceforhassandiab.org/wp-content/uploads/2016/01/Globe_and_Mail_2015-11-09.pdf.

⁶² News release issued by Dr Diab's supporters on 12 November, 2016, online: http://www.justiceforhassandiab.org/news#2016_11_12.

immediately challenged by prosecutors and overturned by a panel of appeal judges who again apparently cited the risk of flight. Dr. Diab remained detained.

An Ottawa Citizen article dated November 13, 2016, reported that the release order by the investigating judge, Jean-Marc Herbaut, included comments as to the strength of the case against Dr. Diab.⁶³ Apparently, Judge Herbaut had questioned Dr. Diab over three days in January 2016. He had also made a trip to Lebanon where he conducted interviews. According to the article, in his release order, Judge Herbaut wrote that his investigation had “cast serious doubts” on the fact that Dr. Diab traveled to France via Spain in September or October 1980 and, hence, that he was the bomber:

Judge Herbaut had questioned Dr. Diab over three days in January 2016. He had also made a trip to Lebanon where he conducted interviews.

Late September, early October 1980 he was very likely immersed in his exams. We know this due to witness reports and documents from the Lebanese University confirming that he studied for his exams, sat them in Beirut and passed them.⁶⁴

The article stated that Judge Herbaut noted that there remained concerns about how Dr. Diab’s passport was found in the possession of a PFLP militant a year after the bombing. Nevertheless, he ordered Dr. Diab’s release. The article reported that Judge Herbaut’s reasons for doing so included the following passage:

The fact that there is some doubt about his involvement demands that he should be released without waiting for the outcome of the ongoing investigation... There is no evidence to indicate, or even imply, that these investigations will enable to gather further incriminating evidence against him.⁶⁵

After Dr. Diab’s release on bail was overturned by the appeal court, his lawyer commented that Dr. Diab’s situation was unprecedented in that he had been

⁶³ It appears at this stage that Judge Trévidic was no longer involved with the case. I have learned that in France it is normal for judges performing a specialized task, such as focusing on terrorism cases, to receive that mandate for a set term. At the end of the mandate, the judge is assigned to another responsibility. I understand this is what happened in the Diab case.

⁶⁴ Chris Cobb, “‘Consistent evidence’ suggests Ottawa academic did not commit 1980 terrorist bombing, French judge says” *Ottawa Citizen* (13 November 2016), online: <https://ottawacitizen.com/news/local-news/consistent-evidence-suggests-ottawa-academic-did-not-commit-1980-terrorist-bombing-french-judge-says>.

⁶⁵ *Ibid.*

repeatedly ordered released by the investigative judge and, each time, the appellate court had overturned the release order. Additional release orders were made and then overturned by the Court of Appeal in the spring of 2017.

On July 28, 2017, the investigating judge issued a notice that he had completed his investigations. Counsel for Dr. Diab and the French prosecutors were both given an opportunity to file written submissions after which the investigating judge would make a decision as to whether to discharge Dr. Diab or refer the matter for trial.

In December 2017, the investigating judge re-issued a notice about the closing of the investigation against Dr. Diab.

In November of 2017, the investigating judge again ordered Dr. Diab's release and again the release order was quashed by the Court of Appeal. I understand that detention orders can only be extended for a maximum period of six months at a time, at which point they must be reviewed. This may explain, in part, the reason for the multiple release orders (and subsequent decisions overturning those orders).

In December 2017, the investigating judge re-issued a notice about the closing of the investigation against Dr. Diab. It appears that, by this point, the investigating judge had received written submissions by counsel for Dr. Diab and by the French prosecutors.

On January 12, 2018, judges Jean-Marc Herbaut and Richard Foltzer ("Juges d'instruction anti-terroristes") released their decision discharging Dr. Diab and ordering his immediate release from detention. The reasons for discharge were not released publicly. They were provided only to Dr. Diab, his counsel in France and the French prosecutors.

The reasons for discharge were not released publicly.

CBC News reported that it had obtained the dismissal order and quotes purportedly taken from the reasons are included in several news stories. According to the CBC report, the investigating judges in France concluded that:

- The handwriting analysis "cannot be accepted as sufficient incriminating evidence".
- The "absence of Hassan Diab's fingerprints among all those revealed... is unquestionably an essential element of discharge".
- "It is likely that Hassan Diab was in Lebanon during September and October 1980 ... and it is therefore unlikely that he is the man ... who then laid the bomb on Rue Copernic on October 3rd 1980."

- The intelligence information was “full of contradictions and inaccuracies” and could not “be considered as evidence to establish the guilt of Hassan Diab”.⁶⁶

On January 15, 2018, with the assistance of Global Affairs Canada, Dr. Diab returned to Canada where he was greeted by family, friends and supporters.

Prosecutors in France appealed the decision to discharge Dr. Diab and the decision to release him from custody. That appeal remains outstanding.

In October 2018, the Ottawa Citizen reported that the appeal judges in France ordered an expert review of controversial handwriting evidence that was key to Dr. Diab’s committal for extradition. The French appeal court judges said the expert review of the handwriting evidence should be completed by February 2019 and suggested a ruling would be forthcoming by the summer of 2019.⁶⁷

18. The Involvement of Global Affairs Canada and the IAG After Surrender

While he was detained in France, Dr. Diab had access to Canadian consular services – although the extent and nature of this contact is unknown. Consular notes are governed by privacy legislation and the notes relating to Dr. Diab could not be provided to or discussed with me in the absence of Dr. Diab’s consent, which, through his counsel, he declined to provide.

Some information is available through media reports and the correspondence provided by the Department of Justice, which I have reviewed.

It appears that officials working at the Canadian Embassy in Paris met with Dr. Diab in custody in France soon after his arrival in that country. Canadian consular officials also met with the lawyer who represented Dr. Diab in the French proceedings.

While consular staff cannot interfere in any way with foreign proceedings, they can make inquiries and send diplomatic notes, particularly where a case appears to be taking longer than anticipated.

⁶⁶ David Cochrane, Lisa Laventure, “Decision in Hassan Diab appeal delayed after sudden appearance of new evidence” *CBC News* (6 July 2018), online: <https://www.cbc.ca/news/politics/diab-terror-verdict-france-1.4735097>.

⁶⁷ Chris Cobb, “Diab’s appeal unexpectedly delayed for new handwriting analysis” *Ottawa Citizen* (26 October 2018), online: <https://ottawacitizen.com/news/local-news/diabs-french-appeal-delayed-again-for-new-handwriting-analysis>.

It seems that Dr. Diab's main concern, expressed at a meeting with consular staff on November 24, 2014, was that someone from the Canadian government would monitor the trial process and the procedures leading to it, to ensure it was fair and transparent. I understand that consular staff explained that was not part of their mandate but agreed to speak with the Department of Justice to see whether that was something they would do in the circumstances of Dr. Diab's case.

In response to an inquiry from consular staff, counsel at the IAG suggested they speak to the legal department at the Department of Foreign Affairs. IAG counsel advised that no special assurances had been given that consular representatives would monitor Dr. Diab's trial and that staff should conduct themselves in accordance with their ordinary policies.

Global Affairs Canada (GAC) provides consular services to Canadian citizens detained abroad. Those services typically include in-person visits with the detained individual and monitoring of any ongoing court proceedings. While consular staff cannot interfere in any way with foreign proceedings, they can make inquiries and send diplomatic notes, particularly where a case appears to be taking longer than anticipated. Consular officials also provide regular updates to family and friends in Canada and will attempt to facilitate communication between the detained person and family in Canada where possible.⁶⁸

In March 2017, the Minister of Justice received a letter from the International Civil Liberties Monitoring Group. The letter expressed concern that Dr. Diab, who was still detained at the time, had repeatedly been ordered released by the investigating judges in France but those release decisions were all overturned. It also expressed concern that Dr. Diab could be detained for an additional two years (four years in total) pending a decision on whether to refer his matter for trial. The Monitoring Group requested that the Minister raise Dr. Diab's case with her French counterparts.

The letter was sent to IAG counsel for their comment and advice as to how to respond. IAG recommended that no response to the letter be provided. In arriving at their advice, Mr. Lemire sought clarification from French officials as to how long Dr. Diab could be detained pending a determination of whether the matter would be referred to trial. Mr. Lemire was told that there is no prescribed period during which the investigating judge must complete his or her investigation. Pre-trial detention during the investigative stage is limited to four years. More specifically, a suspect can be detained initially for one year. Detention may be prolonged by successive periods of six months. In Dr. Diab's case, because it was a terrorism offence, the maximum

⁶⁸ See "A Guide for Canadians Detained Abroad", Global Affairs Canada, online: <https://travel.gc.ca/travelling/publications/guide-for-canadians-detained-abroad>.

permitted duration of potential detention was four years. If the matter was then referred to trial, Dr. Diab could be detained for an additional period of time, until the completion of the trial.

In June 2017, IAG counsel met with the Minister's Office to discuss the Diab matter. IAG counsel took the position that it would be inappropriate for GAC or Justice to reach out to French counterparts at a high level on Dr. Diab's case as such contact could be viewed as an attempt to influence an independent process.

IAG counsel learned that in general, the investigative stage takes one and a half to two years and that in terrorism cases, and other complex matters, it can be longer.

In the Fall of 2018, after Dr. Diab had returned to Canada, IAG counsel, during the course of regular meetings with their French counterparts, discussed the Diab case in order to better understand the French trial procedure and, to the extent possible, what took place specifically in the case of Dr. Diab. IAG counsel learned that in general, the investigative stage takes one and a half to two years and that in terrorism cases, and other complex matters, it can be longer. As noted above, the duration of detention is governed by law. There is a maximum period of four years in terrorism cases with set detention reviews. IAG counsel learned that the length of Dr. Diab's detention in France is not uncommon in terrorism cases, given the complexity of the matters, their international dimensions, the requirement for expert opinions and the need to follow up on requests made by the person under investigation. As I discuss in Part C, this knowledge should routinely be gathered before the Minister makes the final surrender decision.

Dr. Diab, his counsel and others – including Amnesty International, the B.C. Civil Liberties Association and the Criminal Lawyers' Association – denounced Canada's extradition regime as unjust.

19. Calls for a Review

Throughout Dr. Diab's extradition proceedings in Canada, during his detention in France and after his return to

Canada in January of 2018, Dr. Diab, his counsel and others – including Amnesty International, the B.C. Civil Liberties Association and the Criminal Lawyers' Association – denounced Canada's extradition regime as unjust and criticized the conduct of counsel for the Attorney General who acted in Dr. Diab's matter. They also raised concerns about France's criminal justice system and the fact that Dr. Diab spent over

three years in custody in France before the investigating judges concluded there was no case to put on trial.

On January 31, 2018, in response to these concerns, the National Litigation Sector and the Policy Sector (Criminal Law Policy Section) of the Department of Justice were tasked with preparing a “Lessons Learned” report. Defence counsel, the French authorities and all DOJ counsel were involved in the preparation of that report. They were consulted to determine the effectiveness and efficiencies of the Diab litigation and to gather the various stakeholders’ recommendations for improvement.

Counsel for Dr. Diab, human rights organizations and members of the public continued to raise concerns about the handling of Dr. Diab’s case, including the conduct of IAG litigators involved in the committal hearing. In May 2018, the Minister of Justice asked the Department of Justice to establish an external review of Dr. Diab’s extradition.

I have reviewed the Department of Justice report entitled “Information-Gathering Exercise Report”, hereafter referred to as the “Lessons Learned” report. It helpfully summarizes the information obtained during the various consultations and contains suggestions made by the main parties involved in Dr. Diab’s extradition case. From my review of the Lessons Learned report, it is apparent that counsel representing the Attorney General at the extradition hearing and those representing the Minister take the view that the current Canadian extradition system is fair and working well, but it could benefit from improvements to increase efficiency. On the other hand, counsel for Dr. Diab are of the view that fundamental changes to Canada’s extradition system are required.

Part C: Analysis, Response and Conclusions

This part of my report responds directly and specifically to the issues and questions raised in the review's terms of reference and includes my findings, observations and recommendations.

1. Was the law followed in the conduct of the Diab extradition?

The very short answer to this question is: yes. Government actors followed the law in the conduct of the Diab extradition.

In Part A, I briefly summarized what the law requires before an individual in Canada can be committed for extradition by a Superior Court judge and then ordered surrendered by the Minister of Justice. I also noted that the public appears to have little understanding of Canadian extradition law and process. This lack of understanding on the part of the public is not surprising. In fact, many lawyers in Canada are not familiar with the extradition process.

An extradition hearing is not a trial, and the guilt or innocence of the person sought for extradition is not a live issue at any of the three stages of the extradition proceedings.

As now Justice John Norris remarked, "The law of extradition is a foreign land for even the most experienced criminal lawyer. While a criminal charge must be somewhere in the mix of an extradition request, that is where the similarities between a criminal trial and the extradition process begin and end."⁶⁹

First and foremost, an extradition hearing is not a trial, and the guilt or innocence of the person sought for extradition is not a live issue at any of the three stages of the extradition proceedings. For an individual facing extradition who wishes to proclaim their innocence, this is a difficult concept to accept.

Rather than determining guilt or innocence, the extradition process strives to balance two important objectives: 1) expeditious and prompt compliance with Canada's international obligations to its extradition partners; and 2) meaningful protection of the rights and liberty interests of the person sought. The first objective is aimed at "bringing fugitives to justice for the proper determination of their criminal liability;

⁶⁹ Foreword to *Prosecuting and Defending Extradition Cases: A Practitioner's Handbook*, Seth Weinstein & Nancy L. Dennison (Toronto: Emond, 2017).

and ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law.”⁷⁰

At the same time, the protection of the liberty of the individual is one of the most important features of an extradition hearing. Concerns of expediency and comity cannot override the need for a meaningful judicial determination that, in the evidence provided, a requesting state has met the requirements for extradition.

The protection of the liberty of the individual is one of the most important features of an extradition hearing.

Striking the appropriate balance between these competing objectives is a delicate and difficult task. Dr. Diab, his counsel, his supporters, some legal academics,⁷¹ as well as civil liberty groups and defence counsel associations have criticized the current state of the law and argue

strenuously that the rights and interests of individuals sought for extradition have been sacrificed at the altar of expediency and comity. Writing not long after the amendments to the *Extradition Act* in 1999, Professor Anne Warner La Forest argued that the amended *Act* had shifted the balance too heavily in favour of comity over the liberty interests of those sought for extradition.⁷² More recently, influential policy thinkers have advocated for consideration of extradition law reform, citing what they saw as the injustice visited upon Dr. Diab.⁷³

For many, Dr. Diab’s case is disconcerting not because of the conclusions reached by Canadian courts or the manner in which DOJ lawyers may have acted, but rather because the law was applied faithfully and nevertheless produced a troubling result.

⁷⁰ *M.M.*, *supra* note 20 at para. 15.

⁷¹ Professor Robert Currie, of Dalhousie University’s Schulich School of Law, for example, has spoken out in relation to Dr. Diab’s case and has been organizing small conferences of practicing lawyers and academics to come up with a list of reforms to be presented to Parliament. See, *e.g.* Robert Currie, “Repatriate Hassan Diab and reform our unbalance extradition law” *Ottawa Citizen* (27 July 2017), online: <https://ottawacitizen.com/opinion/columnists/currie-repatriate-hassan-diab-and-reform-our-unbalanced-extradition-law>.

⁷² Anne Warner La Forest, “The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings” (2002) 28 *Queen’s L.J.* 95.

⁷³ See, *e.g.*, Joe Clark, Monique Bégin and Ed Broadbent, “There should be a fully independent public inquiry to prevent any repeat of the injustice done to Hassan Diab” *The Globe & Mail* (3 July 2018),

For many, Dr. Diab’s case is disconcerting not because of the conclusions reached by Canadian courts or the manner in which DOJ lawyers may have acted, but rather because the law was applied faithfully and nevertheless produced a troubling result.

On the other hand, counsel within the DOJ, citing consistent jurisprudence from the Supreme Court of Canada upholding the constitutionality of the extradition regime, take the position that extradition in accordance with the *Act* is working well in Canada: that it adequately protects the liberty interests of persons sought while ensuring an efficient extradition process.

Both sides of this debate see Dr. Diab’s case as a cautionary tale..

It is interesting to note that both sides of this debate see Dr. Diab’s case as a cautionary tale. Dr. Diab and his supporters argue that Dr. Diab’s extradition – in the face of judicial findings that the case against him was weak and a conviction unlikely – reveals the failings of the *Extradition Act* and the urgent need for legal reform. At the same time, some on the government side suggest the Diab proceedings were unnecessarily protracted precisely because the extradition hearing took on features of a criminal trial rather than leaving those issues to be addressed in France.

The deep divide in thinking about extradition and the difficult tension involved in balancing individual rights and international cooperation is on display even in recent cases at the Supreme Court of Canada.

The deep divide in thinking about extradition and the difficult tension involved in balancing individual rights and international cooperation is on display even in recent cases at the Supreme Court of Canada. In *M.M.*, Justice Cromwell, writing for the majority, upheld the decision of the lower courts ordering Ms. M’s committal and surrender to the state of Georgia to face charges of kidnapping her children. Ms. M claimed that she fled with her children to protect them from their abusive father. In Canada, that claim potentially could have provided her with a

online: <https://www.theglobeandmail.com/opinion/article-there-should-be-a-fully-independent-public-inquiry-to-prevent-any/>. See also Scott Newark, “The Diab case: Is it time to review Canada’s Extradition Act?” *Inside Policy: The Magazine of the MacDonald-Laurier Institute* (13 February 2018), online: <https://www.macdonaldlaurier.ca/diab-case-time-review-canadas-extradition-act-scott-newark-inside-policy/>.

defence. In Georgia, it arguably did not. The dissenting minority called surrender in these circumstances “Kafkaesque”.⁷⁴

The terms of reference do not direct me to evaluate or make recommendations about the careful balancing of the broader purposes of extradition with individual rights and interests. Instead, I have been asked whether the current law was followed in Dr. Diab’s case by the government and government actors, including counsel. I can say with confidence that it was.

Extradition proceedings are not equivalent to a trial and are not intended to afford the same rights and protections that a trial provides. The *Extradition Act* as interpreted by the Supreme Court of Canada permits the requesting state to support its request for extradition on the basis of a certified summary of evidence. There is no insistence on or requirement for sworn evidence. The ROC cannot, of course, contain any misrepresentations but our law does not require full disclosure to be made to the person sought for extradition nor does it require a requesting state to include all relevant evidence in the materials in support of extradition.⁷⁵ Indeed, even when Canadian authorities are aware of potentially exculpatory or otherwise relevant evidence available in Canada, there is no obligation to disclose that information, unless it is required to challenge the sufficiency of the certified ROC or to raise *Charter* arguments, as circumscribed by the case law discussed earlier and within the jurisdiction of the extradition judge.⁷⁶ Only a summary of the evidence that will be relied on in pursuit of extradition is required to be disclosed to the person sought.

There is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial.

Our law permits and, in fact, requires committal in weak cases so long as the evidence in the ROC could be “used by a reasonable, properly instructed jury to reach a guilty verdict”.⁷⁷ The Supreme Court has made it clear: “[t]here is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial.”⁷⁸ Judges in extradition cases are not permitted to weigh competing inferences or, except in rare circumstances, to consider exculpatory

⁷⁴ *M.M.*, *supra* note 20 at para. 176.

⁷⁵ *Federal Republic of Germany v. Krapohl* (1998), 1998 CanLII 1355 (ONCA) at paras. 14-17.

⁷⁶ *Kwok*, *supra* note 28 at paras. 100-103.

⁷⁷ *France v. Diab*, *supra* note 1 at para. 128.

⁷⁸ *M.M.*, *supra* note 20 at para. 71.

evidence. This restraint on the judges' role is because the core purpose of extradition is not to decide a person's guilt or innocence but – if the test for committal is met – to facilitate a trial on the merits in the requesting state. Nothing prevents counsel for the Attorney General from giving advice to a requesting state about how best to bolster its case for extradition at any stage of the proceedings; indeed, counsel is expected to provide this kind of assistance.

The kinds of evidence that can be used to support an extradition request are broad.

Although this case did not ultimately rely on intelligence-based information, the Court of Appeal for Ontario found no categorical exclusionary rule against the use of this type of information in extradition proceedings – as long as the Minister, before ordering surrender, is satisfied that: the intelligence information

Our laws permit extradition where the prosecution of the person sought has been initiated – even though a trial is not a certainty.

to be relied on was not obtained through the use of torture; and there are adequate protections and safeguards related to the use of intelligence-based evidence in the requesting state to ensure the person sought is subject to a fair prosecution.

While it is clear that the *Act* does not allow extradition of a person for mere investigative purposes (i.e. the person sought must be more than a suspect), the Court of Appeal made clear in this case that a trial in the requesting state need not be inevitable. Our laws permit extradition where the prosecution of the person sought has been initiated – even though a trial is not a certainty.

The extradition judge's role is "not to determine guilt or innocence".⁷⁹ Nor is that the role of the Minister in deciding the issue of surrender.⁸⁰ The ultimate guilt or innocence of the fugitive is not the concern of the Canadian executive or judiciary.⁸¹ The task of the committal judge is to determine whether the evidence contained within the ROC meets the "low threshold"⁸² described above. The task of counsel for the Attorney General is to act as an advocate for the requesting state and to assist the requesting state in advancing its case for extradition. The task for the Minister is to make a surrender decision based on considerations that are "primarily political in

⁷⁹ *Ibid.* at para. 62.

⁸⁰ *Kindler*, *supra* note 4.

⁸¹ *Philippines (Republic) v. Pacificador* (1993), 83 C.C.C. (3d) 210 (Ont. C.A.), at p. 222 (leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 415 (S.C.C.))

⁸² *United States of America v. Beltran*, 2011 ONCA 775 at para. 16; *U.S.A. v. Lucero-Echegoyen*, *supra* note 8 at para. 13.

nature”⁸³; he or she is required to refuse surrender only in limited circumstances, including where it would be unjust or oppressive or would otherwise shock the conscience of Canadians.

In Dr. Diab’s case, each of these tasks was completed in accordance with the law as set out in the *Extradition Act* and interpreted by our courts.

2. Do any particular approaches taken by IAG counsel in the Diab extradition require improvement or correction going forward?

In the terms of reference, I was not asked to comment on state of the law or recommend changes to it. I was asked to evaluate the approaches taken by IAG counsel in Dr. Diab’s case against the backdrop of the current legal reality and to recommend areas of potential improvement.

The focus of the criticism of Canadian government lawyers in their approach to Dr. Diab’s extradition centred on the following allegations:

- that counsel for the Attorney General improperly directed France to obtain a new handwriting report when it became apparent that there were flaws in the original reports included in the ROC;
- that counsel for the Attorney General misled the extradition judge in respect of his knowledge of what evidence France would seek to adduce in response to the defence evidence relating to the original handwriting reports; and
- that counsel for the Attorney General improperly failed to disclose to Dr. Diab and his counsel exculpatory evidence – specifically the fingerprint and palm print analysis.

Having reviewed the relevant materials and interviewed many of the parties, I have concluded that none of the above complaints have merit.

Having reviewed the relevant materials and interviewed many of the parties, I have concluded that none of the above complaints have merit.

Counsel for the Attorney General acted properly in advising France about weaknesses in its case and did nothing improper by offering advice about how to respond to compelling defence evidence. Counsel for the Attorney General was not required to advise Dr. Diab, his counsel or the Court about any efforts France was making to respond to the defence expert handwriting evidence and, more importantly, was not in a position to tell the court what evidence France would rely on until the Bisotti

⁸³ *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p. 659.

report was completed and France had made a decision to rely on it. Finally, disclosure obligations in the context of extradition proceedings did not require counsel for the Attorney General to disclose (or include in the ROC) the finger and palm print analysis.

That being said, I have identified several areas where improvements in IAG approaches may be warranted. Before setting out more fully my findings and recommendations, it is important to describe the unique role counsel for the Attorney General plays in advancing extradition proceedings.

The Role of Crown Counsel in Extradition Proceedings

One of the IAG counsel remarked in my interview with him that to think like a prosecutor in a domestic criminal proceeding is not to think like a government lawyer at an extradition hearing. When acting on behalf of a requesting state in seeking committal for extradition, the role of counsel for the Attorney General is not to consider the strengths and weaknesses of the case or to assess the prospects of conviction in the requesting state. The limited role of the extradition judge – that is, to determine whether there is evidence available upon which a reasonably instructed jury could convict – guides the role of counsel for the Attorney General.

This role can be contrasted with the traditional role of lawyers who act as prosecutors representing Her Majesty the Queen in criminal cases. In such cases the role of Crown counsel is not to obtain a

To think like a prosecutor in a domestic criminal proceeding is not to think like a government lawyer at an extradition hearing.

conviction but rather to “lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime”.⁸⁴ In their capacity as a Crown in domestic criminal proceedings, the role of counsel for the Attorney General is that of a quasi-Minister of Justice. Their function is to assist the Court in the furtherance of justice – not to act as counsel for any particular person or party. Crown counsel are permitted, and indeed expected, to act as strong advocates and vigorously pursue a conviction if that is a just result. However, as the Supreme Court explained long ago in the case of *Boucher v. The Queen*:

Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty

⁸⁴ *Boucher v. The Queen*, [1955] S.C.R. 16 at p. 23.

*than which in civil life there can be none charged with greater personal responsibility.*⁸⁵

Such sentiments have been repeatedly confirmed by the Supreme Court in the years since the decision in *Boucher*.⁸⁶

At an extradition hearing, counsel for the Attorney General is acting *as counsel* for the requesting state. This role can be contrasted to Crown counsel in a domestic criminal proceeding who doesn't act for a particular party. Defence counsel, who are experienced in defending clients accused of criminal offences in Canadian trial proceedings, might well be surprised that counsel for the Attorney General acting on behalf of the requesting state in

extradition proceedings acts in a more purely adversarial role. Of course, in advancing a case for extradition, counsel for the Attorney General must act ethically and fairly – as they did in Dr. Diab's case.

At an extradition hearing, counsel for the Attorney General is acting as counsel for the requesting state.

Before a trial in Canada, Crowns must consider whether there is a reasonable prospect of conviction. They also have an obligation to evaluate the strength of their case at all stages of the proceedings. These types of considerations are not relevant to counsel for the Attorney General in extradition proceedings. These government lawyers are not charged with looking into the future and asking whether, down the line, there will be problems with the case or whether there is a reasonable prospect that the evidence available is capable of convincing a jury beyond a reasonable doubt. Instead, the objective of counsel for the Attorney General at the judicial phase is modest: can they establish a *prima facie* case against the person sought?

There is good reason for this more circumscribed role. Counsel for the Attorney General in extradition proceedings are not building a case for trial. They are not responsible for and may not be knowledgeable about the trial procedures available in the requesting state; and, more to the point, they do not know what evidence will ultimately be available for trial in that country.

It seems to me that some of the conflict that arose between counsel in the course of Dr. Diab's committal proceedings and the allegations of misconduct directed at IAG counsel stem, at least in part, from the disconnect between the traditional role of

⁸⁵ *Ibid.* at 23-24.

⁸⁶ See e.g. *R. v. Babos*, 2014 SCC 16 at para. 61; *R. v. Trochym*, 2007 SCC 6 at para. 79; *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70 at para. 68; *R. v. Regan*, 2002 SCC 12 at para. 65.

Crown counsel in Canadian criminal proceedings and the role of counsel for the Attorney General in extradition proceedings.

To help address that disconnect, I recommend below the creation of a policy manual or “Deskbook” for counsel for the Attorney General in extradition proceedings, which would:

- contain information on the extradition process and the role played by DOJ counsel at each stage of extradition proceedings
- include directives and guidelines to instruct/guide counsel for the Attorney General in their role and in the exercise of their discretion in extradition proceedings.

In the following pages, I discuss the main concerns raised about the IAG’s approach to the Diab case and, where appropriate, recommend improvements. In terms of opportunities for improvement, I offer a number of recommendations related to:

- strengthening independence and reducing any potential for conflict of interest within the IAG
- providing advice to requesting states that will streamline the Record of the Case
- taking a more transparent approach to disclosure
- reducing delays
- educating the public about extradition law and processes.

a. IAG Organization and Roles and the Potential for Conflict of Interest

Issues have been raised regarding how the IAG is organized and whether it maintains the requisite independence at all stages of processing a file for extradition. In general, the IAG acts like a head office. It has many responsibilities, including supporting the Minister in his or her administration of the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act*, as well as in the negotiation and updating of treaties. The IAG consists of about 25 counsel supplemented by dedicated, skilled support staff. It reports to the Assistant Deputy Attorney General, Litigation who, in turn, reports to the Associate Deputy Minister, the Deputy Minister and the Attorney General.

As explained above, there are three distinct stages of an extradition: Authority to Proceed (ATP); the extradition or committal hearing (judicial); and the surrender decision (Ministerial). IAG Counsel is involved at all three stages – although at the “committal” stage of the proceedings they act in an advisory capacity rather than as litigators.

Advisory and Litigation Roles

Traditionally, the litigators – the counsel who represent the requesting state at the committal hearing – will come from regional offices of the DOJ and will not be members of the IAG. For example, if an extradition case is being litigated in Vancouver, someone from the British Columbia Regional Office will be assigned. Not too many extradition cases are litigated in Ottawa but, as that is where Dr. Diab lived,

Recommendation #1:

The role of IAG counsel acting in an advisory capacity should be kept separate from the role of DOJ counsel acting on behalf of the requesting state at the extradition or committal hearing, whenever possible. Efforts should be made to maintain a buffer, where appropriate, between officials in the requesting state and the litigator in Canada advancing the case for committal.

it was convenient to assign IAG counsel from head office. Because the request came from France, the case required someone fluent in French. When the French originally visited Canada to discuss the potential extradition, Claude LeFrançois attended the meeting to provide a solid French-speaking presence. Once the request for extradition had arrived and was approved, he was assigned to act as the litigator because of his interest in and familiarity with the case, his proximity and his fluency in French.

As a general rule, the extradition litigation process contains a buffer between the DOJ counsel litigating the case and the requesting state. For example, if DOJ counsel require more instructions from the requesting state or want to provide an update, that counsel would contact the IAG in Ottawa who would contact their counterparts in France who would contact the investigating magistrate. At the time of Dr. Diab's case, there was an IAG counsel in Paris who would also be involved.

It is better practice that, wherever possible, DOJ counsel litigating a case go through the channels described above – if only to protect themselves from any awkwardness that might emerge from having direct discussions with the requesting state about strategy and similar matters.

However, at a certain point well into a court case, the litigator is the one who knows the case the best and being able to have direct discussions can cut through a lot of steps. In this case, those direct contacts happened on occasion. There is nothing improper about the contacts; however, if at all possible, I would not recommend them as a matter of course.

Roles at the Committal and Surrender Stages

A concern was raised that the member of the IAG assigned to assist the Minister navigate the surrender decision stage of the process may not be sufficiently removed from colleagues in the IAG office involved in the committal hearing, which may unduly influence their considerations. I do not agree. This concern reflects a fundamental misconception about what it means to be Crown counsel. Counsel assigned to assist the Minister has a duty to assist the Minister. That is a serious

Recommendation #2:

To avoid concerns about potential conflicts of interest, the IAG should consider adopting a formal policy whereby counsel involved in approving the Authority to Proceed do not act as litigators at the committal stage, and counsel who provide advice to the Minister at the surrender decision stage have not been involved in either the Authority to Proceed decision or the extradition/committal hearing.

responsibility. The Minister's decision is subject to judicial review by the Court of Appeal. That counsel shares everything with defence counsel except their final privileged legal memorandum.

During Dr. Diab's case, defence counsel complained about the IAG process of summarizing the defence submissions for the Minister. That practice was understandably stopped. The Minister ought to read all the material presented in any event. The Minister and his or her staff know to ask good questions and to probe.

Having someone from the IAG, who had no role in the litigation at the committal stage, assigned to assist the Minister at the critical surrender decision stage makes sense because extradition is a highly specialized area. Few know this area better than IAG counsel. Having interviewed counsel who acted in this capacity in the Diab matter as well as counsel who have acted in that role in other matters, I am absolutely convinced that IAG counsel fully understand the significance of giving ethical and quality advice to the Minister.

I have no doubt that IAG counsel already act in a manner that ensures the requisite independence at each stage of the extradition proceedings. However, adopting a formal policy in this regard would increase transparency and help to ensure the appearance of independence.

The Importance of Consistent Policies and Procedures

One other potential improvement may be useful. Prior to the creation of the Public Prosecution Service of Canada (PPSC) – when Department of Justice counsel, including the IAG, were part of one large service – there was a Deskbook that contained all policies applicable to those involved in the extradition and mutual legal

assistance process. Once Justice and the PPSC went different ways, the PPSC produced a new Deskbook that understandably omitted a discussion of those areas.

Recommendation #3:

The Department of Justice should require the IAG to produce an up-to-date Deskbook on extradition proceedings and mutual legal assistance. The Department of Justice should also consider making appropriate portions of the Deskbook available to the public to promote a better understanding of the extradition process and mutual legal assistance.

Work has been done by IAG counsel to create an updated Deskbook for extradition and mutual legal assistance matters. In the interim, while that work is being completed, portions of the old Deskbook are available on the DOJ website.⁸⁷ A Deskbook, perhaps enhanced by some of the content suggestions made in this report, will be useful for training and it will enhance transparency. Department of Justice spokespersons could also use this resource when, as in Dr. Diab’s case, they are called on to answer public inquiries about the extradition system and the practices of DOJ counsel.

In my view, a better public understanding of the role played by all parties in extradition proceedings can only enhance respect for our extradition system. However, privileged information or advice should obviously not be included in any material made available to the public.

b. The Quality and Usefulness of the Record of the Case

One of the IAG’s central roles is to provide advice to extradition partners and requesting states that are submitting materials to support an extradition request – in particular the ROC. Are there any lessons to be learned about this role from the ROC in Dr. Diab’s case? Yes.

The Timing of a Request for Extradition

Before looking more carefully at the contents of the ROC in this case, I want to make an observation about the timing of requests for extradition and the advice that the IAG should provide on this topic. The law in Canada is clear that extradition is not permitted for mere investigative purposes. As the Court of Appeal held in Dr. Diab’s case, extradition “is not to be used as a tool by foreign states to question people as potential witnesses or suspects.” To trigger the application of the *Extradition Act*, more is required. The extradition request must be for the purpose of prosecuting the person.⁸⁸

⁸⁷ <https://www.justice.gc.ca/eng/cj-jp/emla-eej/db-gs.html#sec3645>.

⁸⁸ *France v. Diab*, *supra* note 1 at para. 165-166

The Court of Appeal found that threshold was met in Dr. Diab’s case, but it is not difficult to imagine instances where an extradition partner might seek Canada’s

Recommendation #4:

Requesting states should be encouraged to complete their investigations in relation to the person sought before making a request for extradition subject, of course, to public safety concerns.

assistance before it is ready to put the person sought on trial. In providing advice on *when* to make a request for extradition, IAG counsel may wish to explore with their foreign counterparts the progress of the investigation in the requesting state. Our extradition partners should be advised not to make a formal request for extradition until after their investigations of the person sought are complete, or at least sufficiently complete to have made a decision that the matter should be referred to trial if extradition is successful. Of course, it has always been recognized that where a fugitive is a danger to the public, the authorities will be obliged to act with dispatch.

Advice on the Contents of the ROC

I do believe that less is better. In providing advice on the evidence to be contained in the ROC, IAG counsel must and, of course do, bear in mind the law on extradition and what evidence will be sufficient to justify committal. Nevertheless, the more that finds itself into the ROC, the greater the possibility that extradition proceedings will be protracted. Of course, the requesting state need not put everything in the ROC – there is no duty to disclose as in domestic criminal cases; however, the ROC must contain sufficient evidence to justify a Superior Court Judge ordering committal.

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As discussed, Dr. Diab’s case was unusual because of its age and complexity, as well as the fact that the investigation passed through multiple countries. The ROC – aptly described as a mixed bag – was not traditional to be sure. Our legal community would be used to a format that might say: “witness A will say X, witness B will say...”. However, that approach is not typical of civil countries. In some countries, the concept of an affidavit is unknown. In this case, the ROC was a mixture of traditional evidence, intelligence, the theory of the case, newspaper accounts and more.

Indeed, it appears that the investigating judge included the results of conversations with some reporters.

Recommendation #5:

Counsel for the IAG should actively advise requesting states to produce streamlined and economical materials to support their extradition requests. They should provide advice on the most effective and efficient way to structure the ROC, the kinds of evidence to include and the type of information to leave out. When it comes to the Record of the Case, less is usually better.

In advancing the case for committal for extradition, counsel for the Attorney General did not rely on many of the non-traditional elements of the ROC in this case. Their inclusion was unnecessary and may have contributed to unnecessary litigation. They certainly did not promote efficiencies in the extradition proceedings.

The Use of Expert Opinion

What evidence should be included in the ROC and what should be left out? In this case, the original two French handwriting reports were included in their entirety in the ROC. Some on the government side have suggested that these reports should not have been attached to the ROC but merely summarized and that appending the reports resulted in unnecessarily protracted extradition proceedings.

While it is true there was no obligation to include them, attaching the reports expedited the search for the truth. They gave Dr. Diab a significant amount to

work with and, through his extremely diligent counsel, he did so successfully. Defence counsel skillfully exposed that the reports were partially dependent on some writing samples that belonged not to Dr. Diab but to his previous wife.

To my mind, in these circumstances, it was important to expose that shortcoming before extradition rather than after. I

appreciate that this may be inconsistent with my suggestion to include less in an ROC but I make that recommendation not in the context of expert opinion evidence. In this case, the handwriting analysis was the linchpin of France's case, so attaching the reports made sense.

It is rare for extradition to be grounded so pivotally on expert evidence.

As a frame of reference, it is rare for extradition to be grounded so pivotally on expert evidence. It is even more rare for an extradition case to turn on expert evidence related to a soft science, which is how I would characterize handwriting analysis and

how both the extradition judge and the Court of Appeal described it in this case.⁸⁹ Although handwriting analysis is not a commonplace forensic tool in Canadian criminal courts, its use is not unknown. Indeed, section 8 of the *Canada Evidence Act* provides:

Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

Recommendation #6:

Where an extradition request rests to a significant degree on expert opinion evidence, the report itself – rather than simply a summary of its conclusions – should be appended to the ROC and thereby disclosed to the person sought.

The section does not distinguish between expert and non-expert opinion on handwriting. That means a witness does not need to be qualified as an expert before being permitted to give evidence comparing handwriting samples. Indeed, in Canada, a trier of fact (either a judge or a jury) is permitted to compare the handwriting on two or more documents *without* the assistance of any witness interpreting or identifying the relevant writing, though the trier must be cautioned about the dangers of doing so.⁹⁰

In recent years, our justice system has been repeatedly cautioned about forensic sciences, most notably in the Inquiry into Pediatric Forensic Pathology in Ontario (also known as the Goudge Report). The findings and recommendations in the

Goudge Report reflect a growing recognition that: incriminating expert testimony can contribute to wrongful convictions; and some forensic soft or pseudo sciences have not been subjected to validation studies, proficiency testing, and other forms of reliability assessment. In his report, Justice Goudge emphasized the important role judges play in Canadian criminal trials in determining whether expert scientific evidence has sufficient threshold reliability to be considered by the trier of fact. He notes that this exercise should not be confined to so-called “novel science”.⁹¹

⁸⁹ *Diab*, Committal Decision, *supra* note 31 at para. 123; *France v. Diab*, *supra* note 1 at paras. 68 and 109.

⁹⁰ *R. v. Abdi*, 1997 CanLII 4448 (ONCA).

⁹¹ Inquiry into Pediatric Forensic Pathology in Ontario: Report (Toronto: Ontario Ministry of the Attorney General, 2008). See especially Volume 3, Chapter 18, online: https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v3_en_pdf/Vol_3_Eng_18.pdf.

Although they perform a different function than trial judges, extradition judges must also have some ability to assess the reliability of expert evidence relied on in support of extradition. The exception to the “less is better” guiding principle for ROCs involves expert reports. Including these types of reports promotes fairness by ensuring the extradition judge can make a meaningful determination of whether the report is manifestly unreliable should the person sought attempt to challenge the evidence.

The Use of Intelligence Information

The question of whether intelligence information should be included in an ROC has no easy answer. Some have suggested that including in the ROC evidence obtained through intelligence gathering prolonged this case. But, as the Court of Appeal for Ontario has indicated, no categorical rule can be advanced to exclude intelligence-based evidence because of the reality of terrorism. Europe’s reality is not our reality. The Court of Appeal held:

...We do not think there should be a categorical exclusionary rule against resort to intelligence-based information in these kinds of situations. To impose such a rule would effectively eviscerate the ability of Canadian and international authorities to bring terrorists to justice because the evidence in such cases is very often sourced through international intelligence agencies. The central issue is the risk that such evidence will be used at trial against the named person in a fashion that fails to protect the person's fundamental right to make answer and defence and have the benefit of a fair trial.⁹²

The Court of Appeal considered the issue of intelligence-based information in the context of the Minister’s surrender decision. It did not consider this issue in relation to the committal stage of extradition proceedings because intelligence-based information had not been advanced as a basis for committal before Justice Maranger. As explained above, when the defence was unsuccessful in having the Bisotti report excluded, counsel for the Attorney General decided not to rely on the intelligence evidence in the ROC in seeking committal. The defence had been permitted to adduce evidence to attempt to show that such evidence was manifestly unreliable; however, Justice Maranger never made any findings in this regard because of the position taken by counsel for the Attorney General.

Practical realities help explain why at least some intelligence information was included in the ROC in Dr. Diab’s case: it played an important narrative function. It helped tell the story as to why and how Dr. Diab became a target of the investigation

⁹² *France v. Diab*, *supra* note 1 at para. 209.

and why his extradition was being sought decades after the alleged offence. In the absence of the intelligence information, the ROC would have been less coherent.

Including intelligence information in the ROC could also be viewed as useful to the person sought. It telegraphs that the requesting state intends to rely on intelligence. On the other hand, if intelligence-based information is included in the ROC, it may be challenged as manifestly unreliable – given the Court of Appeal’s finding that “the frailties of using evidence from international intelligence agencies are universally acknowledged” – and can generally be expected to prolong the litigation. When intelligence-based information is at play at the surrender decision stage, the Minister will need to be satisfied that: it is not the product of torture; and adequate procedural protections are available to the person sought to test that evidence in the requesting state.

In hindsight, it would be easy to say that the decision to not rely on the intelligence-based information in the ROC could have been made much earlier, but that would be wrongheaded. Reliance on at least some of the intelligence-based information in the ROC was a live possibility until the admissibility of the replacement handwriting report was resolved. So, while as a general proposition, intelligence-based information would not be DOJ counsel’s delight, in these circumstances its presence in the ROC, the potential reliance on it and withdrawing that reliance late in the day all made complete sense.

Asking the Requesting State to Translate the ROC

In Part B, I briefly described issues related to the translation of the ROC and SROC

Recommendation #7:

The IAG should consider implementing a practice of asking the requesting state to provide an official translation of the ROC when it is reasonable to anticipate that translation issues will arise during the extradition proceedings.

and the lengthy litigation that resulted. Given that the extradition request was lodged by a French-speaking requesting state to a country that recognizes French as one of our official languages, it is not surprising that the request for Dr. Diab’s extradition was in French. However, Dr. Diab’s French language skills were not up to the task. He was facing a very complex proceeding in relation to a highly serious set of allegations. An early bail hearing had to be redone because Dr. Diab’s language rights were not sufficiently protected. The material had to be translated. The translation process took a lot of time and energy. It was a contentious exercise with much at stake. There were many arguments and many rulings. The committal judge had to devise a protocol to deal with disagreements. Much like the

Interpretation Act, rules had to be devised as to whether, in the case of a dispute, the French ROC should be given more weight. It should.

While making the extradition request in French complied with the treaty, it resulted in Canada having to translate the materials to English to ensure due process for Dr. Diab. This led to delays as well as litigation about the translation of particular words and phrases.

I would propose that the better option, where it can be anticipated that translation issues will arise, would be for the requesting country to provide an “official” translation as concurrently with the original ROC as reasonably practicable. Providing a true official translation would certainly eliminate much of the back and forth that stems from translation by committee. The official translation might still be open to challenges to words and phrases, but my sense is that the process would be less taxing for all Canadian actors. After all, asking Canadians to perfectly translate foreign terms from a foreign system cannot be easy.

The Support Provided to the Requesting State

France and Canada are treaty partners. Part of the responsibility of a good partner is to provide quality legal advice about how a request should proceed. After all, one is

often dealing with foreign frameworks and foreign legal culture.

Recommendation #8:

The Department of Justice should consider reinstating an IAG counsel liaison position in France.

As I have previously noted, if an investigating judge in France wants something, they simply ask. That approach is radically different from our world where such requests have to go before an independent judicial officer who must be presented with detailed reasons or grounds for the search. The IAG liaison

position, then occupied by Jacques Lemire, helped translate what France had to demonstrate in their extradition package. I would not want to hazard what would have happened if that support and expertise had not been provided. Certainly, the value of the role justifies reconsidering its reinstatement. I have no doubt there are significant financial and other issues at play in posting IAG counsel abroad. At the same time, it seems clear that increased efforts to help extradition partners understand our respective criminal justice systems could make extradition proceedings more efficient. It is particularly critical to facilitate dialogue with our international partners when timely additional information is needed to respond to issues raised during the extradition process.

Having someone on the ground who can provide information to French authorities will lead to a better understanding of Canadian procedures and proceedings in

France. The liaison will also be able to gather information about French procedures and proceedings that will aid in the extradition process here. The assistance provided by the Department of Justice does not stop at the framing of the ROC. It continues throughout the extradition proceedings.

One criticism levelled at IAG counsel involved in the Diab case is that they were overly zealous in urging France to consider obtaining a new handwriting report in light of the evidence from defence experts who identified that a few samples of Dr. Diab's ex-wife had tainted their conclusions. On November 21, 2009, IAG counsel wrote a letter to France that was, years later, reported in the media.

To be clear, I find absolutely nothing wrong with counsel in charge of litigation on behalf of a requesting state lending their skill regarding the carriage of the case – both at the commencement of an extradition request and throughout the litigation.

Counsel for the Attorney General advancing the case for extradition are there to provide skill and guidance within ethical bounds. Counsel are not there as empty vessels or disinterested observers:

they are litigating, with skill and commitment, on behalf of the requesting state. If it were not so, treaty relations would suffer, and potential criminal actions could go unanswered. When IAG counsel saw that France's case was critically impacted by errors on the part of France's handwriting experts, they had a responsibility to point that out and discuss with France how the situation could be remedied. France would then have to make a decision. That was what the November 21st correspondence was about and nothing more. As the aptly named related statute reminds us: we live in a world of mutual legal assistance.

Neither the defence nor the extradition judge knew about the November 21st letter during the committal hearing. It came to light only after Dr. Diab had been extradited to France. As a result, the propriety of IAG counsel sending the letter was not argued or addressed before Justice Maranger in either of the defence's abuse of process motions.

However, what was argued and thoroughly considered by Justice Maranger was the propriety of counsel for the Attorney General seeking an adjournment to allow France time to: consider adducing additional evidence in response to defence attacks on the two original handwriting reports; and then introduce the Bisotti report in the

When IAG counsel saw that France's case was critically impacted by errors on the part of France's handwriting experts, they had a responsibility to point that out and discuss with France how the situation could be remedied.

form of a Supplementary Record of the Case some months later. These issues among others – including the non-disclosure of certain finger and palm print comparisons – were litigated during two abuse of process applications, and the extradition judge rejected Dr. Diab's claims. Justice Maranger did not find the conduct of France or IAG counsel representing France in Canada to be abusive.

While the criticism levied against IAG counsel during the extradition proceedings spilled out into the media, public opinion seems to have lost sight of the fact that: these issues were litigated; the judge did not find the conduct legally abusive; and the defence did not pursue abuse of process grounds on appeal. Regardless, the question remains as to whether practices could be improved.

At the end of the day, I cannot find any fault with counsel for the Attorney General's handling of the supplementary handwriting report. I am not at all sure what counsel could have done differently. Of course, it would have been better if the two original experts had not both committed a serious error and if someone had caught the error early on. In saying this I am not at all suggesting that IAG counsel should have rushed out and retained their own handwriting experts to double check the expert evidence forwarded by the requesting state. Such a move would contribute to possibly lengthening proceedings or casting doubt on the requesting state's experts. That is not their role.

Ultimately, counsel for the Attorney General did not rely on the impugned reports and withdrew reliance on them. They played no part in the committal decision or the Minister's decision to surrender Dr. Diab. Thankfully, excellent work by defence counsel caught the error, but not before a lot of expense and court time had been expended while Dr. Diab, on strict bail conditions, continued to face removal from Canada.

With the benefit of hindsight, I wonder whether counsel for the Attorney General could have taken a different approach when, in October 2009, defence counsel provided its expert reports. Given that counsel for the Attorney General was of the view that the presiding judge would find the reports admissible, some time and effort could have been saved by not opposing their admission and, instead, immediately seeking an adjournment for France to consider how or if it wished to respond to the apparent flaws in its evidence.

Of course, at that time, counsel for the Attorney General could not have known that a new handwriting analysis would be forthcoming. It must also be remembered that it is a rare case where committal for extradition depends so heavily on expert opinion evidence and where the threshold reliability of that evidence in the ROC will be successfully challenged. Counsel were in largely uncharted waters.

c. Candour and Discretion

In characterizing the government lawyers as overly zealous in their pursuit of Dr. Diab's extradition, some have suggested that counsel for the Attorney General made false representations to the extradition judge and withheld exculpatory evidence. As I explain more fully below, those suggestions are unfair and should be rejected.

Representations to the Court

One area of contention that received a lot of attention in the media following Dr. Diab's return to Canada was whether counsel for the Attorney General was candid with the court during the period pending France's decision about how to respond to the flaws in the original handwriting evidence revealed by the defence.

They mistakenly relied, in part, on handwriting samples that did not belong to Hassan Diab but were authored by his previous wife as part of samples gathered when the couple lived in the United States. Counsel for the Attorney General surmised that, given the posture of the defence, some of the samples relied upon did not belong to Dr. Diab. Eventually, new expert handwriting opinions were produced that made, among others, that precise powerful point. IAG counsel had a decision to make: could it go ahead with the impugned reports arguing that the incorrect samples did not entirely taint the conclusions that Dr. Diab was, in all probability, the author of the registration card at the Hotel Celtic? Could it argue that the impugned reports did not reach the standard of "manifestly unreliable"? Or should the IAG explore with France the possibility of preparing a brand-new analysis, untrammelled by the same error?

The picture became clearer when the presiding Judge ruled on December 11, 2009, that he would admit the proposed defence evidence. Specifically, Justice Maranger permitted the defence to call two of its four handwriting experts and file all four reports subject to counsel for the Attorney General's right to cross-examine the authors of all four reports. At that stage, counsel for the Attorney General successfully requested an adjournment to allow France to determine its next steps.

Over a number of court appearances, the Court asked counsel for the Attorney General to report on progress regarding France's response to the defence handwriting developments. Counsel informed the court that he was unable to provide any update on whether France would be seeking to adduce additional evidence, and, if so, what the nature of such evidence would be. At the time, of course, counsel for the Attorney General knew that a new handwriting comparison report had been commissioned and that, if it were favourable, France would include the report in a Supplementary ROC (SROC). The decision by counsel for the Attorney General to be less than specific about what was afoot was, nevertheless, understandable. A competent expert had to be found. Once retained, Ms. Bisotti

needed to access the original samples. She required time to prepare the report. Her conclusion – which could impact counsel’s position in respect of the two earlier reports – would not be known until she was finished. It should be noted that Mr. LeFrançois received the new report on Friday, May 7, 2010, and provided it to the defence and the Court at the next opportunity: a previously scheduled in-chambers meeting on Monday, May 10, 2010.

Counsel for the Attorney General were in a difficult spot. At least three factors stood in the way of counsel being completely open with the court. The first reason is elementary: as there was no new report there was nothing to report on. Until the evidence existed it did not exist.

Second, in view of the attack on the original handwriting reports, France was pursuing other avenues of evidence beyond the handwriting comparison. The most prominent example was the distal prints comparison, the results of which were received in January, but there were other avenues genuinely being considered that involved fresh investigative measures, including interviews or re-interviews.

Third, counsel for the Attorney General believed, correctly in my view, that disclosing the fact that France was pursuing a new handwriting comparison report would lead to protracted and unnecessary proceedings. Had counsel for the Attorney General announced that it was awaiting the results of a new handwriting analysis, that may very well have given rise to a host of legal consequences and questions. Who was being approached? What instructions had been given? When was it coming? What would the Attorney General’s position be regarding the two impugned reports that were still part of the ROC? Wasn’t the fact that another expert was being sought illustrative of the diminishing worth of the original reports?

The presiding Judge expressed an understandable degree of frustration at the timing of the presentation of the SROC and at the failure to advise the Court of the possibility of new handwriting evidence – a sentiment that is hard to argue with – but he found no evidence of abuse of process and was not otherwise critical of the behaviour.

More to the point, counsel for the Attorney General did not want to advise the court about the new report because he did not know what the conclusion of that report would be. The fact of the matter is that, if the report was not helpful to France’s case, there would have been no obligation to share the results of the report – or even its existence – with Dr. Diab and his counsel at that juncture. Given the centrality of the

handwriting analysis to the case for extradition, that legal reality may be surprising to some but it is consistent with the limited screening function of committal hearings described above. Nevertheless, I have no doubt that had the defence been aware that a new report had been commissioned but was not being relied on, he would have made every effort to ensure this was a matter considered by the presiding Judge.

And there is one more critical piece. As time progressed, the fact that a new handwriting report might be in the offing became increasingly apparent. After all, the initial adjournment was granted in response to the work of the defence handwriting experts. As time passed, the presiding Judge correctly speculated that, if a positive handwriting report was freshly produced, the Attorney General, on behalf of France, could withdraw reliance on the two impugned reports. That is exactly what happened. There never was a need for the presiding Judge to make a ruling as to whether the two earlier reports were manifestly unreliable⁹³ – although I am confident he might well have done so had the matter been litigated.⁹⁴

The reality is, as the presiding Judge recognized in granting the Attorney General's adjournment request and dismissing the abuse of process application, under the *Extradition Act* the requesting state may always attempt to supplement the ROC, a not uncommon occurrence in extradition practice. As if that were not enough, much like at a preliminary inquiry, there is no bar in extradition preventing a requesting state from initiating a second application after withdrawing the initial one or in the face of a discharge. Presumably, such circumstances would be rare and could be justified in a principled fashion.

Regardless of my view, the fact is that the presiding Judge, when presented with an allegation that counsel for the Attorney General had been disingenuous, rejected the accusation and the matter was not appealed further. The presiding Judge expressed an understandable degree of frustration at the timing of the presentation of the

⁹³ The Lessons Learned document, described above, states that the two original reports were “found to be flawed.” This is certainly fair but should not be read to suggest that a *judicial* finding was made in respect the original reports. A judicial determination of whether the original reports had been tainted by samples of Ms. Copty's writing was rendered unnecessary when counsel for the Attorney General withdrew reliance on the reports.

⁹⁴ In *Diab*, Committal Decision, *supra* note 31 at para. 125, Justice Maranger cited the earlier reports in describing an example of what might amount to “manifestly unreliable” evidence. He wrote:

If I had found as a fact that these two experts had used the wrong known handwriting to arrive at their conclusions respecting the authorship of the hotel card (i.e. Nawal Copty's instead of Hassan Diab's) that would have amounted to, as the Court in *Michaelov*, *supra*, put it “problems inherent in the evidence, problems that undermine the credibility of the source of the evidence or a combination of both factors” that render the evidence manifestly unreliable.

SROC and at the failure to advise the Court of the possibility of new handwriting evidence – a sentiment that is hard to argue with – but he found no evidence of abuse of process and was not otherwise critical of the behaviour.

Allegations of Non Disclosure

Another significant critique of counsel for the Attorney General is that, as part of the committal hearing, they did not disclose “exculpatory” fingerprint and palm print evidence. As with the complaint about the Bisotti report, described above, this allegation of abuse of process was adjudicated and rejected by the extradition judge. It was also rejected by the Minister as a basis for refusing surrender. Neither of these decisions were challenged on the committal appeal or the judicial review application at the Court of Appeal.

There are two main areas in the Diab matter that touch on disclosure. They are:

- the palm print on the inside back window of the vehicle that may have been used to transport explosives; and
- fingerprints associated with the arrest form of the individual (“Panadriyu”) who stole pliers from a hardware store in Paris in the days preceding the explosion.

Each raises slightly different issues.

Palm Print

As indicated earlier, a palm print was found inside a vehicle associated with the bombing. The theory was that the palm print might relate to one of the associates suspected in the bombing. Dr. Diab’s palm print was obtained by the RCMP shortly after his arrest in Ottawa, along with his fingerprints. On November 20, 2008, an RCMP corporal reported that the palm print taken from Dr. Diab did not match the palm print on the window of the abandoned rental car in Paris found shortly after the October 3, 1980, bombing.

Although IAG records do not indicate when that report was received or if it was transmitted and to whom, one thing is clear: counsel for Dr. Diab received it before committal was ordered. Indeed, the report is referred to as part of defence counsel’s application record during the second abuse of process application before the extradition judge. The IAG cannot say precisely whether it “disclosed” the report to defence counsel or not. It was not tendered as part of the ROC or SROC but, regardless, defence counsel received it and put it to use. The criticism of counsel for the Attorney General’s handling of the palm print report was not found to be abusive conduct. Again, it was not the subject of a ground of appeal.

In submissions to the Minister, Dr. Diab’s counsel took the position that it was wrong not to include the palm print comparison in the ROC. He urged the Minister to seek

assurances that France would place both the palm prints comparison and the distal prints comparison in the trial dossier. The Minister rejected the plea to seek assurances as that would be a decision for France and, in any event, Dr. Diab would have the right to tender the evidence.

As set out in the section relating to the law of extradition, Dr. Diab's right to disclosure in the context of the extradition proceedings was limited. It did not include a right to disclosure of exculpatory evidence. Leaving this aside, counsel for the Attorney General took the view that the evidence was not exculpatory but neutral. It showed that one palm print, which may or may not belong to one of an unknown number of confederates, did not belong to Dr. Diab. In any event, the defence had the palm print comparison analysis in its possession before the end of the extradition hearing.

The defence's primary argument was that the palm print comparison and the distal fingerprint comparison "excludes Mr. Diab as the Alexander Panadriyu alleged to have participated in the bombing". To focus on the palm print for a moment, it did not appear that there was any concrete evidence based on the ROC or the Supplementary ROC that Panadriyu was in the car in question. There were allegedly a number of confederates involved in the bomb plot. The fact that the palm print did not match Dr. Diab did not exclude him as a suspect. That was what the Minister determined. That seems right.

Fingerprints

This issue relates to prints lifted from the arrest form used to process Panadriyu for the theft of pliers from a Paris hardware store shortly before the bombing. In late September 1980, Panadriyu was taken to a Paris police station and questioned about the shoplifting. A "procès-verbal", a record of the police interview with the suspect and the incident more generally, was prepared. As is the custom, he was asked to sign the document. The signature was a series of flourishes and, in any event, false. The French police located the original form in 2009. It was tested for fingerprints, which resulted in the discovery of six (6) distal fingerprints. Distal prints are prints left by the ends of fingers. The thinking was that the suspect, operating as Alexander Panadriyu, may have handled or touched the document as part of his review before signing.

On his arrest, both Dr. Diab's regular fingerprints and palm print were taken, but distal prints were not. In October 2009, France made an MLAT request for Canada to take distal prints. An Impression Warrant was judicially authorized on November 20, 2009. On November 21, 2009, Mr. LeFrançois wrote a lengthy letter to BEPI, the central authority for France regarding extradition and mutual legal assistance. In that letter, he suggested that France give consideration to a new handwriting report and

that the distal prints from the “procès-verbal” be forwarded to Canada for comparison. France agreed to proceed as suggested on both fronts.

Dr. Diab’s distal prints were obtained on November 23, 2009. In December, the RCMP received the prints from France on a CD and prepared a report that was finalized and sent to Mr. LeFrançois on January 26, 2010.

The report indicated that there was no match, but two of the six usable prints “could not be eliminated” as being those of Dr. Diab. Counsel for the Attorney General did not seek to tender the report as, in his view, it did not assist in advancing France’s case. Counsel for the Attorney General also took the position that the results were inconclusive *not* exculpatory and considered the possibility that Dr. Diab, posing as Panadriyu, may not have left any distal prints on the paper.

Although counsel for the Attorney General did not provide the distal fingerprint report to Dr. Diab prior to the conclusion of the committal hearing, it was the subject of a sending order to France signed on June 30, 2011. France, of course, was interested in the collection of all evidence gathered in Canada. As part of that process, the report was shared with the defence earlier that month, on June 11.

On the second abuse of process application in October, 2010, Mr. Bayne squarely raised the non-disclosure of the distal prints comparison, urging that the only reasonable explanation for the failure to tender the police report was that the prints on the “procès-verbal” were not those of Dr. Diab. He further submitted that non-disclosure was an abuse of process, which contributed to the general unfairness of the extradition request, and another reason to stay the extradition.

On March 1, 2011, during defence submissions on the issue of committal, the defence again raised the fact that the distal comparison was not disclosed to him and that the only reasonable inference was that the distal prints on the report did not belong to Dr. Diab. Counsel for the Attorney General did not dispute the submission even though the reality was that the distal comparison was inconclusive. As mentioned, no abuse of process was found and committal was ordered. The distal prints did not form the basis of a ground of appeal. It was raised with the Minister as a reason to not surrender Dr. Diab, but rejected by the Minister. In his letter of April 4, 2012, the Minister found that the evidence could not be considered as exculpatory, need not have been part of the ROC process, and would likely be part of the investigative file being accumulated in France and presumably could be raised at a French trial.

Discretion and Disclosure

Counsel for the Attorney General had no legal duty to share the results of the print comparison analysis. Neither the *Charter* nor the *Extradition Act* requires disclosure

of evidence not being relied on for extradition. However, the decision to not provide this information to defence counsel had potential reputational consequences both for the IAG and the particular counsel involved. As I noted earlier, complaints about the IAG and the counsel who had carriage of the case, omit two critical facts: the committal judge twice rejected claims that the prosecutors' conduct was abusive; and the defence did not appeal the conduct issue to the Court of Appeal.

Within the wide sweep of their discretion there is room prior to committal to share information that, though not subject to a legal disclosure requirement, could be shared.

It is not my place to suggest that counsel for the Attorney General acting in extradition cases be guided by rules that our highest courts do not require or have rejected. However, it strikes me that, within the wide sweep of their discretion there is room prior to committal to share information that, though not subject to a legal disclosure requirement, could be shared. It seems to me that if counsel for the Attorney General became aware of exculpatory evidence of unimpeachable authenticity and reliability – information that could undermine the presumptive reliability of the contents of the ROC and, therefore, justify a refusal to commit – they might well have an obligation to disclose that evidence to the person sought.⁹⁵ I would suggest that, even when relevant and potentially exculpatory evidence is not dispositive or does not meet the high threshold of being of unimpeachable reliability, it would be wise for counsel for the Attorney General to consider sharing that evidence, particularly in weak or marginal cases. The fact that the law does not *require* disclosure in such circumstances should not be the end of the analysis. Sharing information is not prohibited and would have the benefit, if nothing else, of enhancing transparency.

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I want to use the distal prints comparison as an example. Counsel for the Attorney General and the requesting state both appreciated and articulated that a match would be determinative. It would eclipse all the other evidence, including the handwriting comparison. If the distal prints from Dr. Diab matched those on the

⁹⁵ In *M.M.*, *supra* note 20 at para. 85, the Supreme Court held that evidence of an unimpeachable quality that offers an exculpatory account of events, could in rare circumstances, meet the high threshold for showing that the evidence of the requesting state should not be relied on.

arrest form it would have been powerful, conclusive and seemingly incontrovertible evidence that Dr. Diab and Panadriyu were one and the same person. It is apparent that counsel for the Attorney General recognized as much in the November 21, 2009, letter to France. My point is this: if that information was of such determinative value, if the prints matched, what was it if they were not a match or Dr. Diab could not be excluded as the maker of some of the lifted distal prints? A failed or an inconclusive result is not the equivalent of a positive match, but neither is it irrelevant. Could counsel for the Attorney General have shared the results pre-committal indicating it was doing so not as a legal requirement but as a courtesy or a discretionary call made in the particular circumstances of this case? Doing so would have enabled counsel for the Attorney General to offer its own take on what the comparison was or was not.

Recommendation #9

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

It was open to counsel for the Attorney General to indicate that such a gesture was not pursuant to any duty to disclose and should not be construed in that fashion. By not sharing, a lot of time was spent characterizing the comparison results as conclusive proof of Dr. Diab's innocence, which they were not. The decision also fuelled an unfair perception that IAG counsel was perhaps hiding something. To be clear, there was no requirement for IAG counsel to share, and sharing may have raised a different set of questions but if, in the exercise of discretion and with France's approval, counsel had shared the results, the IAG would have been seen as being both thorough and transparent.

It turns out the palm print comparison came to the attention of the defence before committal. However, it was open to the IAG to seize the high ground in the circumstances of the case and share the results of the palm print comparison in the fashion outlined above. The defence was aware that a palm print had been found. Dr. Diab had been asked for his palm print just as he had been asked for his distal prints. Everyone knew comparisons would be done. Given the circumstances of the case, sharing the information as a courtesy – and not as a legal requirement – would have been responsive to reasonable questions that arose on these facts. With the benefit of a decade of hindsight, I wonder whether this approach might have taken a bit of the edge off what was described by the extradition judge in his reasons for committal as follows:

This was a difficult case. It required an extraordinary amount of time to litigate. It was bitterly contested. Counsel represented their clients with passion and skill. They clearly believed in their respective causes. However, the heated exchanges

*between counsel and the appeals to emotion did at times serve to distract from the responsibility at hand.*⁹⁶

The theme of DOJ counsel failing in their duties to disclose or to be candid about the replacement handwriting report, the palm print comparison and the distal prints comparison has been perpetuated – in my view unfairly. Counsel for the Attorney General acted in compliance with the law. When tested through a rigorous abuse of process application, twice over, the trial judge found no legal shortcomings and the conduct issues were not appealed further.

Leaving aside my thoughts on a different approach that could be taken with respect to sharing information with defence counsel, I conclude that these repeated accusations are unwarranted and have unnecessarily and unfairly tarnished the work done by DOJ counsel.

d. Delay

The extradition proceedings in the Diab case were unusually long and protracted. As part of my review, I considered ways to help expedite extradition proceedings. I appreciate that two opposing points of view inform this issue. The jurisprudence tells us that extradition should move in a timely fashion: it is not meant to turn into a trial. At the same time, the process must be imbued with fairness consistent with *Charter* values. Undue emphasis on efficiency and speed may threaten a fair process.

The complaints of our extradition partners invariably focus on delay: they say that extradition from Canada takes a long time. The Diab case certainly took a very long time, much of it in an exceedingly lengthy court proceeding that can be partially explained by the seriousness, age, nature and complexity of the case, the handwriting analysis journey and the role of intelligence information, among other issues.

The suggestions below arise from listening to the various stakeholders I consulted. They should be viewed as ideas that may help in the future as opposed to criticisms of the current system.

Case Management Power

The extradition judge did a magnificent job managing this very challenging case. As he noted, the parties were possessed of abundant skills and passion. There were unusual aspects not seen in most extradition hearings, such as a genuine issue regarding manifest unreliability, which ultimately led to the admission of defence evidence *viva voce* and documentary. There were serious issues related to the use of unsourced intelligence information in the ROC, which also led to defence evidence being

⁹⁶ *Diab*, Committal Decision, *supra* note 31 at para. 193.

admitted. There were also concerns and challenges related to translation and allegations of abuse of process.

All that being said, Dr. Diab's matter is not the only extradition case that has absorbed a great deal of court time. While the judge in this case was clearly on top of matters, I

Recommendation #10

The Department of Justice should consider initiating consultations with the judiciary and relevant stakeholders on the viability and desirability of creating case management powers for judges hearing extradition cases.

wonder if – given the trend to long extradition cases – there may be scope to recognize a more formal case management power in the *Extradition Act*.

In recent years, the *Criminal Code* has seen these powers added to contend with lengthening and/or complex trials and respond to the renewed focus that *R. v. Jordan*⁹⁷ has placed on having trials proceed without unreasonable delay flowing from s. 11(b) *Charter* rights. The issue of case management has a richer history in Canada in civil cases. Certainly, the addition of case management powers in the *Criminal Code* has helped address an earlier culture of non-interference in criminal trials. Case management powers may assist with scheduling matters, length of

arguments, length of materials and the like.

It was suggested to me that extradition cases could be given priority over other cases, but I am not sure that is practical. The importance of extradition cases vary. Some individuals facing extradition are granted bail. I know of no way to weigh extradition cases against, for example, domestic criminal cases. Besides, if we identify a number of different types of cases as priorities, sentiment will have to give way to reality. On the other hand, a formal case management power in extradition cases is neutral and has the advantage of focusing the task on narrowing issues and otherwise clarifying expectations. Of course, the viability of such a suggestion would require consultation, including with the judiciary.

Multiple Submissions at the Ministerial Stage

The submissions and surrender decision phase of Dr. Diab's extradition proceedings was completed with minimal delay and as efficiently as possible in the circumstances: Dr. Diab was committed for extradition on June 6, 2011; his counsel made three sets of submissions to the Minister between August 24, 2011 and January 26, 2012; and the Minister rendered his decision on April 4, 2012.

⁹⁷ *R. v. Jordan*, 2016 SCC 27.

In this case, the materials and arguments presented by Mr. Bayne in his second and third sets of submissions were largely responsive to new materials provided to him (for example, a memorandum on the French criminal law system) after the first set of submissions had been provided. I am advised, however, that it is not uncommon in other cases for the defence to forward multiple submissions to the Minister, and for these submissions to become repetitive.

Indeed, because the Minister of Justice has the power to amend a surrender order

at any time prior to the execution of the order (s. 42), the person sought can make additional submissions to the Minister even after a surrender order has been issued.

The tasks of the judge and the Minister do not overlap, and the decision to order surrender involves different concerns than those considered by the judge at an extradition hearing.

Recommendation #11

Counsel for the person sought should only be permitted to make additional and supplementary submissions to the Minister on the issue of surrender when: new information has been disclosed or otherwise come to light; or in situations where there has been a relevant change in circumstances.

There are sound policy reasons behind the provisions of the *Act* that permit further submissions. As the Court of Appeal explained in *Adam v. U.S.A.* there “may often be a time lag between the Minister making a surrender order and its execution. If circumstances arise in that time frame which make a change to that order essential, a refusal to do so by the Minister may appropriately be the subject of judicial review.”⁹⁸

Of course, prudence would say that, even though extradition has already been ordered by the committal judge, the Department of Justice must stop the clock to study and advise the Minister on a recommended course of action. The tasks of the judge and the Minister do not overlap, and the decision to order surrender involves different concerns than those considered by the judge at an extradition hearing.⁹⁹ For example, the Minister must

consider political and humanitarian issues that played no part in the extradition judge’s decision.

⁹⁸ *Adam v. United States of America*, 2003 CanLII 31874 (ONCA) at para. 23.

⁹⁹ *Idziak v. Canada (Minister of Justice)*, *supra* note 83 at p. 659-660.

Still, common sense makes one wonder why, in the absence of a change in circumstances or new information or disclosure coming to light, multiple sets of submissions are necessary. At this point, the case has been going on for a long time. Many of the issues might be repeated. Issue may be taken with a Minister's response. The defence can appeal the committal order and judicially review the Minister's decision.

I wonder whether limiting in a firmer way the time during which the defence can make submissions or the number of times the defence can supplement submissions might expedite proceedings. Duplicative and repetitive submissions should be avoided. Limiting the permissible number of extensions on the statutory deadline to make submissions could also make the surrender stage more efficient and effective. Any such limitations would, of course, need to conform to the rules of procedural fairness and the language of the *Act*. As currently worded and interpreted, the *Extradition Act* declines to treat the concern for finality and the interest in an expeditious extradition process as a limit on the ability of the person sought to make submissions.

e. The Minister's Decision and Transparency Concerns

Our courts have made clear that the Minister's surrender decision is at the extreme legislative end of the continuum of administrative decision-making. It involves weighing many different factors and possesses a "negligible legal dimension".¹⁰⁰ In determining whether to order surrender, the Minister must take into account the constitutional rights of the person being sought for extradition and also Canada's international obligations and responsibilities to our extradition partners. As the Supreme Court has recognized:

*The decision to extradite is a complex matter, involving numerous factual, geopolitical, diplomatic and financial considerations. A strong factor in one case may be a weak factor in another. This supports maintaining a non-formalistic test that grants flexibility to the Minister's decision when faced with a foreign state's request. The Minister of Justice has superior expertise in this regard, and his discretion is necessary for the proper enforcement of the criminal law.*¹⁰¹

Given the complexity of the considerations at issue, the Minister may, if not already doing so, seek advice from other ministries (e.g. the Department of Foreign Affairs)

¹⁰⁰ *Lake v. Canada*, *supra* note 14 at para. 38, quoting *Suresh v. Canada*, 2002 SCC 1 at para. 39.

¹⁰¹ *Sriskandarajah*, *supra* note 29 at para. 22.

related to any diplomatic and human rights concerns associated with an extradition. It is difficult to know whether such efforts are already being pursued because so little information is known about the surrender process.

The reasons for surrender (or – in far fewer cases – refusing surrender) are provided to the person sought but they are not publicly available. When the person sought makes an application for a judicial review of the surrender decision, the reasons form part of the application record and are included with the materials filed at the Court of Appeal. At times,

Currently, the public has very little access to information about the Minister's surrender decisions in individual cases, like Dr. Diab's, or even more generally.

portions of the reasons for surrender are summarized or excerpted in the Court of Appeal's decision on the judicial review application. Beyond these brief glimpses, the content of the Minister's reasons is largely unknown and inaccessible to the public. Given the highly personal nature of the information contained in the reasons for decisions (relating to, for example, illness or other hardships that might follow from extradition), it is understandable that decisions are not posted online. Regardless, there remains room to be more transparent.

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

The absence of any publicly available information about these matters may fuel public ignorance and, potentially, suspicion of the Canadian extradition system. The Department of Justice should consider providing public access to statistics about extradition cases, the policies and procedures that guide decision-making by counsel within the IAG, and summaries of the Minister's decisions. Combined with the creation of a Deskbook, such measures may increase transparency and, ultimately, contribute to greater respect for and confidence in the system.

As an example of the kind of information that could be made publicly available, I point to section 195 of the *Criminal Code*.

This section of the *Code* requires the Minister of Public Safety and Emergency Preparedness to prepare and present to

Greater transparency requires more access to information.

Recommendation #12

The Department of Justice should consider making available to the public: statistics about extradition requests made and received by Canada; the policies and procedures guiding decision-makers within the IAG; the factors considered by the Minister in making surrender decisions; information about the types of assurances sought by the Minister; and summaries of surrender decisions (while respecting privacy concerns).

Parliament an annual report on the use of electronic surveillance to intercept private communications authorized under the *Code*. The report must include the number of applications for authorizations, the number of applications granted, and the number refused. It also includes information on the types of offences for which the authorizations are granted, the interception methods used, how often intercepted communications were entered as evidence at criminal proceedings and how often those proceedings resulted in convictions. The reports, which are available online, provide a measure of accountability and transparency while respecting privacy interests, privilege and secrecy considerations.

The Department of Justice should make a concerted effort to better educate the public on the objectives of extradition, the role the Department of Justice plays in the process and how the Canadian extradition system compares to that of other like-minded states. Greater transparency requires more access to information.

3. Are there specific concerns to be addressed with our foreign partner (France) with respect to Dr. Diab's treatment after he was surrendered to France?

I begin by noting there is a significant information gap in relation to the time Dr. Diab spent in France. Very little is known about the investigations conducted by France after Dr. Diab's surrender, the reasons for the decisions to release him on bail, the reasons those release decisions were overturned or the reasons Dr. Diab's was eventually discharged prior to trial. I also have little information about Dr. Diab's contact with or assistance from Global Affairs Canada while he was in France. In these circumstances, it is difficult to identify specific concerns about Dr. Diab's treatment once surrendered to France or to recommend improvements.

What is clear, even in the absence of specific details about Dr. Diab's treatment in France, is that: he spent over three years detained in a foreign country without facing trial; and his extradition was preceded by a judicial finding in Canada that the case against him appeared to be weak. This troublesome reality is no doubt what was in the minds of our government leaders when comments were made that what happened to Dr. Diab should not have happened and should never happen again.

Below I attempt to review the delay that occurred following surrender and propose steps Canada could take to address this area of concern.

Perhaps the most troublesome issue in Dr. Diab's matter is that he was in jail for 34 months after his extradition by Canada – only to be freed by the investigating magistrates.

a. Delays in France Post-Surrender

Perhaps the most troublesome issue in Dr. Diab's matter is that he was in jail for 34 months after his extradition by Canada – only to be freed by the investigating magistrates. In this post-*Jordan*¹⁰² world, much more emphasis is placed on ensuring that domestic criminal cases are dealt with in a manner that guarantees trial within a reasonable time. The time spent in custody in France is especially concerning given the comments made by the Ontario Court of Appeal, borrowing language from *Ferras*, that Dr. Diab, if extradited, would not languish in prison.

When Canada sent Dr. Diab back to France, it was understood that the investigation against him would continue but that France had initiated a prosecution against Dr. Diab. He was more than a mere suspect. It was also understood that Dr. Diab could apply for bail.

Dr. Diab did so. Eight times he was released on bail and eight times the order was reversed. Although the reasons for overturning the bail decisions are not available, there is some sense that the seriousness of the terrorism and antisemitic accusations coupled with the devastation of the bombing played a role – as may have the flight risk associated with Dr. Diab's Lebanese citizenship. Given the allegations facing Dr. Diab and the evidence presented in the submissions opposing his surrender, it cannot have been unexpected to our Minister of Justice that Dr. Diab would be denied bail in France.

¹⁰² In the 2016 case of *R. v. Jordan*, *supra* note 97, the Supreme Court articulated a new framework for evaluating alleged breaches of the s. 11(b) *Charter* right to be tried within a reasonable time. The central feature of the *Jordan* framework is a ceiling beyond which delay is presumptively unreasonable.

In 2017 – years after Dr. Diab’s extradition – IAG counsel consulted French authorities and confirmed the fact that, in France, Dr. Diab could be held in detention for up to four years before a decision would be made as to whether to refer the matter to trial.

Recommendation #13

In every case, the Department of Justice should find out from the requesting state how long the person sought can be detained before a decision is made as to whether to refer the matter to trial and that information should be shared with the defence and provided to the Minister before a surrender decision is made.

Unfortunately, that information does not, however, appear to have been “on the radar” at the time the Minister made the surrender decision. To be clear, I am not at all certain that it would have had an impact on the Minister’s surrender decision given the seriousness of the charges and the state of the record.

Questions about how long the ongoing investigation and detention of Dr. Diab could last ought to have been asked much earlier. Information about the possibility of a lengthy detention before making the decision to refer the matter to trial would be relevant to the Minister’s calculus and ought to have been identified prior to ordering Dr. Diab’s surrender.

Going forward, this type of information should be gathered, shared with defence and provided to the Minister in the memorandum from IAG counsel. It provides additional, highly relevant context related to

trial readiness and should be considered as part of the Minister’s surrender decision.

There is a general reluctance to second-guess foreign legal systems. The fact that Canada and France have signed an extradition treaty is a recognition that the French criminal justice system, while very different than ours, is one that will treat accused individuals fairly. One would not have thought of France as an unreliable partner or have anticipated an excessive delay. There are other countries whose human rights records are much more concerning. France’s constitution enshrines human rights and France is a member of the European Convention on Human Rights. I should also observe that while a 38-month delay prior to a serious and complex trial in Canada would be concerning, it is not always fatal – although taking 38 months to reach a preliminary hearing likely would be. What is different about Dr. Diab’s case is that, by the time he was extradited, France had over 30 years to be trial ready.

One explanation for the delay in France is that, when he first arrived in France, Dr. Diab apparently initially declined, as was his right, to make a statement. At some point, early in 2016, he apparently did speak to the investigating magistrate and raised that he was in Lebanon studying at the time of the bombing. That claim had to be investigated. It appears from media reports that a reason for discharging Dr. Diab from custody and dropping the charges was that the investigating magistrates were

satisfied that Dr. Diab may have been studying abroad at the time of the bombing. The defence raised in France was not advanced in any formal way in Canada. That would be in accord with the law that defences, such as alibis, are matters for trial, that the committal judge should not be weighing evidence, and that the Minister does not consider the issue of guilt or innocence in making the surrender decision.¹⁰³

What can we learn from the Diab matter in this regard? One suggestion that I have heard is that Canada could ask for assurances from France in future cases that involve serious, complex accusations. That is a possibility but it would be a challenge to

Recommendation #14

The Department of Justice should examine the issue of timely trials arising out of Dr. Diab's experience with a view to determining whether the Canada-France treaty should be updated to specifically address issues of delay and timely proceedings.

fashion assurances as each case is so specific. The general rule is that assurances are requested only when not asking in a particular case would render the extradition unconstitutional.

The issue is not straightforward, although a partial remedy may be. I understand that treaties are reviewed periodically. In anticipation of these reviews, extradition partners regularly make notes and keep logs of issues, concerns and areas for potential improvement. Along these lines, Canada has – for good and sufficient reasons – negotiated clauses in some treaties that focus on time. For example, some treaties provide that the requesting state will ensure the person extradited is brought to trial within a specified period of time, failing which the person is

to be brought to court for a trial date to be set and bail to be considered.¹⁰⁴ In other instances, treaties specify that the person extradited will be brought to trial expeditiously.¹⁰⁵ This is a more tempered solution. Such clauses give the requested state diplomatic leverage to press the other country.

¹⁰³ Neither counsel for the Attorney General nor the Minister are prohibited, of course, from considering compelling exculpatory evidence in exceptional circumstances. Where a person sought is able to present near conclusive proof of innocence, I would like to think that the authorities would review that evidence and take it into consideration.

¹⁰⁴ See, e.g. Extradition Treaty Between the Government of Canada and the Government of India, Can. T.S. 1987 No. 14.

¹⁰⁵ See, e.g. Treaty on Extradition Between Canada and the Republic of the Philippines, Can. T.S. 1990 No. 36.

Conclusion

Dr. Hassan Diab's extradition to France and eventual release has rightfully sparked interest and debate on the extradition process, including decisions made by Canadian justice officials.

From the outset, this case has presented a deep tension between competing interests. On the one hand, France had a legitimate, lawful and significant interest in bringing the alleged author of a devastating, cruel, terrorist and antisemitic attack to justice. On the other hand, as Canadians, we have expectations that our citizens will not be extradited without due process, deprived of their liberty without a meaningful hearing or languish in a foreign jail.

Our *Extradition Act*, *Mutual Legal Assistance in Criminal Matters Act*, and the treaties thereunder provide the bridges between countries to fulfill mutual obligations. The intent of this review was, in part, to identify a series of recommendations that respond to the terms of reference, provide greater transparency in the process, and help build public confidence in the administration of our extradition and mutual legal assistance obligations.

Inviting this review is an indication of the government's commitment to learning and continuous improvement. I am grateful to all who were generous with their time. I am especially grateful to Erin Dann of Toronto and Michele Meleras of Montreal, two highly capable counsel, who assisted me throughout the review.

Appendix A – Terms of Reference

Terms of Reference

Overview

You are to conduct your external review independently of any direction from the Government of Canada and to form your own assessments and conclusions respecting the matters that are the subject of your external review.

You will receive the cooperation of Justice counsel and staff. You will also be provided full access to departmental files and correspondence respecting the Diab extradition, and any related mutual legal assistance request, subject to any limits required by law, including privacy or international relations obligations. Where requested by you, waivers or consents respecting any such limits on access will be reasonably sought by the Department of Justice.

Review of the Diab Extradition

1. Assess whether the law and Department of Justice practices and procedures were followed in the conduct of the Diab extradition.
2. Assess whether there were any particular approaches taken by counsel in the Diab extradition that identify a need to take action to improve or correct the approach that the International Assistance Group (IAG) takes to advisory or litigation files going forward.
3. Assess whether there are specific concerns that need to be addressed with our foreign partner (France) with respect to Dr. Diab once surrendered to France.

Assessment Tools

- Review of the court decisions in Diab, the former Minister's decision and the submissions of counsel to the Minister.
- Review the report from the Department of Justice internal lessons learned exercise, including the summaries of all interviews that took place.
- Speak to Justice counsel involved in this matter.
- Speak to Dr. Diab, if he so wishes, and to his counsel.
- Speak to the French Ministry of Justice about the process in France.
- Speak to Global Affairs Canada about their interactions with Diab while he was in France, to the extent they are permitted to discuss the matters.

- Review correspondence between Department of Justice officials and French officials, including France's request and the evidence in support, as well as correspondence between Department of Justice officials and Diab's counsel.
- Review the decision of the investigating magistrate in France, and any subsequent decisions of French courts respecting Diab, should they be made available by France or Dr. Diab.
- Conduct other interviews as deemed appropriate.
- If deemed relevant and within the scope of the review of this matter, interview representatives of key foreign partners (e.g. US and UK).

News release

Minister Wilson-Raybould announces details of external review of Hassan Diab extradition

From: [Department of Justice Canada](#)

July 5, 2018 - Ottawa, Ontario - Department of Justice Canada

The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced that Murray Segal will lead an external review of the extradition of Dr. Hassan Diab.

The Minister has asked for this external review so that a thorough examination of the circumstances of Dr. Diab's extradition to France can take place. The review will focus on whether the *Extradition Act* was followed in this case and if there are specific concerns that need to be addressed with regard to our extradition treaty with France.

France sought Dr. Diab's extradition as a suspect in a 1980 bombing in that country. Following extradition and appeal proceedings in Canada, Dr. Diab was extradited to France in 2014. He was later released from a French prison in January 2018 and he then returned to Canada.

Mr. Segal is a former Deputy Attorney General for Ontario and is the former Chief Prosecutor for Ontario, with more than 30 years of experience in law and government.

Mr. Segal will be given the tools, access and discretion necessary to conduct a thorough and independent review of the case.

Appendix B – Timeline

Investigations in France	
October 3, 1980	Bomb explodes outside a synagogue at 24 Rue Copernic. French police conduct extensive investigations. Bombing is linked to a man using the pseudonym Alexander Panadriyu.
1999	Intelligence information is received by French authorities that identifies Hassan Diab as involved in the 1980 bombing.
October 2007	Article in <i>Le Figaro</i> reports that French authorities are investigating Dr. Diab in connection to the 1980 bombing. Dr. Diab is interviewed by reporter and denies any involvement.
2008	
January	France makes first formal request for mutual legal assistance in gathering evidence in Canada. RCMP begins surveillance of Dr. Diab in Canada.
March	Jacques Lemire, IAG counsel stationed in France, meets with the investigating Judge, Marc Trévidic, to discuss the Diab case.
April	Judge Trévidic, along with other French officials, meet with officials from the RCMP and members of the IAG, including Tom Beveridge and Claude LeFrançois, in Ottawa.
June 5	France sends a mutual legal assistance treaty (MLAT) request to Canada. The handwriting reports of Ms. Barbe-Prot and Ms. Marganne are included in the material provided in support of the request. Reports compare writing on a hotel registration card filled in by Panadriyu with samples of Dr. Diab's handwriting.
October 21	France sends an MLAT request seeking execution of search warrants relating to Dr. Diab and request that Dr. Diab's palm prints be taken.
November 13	Dr. Diab is arrested and held for bail. Dr. Diab's fingerprints and palm prints are taken by the RCMP in Ottawa.

November 20-21	Dr. Diab's bail hearing is conducted at the Superior Court of Justice. Judgment is reserved.
November 21	RCMP learns that the palm prints taken from Dr. Diab did not match one found inside a vehicle associated with the bombing.
December 3	Dr. Diab is denied bail.
December	Dr. Diab retains Donald Bayne as counsel.
December 12, 2008	The IAG receives the full French request for extradition. It includes the handwriting reports of Ms. Barbe-Prot and Ms. Marganne.
2009	
January 15	The Authority to Proceed is issued on behalf of the Minister of Justice.
February and March	The Record of the Case (ROC), including the handwriting reports, is translated into English.
February 24	Dr. Diab's application to set aside the detention order is granted by the Ontario Court of Appeal. A new bail hearing is ordered.
March 31	After a hearing before Justice Maranger of the Superior Court of Justice, Dr. Diab is released on restrictive bail conditions. He remains on bail until his surrender in November 2014.
April 9	Counsel for Dr. Diab tells the Court that he intends to seek to tender evidence in relation to the French handwriting experts' reports.
May 27-28	Counsel for the Attorney General wants to set earliest possible dates for extradition hearing. Counsel for Dr. Diab requests time to investigate and attempt to adduce defence evidence challenging the reliability of the handwriting analysis and the use of intelligence information in the ROC.
June 2	Justice Maranger grants Dr. Diab's request. Counsel for Dr. Diab is to provide a summary of proposed evidence by October 2009

	and extradition hearing is set to be heard in January 2010.
June 26	The Ontario Court of Appeal dismisses the bail review application of the Attorney General of Canada.
October 15-22	<p>Counsel for Dr. Diab gives counsel for the Attorney General the defence expert reports challenging the reliability of the French handwriting analysis.</p> <p>The defence experts concluded that the two French experts had mistakenly relied, in part, on some handwriting samples that belonged to Dr. Diab's former spouse.</p> <p>The defence expert reports are forwarded to the French authorities including Judge Trévidic. IAG counsel asked French authorities to consider obtaining a new handwriting report that did not rely on the documents alleged to be penned by Dr. Diab's former spouse.</p>
October 12	<p>France sends an MLAT request to obtain Dr. Diab's distal fingerprints (the prints left by the ends of the fingers).</p> <p>France had, earlier in 2009, discovered an arrest record signed by the fictitious Panadriyu days before the bombing. Fingerprints were discovered on it. France thought there could be a match to Dr. Diab.</p>
November 20	A warrant to take Dr. Diab's distal fingerprints is signed.
November 21	IAG counsel writes to France providing an update on proceedings. Counsel suggests that France consider obtaining a fresh handwriting analysis. Counsel also requests that France send copies of the fingerprints detected on the arrest record to Canada.
November 23	RCMP Cpl. Maryse Laurin takes Dr. Diab's distal fingerprints.
November 30, December 1-3, 10	Hearing to determine the admissibility of the proposed defence evidence is argued before Justice Maranger.
December 11	Justice Maranger rules that Dr. Diab can call defence handwriting experts and one expert on the issue of the use of intelligence information as evidence. French authorities are

	informed of the ruling.
December 15	Counsel for the Attorney General learns that Judge Trévidic has decided to have new handwriting report prepared.
December 18, 2009	Counsel for the Attorney General brings an adjournment application to allow France to consider whether and what evidence they might wish to submit in a Supplemental ROC. Adjournment application is granted over the objection of counsel for Dr. Diab. Matter adjourned to February 8, 2010 for an update and to potentially set new dates for the extradition hearing.
2010	
January	Counsel for the Attorney General learns that a comparison of Dr. Diab's distal fingerprints to those detected on the Panadriyu arrest record has not resulted in any matches. Four of the prints conclusively excluded Dr. Diab. Two were inconclusive. Counsel for the Attorney General decides they will not rely on this evidence at the extradition hearing. The results are not disclosed to Dr. Diab's counsel until June 10, 2011 (after committal but before surrender).
February 8	Appearance before Justice Maranger to provide update and discuss scheduling. Counsel for the Attorney General informs the Court he is not able to say whether or not new evidence would be called. Three-week period in June set aside for extradition hearing. Matter adjourned to March 29, 2010 for update.
March 2010	Ms. Bisotti is given access to original handwriting samples of Dr. Diab necessary to complete her analysis.
March 29	Appearance before Justice Maranger to provide update. Counsel for the Attorney General informs the Court he can not describe the nature of the new evidence, if any, France might adduce.
May 7	Counsel for the Attorney General receives copy of Bisotti Report.

May 10	Counsel for the Attorney General advises Justice Maranger and counsel for Dr. Diab of the Bisotti Report in an in-chambers meeting.
May 17	Counsel for the Attorney General formally files the Bisotti Report and withdraws the two earlier handwriting reports. All parties agree June dates must be cancelled and new dates set for the extradition hearing.
August 31	Hearing of Dr. Diab's application to exclude the Bisotti handwriting report, based on alleged abuse of process.
September 1	Justice Maranger dismisses Dr. Diab's application to exclude the Bisotti Report on abuse of process grounds.
October 2010	Counsel for Dr. Diab files a factum in support of Dr. Diab's application for a stay of the extradition proceedings, based on alleged abuse of process.
November 8 to November 23	Justice Maranger hears arguments on Dr. Diab's application for a stay of the extradition proceedings and defers his ruling on this issue to the end of the extradition proceedings.
November 24 to December 3	Justice Maranger hears arguments on the admissibility of evidence from three defence handwriting experts challenging the reliability of the Bisotti Report. Justice Maranger rules that the defence evidence is admissible.
2011	
December 13, 2010 to January 7, 2011	The defence handwriting experts testify.
February 9-11	Arguments made on whether the Bisotti Report should be excluded as "manifestly unreliable."
February 18	Justice Maranger dismisses the application by Dr. Diab to have the Bisotti Report excluded on the basis that it is manifestly unreliable.
February 24	Dr. Diab files an application pursuant to s. 24(2) of the <i>Charter</i> , seeking to have the Bisotti report excluded from the ROC.

February 28	Arguments made on the <i>Charter</i> application.
March 1	The <i>Charter</i> application is dismissed.
March 7 and 9	Final arguments on the issue of committal made. Justice Maranger reserves his decision.
May 20	Counsel for Dr. Diab applies to reopen the extradition proceedings to tender new evidence.
May 26	The application to reopen the extradition proceedings is dismissed.
June 6	Dr. Diab is committed for extradition by the extradition judge.
June 6	Dr. Diab files a Notice of Appeal with the Ontario Court of Appeal appealing Justice Manager's committal decision.
June 9	The Ontario Court of Appeal hears Dr. Diab's application for bail pending appeal. Bail is granted.
June 10	Comparison analysis of the fingerprints on the Panadriyu arrest record disclosed to Dr. Diab's counsel as part of MLAT proceedings.
August 24 to January 26, 2012	Counsel for Dr. Diab makes submissions to the Minister of Justice asking that Dr. Diab's surrender to France be refused.
2012	
March 11	IAG counsel provides legal memorandum to the Minister of Justice on the issue of surrender.
April 4	Minister of Justice orders surrender of Dr. Diab to France.
May 7	Dr. Diab files an application for judicial review of the Minister's surrender decision at the Ontario Court of Appeal.
2013	
November 4-5	The Ontario Court of Appeal hears Dr. Diab's appeal from committal and the application for judicial review of the surrender decision.

2014	
May 15	The Ontario Court of Appeal dismisses Dr. Diab's appeal and application for judicial review.
May 15	Dr. Diab files application seeking leave to appeal to the Supreme Court of Canada. The Court of Appeal extended Dr. Diab's bail pending the outcome of his leave application to the Supreme Court of Canada.
November 13	The Supreme Court of Canada denies Dr. Diab's application for leave to appeal from the decision of the Court of Appeal.
November 14	Dr. Diab is surrendered to France.
Proceedings in France	
November 2014	Dr. Diab is detained in jail in France after being denied bail.
January 2016	Dr. Diab apparently speaks to the investigating judge, Jean-Marc Herbaut, over three days and says he was in Lebanon at the time of the bombing.
May 14, 2016	Dr. Diab is released on bail, with electronic monitoring. The release order was made by the investigating judge. The prosecutors successfully appealed the release decision and, after 10 days on bail, Dr. Diab is returned to a French prison.
October 27, 2016	Dr. Diab is again ordered released but the release decision is overturned. In his release decision, the investigating judge apparently stated there was "consistent evidence" suggesting Dr. Diab was in Lebanon at the time of the 1980 bombing.
2017	Additional release orders are made by the investigating judge and subsequently overturned. Dr. Diab remains in custody.
July 28, 2017	The investigating judge issues a notice that he had completed his investigations.
Fall 2017	The prosecutors in France and Dr. Diab's counsel in France make submissions to the investigating judge.

2018	
January 12	<p>Dr. Diab is discharged by the French investigating judge and released from French custody.</p> <p>Prosecutors in France appeal the decision to discharge Dr. Diab and the decision to release him from custody. That appeal remains outstanding.</p>
January 15	Dr. Diab returns to Canada.
January 31	Department of Justice is tasked with preparing a “Lessons Learned” report in relation to the extradition of Dr. Diab.
May	Minister of Justice asks the Department of Justice to set up an external review of the extradition of Dr. Diab.
October 26	Ottawa Citizen reports that the appeal judges in France ordered an expert review of the handwriting evidence. The articles suggested a ruling would be forthcoming from the appeal judges by the summer of 2019.

Appendix C – Summary of Recommendations

1. The role of IAG counsel acting in an advisory capacity should be kept separate from the role of DOJ counsel acting on behalf of the requesting state at the extradition or committal hearing, whenever possible. Efforts should be made to maintain a buffer, where appropriate, between officials in the requesting state and the litigator in Canada advancing the case for committal.
2. To avoid concerns about potential conflicts of interest, the IAG should consider adopting a formal policy whereby counsel involved in approving the Authority to Proceed do not act as litigators at the committal stage, and counsel who provide advice to the Minister at the surrender decision stage have not been involved in either the Authority to Proceed decision or the extradition/committal hearing
3. The Department of Justice should require the IAG to produce an up-to-date Deskbook on extradition proceedings and mutual legal assistance. The Department of Justice should also consider making appropriate portions of the Deskbook available to the public to promote a better understanding of the extradition process and mutual legal assistance.
4. Requesting states should be encouraged to complete their investigations in relation to the person sought before making a request for extradition subject, of course, to public safety concerns.
5. Counsel for the IAG should actively advise requesting states to produce streamlined and economical materials to support their extradition requests. They should provide advice on the most effective and efficient way to structure the ROC, the kinds of evidence to include and the type of information to leave out. When it comes to the Record of the Case, less is usually better.
6. Where an extradition request rests to a significant degree on expert opinion evidence, the report itself – rather than simply a summary of its conclusions – should be appended to the ROC and thereby disclosed to the person sought.
7. The IAG should consider implementing a practice of asking the requesting state to provide an official translation of the ROC when it is reasonable to anticipate that translation issues will arise during the extradition proceedings.
8. The Department of Justice should consider reinstating an IAG counsel liaison position in France.

9. Counsel for the Attorney General advancing a case for extradition should consider sharing evidence – particularly relevant and exculpatory or potentially exculpatory evidence – even when they are not required or obligated to do so.
10. The Department of Justice should consider initiating consultations with the judiciary and relevant stakeholders on the viability and desirability of creating case management powers for judges hearing extradition cases.
11. Counsel for the person sought should only be permitted to make additional and supplementary submissions to the Minister on the issue of surrender when: new information has been disclosed or otherwise come to light; or in situations where there has been a relevant change in circumstances.
12. The Department of Justice should consider making available to the public: statistics about extradition requests made and received by Canada; the policies and procedures guiding decision-makers within the IAG; the factors considered by the Minister in making surrender decisions; information about the types of assurances sought by the Minister; and summaries of surrender decisions (while respecting privacy concerns).
13. In every case, the Department of Justice should find out from the requesting state how long the person sought can be detained before a decision is made as to whether to refer the matter to trial and that information should be shared with the defence and provided to the Minister before a surrender decision is made.
14. The Department of Justice should examine the issue of timely trials arising out of Dr. Diab's experience with a view to determining whether the Canada-France treaty should be updated to specifically address issues of delay and timely proceedings.