Germany v. Ebke, 2001 NWTSC 17

Date: 2001 02 23
Docket: CR03881

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE FEDERAL REPUBLIC OF GERMANY

RESPONDENT

-and-

WALTER LOTHAR EBKE

APPLICANT

Application for a declaration that sections 32(1)(a), 32(1)(b), 33 and 34 of the Extradition Act violate s.7 of the Charter of Rights and Freedoms.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z.VERTES

Heard at Yellowknife, Northwest Territories
on December 19 & 20, 2000.

Reasons Filed: February 23, 2001

Counsel for the Applicant:	Wes Wilson
Counsel for the Attorney General of Canada (on behalf of the Respondent):	Debra Robinson

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REASONS FOR JUDGMENT

[1] Walter Lothar Ebke, the subject of an extradition request by the Federal Republic of Germany, has applied for a declaration that certain sections of the Extradition Act, S.C. 1999, c.18, contravene s.7 of the Canadian Charter of Rights and Freedoms and are therefore of no force and effect. The sections under attack are ones dealing with the rules of evidence applicable to extradition hearings, in particular sections 32(1)(a), 32(1)(b), 33, and 34. In essence the applicant submits that the combined effect of the impugned sections eliminates any requirement for indicia of reliability for the material adduced in support of the extradition request and thus the hearing is substantively and procedurally unfair to the person sought for extradition. And, since the right to a fair hearing is constitutionalized as a principle of fundamental justice, and since the applicant's liberty and security interests are at stake in the extradition hearing, it would be a violation of his rights under s.7 should these provisions be allowed to set the standard for the admissibility of evidence at the hearing.

[2] There is no dispute that s.7 of the Charter, which provides that an individual has a right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, applies to an extradition hearing. There is also no dispute that the impugned sections of the Extradition Act provide for the admission of evidence at a hearing in forms that would not ordinarily be admissible in Canadian criminal proceedings. The issue therefore is whether it is constitutionally effective to allow such evidence to be admissible in extradition hearings. For the reasons that follow, I have concluded that the pertinent sections of the Act are constitutionally valid.

Outline of the Legislation:

[3] The current extradition Act came into force in 1999. There are some similarities and some differences between it and the former Act. Both statutes incorporate the terms of extradition treaties between Canada and other countries. The old Act provided that, in case of any conflict between the Act and the terms of an applicable treaty, the provisions of the treaty prevailed. The new Act provides, in s.3(1), that "a person may be extradited from Canada in accordance with this Act *and* a relevant extradition agreement on the request of an extradition partner". The terms of any treaty are therefore relevant in addition to the specific legislative provisions. In this case the applicable treaty is that between Canada and the Federal Republic of Germany dated September 30, 1979. I will review the terms of this treaty later in these reasons. The important point, however, is that these proceedings must comply with the provisions of both the Act and the treaty so that if one imposes more restrictive requirements than the other then those are the ones that must be satisfied. If, on the other hand, the requirements are similar, then that may aid to interpret the aims and objectives of the statutory provisions.

[4] The new Act contains a number of other significant changes. As others have noted, some of the innovations in the new Act are provisions designed to relax and streamline the procedures leading to an extradition and the rules of evidence at the hearing: see, for example, *United States v. Drysdale*, [2000] O.J. No. 214 (S.C.J.), at para. 29. Many of these provisions are aimed at ameliorating the difficulties that arose in the past when the requesting state, which may have a different legal system from our own, tried to comply with Canadian domestic evidentiary requirements. This has been a common problem encountered in extradition proceedings in other countries, especially where one state has a common law tradition and the other is based in the civil law.

[5] Under the new Act, the Minister of Justice, after receiving a request for extradition, commences proceedings by issuing an authority to proceed authorizing the Attorney General to seek, on behalf of the requesting state, an order of the court committing the person sought for extradition: s.15(1). In this case, an authority to proceed was issued on November 28, 2000, identifying the applicant and listing the Canadian offences that are said to correspond to the alleged criminal conduct of the applicant in Germany. A warrant of arrest issued in Germany directs that the applicant Ebke be arrested and held in pre-trial detention on suspicion of having been a member of a terrorist criminal organization between 1985 and 1993 and of participating in bombings in Berlin in 1987 and 1991, all of which being crimes punishable under the German penal code. The authority to proceed lists, as the purported corresponding

offences under Canadian law, two counts each of aggravated assault and conspiracy to commit aggravated assault.

[6] The Act further provides that a judge (in this jurisdiction that being a judge of the Supreme Court) shall hold an extradition hearing on receipt of an authority to proceed: s.24(1). The judge has, for purposes of the hearing and subject to the Act, the powers of a justice conducting a preliminary inquiry under Part XVIII of the Criminal Code: s.24(2). As many cases have held, the role of the extradition judge is a modest one and the judge's jurisdiction is derived entirely from the statute and the relevant treaty: see *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *Re McVey*, (1992), 77 C.C.C. (3d) 1 (S.C.C.).

[7] The extradition judge also has a limited Charter jurisdiction as provided by s.25 of the Act:

> For the purposes of the Constitution Act, 1982, a judge has, with respect to the functions that the judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge.

In an earlier set of reasons issued in this case (2001 NWTSC 2), I briefly discussed the limitation imposed by this section as interpreted by such cases as *Mellino (supra).* This section limits the Charter competence of an extradition judge to the functions assigned to the judge by the Act. There is no plenary Charter jurisdiction as otherwise enjoyed by a superior court judge. I also noted in my earlier reasons that this is not a point without controversy and further pronouncements on this subject are expected soon from the Supreme Court of Canada. That controversy is not pertinent for the purpose of these reasons since obviously any Charter attack on sections of the Act dealing with the hearing is within the jurisdiction of the extradition judge.

[8] In a case such as this one, where the fugitive is sought for prosecution in the requesting state, the responsibility assigned to the extradition judge is to determine if the evidence presented at the hearing establishes a *prima facie* case. This is set out in s.29(1) of the Act:

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

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

[9] The test is the same as that applied on a preliminary inquiry under Canadian domestic criminal law: Is there sufficient evidence to put the accused on trial? As noted in *Netherlands v. Clarkson* (2000), 146 C.C.C. (3d) 482 (B.C.C.A.), at 492 (leave to appeal to S.C.C. denied):

> The evidentiary threshold for committal which the Requesting State must meet is low. The test remains that enunciated in *United States of America v. Sheppard*, [1977] 2.S.C.R. 1067, 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136. The question for the extradition judge is whether the Requesting State has provided evidence which, *if believed*, would constitute a *prima facie* case against the fugitive. The extradition judge is not required or permitted to analyze the credibility or reliability of the evidence. (emphasis in original)

[10] The *Sheppard* test, of course, was articulated in a case that dealt with testimony under oath and evidence admissible according to Canadian law. The former Act required that evidence at the hearing be legally admissible under Canadian law. Thus part of the applicant's argument in this case, as it was in *Clarkson*, is that the *Sheppard* test presumes that the evidence placed before the extradition judge will meet a minimal standard of reliability. Applicant's counsel submitted that the *Sheppard* test incorporates in the concept of "sufficiency" a prerequisite of admissibility under Canadian law. The rules of evidence under Canadian law whereby evidence becomes admissible, it was argued, provide a minimum threshold reliability so that, without those rules, the integrity of the *Sheppard* test is compromised.

[11] The new Act does not mandate that evidence presented at the hearing comply with Canadian law. It can but it need not. That is the impact of the sections under attack on this application. For ease of reference I set them out in full:

> 32.(1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);

(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

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

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

(b) in the case of a person sought for the imposition or enforcement of a sentence.

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

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

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

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

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

> (i) is sufficient under the law of the extradition partner to justify prosecution, or
>
> (ii) was gathered according to the law of the extradition partner; or
>
> (b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.
>
> (4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.
>
> (5) For the purposes of this section, a record of the case includes any supplement added to it.
>
> 34. A document is admissible whether or not it is solemnly affirmed or under oath.

[12] The specific sections under attack are, as noted previously, sections 32(1)(a), 32(1)(b), 33 and 34. Sections 32(1)(a) and (b) make admissible the contents of documents contained in a "record of the case", or documents submitted in conformity with the terms of a treaty, "even if they would not otherwise be admissible under Canadian law". Section 33 outlines the mandatory and optional contents of the "record of the case" and the necessary manner of certification by the requesting state. Section 34 makes a document admissible whether or not it is sworn or affirmed.

[13] In this case the requesting state, as represented by the Attorney General, will rely on a record of the case, pursuant to s.32(1)(a), for purposes of the extradition hearing. The record contains a prosecutor's summary of the case which includes findings by German courts relating to the history and character of the terrorist group to which the applicant Ebke allegedly belonged and certain incidents attributed to this group, summaries of information from various individuals who could give evidence pertaining to certain actions which indirectly implicate the applicant (similar to "can say" statements often prepared by Canadian police investigators), information relating to the identification of the applicant, and a statement from an individual, now in a German witness protection programme, who could be described as a co-perpetrator of the crimes alleged against

Ebke and who directly implicates Ebke in those crimes. That statement is not under oath or affirmation but it was made during an interview by an examining judge of the German Federal Court of Justice, after a caution as to the penal consequences of making a false statement, and it was, as noted at the end of the statement, "read, approved and signed" by the informant. The signature is witnessed by the examining judge and a court officer. As noted by applicant's counsel, the documents in the record of the case contain hearsay, character evidence, unqualified opinion evidence, and other forms of evidence that would not ordinarily be admissible in domestic Canadian criminal proceedings.

[14] The record of the case also contains the certification contemplated by s.33(3)(a) of the Act. It is in the name of the senior public prosecutor at the Federal Court of Justice who certified that "the evidence consolidated or contained in the attached documentation are available for main trial and according to the law of the Federal Republic of Germany suffice for the constitution of penal prosecution and also that it has been collected pursuant to the law of the Federal Republic of Germany." All of the documents are, of course, in German with translation into English.

[15] Applicant's counsel made the point that the certification may be defective in that it appears, from the original document in German, that it was not signed by the named senior public prosecutor but signed by a secretary in the prosecutor's office. This is not an issue of constitutional validity of the Act but one of compliance with the Act. It is therefore not necessary to consider this submission on this application. It will only be pertinent if at all at the actual hearing when considering whether the record of the case should be admitted.

[16] Finally, it is important to note a number of procedural safeguards in the Act. An extradition judge's committal order may be appealed by the fugitive to the court of appeal: s.49. Even if a committal order is issued, the final decision to surrender the fugitive is that of the Minister of Justice: s.40(1). The fugitive may make submissions to the Minister: s.43. And the Minister's decision to surrender may be the subject of a judicial review application by the fugitive to the court of appeal: s.57.

The Applicable Treaty:

[17] As I noted above, the new Act requires that extradition proceedings comply with the provisions of both the Act and any relevant extradition agreement. This requires an examination of the terms of the Canada-Germany treaty, dating from 1979, with respect to evidentiary rules.

[18] The treaty contains a general provision in Article XXVIII that, except where the treaty otherwise provides, extradition shall be governed by the law of the requested state (in this case Canada). The treaty does, however, provide otherwise for purposes of the extradition hearing in Article XIV, subclause (4):

> (4) A statement on oath or affirmation, a deposition or any other statement which satisfies the requirements of the law of the requesting state shall be admissible as evidence in extradition proceedings in the requested state.

So, for proceedings in the requested state (Canada) admissibility is satisfied by the requirements of the law of the requesting state (Germany). This would seem to accord with the provisions of the Act dealing with a record of the case being admissible if its contents have been certified pursuant to s.33(3)(a) of the Act.

[19] The treaty contains its own certification requirement as a precondition to admissibility in Article XV:

> The documents required under Article XIV or copies thereof shall be admitted in evidence in extradition proceedings in the requested state if signed by a competent judge or officer and sealed with the seal of the Federal Minister of Justice of the requesting state. Any such document that purports to be so signed and sealed shall be deemed to de duly certified and authenticated by the person or authority competent to do so.

In this case the record of the case contains a second certification executed by an individual identified as "the civil servant responsible for extradition matters with Canada in the section of the Federal Ministry of Justice dealing with International Criminal Law". It states, in part, that "these extradition documents", meaning the contents of the record of the case, "satisfy the requirements of the law of the Federal Republic of Germany". It is signed and the seal of the German Federal Ministry of Justice is affixed.

[20] The fact that the treaty contains these provisions does not, of course, validate constitutionally the impugned sections of the Act. The treaty itself must conform to the requirements of the Charter, including the principles of fundamental justice, in recognition of the supremacy of the Constitution: *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193 (S.C.C.), at 213. But it has been held that treaties are to be given a fair and liberal interpretation, and extradition proceedings are to be approached in a broad spirit, so as

to give effect to Canada's international obligations: *Schmidt (supra)*, at 215-216; *LaForest's Extradition to and from Canada* (3d ed.), at 158.

[21] I note as well, however, that the treaty also gives recognition to the need to satisfy certain legal requirements of the requested state (Canada in this case). Article XIV, in subclauses (1) and (2), sets out what is required to be sent with a request for extradition. This includes "such evidence as, according to the law of the requested state, would justify the arrest and committal for trial of the person claimed if the offence had been committed in the requested state". So, for purposes of the request for extradition, the evidence must conform to Canadian law, whereas for purposes of the extradition hearing the evidence only needs to conform to German law.

[22] It may be said that this requirement provides an additional safeguard for the protection of the fugitive's rights within Canada pursuant to Canadian law. But, of course, this is tempered by the fact that the request for extradition is strictly a government-to-government process, made through diplomatic channels, and beyond the supervision of the courts. As I noted in my earlier judgment in this case, it is the Minister who is assigned by the Act the responsibility of dealing with requests for extradition. There is no role assigned to the court to review this executive responsibility. The Minister has the sole authority to determine the purpose of the extradition request and whether the request is adequately supported so as to warrant issuing an authority to proceed.

[23] I find it interesting to note in passing that the treaty pre-dates the new Act and the Charter. Its provisions, particularly Article XIV (4) making evidence conforming to German law admissible at the hearing, would have over-ridden any inconsistent requirement under the former Extradition Act. Yet this issue, as to whether the use of evidence that only conforms to foreign law would be contrary to the principles of fundamental justice, was apparently never raised with respect to the old Act. This is particularly curious since there are a number of treaties, in addition to the German one, which pre-date the 1999 Act and which also authorize the reception of evidence at an extradition hearing that is not otherwise admissible under Canadian law. There are of course other treaties, such as the one with the United States, that require the application of Canadian admissibility rules. It seems to me that if the provisions of the Act allowing the use of evidence that does not meet Canadian admissibility standards are found to be unconstitutional then any similar provision in a treaty would likewise be unconstitutional.

<u>Submissions of the Applicant:</u>

[24] The substance of the applicant's submissions can be summarized in certain basic propositions. If the test at an extradition hearing is the same test as that for committal for trial if the offence had occurred in Canada, then that test inherently requires the application of Canadian admissibility rules. The allowance of foreign rules of admissibility do not meet Canadian constitutional standards since s.7 of the Charter requires, at a minimum, that the deprivation of liberty be justified by reliable evidence (or at least evidence with some indicia of reliability as contemplated by Canadian law). Otherwise the process becomes arbitrary and subject to the choices made by foreign authorities.

[25] Applicant's counsel argued that, since committal for extradition is functionally equated with that of committal for trial, then the evidentiary screening provided by an extradition hearing should have the same level of protection as that of a preliminary inquiry in domestic law. The *Sheppard* test is predicated upon admissibility of evidence according to Canadian law. Since the preliminary inquiry judge, under *Sheppard*, is not permitted to weigh the evidence for its reliability, it is the fact that the evidence meets admissibility requirements that provides a minimum level of protection (since the ordinary rules of evidence have built-in reliability safeguards such as the exclusion of hearsay). Counsel submitted that any attenuation of this protection would not accord with fundamental justice.

[26] Counsel also pointed out that, while the role of the extradition judge is a modest one, it is nevertheless a critical one for the protection of the liberty interests of the fugitive. The hearing and the requirement for a *prima facie* case protect the rights of the fugitive in this country: see *Schmidt (supra)* at 208-209; *McVey (supra)* at 15-20; and *United States v. Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.), at 521. Counsel submitted that the traditional function of the extradition judge, that being the determination of the admissibility of evidence and its sufficiency for committal, is so ingrained in Canadian jurisprudence as to constitute a principle of fundamental justice. Thus any law that diminishes that role by allowing the use of evidence that would be inadmissible under Canadian law is a violation of s.7 of the Charter.

[27] It is this last point that brings us to the crux of the applicant's argument. It is that the judicial role is becoming irrelevant. The protective role played by the extradition judge in the process has been reduced, in counsel's words, to that of a rubber stamp. All reliability requirements for the evidence have been removed; determination of admissibility has been left to the requesting state's authorities; nothing needs to be sworn or affirmed. In counsel's submission, the new legislation allows foreign states to impose their law on Canadian courts. These provisions are based, it was said, on nothing more

than the desire to make the process of extradition easier for foreign governments. And, as counsel put it, administrative expedience can never justify a constitutional violation.

Submissions of the Respondent:

[28] The position of the Attorney General was that, having regard to the principles and policies underlying extradition law and procedure, and applying a contextual analysis of the applicable principles of fundamental justice, the impugned provisions are constitutionally sound. The evidentiary changes introduced by the new Act are aimed at enabling Canada to meet its responsibilities pursuant to its international commitments while preserving the necessary safeguards for individuals subject to extradition. Those safeguards are to be found in the requirement for a judicial assessment of the sufficiency of the evidence using the *Sheppard* test. That test, as under the old Act, is whether the evidence presented would justify committal if the conduct alleged against the fugitive would constitute a crime in Canada. This test has not changed; it is the method by which sufficiency is established that has changed. The requesting state must still produce evidence that is admissible under that state's laws. That must be certified by the judicial or prosecuting authorities of that state. Any importation of a further reliability assessment into the hearing in Canada would go beyond the role accorded to an extradition judge (or even a preliminary inquiry judge under the *Sheppard* test). As counsel argued, relying on *Schmidt (supra*), it is ultimately the trial in the foreign jurisdiction which must be fair and Canadian extradition law assumes that it will be.

[29] Counsel for the Attorney General provided, as part of her brief, numerous articles regarding international standards for extradition. I was also provided, by agreement of counsel, transcripts of expert testimony regarding extradition law given in a proceeding in Ontario last year. All of this is relevant, in my opinion, since extradition has an international focus and therefore Charter considerations in extradition must have regard to international norms.

[30] What the material shows is that there is no one model for extradition. Most states have some type of mixed judicial and administrative system whereby the courts and the executive have a role to play at different stages of the process. Some states however provide for exclusive executive control. Some states, including some common-law states, have abolished the *prima facie* case requirement. The European Convention on Extradition and the United Nations Model Treaty on Extradition both do not require the establishment of a *prima facie* case to extradite. All that is required is a certificate accompanied by a warrant of arrest, a statement of the offence for which extradition is sought, a copy of the relevant laws and an accurate description of the person sought. In

1989, by passage of a new Extradition Act, the United Kingdom ratified the European Convention so that all extradition to other member states of the European community is governed by the Convention requirements. There is no need to establish a *prima facie* case.

[31] With respect to evidentiary rules, the system adopted by the United Kingdom under the European Convention permits the use of hearsay evidence in the documents submitted by the requesting state. In the United States, while there is a requirement for a hearing to establish probable cause for extradition, the hearing is conducted primarily on the basis of documentary evidence. There are few procedural safeguards for the fugitive. Hearings often rely on hearsay evidence and unauthenticated documents (including police reports describing witness statements).

[32] Counsel for the Attorney General submitted that, having regard to this mixture of international practices, the new Act, by its modification of evidentiary requirements for hearings in Canada in respect of fugitives wanted abroad, attempts to recognize and give effect to Canada's international commitments. These new provisions provide, it was argued, fairness (in that the requirement for a *prima facie* case is maintained), reciprocity (in the sense that by our evidentiary laws we may impose more onerous requirements on requesting states than those states impose on us when Canada seeks the return of a fugitive), certainty (in that all requesting states are treated the same), and efficiency (in that formal requirements for affidavits and depositions are relaxed, something which becomes especially necessary if evidence or witnesses are located in several states with differing legal systems) .

[33] Counsel also submitted that a fastidious concern over the use of hearsay at the extradition hearing is unpersuasive in the context of extradition given that the ultimate decision on surrender is an executive decision. The Minister of Justice, who makes the ultimate decision, does so on the basis of written materials including any submissions provided by the fugitive. There are no admissibility restrictions at this stage and the Minister's decision is subject to review. Therefore, given the limited purpose of the extradition hearing, and the various safeguards in place, the new regime created by the Act complies with s.7 of the Charter.

Analysis:

[34] As I noted earlier, there is no dispute that s.7 of the Charter applies to an extradition hearing. That is true whether the wanted fugitive is a Canadian citizen or not. Section 7 provides that "*everyon*e has the right to life, liberty and security of the person

and the right not to be deprived thereof except in accordance with the principles of fundamental justice". This can be contrasted with the right protected by s.6(1) of the Charter which guarantees to *every citizen* of Canada "the right to enter, remain in and leave Canada". The question of citizenship is not a factor in this case since the applicant is still a citizen of the requesting case (but a landed immigrant in Canada).

[35] The section 7 protection applies in respect of state action by Canadian authorities within Canada. It cannot apply to the conduct of foreign authorities outside of Canada. We cannot either impose our standards on foreign authorities nor can we expect conformity between our legal system and that of another country. That point was made in *Ross v. United States* (1995), 93 C.C.C. (3d) 500 (B.C.C.A.), at 534 (affirmed [1996] 1 S.C.R. 465):

> We must also be mindful of the fact there will inevitably be large differences in criminal law and procedure between member countries of the free and democratic international community with whom Canada has such treaties, and it will rarely, if ever, happen that all rights and freedoms recognized by our Charter are afforded to persons charged with crime in a reciprocating state. Not even the presumption of innocence, protection against self-incrimination and the right to be tried by jury are available in all such jurisdictions, leave alone a similar criminal sentencing regime to our own.

So, as was noted in *Schmidt (supra)*, at 215, we must "begin with the notion that the Executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place". The question therefore is not the quality of German law but whether the Canadian law meets the standards of fundamental justice.

[36] I begin with some well-established law. To ascertain if a statutory provision violates s.7. of the Charter, we must conduct a contextual analysis. This approach involves a balancing exercise between the constitutional rights of the individual and the interests of the state. It must be done within the context of the relevant circumstances, in this case extradition. As noted in *Kindler v. Canada* (1992), 67 C.C.C. (3d) 1 (S.C.C.), at 54:

> Thus the court, in defining the principles of fundamental justice relevant to the extradition, draws upon the principles and policies underlying

> extradition law and procedure. Is the impugned provision consistent with extradition practices, viewed historically and in the light of current conditions? Does the provision serve the purposes and concerns which lie at the heart of extradition policy?

This analytical method, in the context of extradition law, was very recently upheld once again by the Supreme Court of Canada in *United States v. Burns*, [2001] S.C.J. No.8 (although the result was contrary to the specific result in *Kindler*).

[37] Another line of well-established law is that, while an extradition hearing must be conducted in accordance with the principles of fundamental justice, those principles do not necessarily correspond as between the domestic criminal law forum and the extradition process. The majority in *Dynar (supra)* put it as follows (at 523-524):

> The principles of fundamental justice guaranteed under s.7 of the Charter vary according to the context of the proceedings in which they are raised. It is clear that there is no entitlement to the most favourable procedures imaginable: *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 361-62, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193. For example, more attenuated levels of procedural safeguards have been held to be appropriate at immigration hearings than would apply in criminal trials. See *Chiarelli v. Canada* (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, 72 C.C.C. (3d) 214, 90 D.L.R. 94th) 289. The same approach is equally applicable to an extradition proceeding. While it is stated in *Idziak v. Canada* (Minister of Justice), [1992] 3 S.C.R. 631, at p. 658, 77 C.C.C. (3d) 65, 97 D.L.R. (4th) 577, that the committal hearing in the extradition process is "clearly judicial in its nature and warrants the application of the full panoply of procedural safeguards", it was held that the extent and nature of procedural protection guaranteed by s.7 of the Charter in an extradition proceeding will depend on the context in which it is claimed (at pp. 656-57)...
>
> Procedures at the extradition hearing are of necessity less complex and extensive than those in domestic preliminary inquiries or trials. Earlier decisions have wisely avoided imposing procedural requirements on the committal hearing that would render it very difficult for Canada to honour its international obligations...

[38] In *Dynar*, the fugitive sought disclosure of documents from the requesting state that were not included in the material at the hearing in order to develop a Charter

argument. Noting that the level of procedural safeguards necessary had to be considered in the context of the statute and governing treaty, and bearing in mind the limited role of the extradition judge and the obligation on the requesting state to merely establish a *prima facie* case, the Supreme Court concluded that the fugitive was not entitled to disclosure beyond what the requesting state was relying on to establish its *prima facie* case.

[39] In a similar vein, the majority in *Kindler* wrote as follows (at 51):

> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

[40] The final general point is that extradition is an area that by necessity involves policy decisions by the executive and Parliament as to how best to accommodate Canada's role in the world. As noted in *Schmidt (supra)*, at 215, while the courts cannot adopt a posture of blind judicial deference to executive action, neither should the courts intervene unless there is some real substantive defect. The area of extradition is one "where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states". Finally, to paraphrase something said in the recent non-extradition case of *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.), at 358, one cannot presume that the legislation is unconstitutional just because it imposes some requirement different from the common law position. The question is whether the legislation is nonetheless constitutionally acceptable.

[41] In my opinion, this analysis can best be conducted by examining four issues: (1) the objectives and purpose of extradition law; (2) the international context; (3) the principles of admissibility of evidence under Canadian law; and (4) the role of the judge in assessing the sufficiency of evidence. The first two can be said to favour the interests of the state; the second two can be said to arguably favour the rights of the individual.

1. <u>Objectives and Purpose of Extradition:</u>

[42] The purpose of extradition can be described as having an external and internal component. The external one is the removal of fugitives from justice in another country;

the internal one is the protection of the Canadian public from foreign criminals. That the suppression of crime is in the national as well as the international interest is beyond dispute. The objectives of extradition law are therefore of pressing and substantial concern. This was explained in *United States v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.), at 215-216:

> ...The objectives sought by the legislation, the parties agree, relate to concerns that are pressing and substantial. The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today...
>
> The importance of extradition for the protection of the Canadian public against crime can scarcely be exaggerated. To afford that protection, there must be arrangements that ensure prosecution not only of those who commit crimes while they are physically in Canada and escape abroad, but also of those whose acts abroad have criminal effects in this country. This requires reciprocal arrangements with other states seeking similar objectives...
>
> There is another aspect respecting the objectives of extradition worth mentioning. As I earlier indicated, these objectives go beyond that of suppressing crime, *simpliciter*, and include bringing fugitives to justice for the proper determination of their guilt or innocence. (Indeed most extradition cases, like the case here, involve accused, rather than convicted persons.) Extradition thus shares one of the basic objectives of all criminal prosecutions: to discover the truth in respect of the charges brought against the accused in a proper hearing.

[43] The majority in *Cotroni* acknowledged that the present system of extradition law is effective because it reduces the technicalities of Canadian criminal law and leaves it to the requesting state to give the fugitive a fair trial (at 223). The judgment also referred to the need to allow Parliament adequate scope to achieve objectives that are of pressing and substantial concern. It adopted a comment made by LaForest J. in an earlier case, *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, and subsequently approved by a majority of the Court:

> Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan*, *supra*, at p. 524 calls "the practical living facts" to which a Legislature must respond.

[44] The comments from the *Cotroni* judgment were made in the context of a s.1 justification for the *prima facie* violation of a Canadian citizen's right to remain in Canada. These comments, however, are equally applicable on a s.7 analysis. There are admittedly important distinctions between the balancing of the principles of fundamental justice under s.7 and the balancing of interests so as to justify a constitutional violation under s.1 of the Charter. Nevertheless, the balancing exercise under both is in many respects quite similar: see *Mills (supra)*, at 359-360. In my opinion, the comments in *Cotroni* are relevant to the delineation of the principles of fundamental justice in this case.

[45] The objectives outlined in *Cotroni* were also recognized in the recent *Burns* judgment (*supra).* Among the factors said to weigh in favour of the interests of the state is that extradition is based on the principles of comity and fairness to other co-operating states in rendering mutual assistance in bringing fugitives to justice. The Court wrote (at para.73):

> A state seeking Canadian cooperation today may be asked to yield up a fugitive tomorrow. The extradition treaty is part of an international network of mutual assistance that enables states to deal both with crimes in their own jurisdiction and transnational crimes with elements that occur in more than one jurisdiction. Given the ease of movement of people and things from state to state, Canada needs the help of the international community to fight serious crime within our own borders. Some of the states from whom we seek cooperation may not share our constitutional values. Their cooperation is nevertheless important. The Minister points out that Canada satisfied itself that certain minimum standards of criminal justice exist in the foreign state before it makes an extradition treaty in the first place.

[46] These considerations reflect the state's interest in facilitating the extradition of fugitives in compliance with international commitments. The relaxation or even

elimination of Canadian admissibility requirements for evidence produced by a requesting state would certainly aid in accomplishing this objective.

2. The International Context:

[47] Earlier in these reasons I made note of the different systems employed for extradition by other countries. Some have judicial hearings, some do not; some allow evidence that does not comply with common law principles, some require it; some have different procedures and requirements depending on where the request comes from. All of this has led, from time to time, to difficulties with the extradition process.

[48] One of the recurring themes in the material placed before me is the difficulty caused for civil law states in complying with common law rules of evidence. And the main perpetrator has been the rule against hearsay. In the common law, hearsay is not excluded because it is not relevant; it is excluded because of what historically has been regarded as its inherently untrustworthy quality. In civil law jurisdictions practically all relevant evidence, regardless of its source, is admitted and then weighed by the trier. Thus, as noted before, many international conventions on extradition now leave it up to the requesting state to determine what evidence, admissible under its internal rules, it will provide to the requested state. This is reasonable because, as one commentator put it, an extradition hearing is meant "to accommodate the practice and procedure of both the requesting and requested States. Thus, hearsay evidence, inadmissible in a committal hearing in (the requested state), would only be received if it were admissible in the requesting State": G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998), at 136.

[49] This same commentator also discusssed the apparent contradiction, at least in common law states, of allowing foreign admissibility rules to govern the admission of evidence while still retaining the requirement to establish a *prima facie* case:

> It may seem illogical to retain the *prima facie* requirement but relax the admissibility rules, yet the *prima facie* rule provides a safeguard to a fugitive threatened with trial in another State in a sensible manner. It is the rules of evidence which merely hinder the requesting State in its attempt to show a *prima facie* case. Given that extradition is founded partly on reciprocity, allowing evidence to be admitted that could be put forward in a trial in the requesting State and leaving the magistrate to assess its value seems fair and reasonable.

The author also noted that it was Canada that made a proposal at a Commonwealth Law Ministers Conference in 1990 to permit the *prima facie* case requirement to be met by means of a record of the case prepared by the requesting state.

[50] The use of some type of hearing in the requested state, so as to assess the evidence submitted by the requesting state, and relaxation of the requested state's admissibility rules, were also endorsed by the Committee on Extradition & Human Rights of the International Law Association in its Report of the 66th Conference in 1994 (at 160):

> The Committee does not believe that the production of evidence sufficient to raise a *prima facie* case, as understood by common-law courts, should be the general rule, since that standard has given rise to difficulty in many cases and is largely unknown to outside common-law jurisdictions. Nevertheless the Committee believes that the rights of the accused fugitive are best protected where the requesting state is obliged to produce evidence of the allegations sufficient to allow judicial or executive authorities in the requested state to decide whether there are reasonable grounds to suspect that the person whose extradition is requested has committed an extraditable offence. Such evidence should be in sufficient detail to disclose the substance and the source of the allegations made against the accused. However, the evidence should not be required to be presented in a form that satisfies the legal rules governing the receivability of evidence in courts of the requested state in domestic proceedings.

[51] These sources, as well as the other reference works provided to me, convince me that the Canadian legislation accords with current international standards for extradition procedures. Indeed, it may be argued that they go beyond international standards by at least maintaining the necessity of a *prima facie* case to be established at a judicial hearing. These provisions, in the context of international norms, conform to widely recognized principles of fundamental justice. A summary yet still judicial hearing is held in the requested state to assess the sufficiency of the evidence produced against the fugitive with issues of admissibility and reliability being left to the ultimate trial in the jurisdiction where the crime was allegedly committed.

3. Principles of Admissibility of Evidence:

[52] One of the foundations for the applicant's argument is that any law that obviates the need for evidence to be admissible under Canadian law is a violation of fundamental justice. But even applicant's counsel conceded that no rule of admissibility is cast in stone. The rules are always subject to judicial refinement and statutory change. The

question is whether any particular rule is so unfair, or conversely so important, that its application or non-application would result in proceedings that are manifestly unfair.

[53] There are very few principles that are so fundamental to our justice system as to be beyond encroachment in certain circumstances. Arguably some of those are the presumption of innocence, the right to remain silent and the protection against self-incrimination, the right to counsel, and the requirement for at least a minimal *mens rea* for an act to be criminal. But those, of course, are in the domestic criminal law context.

[54] The principles of fundamental justice do not entitle an accused, even in the domestic criminal context, to the most favourable procedures that can be imagined: *R. v. Lyons*, [1987] 2 S.C.R. 309. As examples, one need only note that there is no constitutional right to a preliminary inquiry: *R. v. Arviv* (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), leave to appeal to S.C.C. refused. There is no fundamental principle that an accused has the right to confront every witness before the trier of fact: *R. v. Potvin*, [1989] 1 S.C.R. 525. There is no impediment to Parliament precluding the availability of a certain defence for certain crimes: *R. v. Penno*, [1990] 2 S.C.R. 865. Even where the accused does enjoy a broad right, such as the right to Crown disclosure so as to protect the accused's right to make full answer and defence, there may be limitations, such as disclosure being subject to privilege concerns: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[55] I am not aware of any evidentiary rule that can be said to be a fundamental principle of justice (except perhaps the requirement to establish voluntariness of a purported confession). It is certainly open to Parliament to legislate restrictions on access to certain evidence (such as a complainant's sexual history or third party therapeutic records) and to legislate the admissibility of evidence that under the common law would not be admissible (such as the admissibility of business records pursuant to the Canada Evidence Act). There are also legislative provisions that relax the normal rules of admissibility for certain judicial proceedings, such as judicial interim release hearings, sentencing hearings, and hearings regarding breaches of conditional sentence orders. All of them permit hearsay evidence. The Canada Evidence Act also provides, in s.16(3), for the reception of unsworn evidence. So, in my opinion, it cannot be said that there is any particular rule of evidence that is fundamental to a fair hearing in all circumstances.

[56] Admissibility is a question of law; it is not merely a question of relevance or materiality, and certainly not of reliability. As a general statement, for evidence to be admissible it must be logically probative of some matter required to be proven and not be excluded by some policy rule: *R. v. Morris* (1983), 7 C.C.C. (3d) 97 (S.C.C.), at 106.

In the context of a domestic criminal trial, at least, there is also a residual discretion to exclude evidence that would result in an unfair trial. But, while the right to a fair trial is a constitutional imperative, there are no specific rules as to what would in all cases make a trial unfair: *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.), at 205.

[57] There is nothing to suggest that hearsay evidence, or the contents of a document such as the record of the case in this proceeding, are not probative of the crimes alleged against the applicant. And, in this case, there is no rule against its admissibility; on the contrary it is expressly admissible by the statute. Applicant's counsel, however, argued that there must be some indicia of reliability so as to conform to fundamental justice.

[58] This is a point that is intertwined with the next issue, that being the role of the judge in assessing sufficiency of the evidence. Again, as a general proposition, however, the admission of evidence which may be unreliable does not *per se* render a trial unfair: *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont. C.A.), at 111, affirmed (1996) 114 C.C.C. (3d) 95 (S.C.C.). It is for the trier of fact to assess the quality of the evidence, i.e. whether it should be believed or not. It is not for the judge to usurp or short-circuit that assessment by some preliminary determination of admissibility on the basis of reliability. (I do not include in this discussion the responsibility of the trial judge to assess threshold reliability under the principled approach to hearsay as in *R. v. K.G.B.*, [1993] 1 S.C.R. 740, but merely refer to the general rule.)

[59] In my opinion, there is no particularly inherent feature of Canadian evidentiary rules that one can point to as a fundamental principle of justice. Many of those rules are of course meant to protect the fair trial rights of the accused in a domestic criminal trial. Not all of them apply even to a domestic preliminary inquiry. While certainly strict compliance with Canadian admissibility requirements would enhance protection for a fugitive here in Canada, it is not a requirement of fundamental justice that rules be crafted so as to optimize the interests of the fugitive. This is especially pertinent in a proceeding within which Canada is obligated to recognize and respect foreign legal systems.

[60] It is fair to say that the Canadian law of evidence is premised on a desire to put the best evidence before the trier of fact. Many of the exclusionary rules were developed due to a concern to prevent improper or presumptively unreliable evidence from being put before the trier of fact (usually a group of untrained jurors). But even some of these rationales have been reconsidered in recent years. The new principled approach to hearsay is a perfect example. In the context of extradition hearings, there is a trained judicial officer assessing the evidence. That evidence will have been certified as admissible under the laws of the state where the trial will be held. Under the

circumstances I cannot conclude that the principles of fundamental justice mandate compliance with Canadian evidentiary rules.

4. Role of Judge in Assessing Sufficiency:

[61] The fourth factor that must be considered is the role of the extradition judge.

[62] As noted in many cases, the purpose of an extradition hearing is not to determine the guilt or innocence of the fugitive. It is merely an inquiry to determine whether there is sufficient evidence to warrant sending the fugitive to the requesting state to stand trial. The extradition judge is not expected to weigh the evidence or to rule on the credibility of witnesses. The judge's duty is to determine if there is sufficient evidence to justify a committal for trial if the alleged crime had been committed in Canada.

[63] The role of the extradition judge is compared to that of a preliminary inquiry judge. One of the basic principles guiding a preliminary inquiry judge is the following. It is not the function of the judge to test the evidence for its reliability once a determination as to its admissibility has been made: *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.), at 198. This principle was recently reaffirmed by the majority in *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 (S.C.C.), at 230. The judge is not entitled to discharge even if the evidence is "manifestly unreliable": *United States v. Sheppard* (1977), 30 C.C.C. (2d) 424 (S.C.C.), at 433. The test on a preliminary inquiry is simply whether there is any admissible evidence, either direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction. The question for the judge is whether there is any evidence that has the *capacity* to found a conviction, not whether it does or does so strongly or weakly.

[64] The same principle applies under s.29(1)(a) of the Act. The evidence submitted by the requesting state is admissible pursuant to the Act so there is admissible evidence at the hearing. Does this relegate the extradition judge to being merely a rubber stamp? I think not. There is still an important, albeit limited, role for the judge to play.

[65] While the extradition judge is precluded from weighing the evidence as to its reliability or probative force, there is still a certain "weighing" that must be carried out. I refer, in this context, to the comment in *R. v. Dubois* (1986), 25 C.C.C. (3d) 221 (S.C.C.), at 230, a preliminary inquiry case, to the effect that, where there is some evidence, it is within the judge's jurisdiction to decide whether that evidence is of "sufficient weight" to commit. This was explained by Campbell J. in *R. v. McIlwain*, [1988] O.J. No. 2022 (H.C.J.):

> "Weigh" in the context of Dubois must mean to ponder and examine the force of evidence; to see if it registers in the scales as any evidence at all to meet the Sheppard test. Having weighed the evidence to determine whether it registers in the scales as any evidence at all within the Sheppard test, the task of weighing at the preliminary inquiry is complete. That is the task set by Sheppard; to weigh or balance in the scales or to measure or to ponder and examine the force of evidence to determine whether or not it is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. That is the sole and very limited purpose for which one weighs or scrutinizes the evidence at a preliminary inquiry. It is not weighed for competing inferences or for frailties or contradictions, but solely to see if it meets the Sheppard test.
>
> It is clear from Mezzo (1986) 52 C.R. (3d) 113, per McIntyre J. at pp. 124-126 that the dubious nature of the Crown's case or the reliability of the evidence or concerns about its weight, in the sense of assessing its quality, have no place at all in the Sheppard test.

This was subsequently approved by the Ontario Court of Appeal in *R. v. Campbell* (1999), 140 C.C.C. (3d) 164.

[66] The extradition judge must still "weigh", in the sense noted above, the evidence presented at the hearing to determine its sufficiency. Admissibility is not the issue since the statute provides for what is admissible. The judge, however, must still assess its value as to whether there is *any* evidence which, *if believed*, could support a conviction. Questions of admissibility under Canadian law become irrelevant in this regard. Questions of reliability are irrelevant whether the evidence is admissible under Canadian law or not. The question is whether the evidence registers at all on the Sheppard test. If there is no evidence, regardless of the form of that evidence, then the test is not satisfied; if there is, regardless of the form of the evidence, then it is.

[67] The extradition judge must, in this assessment, have regard to the double criminality rule. That requires that the alleged offence be considered criminal in both the requesting and requested states. Double criminality protects the interests of the fugitive by focussing on actual conduct as opposed to how that conduct is characterized by the requesting state. That is an integral part of the sufficiency assessment regardless of whether the evidence is admissible according to the laws of one or both states. So I do not think the role of the extradition judge is made irrelevant by the new Act's evidentiary provisions.

[68] Finally, while the extradition judge's role in assessing the evidence is limited, he or she may still be called on to assess it in light of conflicting evidence. Section 32(1)(c) of the Act directs that evidence adduced by the fugitive, relevant to the test in s.29(1)(a), be admitted. It could be that evidence would be adduced that would undermine the sufficiency of the requesting state's evidence, whether as to double criminality or identity, so as to cause the evidence to be insufficient for committal. Evidence from the fugitive may reveal some deficiency in the requesting state's evidence. It is pointless to speculate on possibilities but this points out the protection afforded to the fugitive by even the limited judicial role performed by the extradition judge.

Conclusions:

[69] As previously noted, section 32(1)(a) of the Act makes the contents of the documents contained in the record of the case, if certified according to s.33(3), admissible even if it would not otherwise be admissible under Canadian law. Section 32(1)(b) provides likewise for the contents of documents submitted in conformity with the terms of the governing treaty. Applicant's counsel conceded that if I were to find s.32(1)(a) valid I need not go on to consider s.32(1)(b) since the requesting state is relying here on a record of the case. In any event, in this case, the treaty parallels the statute in terms of admissibility requirements at the hearing.

[70] The thrust of the applicant's argument, of course, is directed toward the admissibility of any document "even if it would not otherwise be admissible under Canadian law". That provision, and s.34, which provides that documents are admissible whether or not they are solemnly affirmed or under oath, are the main targets of the attack. The complaint is similar against both: evidence not in conformity with Canadian evidentiary rules, including the requirement for evidence to be solemnly affirmed or under oath, bear no indicia of reliability or credibility. And, counsel argued, the principles of fundamental justice require at least a minimum threshold of reliability.

[71] Also under challenge on this application is s.33 but no particular attack was directed at it. Section 33 merely outlines what can be included in the record of the case and the certification requirements. It stands to reason that this section stands or falls on the validity of s.32(1)(a). I need not, therefore, address it specifically.

[72] Earlier I commented that it is surprising to me that the question of admissibility of evidence not in conformity with Canadian law was not raised under the old Act. It has,

however, been the subject of several cases under the new Act and the case before me is simply the latest foray onto the same ground. There has, as yet, been no pronouncement by an appellate court on this issue.

[73] The applicant relies on the judgment of Ewaschuk J. of the Ontario Superior Court of Justice in *Bourgeon v. Canada*, [2000] O.J. No. 1656. In that case, the judge concluded that sections 32(1)(a) and (b) of the Act contravene s.7 of the Charter but constitute a reasonable limitation on the fugitive's constitutional rights provided that the words "if the judge considers it reliable" are added to each subsection. In the opinion of Ewaschuk J., it would be manifestly unfair to a fugitive to admit evidence that is not otherwise admissible at a Canadian hearing in the absence of a statutory safeguard against the reception of unreliable evidence. In his view the admissibility of otherwise inadmissible foreign evidence must not be determined by foreign standards varying from country to country. The *Bourgeon* judgment, I was told, was not appealed because the fugitive eventually voluntarily surrendered to extradition.

[74] With the greatest of respect, I cannot agree with Ewaschuk J. on this issue.

[75] First, I disagree with the premise that the admissibility of evidence is being determined by foreign standards. Admissibility is being determined by a Canadian law, the Extradition Act, and, in this case, by a treaty entered into by Canada. There is nothing particularly unique about Canadian law adopting, by statute, some specific rule or even a non-domestic rule for a particular type of case. Examples can be found throughout Canadian law. For example, s.7(3.76) of the Criminal Code incorporates by reference into Canadian law both customary and conventional international law for the prosecution of war crimes. This has survived s.7 review: *R. v. Finta*, [1994] 1 S.C.R. 701. Indeed, the Charter itself recognizes that international law may have application in Canadian criminal proceedings: see s.11(g). In the area of civil litigation, one need only look at the choice of law rules in cases where different legal jurisdictions are involved to see the application of foreign law by domestic tribunals.

[76] The decision to rely on the requesting state's law to determine admissibility also accords with international norms as noted before. It is a policy choice by Parliament. It recognizes that, since the trial will eventually be held in the requesting state, then the critical issue is whether there is sufficient evidence admissible and available for trial under that state's rules, not under Canadian rules. I find nothing manifestly unjust about that.

[77] Second, Ewaschuk J. seems to suggest that there should be some broader role for an extradition judge under the new Act. He accepts the rule from *Sheppard* that an

extradition judge may not exclude manifestly unreliable evidence at the committal hearing. This was true under the old Act where evidence had to be admissible by Canadian standards. So, even if evidence under Canadian law is manifestly unreliable, it still qualified as some evidence under the *Sheppard* test. Ewaschuk J. would require, under the new Act, that the judge make an assessment of reliability. It seems to me that evidence could be manifestly unreliable whether it is admissible under Canadian law or not. It is still evidence, however, for the ultimate trier to assess. This requirement would alter substantively the role of the extradition judge.

[78] This point was also made in another Ontario judgment, *United States v. Reid* (Ont. S.C.J.; May 23, 2000), which declined to follow the judgment in *Bourgeon.* In *Reid*, Low J. held that, if quality of the evidence becomes a condition of admissibility, then the extradition judge would be obliged to enter into the type of inquiry that a preliminary inquiry judge may not enter into in considering whether there is any evidence upon which a properly instructed jury could convict. And, Low J. held, there is negligible ability to assess the reliability of evidence at an extradition hearing.

[79] In addition, I am of the opinion that the *Bourgeon* judgment failed to adequately consider the effect of the certification requirements of the Act and the treaty. Section 33(3) requires certification by a judicial or prosecuting authority in the requesting state to certify that the evidence summarized or contained in the record of the case is available for trial and is sufficient under that state's law to justify prosecution or was gathered according to that state's law. In this case the certificate purports to satisfy all three requirements. The treaty also requires a certification from a judicial or prosecuting officer of the requesting state. In this case there is a second certificate verifying that the evidence satisfies the requirements of German law. It seems to me that these requirements confer a certain measure of reliability in the sense that the evidence complies with legal standards, albeit a foreign standard. In *Clarkson (supra)*, a case dealing with the admissibility of unsworn statements, the British Columbia Court of Appeal held that the certification by the examining magistrates of the requesting state that the statements constitute admissible evidence in that state provides at least "some" indicia of credibility (at 493). It also seems to me that a degree of deference should be accorded as well to these foreign certifications. They must be taken at face value. As stated by LaForest J. in *Mellino (supra)* at 554:

> In particular, it is not the business of an extradition judge to assume responsibility for reviewing the actions of foreign officials in preparing the evidence for an extradition hearing. This would seem to me to be in

> breach of the most elementary dictates of comity between sovereign states.

[80] The point about certification was also a factor in the judgment of Dilks J., in *Canada v. Yang* (Ont. S.C.J.; September 25, 2000), which also disagreed with the *Bourgeon* decision. Dilks J. held that the reliability of the record is established by the weight of the foreign prosecutorial system which certifies, in effect, that the evidence is good evidence according to the law of the requesting state. This did not violate any principle of justice since, as under the old Act, reliability of the evidence is left to be considered by the trial court which will be in the best position to deal with it.

[81] Dilks J. also addressed another argument from *Bourgeon*. Ewaschuk J. expressed grave concern over what he considered to be unequal treatment of evidence adduced by the fugitive. Section 32(1)(c) prescribes that the extradition judge must consider evidence adduced by the fugitive but only "if the judge considers it reliable". Ewaschuk J. thought it was fundamentally unfair to impose this requirement on the fugitive's evidence while the requesting state's evidence is not subject to this precondition for admissibility. Dilks J. placed this point in context by comparing it to the certification requirement. He wrote, in *Yang* (at para. 42), as follows:

> With great respect, I find myself in disagreement with Ewaschuk, J.'s conclusion in *Bourgeon* that s.s.32(1)(a) and 32(1)(b) contravenes s.7 of the *Charter*. His decision appears to have been based at least in part on the fact s.32(1)(c) of the Act provides that foreign evidence adduced by the person sought is admissible at the extradition hearing only if the judge considers it reliable. He points out in paragraphs 48 and 55 of his ruling that it is manifestly unfair to create one test for admission of such evidence and another less strict test where it is presented by the requesting state. With great respect, I believe that this argument fails to recognize the authenticity provided by the foreign certification requirement. The foreign certification component was in fact considered and rejected by Ewaschuk, J. as a suitable check against what he clearly felt was the inherent reliability of hearsay but it doesn't appear to have been argued as a balancing factor with respect to s.32 (1)(c). Had it been, it may well be that the result in *Bourgeon* would have been different.

[82] The differing standard for reception of the fugitive's evidence can be justified by the fact that his evidence as well need not be admissible under Canadian law. But, with respect to that evidence, there is not even the assurance that it would be admissible at a trial in the requesting state. That assurance is provided for the state's evidence by the certificate. Thus there is a rational reason for the distinction.

[83] The question is whether these provisions, by allowing the use of evidence that does not conform to Canadian admissibility standards, contravene the principles of fundamental justice enshrined by s.7 of the Charter. I have to bear in mind that those principles reflect not just the rights of the accused but a spectrum of interests from the rights of the accused to broad societal concerns. As McLachlin J. (as she then was) wrote in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (at 603): "The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice."

[84] When I consider the purpose and objectives of legislation dealing with extradition, the standards set by international norms and the need for efficient and co-operative measures as between nations, the fact that Canadian admissibility rules are not immutable, and particularly considering that the burden on the requesting state is simply to present evidence which, if believed, would establish a *prima facie* case, then I am satisfied that s.32(1)(a) of the Act, along with s.33, are constitutionally valid and comply with the requirements of fundamental justice. In accordance with counsel's concession, I need not rule definitively on s.32(1)(b) for all cases although, because of the symmetry between the Act and the relevant treaty, I find no s.7 violation either in this case with respect to that subsection.

[85] With respect to s.34, counsel for the respondent noted that a constitutional attack on the admissibility of unsworn and unaffirmed statements was rejected in *Clarkson (supra)*. The British Columbia Court of Appeal held that it would make no sense to require officials of the requesting state to administer a Canadian-like oath or affirmation to foreign witnesses where such an oath or affirmation, because of differences in legal systems, might well be meaningless to them. The Court noted, as I mentioned earlier, that the statements were certified to be admissible as evidence according to the law of the requesting state, the statements were taken by investigating officers who attested to their authenticity, and there were declarations to the effect that the witness "persevered" with what he or she stated and signed the statement. The Court, while acknowledging that generally evidence in Canada must be sworn or affirmed to be admissible (although not always), held that in the context of extradition hearings the lack of an oath or affirmation did not breach fundamental justice.

[86] Respondent's counsel submitted that this should be the decisive word on the subject since the Supreme Court of Canada denied leave to appeal. The applicant's counsel suggested that denial of leave cannot be taken as definitive endorsement of a judgment; it may merely mean that the issue is not ripe for consideration by the Supreme

Court or the decision is too fact-specific to warrant an appeal. Whatever may be the appropriate response, I agree with the decision in *Clarkson.*

[87] In this case, the statement in question is that of the informant who is now in police protection. That statement, not under oath or solemnly affirmed, was signed by the informant and witnessed by the examining judge and a court officer. At the beginning of the statement there are the following notations: (a) the witness was cautioned as to possible penal consequences should he make a false statement; (b) the witness was instructed as to his right to refuse testimony as to self-incriminating questions; and, (c) the witness stated that he was willing to make a statement. These assertions provide, in my opinion, no less of an assurance of truthfulness than the formality of an oath or a solemn affirmation. It seems to me, as it did to the court in *Clarkson*, that knowledge of a penalty for making a false statement qualifies as a measure of reliability. The same issue also came up in *Bourgeon (supra)* but, on this point, Ewaschuk J. held that s.34 did not violate s.7 of the Charter.

[88] I agree with these conclusions. Having regard to the low evidentiary threshold set for an extradition hearing and Canada's obligation to recognize and respect the different legal standards of its extradition partners, I am satisfied that s.34 of the Act meets the requirements of fundamental justice.

[89] For these reasons, the application for a declaration as to a breach of s.7 of the Charter is dismissed.

[90] Earlier in these proceedings, on November 20, 2000, I issued a publication ban on evidence to be presented at the extradition hearing. For sake of clarity, these reasons are not subject to that ban. I thank counsel for their excellent submissions.

J .Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 23rd day of February, 2001.

Counsel for the Applicant:	Wes Wilson
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