

Germany v. Ebke, 2000 NWTSC 47

CR 03881

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

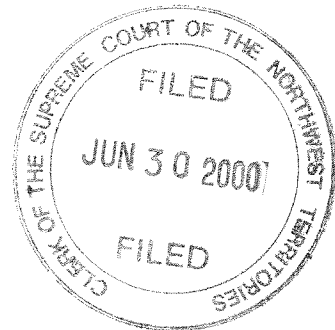
IN THE MATTER OF *THE EXTRADITION ACT*  
S.C. 1999 CHAPTER 18

AND IN THE MATTER OF:

THE FEDERAL REPUBLIC OF GERMANY

- vs. -

WALTER LOTHAR EBKE



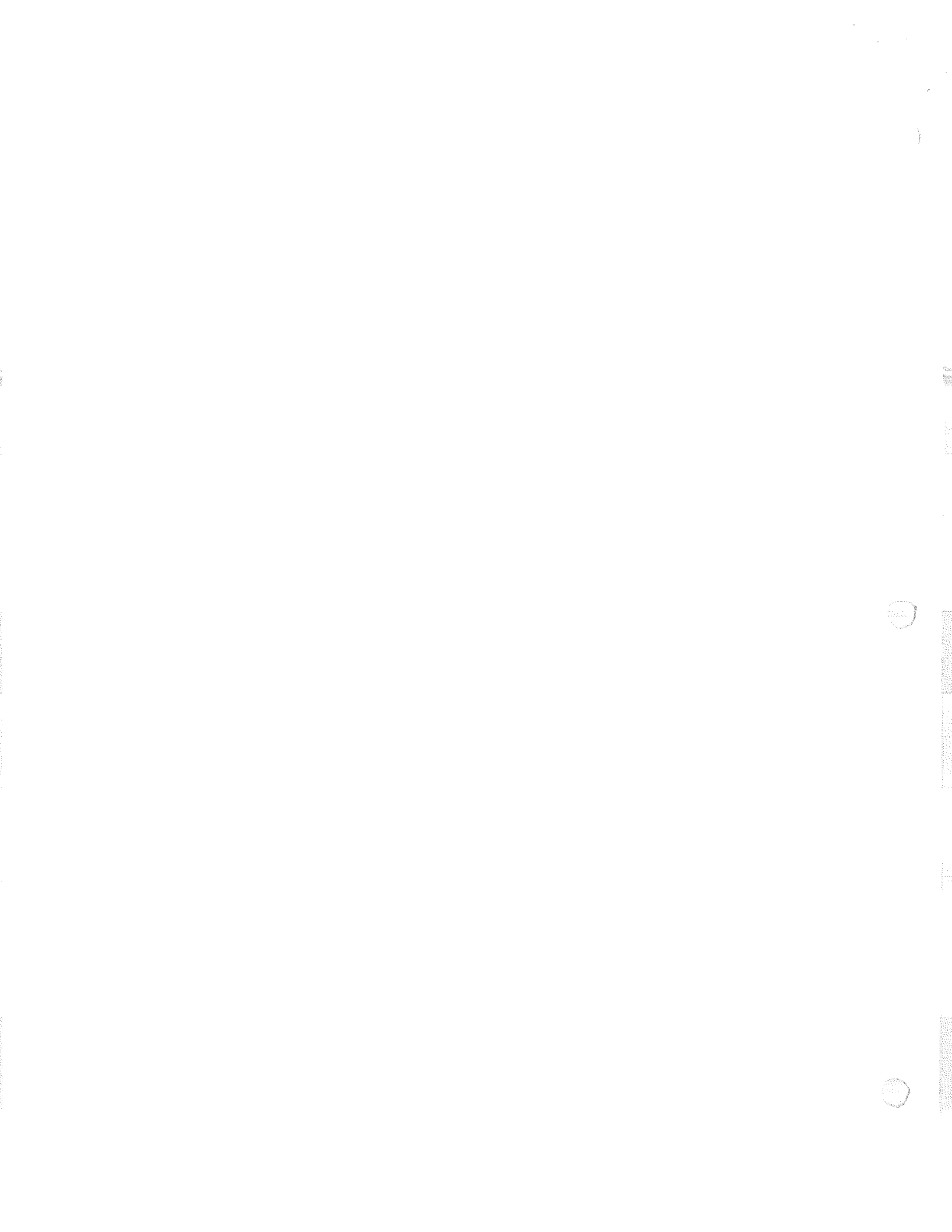
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Transcript of the Chambers Applications before The Honourable Justice J.E. Richard, at Yellowknife in the Northwest Territories, on Thursday, June 5th A.D., 2000.

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APPEARANCES:

Ms. S. Creagh:	Counsel for the Attorney General of Canada on behalf of the Federal Republic of Germany
Mr. A. Wright:	Counsel for Mr. Ebke
Mr. L. Walsh:	Counsel for the Canadian Broadcasting Corporation



1 THE COURT: Now, counsel, having reviewed the  
2 file, there are two other matters that I want to  
3 deal with before we conclude today, but we can do  
4 them after the bail hearing and the CBC application,  
5 and that is there is a review required under this  
6 other federal statute.

7 MS. CREAGH: Under the *Mutual Legal Assistance*  
8 *and Criminal Matters Act*, yes, we have to fix a date  
9 for what is referred to as a sending hearing.

10 THE COURT: At the moment it is returnable  
11 today.

12 MS. CREAGH: Yes, but that's for the fixation  
13 of the date.

14 THE COURT: We have to deal with that and of  
15 course there is the date of the extradition hearing  
16 itself. So don't let me forget to get to those  
17 matters when we are finished.

18 Now, if we could deal with the bail hearing, I  
19 have had an opportunity now to read the document  
20 entitled "information and complaint sworn by  
21 Corporal Munn", and I have read all of these  
22 affidavits that Mr. Wright has filed. I believe  
23 that's the evidence that counsel want to refer to on  
24 the bail issue.

25 MR. WRIGHT: My friend has advised me, My  
26 Lord, that there is a witness that she wishes to  
27 cross-examine and unfortunately that witness is not

1 available today. But I have spoken to that witness,  
2 and she will be available or can make herself  
3 available tomorrow. It would be my preference, if  
4 possible, if we could proceed tomorrow. I believe  
5 it is my friend's preference that we do the bail  
6 hearing all at once and including that witness's  
7 cross-examination, and I am inquiring whether that  
8 would be possible for the Court because if it is, I  
9 will need to contact that witness and have -- she is  
10 not in town but she can be in town tomorrow.

11 THE COURT: Yes, we could do it tomorrow. I  
12 am not absolutely certain about the number of  
13 courtrooms available but I believe we can. And  
14 counsel feel there is an advantage to doing it all  
15 at one time?

16 MS. CREAGH: Yes.

17 THE COURT: Just to jump forward then so  
18 there is no more of these, the Crown wants to  
19 cross-examine one of these affiants?

20 MS. CREAGH: Actually we wished to  
21 cross-examine -- we had originally wished to  
22 cross-examine four. My friend gave us the  
23 affidavits over the last two days; we notified him  
24 yesterday of the four people that we wished to  
25 cross-examine. This morning, he withdrew one of  
26 those affidavits and so now there are three, and  
27 this morning he raised with me the prospect that one

1 of these individuals was away. There was some hope,  
2 I think, that we could have had her today up until  
3 about 12:30 today so we think that it would be  
4 preferable if the bail application is dealt with in  
5 one scoop.

6 THE COURT: You want to cross-examine which  
7 ones?

8 MS. CREAGH: We want to cross-examine Ms.  
9 Brockman, Mr. Fancott, and Ms. Arden.

10 THE COURT: And so we would do that first and  
11 there is no other viva voce testimony?

12 MR. WRIGHT: That's correct, My Lord.

13 MS. CREAGH: Yes.

14 THE COURT: And I would hear submissions on  
15 behalf of Mr. Ebke?

16 MR. WRIGHT: Yes.

17 THE COURT: Reference to all of the filed  
18 evidence?

19 MR. WRIGHT: Yes.

20 THE COURT: And from the Crown?

21 MS. CREAGH: Yes.

22 THE COURT: Fine, then we will plan on that.  
23 So we will set it at 10 o'clock tomorrow morning,  
24 the bail hearing.

25 MR. WRIGHT: Thank you, My Lord.

26 THE COURT: And it may be in Courtroom 1  
27 downstairs or it may be here.

1 MS. CREAGH: Fine.

2 THE COURT: Now, the CBC application.

3 I have read the motion, the Affidavit in  
4 Support and made reference to the case law filed,  
5 including that filed by Mr. Wright this morning. So  
6 I will hear from Mr. Walsh.

7 MR. WALSH: Yes, My Lord, it is the  
8 applicant's position that this ban was originally  
9 ordered based only on a straight reading in of  
10 Section 517 of the *Criminal Code* into the  
11 *Extradition Act* without reference to Section 26 of  
12 the *Extradition Act* which provides that the  
13 publication ban can only be ordered in circumstances  
14 where it is shown that there is a risk that there  
15 would not be a fair trial in the -- in the  
16 expatriating country, in the country that is  
17 extraditing him, the accused.

18 Section 26, it is the applicant's submission,  
19 must be read in context with the Dagenais decision  
20 so that when --

21 THE COURT: -- just before you jump ahead to  
22 that though, does the record here not show that the  
23 order of Justice Vertes that you are asking be  
24 reviewed or varied was made under Section 517 of the  
25 Code?

26 MR. WALSH: That's correct, My Lord, but  
27 Section 517 of the Code must be brought in subject

1 to the provisions of the *Extradition Act* which is  
2 Section 26. In other words, the Section 517 section  
3 was brought in based on Section 19 of the  
4 *Extradition Act* which states that Part 16 of the  
5 *Criminal Code* applies with any modifications that  
6 the circumstances require in respect of a person  
7 arrested pursuant to the *Extradition Act*.

8 THE COURT: So you are saying when we bring  
9 the judicial interim release provisions of the Code  
10 into the extradition proceeding, Section 26 alters  
11 those requirements?

12 MR. WALSH: That's correct, My Lord. Section  
13 26, being a specific provision of the *Extradition*  
14 *Act*, would override a general bringing in of certain  
15 sections of the *Criminal Code* and it therefore  
16 becomes the test under the *Extradition Act* for a  
17 publication ban.

18 Under Section 26, the onus is placed on the  
19 person seeking the ban to establish, firstly, that  
20 there would not be a fair trial in the country to  
21 where the trial would be held; and secondly, there  
22 is a discretion on the Court, as it is a "may"  
23 section and not a "shall", the Court is not required  
24 even if that is established to grant a publication  
25 ban. And this section was recently added to the  
26 *Immigration Act* and it appears to fit much better  
27 with the Dagenais Supreme Court of Canada decision.

1           And what you are looking at, My Lord, is first  
2           of all, the only ground for a publication ban is the  
3           question of the risk for a fair trial and Dagenais  
4           has decided, Supreme Court of Canada, that when you  
5           are saying risk of a fair trial, you are saying that  
6           it must be a real and substantial risk to the  
7           fairness of the trial and there can be -- because  
8           reasonably available alternate measures will not  
9           prevent risk and the salutary effect of the ban  
10          outweigh the deleterious effects. So when you bring  
11          in the question of a risk of a fair trial, it is a  
12          strong burden that is on the person trying to obtain  
13          the publication ban.

14                 What he has to establish is first that there is  
15                 a real substantial risk of a fair trial not being  
16                 obtainable because of publication.

17                 Two, he has to establish that there is no other  
18                 alternative method preventing that risk to a fair  
19                 trial.

20                 And three, the Court must determine on a  
21                 balance that the publication ban and its deleterious  
22                 effect on the right of free speech under Section  
23                 2(b) of the Charter in a balance, balancing the risk  
24                 of a fair trial in the country that the accused is  
25                 going to, that on a balance those two rights balance  
26                 in favour of a publication ban and that is not an  
27                 easy test under Dagenais because all other methods



1 must be looked at.

2 THE COURT: In the level of -- let me just  
3 use a hypothetical here, not Mr. Ebke's case.

4 Let's say we have a person charged with murder  
5 having committed in Canada. He comes before the  
6 Court on this bail hearing and he is entitled to  
7 stand up and say I want to address my bail and I  
8 want to do it freely within the confines of the  
9 Court and I don't want it published in the  
10 newspapers or on the radio what myself and my lawyer  
11 and the witnesses say at this bail hearing.  
12 Canadian law says he gets that right, he gets a ban  
13 automatically.

14 The second hypothetical is the guy who is  
15 charged with murder that occurred in the States but  
16 Canada is being asked to extradite him, he is coming  
17 in for his bail hearing on the extradition process,  
18 why should that person have a lesser right?

19 MR. WALSH: Essentially the person charged in  
20 Canada is perceiving the future of a possible jury  
21 trial in Canada. And the possibility of tainting  
22 the jury is really the big question on a publication  
23 ban.

24 The United Steelworkers case, among others, but  
25 that one is one from the Supreme Court of Canada,  
26 says if there is no jury trial envisioned in the  
27 future, then there is really no basis for the

1 publication ban. It is the tainting of the jury  
2 that is the question.

3 THE COURT: But the Code doesn't say that.  
4 517 doesn't say only in jury trials.

5 MR. WALSH: No, 517 is a provision which has  
6 been questioned which was upheld in the Global  
7 Communications case but this was prior to the  
8 Dagenais case, and Section 517 does not have --  
9 Section 26 of the *Extradition Act* does not apply to  
10 the *Criminal Code*. The *Criminal Code* comes into the  
11 *Extradition Act* with reference to Section 26 so it  
12 is Parliament itself that has decided that the  
13 *Criminal Code* matters will be dealt with pursuant to  
14 the right as stated in Section 517 but on an  
15 *Extradition Act* hearing, that balance is changed  
16 more equitably with respect to the Dagenais  
17 decision.

18 And in line with the Dagenais decision, it is  
19 arguable whether, with the change in the common law  
20 in Dagenais, whether Global was actually rightly  
21 decided in view of the Supreme Court of Canada  
22 decision in Dagenais.

23 Section 517 may now be put to a Charter  
24 challenge, again based on the Dagenais decision, but  
25 that is not what the applicant has to do in this  
26 situation. The applicant is saying that Section 26  
27 was not met, the requirements of Section 26, and

1           that those requirements must be looked at in light  
2           of the principles enunciated by the Supreme Court of  
3           Canada in Dagenais.

4           So, it is the applicant's submission, first,  
5           that the original order was not properly granted and  
6           that the test of Section 26 was not applied. And  
7           secondly, that if the publication ban is to be  
8           granted, it must not only meet the bare bones of the  
9           test in Section 26 but that must be seen in light of  
10          the circumstances and principles as outlined in  
11          Dagenais with respect to what is required and what  
12          must be established by someone seeking a publication  
13          ban, and Dagenais makes it clear that the onus is on  
14          the applicant and indeed so does Section 26 show  
15          that the onus is on the applicant for a publication  
16          ban to satisfy the Court and then the Court's  
17          discretion, if satisfied that there would be  
18          prejudice to a fair trial, must also be tempered by  
19          a balancing factor as to the rights of freedom of  
20          expression versus the rights of the accused.

21                 Thank you, My Lord.

22         THE COURT:                     Thank you. The Crown, I will  
23                 hear from now, because the Crown sought the 517  
24                 order on May 18th or 19th -- May 19th.

25         MS. CREAGH:                    Yes, but I think that we were  
26                 also clear that we sought the order only for the  
27                 purposes of that particular day and that our

1 position would be evolving throughout the progress  
2 of the hearing and that is because our concern  
3 arises now for the purposes of the bail hearing with  
4 respect to the fact that the Crown allegations in  
5 the bail hearing will get into the manner and the  
6 means by which Mr. Ebke came to Canada and there are  
7 a number of individuals now, including Mr. Ebke, who  
8 are facing charges in Canada arising from those  
9 activities. Those charges are before the  
10 Territorial Court at this time. They are offences  
11 that are not within the absolute jurisdiction of  
12 either the Territorial Court or the Supreme Court so  
13 they are offences which are electable at the behest  
14 of the various accused individuals and there may  
15 well be jury trials flowing from those matters.

16 Given again that our allegations will relate to  
17 how a person who is an alleged terrorist came into  
18 the country avoiding the various -- evading certain  
19 requirements of the *Immigration Act*, that's quite  
20 explosive testimony and certainly in our submission  
21 will have an impact on the ability of those  
22 individuals to have a fair trial with respect to  
23 those allegations.

24 THE COURT: You are saying you are going to  
25 be making allegations on behalf of the Republic of  
26 Germany in this hearing tomorrow that are  
27 allegations in common on these other -- *Immigration*

1           Act, are they --

2       MS. CREAGH:           Yes.

3       THE COURT:           -- or *Criminal Code*?

4       MS. CREAGH:           *Immigration Act*.

5       THE COURT:           *Immigration Act* files?

6       MS. CREAGH:           Yes.

7       THE COURT:           There are common allegations?

8       MS. CREAGH:           Yes.

9       THE COURT:           And have those charges been laid?

10      MS. CREAGH:           Yes.

11      THE COURT:           Any appearances?

12      MS. CREAGH:           I believe Mr. Ebke, who is one of

13           the accused in those matters, made a brief

14           appearance in Territorial Court today and the

15           matters have been remanded until the 15th of July.

16      MR. EBKE:            Sorry, I was not in court.

17      MS. CREAGH:           My apologies.

18      THE COURT:           But other accused have appeared

19           for the first appearance?

20      MS. CREAGH:           July 25th is the first

21           appearance.

22      THE COURT:           I understand what you are saying

23           now.

24      MS. CREAGH:           Yes.

25      THE COURT:           So this is a basis on which you

26           ask that the publication ban already given continue?

27      MS. CREAGH:           For the purposes of the bail

1 hearing. Clearly when we get to the extradition  
2 hearing, those allegations may or may not form a  
3 part of the Crown case at that particular time so we  
4 are only looking to the bail hearing and what we  
5 will be alleging in that context and our concern is  
6 the fair trial right of those other individuals.

7 THE COURT: Yes.

8 MS. CREAGH: I might add because those are  
9 going to be -- I am advised by my colleagues that  
10 the Crown will be electing to proceed by  
11 Indictment on those matters. Of course, again those  
12 individuals have the option of electing to be tried  
13 by a Judge and jury, having a preliminary hearing in  
14 which case, particularly with respect to the  
15 preliminary inquiry, a well recognized publicity ban  
16 would be in effect. One is in the anomalous  
17 situation that if the press are banned from  
18 publishing what is at the preliminary inquiry but  
19 can publish the allegations made today, it really  
20 undermines the publicity ban at the preliminary  
21 inquiry. Thank you.

22 THE COURT: Mr. Wright? Just for the record,  
23 I notice that your predecessor counsel at the May  
24 19th, the first Court appearance, the record seems  
25 to show that she was in agreement with the Crown  
26 request for the publication ban but perhaps I can  
27 ask you formally. In terms of Section 517 and this

1           bail hearing, does the accused Mr. Ebke seek such an  
2           order, a 517 order?

3           MR. WRIGHT:                   Yes, My Lord, for a publication  
4           order whether it is Section 517 or under Section 26  
5           of the *Extradition Act*.

6           Mr. Ebke's position is that the application my  
7           friend is making effectively requires this Court to  
8           apply the Dagenais case which was an order that was  
9           made at a trial involving whether or not a  
10          particular television program could be broadcast  
11          during the course of a trial and that was an  
12          exercise of the inherent jurisdiction of a Court to  
13          make orders incident to the trial. He asks that  
14          that reasoning be applied to a bail hearing and, in  
15          my submission, those are two different things.

16          Moreover, the Dagenais case was an exercise by  
17          the Court of its jurisdiction under the Charter of  
18          Rights.

19          As my friend Ms. Creagh pointed out this  
20          morning, Mr. Walsh's material makes no mention of  
21          any constitutional challenge being advanced at this  
22          stage and I would point out that Section 26, in my  
23          submission, confines the jurisdiction of the Court  
24          as to who can make this application.

25          One has to remember that the Supreme Court  
26          sitting hearing extradition matters is a statutory  
27          Court. Its jurisdiction comes from the statute,

1 being the *Extradition Act*, and therefore it has to  
2 strictly -- it has to be strictly confined to the  
3 limitations of that Act.

4 Section 26 of the *Extradition Act* says that  
5 before beginning a hearing in respect of a judicial  
6 interim release or an extradition hearing, a Judge  
7 may, on application by the person or the Attorney  
8 General, etcetera.

9 Now one of the things that the Supreme Court  
10 decided in Dagenais was that the media could bring  
11 an application to deal with publication bans at a  
12 trial because that was part of the Court's inherent  
13 jurisdiction to recognize parties that may have an  
14 interest. There has been no such application here  
15 to broaden, by way of the Charter or otherwise, the  
16 Court's jurisdiction under Section 26 and in my  
17 submission therefore the CBC has no standing to make  
18 this application.

19 If this Court is disposed to grant the CBC's --  
20 THE COURT: -- well, I don't hear Mr. Walsh  
21 saying that the CBC is making a Section 26  
22 application. He is saying the CBC has found out  
23 that there was a publication ban and in accordance  
24 with the principles in Dagenais wants to be heard  
25 about that. And so at a minimum, Dagenais says that  
26 they have the right to be heard, usually after the  
27 fact, by way of a review or something.



1 MR. WRIGHT: But neither Mr. Ebke or the Crown  
2 is making an application here.

3 THE COURT: No, I hear that part, yes.

4 MR. WRIGHT: So it seems to me that you have  
5 no jurisdiction to make an order in absence of an  
6 application and in my submission there is no  
7 application by anyone who has jurisdiction under the  
8 statute to make an application. The parties to the  
9 proceedings, in other words, are in agreement at  
10 this stage at least that there should be a  
11 publication ban at the bail hearing. A publication  
12 ban would be made via Section 517 in part for the  
13 reasons that my friend alleges. But in my  
14 submission as well, you can look at other factors in  
15 deciding whether or not a publication ban should  
16 issue.

17 If Mr. Walsh says that Dagenais gives him the  
18 ability to come to Court and raise this issue. It  
19 seems to me that you can look at issues outside of  
20 Section 26 as being reasons for extending a  
21 publication ban and one of them, in my submission,  
22 would be that the evidence that you have before you  
23 establishes that Mr. Ebke has business in town. He  
24 has -- he has a bed and breakfast operation in town.  
25 He has various contracts that he could do and  
26 clients potentially that he has. And those would be  
27 things that he would be looking to do if he was

1 released on bail and, in my submission, publication  
2 ban -- lifting the publication ban and allowing the  
3 papers and the press to print, publish, broadcast  
4 what goes on at this hearing may well make it  
5 difficult for Mr. Ebke to survive on bail the way  
6 that he feels that he can at least as established in  
7 the affidavit evidence.

8 So in submission that is another -- another  
9 issue that you can look at in deciding whether or  
10 not to issue a public -- or to continue the  
11 publication ban.

12 In my submission, contrary to what Mr. Walsh  
13 has said as well, the Global Communications case is  
14 still good law. It has not been appealed and, in my  
15 submission, therefore, what it says about broadcast  
16 rights should be taken into account by you. And I  
17 provided a copy of the Global Communications case  
18 earlier today. It is an Ontario Court of Appeal  
19 decision.

20 If I could refer you to a couple extracts, My  
21 Lord.

22 THE COURT: Yes?

23 MR. WRIGHT: It is a judgment of Justice  
24 Thorson who says at the bottom of page 6, that he --  
25 the *Bail Reform Act* provisions of the *Criminal Code*  
26 should apply to the *Extradition Act*. So even in the  
27 absence of provisions of the Act that my friend has

1 referred to, the Courts have said that the *Bail*  
2 *Reform Act* provisions of the *Criminal Code* should  
3 apply.

4 THE COURT: In fairness to Mr. Walsh's  
5 arguments, Global not only predates Dagenais but  
6 there was no Section 26 then either.

7 MR. WRIGHT: That's correct.

8 THE COURT: The old Act.

9 MR. WRIGHT: That's correct, yes. And the  
10 Court makes the point at the top of page 7 that you  
11 have made to Mr. Walsh.

12 In the first full paragraph at the bottom of  
13 that paragraph, Justice Thorson asked the question,

14 Should the person whose liberty  
15 is at risk as a result of the  
16 extradition proceedings be taken  
17 to enjoy, in the matter of bail,  
18 fewer and inferior rights, and  
19 thus a less equal protection of  
the law, than the person whose  
liberty is at risk as a result  
of the proceedings commenced in  
Canada?

20 And over the page, My Lord, in the middle  
21 paragraph, the one that starts "one of the problems  
22 that I have", there is a sentence that starts,

23 Implicit in this decision was  
24 Parliament's acceptance that the  
25 public interest in allowing  
26 full media publication and  
27 broadcasting of the evidence  
that may be given at a bail  
hearing must yield to the public  
interest in ensuring the right  
of the accused to a fair trial,  
and that the latter may be

1                   jeopardized if the accused has  
2                   no assured means of preventing  
3                   the dissemination of that  
4                   evidence in advance of his or  
5                   her trial.

6                   The Court goes on later on in the decision to  
7                   distinguish the means used in Canada and the United  
8                   States for protecting the right to free speech and  
9                   dealing with the accused's right to a fair trial,  
10                  the balancing of the two.

11                  The bottom of page 10, the Court discusses  
12                  that in the United States, the jury system provides  
13                  for extensive cross-examination of jurors,  
14                  sequestration of jurors during the course of a jury  
15                  trial, and those are matters that are not often done  
16                  in Canada. Canada has instead taken the position  
17                  traditionally that publication bans are the means  
18                  better otherwise that have been used to protect the  
19                  accused's right to a fair trial.

20                  So I appreciate that Section 26 does say what  
21                  my friend states but in my submission there are --  
22                  my client has legitimate concerns about his ability  
23                  to survive on bail if the publication ban was lifted  
24                  at this stage.

25                  I echo what my friend Ms. Creagh says about the  
26                  other accused that are out there whose right to a  
27                  fair trial in this country may be jeopardized if a  
28                  publication ban is not issued.

29                  And I also note that the Ng case, which I have

1 provided, Madam Justice Trussler in an extradition  
2 case actually went further than simply ordering a  
3 publication ban.

4 Ms. Creagh, who was counsel in that case, has  
5 advised me that Madam Justice Trussler was aware  
6 that there were members of the media from California  
7 who were present throughout the court sittings and  
8 Madam Justice Trussler realized that a publication  
9 ban would not affect the ability of the media in the  
10 United States to publish the goings-on in the bail  
11 hearing or the extradition hearing. And as a  
12 result, she closed the courtroom.

13 Now, her reasons for coming to that conclusion  
14 are not addressed in the judgment that I have  
15 provided to you but the fact that she did close the  
16 courtroom is alluded to I believe in the reasons.

17 So those are my submissions, My Lord.

18 THE COURT: Any reply, Mr. Walsh?

19 MR. WALSH: Just a few points, My Lord.

20 Firstly, with respect to Global Communications  
21 and its anticipation of how a jury trial would be  
22 run in light of publication and that sequestering  
23 and allowing challenges for cause and voir dieres  
24 were not part of Canadian law, they have been  
25 brought in in Dagenais, the bottom of page 23, the  
26 last line, and top of page 24. Those are  
27 possibilities that have to be looked at prior to

1           issuing a publication ban.

2           So what Dagenais has done has said we are now  
3 more like the United States because of Section 2(b)  
4 of the Charter of Rights. Sequestering juries,  
5 allowing challenges for cause and voir dires during  
6 jury selection are now possibilities which are  
7 recommended superior to publication bans for  
8 ensuring a fair trial.

9           With respect to the application by the Crown, I  
10 wasn't aware of this side of it. It does not appear  
11 to be an issue under the *Extradition Act* and because  
12 the *Extradition Act* allows for one test under  
13 Section 26 for a publication ban, and that being the  
14 right of the accused to a fair trial in the other  
15 country, it doesn't take into account the situation  
16 with respect to other accused concerning another  
17 person's trial. I am not certain what jurisdiction  
18 that would come in under. It would probably be some  
19 type of common law, I suppose.

20           The application that the Crown is making on  
21 some common law basis with respect to the inherent  
22 jurisdiction of the Court, my learned friend Mr.  
23 Wright has indicated that perhaps under the  
24 *Extradition Act* that type of inherent jurisdiction  
25 does not exist to look at something as broad as an  
26 application by another person to say that because of  
27 releasing information concerning this accused, it

1           may affect my right to a fair trial.

2           THE COURT:                    But you see, I think Ms. Creagh  
3           is pointing out that the very practical aspect of it  
4           is, let's say two or three of these other  
5           individuals were appearing in Territorial Court  
6           tomorrow for their bail hearing on the *Immigration*  
7           Act charges. One of them asks for a publication ban  
8           for the bail hearing, and it is common information,  
9           CBC can't broadcast that information which is this  
10          information. Now, it may be hypothetical, it may  
11          not happen in Territorial Court, but you can see  
12          where --

13          MR. WALSH:                   -- so because a ban could be  
14          issued in other proceedings under say Section 517,  
15          does that necessarily apply that there is grounds to  
16          bring an application in these proceedings with  
17          respect to section -- with respect to something that  
18          may happen, you know, with respect to maybe even  
19          another statute? It appears a bit broad especially  
20          when one looks at Dagenais saying that can the Crown  
21          establish, even granted that maybe the argument  
22          exists, but can the Crown establish there is no  
23          other method of ensuring a fair trial other than  
24          bringing an application for a publication ban in  
25          different proceedings with respect to different  
26          individuals? I submit that that is quite a stretch.

27                                    And with respect to the Ng case, I would just

1 say again that that is prior to Dagenais and prior  
2 to the changes in the Act that that decision was  
3 made and Dagenais did make fundamental changes with  
4 respect to how the common law rights with respect to  
5 publication bans are instituted and Section 26 was  
6 brought in to establish the test subsequent to the  
7 Ng decision.

8 Those are my submissions, My Lord.

9 THE COURT: Well, on this matter, the  
10 application from CBC contained in its Notice of  
11 Motion, I am considering a request to the Court for  
12 a review or reconsideration of the Section 517 order  
13 that was made on May 19th. And I reiterate, it is  
14 my finding that it was a Section 517 order that  
15 issued on May 19th and not a Section 26 *Extradition*  
16 *Act* order.

17 In the context of the submissions made by the  
18 CBC counsel and the reasons why CBC are here seeking  
19 this relief, I point out that a Section 517 *Criminal*  
20 *Code* order is a temporary ban only on publication of  
21 matters that occur in court.

22 I am satisfied that on this bail hearing, under  
23 the *Extradition Act*, I am satisfied that I am bound  
24 by the provisions of Section 517 of the *Criminal*  
25 *Code*.

26 I am satisfied that those provisions are not  
27 altered by Section 26 of the *Extradition Act*.



1 Section 517 has withstood a constitutional challenge  
2 in another jurisdiction, Ontario, and my reading of  
3 it is that it is mandatory. The Court has no  
4 discretion when an accused person under a *Criminal*  
5 *Code*, or so-called fugitive brought before the Court  
6 on an *Extradition Act*, requests the order, he is  
7 entitled to it.

8 So the Section 517 order as it applies to the  
9 bail hearing is continued, and CBC's application is  
10 denied.

11 Now, counsel, the other two matters then are  
12 the -- we don't have to deal with them today but  
13 coming back tomorrow, setting the date for the  
14 extradition hearing and the matter of the return of  
15 the issue of the search warrant which was scheduled  
16 for today. I take it that you want to set a date  
17 for that hearing, and is there any reason why it  
18 can't be at the same time as the extradition hearing  
19 or is it something that you want to do in advance of  
20 that? Has counsel considered when that might occur  
21 in the sequence? Is there going to be any  
22 particular application by Mr. Ebke under that -- I  
23 hate these statutes with long names, the *Mutual*  
24 *Legal Assistance* statute?

25 MR. WRIGHT: Mr. Ebke would want to be present  
26 at the hearing. Whether or not he takes a position,  
27 I can't say at this point in time but he will want

1 to be present at the hearing.

2 In terms of the extradition hearing, I have  
3 advised my friend yesterday that until the documents  
4 that the State is going to be relying on, that  
5 Canada will be relying on at the extradition hearing  
6 have been produced, we are taking the position that  
7 it is premature to set a date for the hearing.

8 THE COURT: On the first question, or the  
9 *Mutual Legal Assistance* statute question, Ms.  
10 Creagh, is the Crown aware of anyone else who might  
11 be making an application in that statute other than  
12 Mr. Ebke?

13 MS. CREAGH: Ms. Pfieffer may be and I  
14 underline the "may" because it is early days in  
15 terms of -- although an inventory has been filed of  
16 the items seized, it is early days yet in terms of  
17 determining which items we will be asking the Court  
18 to order be sent to Germany and which we will not be  
19 asking with respect to. So Ms. Pfieffer is the only  
20 other person I believe that may have an interest in  
21 the documents.

22 If I can just leap ahead, it would be the  
23 preference of the Attorney General to ask that a  
24 date into the future certainly to give my friend  
25 time to look at the documents. And the *Mutual Legal*  
26 *Assistance Act* being set for the sending hearing, I  
27 am not aware of any reason why it should be bound up

1 with the *Extradition Act* hearing. They can be dealt  
2 with, in my submission, separately and we may then  
3 be able to deal with the mutual legal assistance  
4 matter in advance of the extradition matter.

5 With respect to the extradition matter, I  
6 certainly can understand my friend's position with  
7 respect to that matter but, as Your Lordship is well  
8 aware, the combination of the *Extradition Act* and  
9 the Treaty set certain deadlines on the  
10 extradition -- on the requesting State with respect  
11 to them putting up the material that will be used in  
12 the course of the extradition and then allows the  
13 Minister of Justice a certain amount of time to  
14 review those and determine if the matter should  
15 proceed.

16 It would be my suggestion that if it suits with  
17 the Court's convenience, that we block some time  
18 tentatively for the hearing in -- giving perhaps a  
19 month after the outside of those two days which  
20 would again hopefully give us time to deliver the  
21 materials to Mr. Wright so that he can have an  
22 opportunity to study them and be in a position to  
23 proceed with the extradition hearing.

24 If the requesting State of course does not meet  
25 the deadlines, there are certain consequences in the  
26 Act with respect to their failure to do so and by my  
27 calculation, that date is the 4th of July. If they

1           have not met it by then, and assuming that we set  
2           it, the Court is of a mind to block us off some time  
3           for the extradition hearing, that should give ample  
4           time to reroute that if the Attorney General intends  
5           to seek more time from the Court.

6           MR. WRIGHT:                   My Lord, my concern about setting  
7           a date right now is I simply don't know what  
8           position Mr. Ebke will take until I have some  
9           documents.

10          THE COURT:                   Maybe having heard Ms. Creagh  
11          then, if her date of July 4th for that next  
12          important step for the deadline is correct, perhaps  
13          whatever happens tomorrow, we could set it to a date  
14          shortly after July 4th to speak to a date.

15          MR. WRIGHT:                   That would be satisfactory, My  
16          Lord.

17          THE COURT:                   It is obviously not going to  
18          happen before then.

19          MS. CREAGH:                   No, my colleagues in Ottawa tell  
20          me that they are in communication with the German  
21          legal officials and they are working on the  
22          materials but there has to be a translation done and  
23          they have to be sent to Canada through the  
24          diplomatic channel. So the 45 days, no doubt every  
25          minute of them will be required by the requesting  
26          State to meet their obligations.

27          THE COURT:                   Fine, we will leave those

1           formally until tomorrow but you can perhaps remind  
2           me that that may be the best basis on which we leave  
3           both of those hearings, just that we have some  
4           certainty as to when it is coming back.

5                     Anything else for today until we deal with the  
6           bail tomorrow?

7           MS. CREAGH:                     No.

8           MR. WRIGHT:                    No, My Lord.

9           MS. CREAGH:                    I suppose other than with respect  
10          to the ban, just to put my friend Mr. Wright on  
11          notice, that the position we took today may not be  
12          the position that we take at the extradition hearing  
13          with respect to the ban on publication.

14          THE COURT:                    No, because as I recall Section  
15          517 of the *Criminal Code* deals with the bail  
16          hearing.

17          MS. CREAGH:                    Yes.

18          THE COURT:                    At the actual extradition  
19          hearing, if you apply under Section 26 of the  
20          *Extradition Act*, you may open the door for the CBC  
21          to renew. We will cross that bridge when we come to  
22          it.

23                     Fine, we are adjourned until 10 a.m.

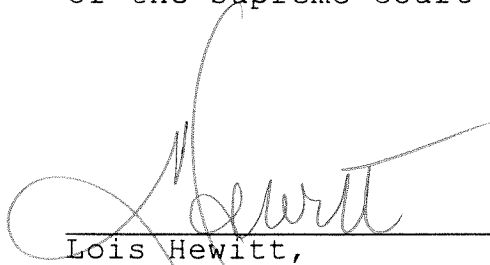
24          **(AT WHICH TIME THE PROCEEDINGS CONCLUDED)**

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Certified pursuant to Rule 723  
of the Supreme Court Rules.



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Lois Hewitt,  
Court Reporter

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