Republic of Germany v. Ebke, 2001 NWTSC 52

Date: 2001 09 06
Docket: CR 03881

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE FEDERAL REPUBLIC OF GERMANY

Applicant

- and -

WALTER LOTHAR EBKE

Respondent

Committal hearing on extradition request; application by respondent for a judicial stay of proceedings; and, sending hearing respecting search and seizure.

Heard at Yellowknife, Northwest Territories
on May 22, 23, 24, 25, 29, 30 & 31, 2001

Reasons Filed: September 6, 2001

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

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Counsel for Intervenor Pfeiffer (re search warrant issue only):	Adrian C. Wright

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REASONS FOR JUDGMENT

[1] The Federal Republic of Germany seeks the extradition of Walter Lothar Ebke. The Minister of Justice has authorized the Attorney General of Canada to seek an order for Ebke's committal for that purpose. These proceedings are to determine if an order of committal should issue to await the decision of the Minister on whether or not to surrender Ebke to the requesting foreign state.

[2] Ebke, a German citizen, is a landed immigrant to Canada and has been residing in Yellowknife for several years. He was arrested on May 18, 2000, on a provisional arrest warrant issued *ex parte* by me pursuant to s.13 of the *Extradition Act*, S.C. 1999, c.18. On that date I also issued a search warrant pursuant to s.12 of the *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c.30 (4th Supp.). The warrants were issued at the request of the Attorney General, representing the requesting state, and partly on the basis of an arrest warrant issued by a judge of the German Federal Court of Justice on March 9, 2000. That warrant directs that 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 are crimes punishable under the German penal code.

[3] Extradition has been described by the Supreme Court of Canada as primarily a function of the executive branch of government. It said that extradition proceedings involve a two-stage process: committal and surrender. I prefer to think of it as three different phases of one process: (a) the decision to institute proceedings; (b) the committal proceedings; and (c) the decision to surrender the person sought to the requesting state. The first and third phases are the responsibility of the executive branch as exercised by the Minister of Justice. These functions are essentially political in nature. It is only the second phase of this process, the committal proceeding, which is judicial in nature. The function of the extradition judge is to determine if there is sufficient evidence to order committal of the person sought to await surrender. It is then the Minister who decides whether or not to actually surrender the person to the requesting state. The executive and judicial functions in the extradition process are clearly distinct and separate ones: see *United States v. Kwok* (2001), 152 C.C.C. (3d) 225 (S.C.C.), at paras. 27-33.

[4] In this case, the Minister of Justice issued an authority to proceed to the Attorney General, pursuant to s.15(1) of the *Extradition Act*, on November 28, 2000. That document requires this court to proceed with the committal hearing. It identifies Ebke as the person sought and lists ten substantive Canadian criminal offences that the Minister of Justice says correspond to the conduct alleged to be crimes under German law.

[5] In two earlier reasons for judgment (2001 NWTSC 2, [2001] N.W.T. J. No. 2 (Q.L.), released January 15, 2001; and 2001 NWTSC 17, [2001] N.W.T.J. No. 13 (Q.L.), released February 23, 2001), I addressed a number of substantive and procedural issues, including a constitutional challenge to the evidentiary rules contained in the *Extradition Act*. I will attempt to avoid covering the same ground once again. In these reasons, I address the ultimate issue as to whether a committal order should be made as well as two further issues related to these proceedings: (i) an application on behalf of Ebke for a judicial stay of proceedings on the basis that his arrest gave rise to an abuse of process; and (ii) an application by the Attorney General for an order, pursuant to s.15 of the *Mutual Legal Assistance in Criminal Matters Act*, sending the materials seized as a result of the execution of the search warrant to the requesting state, and a cross-application on behalf of Ebke and his partner, Regina

Erika Pfeiffer, for an order returning all of the seized items to them. I propose to deal with these issues, which raise discrete points, in what I consider to be the logical order: the stay application, the search and seizure issue, and then the committal question.

THE STAY APPLICATION:

1. Background:

[6] On May 18, 2000, Ebke was arrested on a provisional arrest warrant. That warrant was issued by me *ex parte* on receiving the sworn Information and Complaint of Cpl. Susan Elizabeth Munn of the Royal Canadian Mounted Police. Ebke spent 32 days in custody and was then released on bail with stringent conditions. Notwithstanding his release on bail, Ebke has applied for a judicial stay of proceedings challenging the basis for his arrest and the procedure employed to issue the provisional arrest warrant.

[7] There are two grounds put forth in support of this application:

(1) The documentation relied upon in support of the arrest warrant, and the extradition request itself, indicates that Ebke is wanted in the requesting state for investigative purposes only. He is not wanted for the purpose of prosecution, as required by the *Extradition Act* and the Canada-Germany treaty on extradition, and indeed no formal prosecution has yet been commenced in Germany. This violates the protections afforded by sections 7 and 9 of the Charter of Rights and Freedoms since there is no authority in Canadian law to arrest a person and deprive them of their liberty on the basis of mere suspicion and for investigative purposes only.

(2) The constitutional standard that must be met to justify an arrest is that of reasonable and probable grounds to believe that the person arrested has committed an offence. In this case, Cpl. Munn did not expressly aver in her Information and Complaint to having such belief. This is a requirement inherent in the process for the issuance of a provisional arrest warrant.

[8] Therefore, in the submissions of Ebke's counsel, Ebke was subject to an unlawful and arbitrary arrest, a continuing deprivation of his liberty interests due to the constraints imposed by the bail order, and the prospect of a committal and surrender to a foreign state, all on the basis of steps contrary to Canadian law. It is submitted

that this is an ongoing violation of the principles of fundamental justice and an abuse of the court's process and that the only appropriate remedy would be a judicial stay of proceedings.

2. Legislation:

[9] To properly analyze these submissions, it is necessary to review the applicable provisions of the *Extradition Act* and the treaty as well as some recent jurisprudence respecting the jurisdiction of an extradition judge to remedy constitutional violations or an abuse of process. The treaty is relevant because the Act requires compliance with both the Act and the treaty as prerequisites for extradition.

[10] The relevant sections of the *Extradition Act* make it clear that it is the Minister of Justice who is responsible for the implementation of extradition agreements, the administration of the Act, and dealing with requests for extradition: s.7. A request for extradition or the provisional arrest of a person must be made to the Minister: s.11. The extradition treaty between Canada and Germany, executed in 1979, provides also that a request for extradition shall be communicated through the diplomatic channel (Article XIII) as well as a request for the provisional arrest of the person sought (Article XVII).

[11] The general principles underlying extradition are found in s.3 of the Act:

> 3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on ! or enforcing a sentence imposed on ! the person if
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> (a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment: and
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> (b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

(2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.

(3) Subject to a relevant extradition agreement, the extradition of a person who has been sentenced to imprisonment or another deprivation of liberty may only be granted if the portion of the term remaining is at least six months long or more severe punishment remains to be carried out.

and in Articles I and II of the treaty:

I. (1) The Contracting Parties undertake, subject to the provisions and conditions prescribed in this treaty, to extradite to each other any person found within the territory of the requested state who is subject to prosecution by a competent authority of the requesting state for, or convicted by such an authority of, an offence committed within the territory of the requesting state and who is claimed by that authority for the purpose of prosecution or for the purpose of carrying out a sentence.

...

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

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

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

(b) carrying out a sentence, where deprivation of liberty of at least six months remains to be served or, if more than one sentence is to be carried out, where deprivation of liberty of at least six months in the aggregate remains to be served.

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

[12] The pertinent point for the purpose of this discussion is that the Act and the treaty clearly specify that a person may be extradited only (a) for the purpose of prosecution or (b) for the purpose of carrying out a sentence. In this case the Attorney General says that Ebke is wanted for the purpose of prosecution. The Authority to Proceed issued by the Minister of Justice refers to Ebke as "a person sought for prosecution". The Authority to Proceed is authorized by s. 15(1) of the Act:

> 15.(1) The Minister may, after receiving a request for extradition and being satisfied that the conditions set out in paragraph 3(1)(a) and subsection 3(3) are met in respect of one or more offences mentioned in the request, issue an authority to proceed that authorizes the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of the person under section 29.

[13] The Act also addresses the question of provisional arrest warrants, and the respective roles assigned to the Minister and to the judiciary, in sections 12 and 13:

> 12. The Minister may, after receiving a request by an extradition partner for the provisional arrest of a person, authorize the Attorney General to apply for a provisional arrest warrant, if the Minister is satisfied that
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> (a) the offence in respect of which the provisional arrest is requested is punishable in accordance with paragraph 3(1)(a); and
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> (b) the extradition partner will make a request for the extradition of the person.
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> 13.(1) A judge may, on *ex parte* application of the Attorney General, issue a warrant for the provisional arrest of a person, if satisfied that there are reasonable grounds to believe that
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> (a) it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence;
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> (b) the person is ordinarily resident in Canada, is in Canada or is on the way to Canada; and

> (c) a warrant for the person's arrest or an order of a similar nature has been issued or the person has been convicted.

[14] This review of the statute and the treaty leads to only one conclusion. It is the Minister who is charged with the responsibility of determining if a foreign request, whether for extradition or for the provisional arrest of a fugitive, meets the statutory and treaty prerequisites. It is the Minister who must be satisfied that the conditions in ss. 3(1)(a) of the Act are met before issuing an Authority to Proceed. It is the Minister who has the discretionary power to authorize the Attorney General to apply for a provisional arrest warrant but again only if he or she is satisfied that the request comes within the scope of ss. 3(1)(a).

3. Jurisdiction:

[15] The question of jurisdiction has two aspects.

[16] First, there is the question of my jurisdiction, on this committal hearing, to review the arrest warrant. I was the judge who issued that warrant. As I stated in one of my earlier judgments, it seems to me that a motion to set aside a judge's discretionary order made *ex parte* may always be entertained if it is asserted that there were no reasonable grounds to issue the order in the first place. I heard nothing that would cause me to change my opinion in that regard.

[17] The other question of jurisdiction, however, deals with the power of an extradition judge to stay proceedings whether as a remedy for abuse of process or for constitutional violations. This question has recently been answered by the Supreme Court of Canada in a series of judgments: *United States v. Kwok*, *supra; United States v. Cobb* (2001), 152 C.C.C. (3d) 270; and *United States v. Shulman* (2001), 152 C.C.C. (3d) 294. I need not review these cases in detail. It is sufficient for these purposes to note a number of significant points that reinforce much of the case law to date and also clarify the extent of powers enjoyed by an extradition judge.

[18] Jurisprudence in the extradition field has consistently held that there is a clear distinction between the judicial role and the ministerial or executive role. The judicial role essentially determines if a factual and legal basis exists for extradition. That is the requirement to determine if there is a *prima facie* case to support a committal if the

alleged acts had been committed in Canada. This role is consistently described as a "modest" one. There must be a statutory source for attributing a particular function to the extradition judge: see *McVey v. United States*, [1992] 3 S.C.R. 475; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *United States v. Dynar*, [1997] 2 S.C.R. 462. The ministerial or executive role, however, is political in nature. It is there that the interests of the fugitive are weighed in the context of Canada's international treaty obligations. None of this has been changed by the recent judgments.

[19] The Supreme Court has clarified, however, that, since the extradition hearing is presided over by a superior court judge, that judge is empowered to grant any statutory, common law or Charter remedy related to an issue that properly arises before him or her. Such an issue would be one relevant to the committal phase of the extradition process provided that the judge does not usurp the Minister's function: see *Kwok* (at paras. 43-44). And, since extradition is primarily a function of the executive, any function within the extradition process that is not expressly assigned by statute to the extradition judge remains with the executive: *Ibid* (at para.31). The Court was primarily engaged in an interpretation of s.9(3) of the old *Extradition Act* (replaced by the current Act in 1999). That sub-section however was substantially maintained and is now found as s.25 of the Act. Therefore these conclusions are pertinent to the present legislation.

[20] The Supreme Court also went on to conclude that a stay of proceedings is available to a committal judge to remedy an abuse of process, whether at common law or as a violation of the principles of fundamental justice incorporated in s.7 of the Charter. The two rest on the same principles and call for the same remedies. This is not only an aspect of Charter jurisdiction but an aspect of a Canadian court's inherent and residual discretion at common law to control its own process and prevent abuse.

[21] The principles animating recourse to a stay of proceedings were also affirmed in *Cobb* (at paras. 37-38):

> Canadian courts have an inherent and residual discretion at common law to control their own process and prevent its abuse. The remedy fashioned by the courts in the case of an abuse of process, and the circumstances when recourse to it is appropriate were described by this Court in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. 128, at pp. 136-137). The Court in *Jewitt* also adopted "the caveat added by the Court in Young that this is a power which can be exercised only in the 'clearest of cases'" (p. 137)
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> ....
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> When a stay of proceedings is entered in a criminal case for abuse of process. "[t]he prosecution is set aside, not on the merits ..., but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court". *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. The remedy is reserved for the clearest of cases and is always better dealt with by the court where the abuse occurs: *R. v. Jewitt*, [1985] 2 S.C.R. 128.

[22] Based on these authorities, I have no doubt that I have jurisdiction to entertain this application for a stay based on alleged defects in the provisional arrest warrant process.

4. Analysis:

(a) For Purpose of Prosecution:

[23] The first ground in support of the stay application is that the purpose of the extradition request and Ebke's arrest is not the prosecution of Ebke in Germany but merely for investigation. Counsel argued that since Canadian law does not authorize arrest for the purpose of investigation then Ebke's arrest, detention, and restrictive bail release were unlawful, arbitrary and contrary to the principles of fundamental justice.

[24] In support of this argument, Ebke's counsel points first to the German arrest warrant. That document was issued by "The Preliminary Proceedings Judge at the Federal Court of Justice" in Germany on March 9, 2000. It is entitled "Warrant of Arrest" and names Ebke as the person to be "arrested and held in pre-trial detention pending further investigations". It goes on to state that "the accused person Walter Lothar Ebke is strongly suspected of having" been involved in the alleged German

crimes. The request from the German Federal Attorney General for the arrest of Ebke refers to how "the person sought is urgently suspected" of being involved in the alleged crimes. The German prosecutor's summary of the case states the subject as "investigation proceedings against Walter Lothar Ebke because of suspicion". Counsel argued that all of this should lead to the conclusion that Ebke is wanted merely for investigation and on suspicion only.

[25] Ebke's counsel concedes that there is no need for an actual prosecution to be already commenced to satisfy this requirement; an imminent prosecution or at least a present intention to prosecute would be sufficient. But, in his submission, what is not sufficient is the mere possibility of prosecution depending on the outcome of further investigations. Counsel presented at the hearing an affidavit from German counsel for Ebke confirming that no formal proceedings have as yet been commenced in Germany.

[26] Counsel for the Attorney General responded that use of such words as "investigation" and "suspicion" are matters of form not substance. Their usage in German proceedings may have different connotations in German law than in our own. And one must be mindful that there is no role for the extradition judge to play in assessing foreign law or proceedings: see *Pacificador v. Philippines* (1993), 83 C.C.C. (3d) 210 (Ont. C.A.), leave to appeal refused [1994] 1 S.C.R. x. More particularly, counsel referred to the Certification of the case documentation provided by the Senior Public Prosecutor in Germany. That document states the subject as "investigation proceedings against Walter Lothar Ebke because of suspicion of " the crimes alleged against him in Germany. But it also states that "the Federal Republic of Germany petitions for the extradition of (Ebke) for prosecution". And the prosecutor goes on to certify 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 prusuant to the law of the Federal Republic of Germany". These points are all ones required for certification of the record of the case as stipulated by s.33(3)(a) of the Act.

[27] There is no dispute that Canadian law does not authorize the arrest of someone on mere suspicion or for investigative purposes. An arrest, whether under common law or pursuant to the Criminal Code, can only be made if there are reasonable and probable grounds to believe that the person to be arrested has committed an offence.

An arrest may be made and the investigation may continue but that does not alleviate the need for those grounds. If all that can be said is that the person is a suspect then that without more does not justify an arrest: see *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.), at 322-327; *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.), at 149-150. But this may be quite beside the point because the *Extradition Act* also does not allow arrest for mere investigation purposes. The purpose must be, a set out in s.3(1) of the Act, and relating to this case specifically, the prosecution of the person sought.

[28] On this issue I agree with counsel for the Attorney General. It would not be warranted to conclude, merely from an examination of the wording of the German documents, that Ebke is wanted just for investigation purposes. More importantly, this is not an issue that is within my statutory mandate as the extradition judge to decide. In my opinion, any determination as to the "purpose" for the extradition request or the request for the arrest warrant rests with the Minister. There is nothing, in the Act or otherwise, to suggest that the extradition judge has jurisdiction to determine whether someone is a person sought for the "purpose of prosecution" or to review the decision of the Minister in this regard.

[29] It is the Minister who must determine if the statutory foundations in s.3(1) of the Act are satisfied before issuing either an Authority to Proceed (so as to commence the committal proceedings) or the authorization to the Attorney General to apply for a provisional arrest warrant. This court has no review or appellate jurisdiction over those decisions. On this point I agree with the comments of Watt J. in *Germany v. Schreiber*, [2000] O.J. No. 2618 (S.C.J.), at para. 87:

> It is the responsibility of the Minister to implement extradition agreements, administer the Act and deal with the requests for extradition made under either or both of them. The requests for provisional arrest or extradition are made to the Minister. It is for the Minister to review the materials offered by the extradition partner in support of the request to determine whether it is in order. This determination involves, amongst other things, a consideration of foreign law. It is the Minister who must be satisfied that the requirements of s.3(1)(a) of the Act have been met before she or he is entitled to instruct the Attorney General to apply for a provisional warrant of arrest under s.12 or issue an authority to the Attorney General to proceed under s. 15(1) of the Act. Section 3(1)(a) of the Act defines extraditable conduct. It also makes it clear that the purpose of the extradition partner in requesting extradition must be any of
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> i. prosecuting the fugitive;

ii. imposing a sentence; or,

iii. enforcing a sentence already imposed in the foreign jurisdiction.

> There is nothing in the Act or treaty that entitles the extradition hearing judge to review the Minister's decision or decide, *de novo* as it were, whether the fugitive is a person sought for prosecution.

See also *United States v. Drysdale*, [2000] O.J. No. 214 (at para. 78); *United States v. Quintin*, [2000] O.J. No. 791 (at para. 101).

(b) Reasonable and Probable Grounds:

[30] The second ground of attack on the arrest warrant focuses on the sworn Information and Complaint of Cpl. Munn used in support of the *ex parte* application for the warrant. Counsel argued that since Cpl. Munn at no point swore that she had reasonable and probable grounds to believe that Ebke committed the alleged offences then that is insufficient to support issuance of the warrant. And, if the Act permits the issuance of a warrant on less than reasonable and probable grounds then it is constitutionally defective and inoperative. Hence Ebke's arrest was arbitrary and unlawful.

[31] It will be recalled that s.13(1) of the *Extradition Act* authorizes a judge to issue a provisional arrest warrant if satisfied that there are reasonable grounds to believe that (a) it is necessary in the public interest to arrest the person (including the need to prevent escape or the commission of an offence); (b) the person is ordinarily resident in Canada; and (c) a warrant for the person's arrest has been issued. The points raised here address what I would call a substantive issue, that being a challenge to s.13(1) itself, and a procedural issue, that being the alleged defect in Cpl. Munn's Information to obtain the warrant. The substantive issue would result in a violation of s.9 of the Charter (the protection against arbitrary detention) since then it would be the statutory standard that is constitutionally impaired. The procedural issue would result in a violation of s.7 of the Charter (the fundamental principles of justice) since there the complaint is that the procedure used by Cpl. Munn, and this court, in issuing the warrant was defective. (For an explanation of this distinction see P.W. Hogg, *Constitutional Law of Canada*, 1999 loose-leaf edition, at 46-5 & 46-6). If the law

is constitutionally defective, then the court can invalidate it under s.52 of the Charter. If the procedure used in this case does not comply with constitutional standards then it will be a question of the appropriate remedy under s.24 of the Charter.

[32] It will also be remembered that the general principle underlying the power of arrest is that there must be reasonable and probable grounds to believe that the person to be arrested has committed a crime. In the context of extradition this becomes somewhat problematic since, of course, Canadian authorities do not have direct involvement in the investigation of a crime committed in another country. So how is this standard to be satisfied?

[33] Section 13(1) of the Act requires a judicial assessment of the information presented so as to satisfy the criteria set out therein. It is the judge who must be "satisfied" that there are reasonable grounds to believe that it is necessary in the public interest to arrest the person, that the person is ordinarily resident in Canada, and that a foreign warrant for the person's arrest has been issued. "Satisfied" in this context means simply that the judge makes up his or her mind, comes to a conclusion, based on the evidence presented: see *Blyth v. Blyth*, [1996] A.C. 643 (H.L.), at 676. There is an obligation on the applicant to present sufficient evidence so as to enable the judge to be satisfied that there are those reasonable grounds.

[34] The police officer swearing the Information, on the other hand, can only provide whatever information has been provided by the requesting state as to the commission of the crimes. The officer may have conducted some direct investigation, such as determining the residence of the person sought, but by necessity the bulk of the officer's information is hearsay. It depends on material provided by someone else and already reviewed by the executive branch (since the Minister is the one who decides whether to authorize the Attorney General to apply for a provisional arrest warrant). So, in this context, is it necessary for Cpl. Munn to form a subjective belief that reasonable and probable grounds exist to arrest or is it sufficient if those grounds are objectively established? And does Cpl. Munn have to expressly state her belief? Those questions seem to me to be at the core of this issue.

[35] In this case, Cpl. Munn confirmed, in her Information and Complaint, that she received and reviewed various German documents (and their English translations), including the request for the provisional arrest (which contains an outline of the alleged facts in support of the charges), the German arrest warrant (with the grounds attached

thereto), the annex to the warrant (containing the applicable German penal provisions), and the Minister's authorization. All of these documents were attached as exhibits. She herself summarized the allegations against Ebke in the body of the Information. She set out the information available to her as to Ebke's identification and his residence in Yellowknife (and details as to her own inquiries in that regard). She also set out facts supporting her belief that there are grounds to think that Ebke may flee should he become aware of the extradition request, thus necessitating his arrest. She set out her belief that reasonable grounds exist to satisfy the three criteria stipulated in s.13(1) of the Act. And, finally, she swore that she believed that the facts and matters set out in her Information were true.

[36] In my opinion, Cpl. Munn did all that could be done in the context of an extradition case. She provided the evidence necessary for a judge to form the judicial opinion that reasonable and probable grounds existed to issue the arrest warrant. I fail to see what more she could have done. Anything more could very easily have led her to make evaluations of German law and investigative procedures. If Canadian courts are not allowed to do this then I fail to see how a Canadian police officer could do it. It must be remembered that the issuance of a provisional arrest warrant is a judicial act. It is not an exercise in semantics. The point is whether the judge issuing the warrant can be satisfied that reasonable grounds exist, not whether any particular formulaic expression is used in the material used to support the application.

[37] With respect to the statutory provisions, I am also of the opinion that s.13(1) satisfies constitutional requirements. The protection afforded by s.9 of the Charter is against "arbitrary" detention or imprisonment. A detention would be "arbitrary" if it was discretionary and there were no criteria, express or implied, which governed its exercise: *R. v. Hufsky*, [1988] 1 S.C.R. 621. Section 13(1), in my opinion, does set out criteria to govern exercise of the arrest power. And those criteria must be premised on reasonable grounds.

[38] One criterion is the existence of a foreign arrest warrant. That assumes that foreign process is engaged. Another criterion is the presence of the person sought in Canada. That triggers the involvement of Canadian process. The third, and primary, criterion is that it is necessary in the public interest to arrest the person. What constitutes the "public interest" is not explained (other than the inclusion of the risk of flight or the commission of offences). But that phrase — "necessary in the public interest" — is not unknown to Canadian domestic law. Section 512 of the Criminal

Code provides that a justice has the power to issue an arrest warrant, at any stage of proceedings, where the justice has reasonable and probable grounds to believe that it is necessary in the public interest to issue the warrant. The Criminal Code also does not define what is meant by "public interest". Presumably the risk of flight would be a factor. Reasonable grounds to believe that the person sought committed the alleged crimes would be another factor. In the extradition context, it seems to me that ensuring Canada's compliance with its international treaty obligations respecting the apprehension of alleged foreign criminals would also be in the public interest.

[39] In my opinion s. 13(1) does not permit arbitrary detention or imprisonment. It contains rational criteria as well as the requisite constitutional standard of reasonable grounds. It provides for prior judicial assessment of the evidence in support of the warrant. Furthermore, the liberty interests of the person are protected by other provisions of the Act which impose strict time limits on the steps that the authorities must take and that apply Canadian bail laws. Thus I reject this argument.

5. Conclusion:

[40] I dismiss the application for a stay of proceedings in respect of the issuance of the provisional arrest warrant. I have concluded that I have no jurisdiction to determine if the foreign request is for the purpose of prosecution or merely for investigation. That is something left within the jurisdiction of the Minister and I have no power to conclude otherwise. I have also concluded that the provisional arrest warrant was properly and lawfully issued, based upon reasonable grounds, in accordance with a constitutionally valid statutory provision.

[41] Even if I had concluded that there was some defect in the procedure respecting the provisional arrest warrant, I would not be inclined to grant a stay of proceedings as the remedy. Nothing has been placed before me to suggest that the detention of Ebke produced any evidence, or prevented him from making answer and defence (if I may borrow that term from domestic criminal law) in these extradition proceedings, or otherwise affected the fairness of these proceedings. In my opinion, the integrity of the court's process would not be tainted to such an extent that it would warrant terminating these proceedings. Further, the provisional arrest procedure is not the only means of bringing a fugitive to court. A summons or an arrest warrant could have been issued after the Minister issued the Authority to Proceed: see s.16 of the *Extradition Act*. Thus the person sought would be before the court one way or the

other. Therefore, in my opinion, this is not one of those clearest of cases that would justify a stay of proceedings.

THE SEARCH AND SEIZURE ISSUE:

1. Background:

[42] On May 18, 2000, in addition to issuing the provisional arrest warrant, I also issued a search warrant under the authority of s.12 of the *Mutual Legal Assistance in Criminal Matters Act*. That statute requires that a hearing be held to consider the execution of the warrant as well as the report of the peace officer concerning its execution. Accordingly I also heard evidence and representations respecting execution of the warrant and the report.

[43] The purpose of the hearing before me is to determine if any item seized should be sent to the requesting state or returned to its rightful owner. This is found in s.15 of the Act:

> 15. (1) At the hearing to consider the execution of a warrant issued under section 12, after having considered any representations of the Minister, the competent authority, the person from whom a record or thing was seized in execution of the warrant and any person who claims to have an interest in the record or thing so seized, the judge who issued the warrant or another judge of the same court may
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> > (a) where the judge is not satisfied that the warrant was executed according to its terms and conditions or where the judge is satisfied that an order should not be made under paragraph (b), order that a record or thing seized in execution of the warrant be returned to
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> > > (i) the person from whom it was seized, if possession of it by that person is lawful, or
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> > > (ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or
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> > (b) in any other case, order that a record or thing seized in execution of the warrant be sent to the state or entity mentioned in subsection 11(1) and include in

> the order any terms and conditions that the judge considers desirable, including terms and conditions
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> (i) necessary to give effect to the request mentioned in that subsection,
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> (ii) with respect to the preservation and return to Canada of any record or thing seized, and
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> (iii) with respect to the protection of the interests of third parties.

[44] The statute contemplates that anyone who claims to have an interest in something seized has the right to be heard at the hearing. I therefore granted standing to Regina Erika Pfeiffer to appear by counsel at the hearing on this issue. Ms. Pfeiffer has been variously described as Ebke's "partner" and a "co-occupant" of Ebke's residence in Yellowknife.

[45] A number of points were raised on behalf of Ebke and Pfeiffer in opposition to the Attorney General's request for an order sending the materials seized on to Germany. None of the points raised an argument as to the issuance of the search warrant *per se*. The arguments related primarily to the execution of the warrant. It was submitted that the police failed to comply with the terms and conditions of the warrant.

2. Evidence:

[46] A number of witnesses were called respecting the search. That evidence revealed a number of significant points.

[47] Cpl. Munn was designated as the "lead investigator" on the Ebke file. She had the responsibility of reviewing the material received from Germany and she developed an "operational plan" for the arrest of Ebke and the search and seizure requested by Germany. Cpl. Munn reported to Staff Sgt. Grundy. She kept him briefed on her work. Other officers were brought in on the operation.

[48] On or about May 10, 2000, Cpl. Munn and some other officers started to prepare the Information to Obtain the search warrant. Cpl. Munn completed it and swore it on May 18. In it she outlines, among other things, that (i) the Federal Court of Justice in Germany issued an order authorizing a search of the residence of Ebke and Pfeiffer and the seizure of material related to the alleged offences by Ebke; (ii) the

Canadian Minister of Justice approved the German request for assistance with respect to a search and seizure to be conducted in Canada; (iii) the residence of Ebke and Pfeiffer is also operated as a bed-and-breakfast business and there may be guests on the premises; (iv) the R.C.M.P. were receiving assistance from a German police officer, Kriminal ober Kommissar Trede, and were requesting that he be authorized to attend as an observer at the search; and, (v) Cpl. Munn was also applying for a search warrant under the *Immigration Act* on grounds alleging a violation of that Act by Ebke and Pfeiffer (and others). The application for the warrant in relation to the *Immigration Act* investigation was made in the Territorial Court and a judge of that court issued a warrant.

[49] On May 18 I issued the search warrant requested under the *Mutual Legal Assistance in Criminal Matters Act.* The warrant was directed to Cpl. Munn by name. This was in compliance with s.12(1) of that Act which states that a judge may issue a search warrant "authorizing a peace officer *named therein* to execute it" (emphasis added). The warrant set out the alleged German offences. It also set out a lengthy description of things and records of a certain type which may afford evidence of the commission of those offences. The warrant stipulated specific measures for the search of any guest rooms and structures. It also authorized the presence of Officer Trede:

> I authorize the presence of Kriminal ober Kommisar Trede of the B.K.A. as an observer at the search and I authorize him to enter onto the premises to be searched.

[50] The search was carried out in the evening of May 18 and 19 (from approximately 8:40 P.M. to 2:05 A.M.). Prior to the search a briefing was held with all of the officers involved. The evidence was that Staff Sgt. Grundy had assigned Sgt. Hardy to be the commander of the search team and the on-site director of the search. Cpl. Munn was charged with the arrest of Ebke and she was the commander of the team assigned to that task. Cpl. Munn took no part in the search or the decisions as to what to seize (indeed she was only at the search site for a short time at approximately 1 A.M. when Sgt. Hardy briefed her on the progress of the search).

[51] It would be somewhat inadequate to simply say that a large volume of material was seized. There were books and other written materials, boxes and entire drawers of papers, a computer (from which some 35,000 files were recovered, both active and

deleted), financial records, reference books (including Pfeiffer's academic thesis for a university degree), over 4000 photographic slides and countless photographs, newspaper articles, personal notes, answering and fax machines, and other items. Cpl. Brandford was the on-site exhibit custodian. He prepared the initial list of items seized. Neither he nor Sgt. Hardy, nor any other member of the search team, attempted to differentiate between items being seized under the warrant issued by me or those things being seized under the warrant issued out of the Territorial Court relating to the alleged *Immigration Act* offences.

[52] Cpl. Brandford prepared the initial exhibit control list. Another officer, Sgt. Code, prepared a detailed inventory of the seized items. Computer files and hardware were forwarded to Ottawa for forensic examination. Cpl. Munn from time to time reviewed various exhibits and eventually prepared a composite exhibit list where she grouped items by categories divided on the basis of those items she thought should not be sent to Germany, items that may be returned to Ebke and Pfeiffer but which need further investigation, items where consultation with German officials is needed so as to assess their investigative relevance, and items which she considered to have investigative value. Cpl. Munn also decided on her own to return some things to Ebke and Pfeiffer and that was done prior to the hearing before me.

[53] It is fair to say that the Canadian authorities still do not know if some of the material seized is even connected to the subject-matter of the warrant. Much of the written material is (obviously) in the German language. Much of this has not been translated.

[54] On June 9, 2000, Cpl. Munn prepared and filed the report on the execution of the warrant as required by s.14(1) of the Act. In it she identified herself as "the peace officer who executed the warrant", stated that "I did the following: 1. Searched the premises ... (and) 2. Seized the following ...", and attached Cpl. Brandford's exhibit list and Sgt. Code's notes.

[55] Several officers also testified about the role of Officer Trede at the search site. Trede was on the scene throughout the search accompanied by an R.C.M.P. Superintendent. Also on the scene was a German speaking R.C.M.P. officer, Insp. Brettschneider. Cpl. Brandford testified that Officer Trede pointed out some item to be seized. He said that one of the other officers had also indicated that Trede had told him to take a certain collection of binders and boxes. Cpl. McBride, another officer

active in the search, testified that if he came across documents or materials in German then he would ask either Insp. Brettschneider or Officer Trede what it was and what it may pertain to. Then, based on what he was told, he would decide whether or not to seize it. Cpl. McBride testified that at one point Officer Trede drew his attention to a book that should be seized. Cst. Taker testified that he showed some German documents to Trede who indicated whether or not they should be seized. There was also evidence that Trede, and the Canadian officials, intended, indeed needed, to examine and sift through the material seized to determine if any particular item had investigative value.

3. Issues:

[56] There is no discernable dispute among counsel as to the broad aims of this review exercise. Under s.15(1) of the Act, there are only two options available: either order that the material seized, or part of it, be sent on to the requesting state or order that it be returned to the owners. This is a discretionary power. The Attorney General has the burden of satisfying me that the warrant was executed according to its terms and conditions. I also have to consider all of the circumstances to determine if an order sending the material to the requesting state should not be made. This was explained in *R. v. Gladwin* (1997), 116 C.C.C. (3d) 471 (Ont. C.A.), at 474-475 (leave to appeal to S.C.C. refused 117 C.C.C. (3d) vi):

> In my opinion, despite the awkward language of this section, couched as it is in negatives and coupled with the disjunctive "or" instead of the conjunctive "and", this section imposes a double burden upon the judge called upon to make an order under s. 15(1)(b) of the Act sending the material seized to the foreign state. He or she is obliged under s.15(1)(a) to review what has transpired to the date of the return of the application. Before he can order that the record or thing seized be sent to the foreign state, the reviewing judge must be satisfied, first, that the warrant was executed according to its terms and conditions and, second, that he is satisfied that there is no reason why the order should not be made. The respondent submits, and I agree, that the inherent nature of this second condition necessarily bestows discretion on the reviewing judge to consider all relevant factors bearing on the application.
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> In both of these instances, the reviewing judge is exercising a jurisdiction akin to that of a trial judge considering the admissibility into evidence of the things seized pursuant to a search warrant. In the case in appeal, the reviewing judge had to consider the conduct of the police in the execution of the warrant and whether the search warrant was facially valid.

And, as part of the overall consideration of the circumstances, I must also keep in mind "the need to ensure that Canada's international obligations are honoured and to foster co-operation between investigative authorities in different jurisdictions": *R. v. Budd* (2000), 150 C.C.C. (3d) 108 (Ont. C.A.), at 122.

[57] I will address each of the grounds raised on behalf of Ebke and Pfeiffer against the order sought by the Attorney General.

(a) Facial Validity of the Warrant:

[58] The argument here is that the terms of seizure are overly broad and vague. Counsel for Ebke, in particular, submitted that the description in the warrant of the things to be seized are cast so broadly that it did not convey definable parameters or limits to guide the police in their search. It therefore necessarily devolved a great deal of discretion to the police. This would, it was argued, render the warrant invalid and, if so, then the search was not one authorized by law.

[59] As a corollary to his first argument, counsel also submitted that there was no evidentiary nexus in time between the alleged foreign offences committed several years ago and the reasonable probability that evidence will be found now in the place to be searched. The timing of the alleged offences ended in 1993 and, as counsel put it, all that was put forward to justify the temporal connection, if any, was assumption and speculation.

[60] The law as to the description in a search warrant of things to be searched for can be stated broadly but each case depends on its own circumstances. This law, as it has developed generally for criminal search warrants, is equally applicable to a warrant under the Act. Both the Information to Obtain and the warrant must describe the items to be searched for with sufficient particularity so as to permit identification of the items and to avoid "fishing expeditions". However, the description in the Information and warrant must be viewed as a whole in the context of the nature of the alleged offences. The degree of specificity required was explained by Osler J. in *Re Church of Scientology and the Queen (No. 6)* (1985), 21 C.C.C. (3d) 147 (Ont. H..C.J.), affirmed 31 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused, at 176:

> The description of what is to be searched for must not be so broad and vague as to give the searching officers *carte blanche* to rummage through the premises of the target. The things must be described in such a way as to guide the officer or officers carrying out the search and assist them in identifying the object.

[61] There are no specific guidelines that can be universally applied. It may be sufficient if objects are described by class and type. As noted by the Court of Appeal in the *Scientology* case (*supra*, at 516), it may be inevitable that executing officers will have to exercise some discretion where it is not possible to describe the things to be seized with precision. Some latitude in description must be permitted to recognize that the police are in an investigative stage (and, in this case, assisting the investigation of a foreign case).

[62] I am of the opinion that the description in the warrant of the things to be seized was sufficient to guide the police and reasonable in the circumstances. As submitted by counsel for the Attorney General, the question is whether this type of material could provide evidence of the crimes alleged as opposed to whether each particular item seized actually does so. The breadth of the description can be related back to the nature of the allegations against Ebke. They are only in part allegations of specific acts. For the most part the allegations relate to a long-term association with a terrorist organization and different sorts of conduct as part of that association.

[63] With respect to the corollary point, I agree with Ebke's counsel that there should be evidence as to the nexus between a thing to be searched for and the alleged offence. But there is no need to identify a precise nexus. It is sufficient if there are reasonable grounds to believe a nexus exists. Here, as counsel for the Attorney General put it, there may be things in existence now that would provide evidence of past activity or links to past activity. Such items may be journals, correspondence, photographs, and other things relating to the alleged association over years between Ebke and other members of the organization. A direct link in time between the offences and the material seized is not therefore necessary.

[64] In my opinion the description of what to search for is sufficient and not overly broad or vague. Accordingly, I am satisfied that the warrant is valid.

(b) Manner of Execution of Warrant:

[65] The issue here is not specifically whether the police officers executed the warrant according to its terms (that will be the issue under the next two grounds). The issue is the manner in which the officers seized what they did. It is an argument going to the reasonableness of the way the search was conducted.

[66] Counsel for both Ebke and Pfeiffer made the same essential point. The seizure was overly broad and things were seized in bulk for later investigation without any idea as to their relevance or even in some cases their contents. They submit that the police basically took anything suspicious and thus engaged in nothing more than a "fishing expedition". There was no attempt to discern the relevance of material on site (even though the warrant did not expire for a further 22 hours after the police ended their search).

[67] Certainly a great deal of material was seized. And certainly, based upon initial impressions, it appears that much of the material was seized because the subject-matter is "political" in nature. Why some items were seized, such as Pfeiffer's academic thesis papers, seems truly inexplicable. But, there is no requirement on the police to examine each item before seizure for its evidentiary value: *Re Pica & Canada* (1985), 53 O.R. (2d) 193 (C.A.). There is no obligation to separate out files or documents. Also, there is nothing wrong, in my opinion, for the police to seize something for further investigation or analysis. This is exactly what was done with the computer equipment. The computer was seized without knowing what was on it. But it was seized so that information could be extracted from it. The same can be said for much of the material seized in this case.

[68] I may think that the executing officers could have been more discriminating in what they seized. I certainly think that some attempt should have been made to differentiate between items seized under this warrant and items seized under the Territorial Court warrant and those seized under both. But, at this investigative stage, the questions are whether the items relate to the description in the warrant and whether they could be of investigative value. It is not necessary for me to examine the seized items: see *United States v. Ross*, [1994] B.C.J. No. 971 (C.A.). The list of things seized satisfies me that generally they are of the same description or nature as the things listed in the warrant.

[69] Even if I did form the opinion that the seizure was overly broad, that in itself would not necessarily invalidate the warrant. It would then be a matter of determining

if the search itself was done in an unreasonable manner. That itself is a contextual issue and primarily relates to the physical manner in which the search is carried out. As noted in *R. v. Collins*, [1987] 1 S.C.R. 265, a search may be authorized by law but it may still be unreasonable, and thus contrary to s.8 of the Charter, if the manner in which the search was carried out was not reasonable. But then the burden is on Ebke and Pfeiffer to establish that on a balance of probabilities. Even if I may have some concerns about the broad sweep of the seizures, I am not convinced that the search was unreasonable from that perspective.

(c) Officer Named in the Warrant:

[70] The most significant point raised on behalf of Ebke and Pfeiffer concerns the requirement that the warrant be directed to a "peace officer named therein" (as per s. 12(1) of the Act). This is not a question as to the validity of the warrant but one as to whether the warrant was executed "according to its terms and conditions" (as per s.15(1)(a) of the Act).

[71] As I have recounted, the Information to Obtain was sworn by Cpl. Munn. The warrant was directed to Cpl. Munn and its terms authorized her to enter the premises to search and to seize things outlined in the description and any other evidence of the commission of the alleged offences. Section 14 of the Act requires the peace officer who executes a search warrant to file a report. Cpl. Munn did so. In it she stated that she searched the premises and that she seized the various items listed in the exhibit catalogue. The evidence, however, was very clear that Cpl. Munn was not the officer in charge of the search team; she did not decide what items were to be seized; and, she was not even on the scene during the search (except for a very brief period of time). Sgt. Hardy was commander of the search team and that assignment was made prior to seeking the search warrant.

[72] Counsel for Ebke and Pfeiffer argued that this evidence shows a flagrant disregard for the truth and a deliberate attempt by the police to mislead this court as to the execution of the search. I do not characterize it that harshly. I think the police were trying to act in good faith. But, what this does reveal is ignorance of the obligations imposed by the statute on the officer who is named in the warrant. And, frankly, there is no excuse for it.

[73] Section 12(1) of the Act, as referenced above, requires that a specific peace officer be named in the warrant. This differs from the general search warrant provision in s.487 of the Criminal Code by which any peace officer may execute a warrant. Section 12(1) is similar to what used to be found in s.12 of the old *Narcotic Control Act*. That section also required that a warrant be issued to "a peace officer named therein". So Canadian police officers should be aware of the distinction. And, it is somewhat trite law to say that the statutory provisions enabling a search, and the necessary formalities in the execution of a search warrant, must be strictly observed: see *Re Old Rex Cafe* (1972), 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.), at 283; *R. v. J.E.B.*, [1989] N.S.J. No. 383 (C.A.), at 6.

[74] The naming requirement found in the old *Narcotic Control Act* and other statutes was the subject of many cases over the years. The results of those cases are fairly consistent: see *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Genest* (1989), 45 C.C.C. (3d) 385 (S.C.C.) ; *R. v. Heikel* (1984), 57 A.R. 221 (C.A.); *R. v. Fekete*, [1985] O.J. No. 18 (C.A.). The legislative object in requiring that a specific peace officer be named is that somebody be directly responsible to account for the search. The naming requirement is a special condition and not a mere technicality. And, as stated in *Genest* (at 406): "While it is not expected that police officers be versed in the minutiae of the law concerning search warrants, they should be aware of those requirements that the courts have held to be essential for the validity of the warrant." And, I would add, they should be aware of what the courts have for years held to be essential as to the execution of warrants.

[75] The naming requirement is to ensure that there is one officer who is in charge of, and responsible for, the search. That officer must be personally present and supervise the search. That officer may have the assistance of others in carrying out the search but he or she cannot delegate the supervisory role to another officer. As noted in *Strachan*, the important point is that the search be conducted under the close control and supervision of the officer named in the warrant. The Chief Justice of Canada wrote (at para. 27-28):

> There must be some person responsible for the way the search is carried out.
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> This requirement is met when the officer or officers named in the warrant execute it personally and are responsible for the control and conduct of the search. The use of unnamed assistants in the search does not violate the requirement of [s.12 of the *Narcotics*

> *Control Act*] so long as they are closely supervised by the named officer or officers. It is the named officers who must set out the general course of the search and direct the conduct of any assistants. If the named officers are truly in control, participate in the search, and are present throughout, then the use of assistants does not invalidate the search or the warrant.

[76] I think there can be no doubt that Cpl. Munn failed to exercise that close control and supervision required of her as the officer named in the warrant. I recognize that she was tasked with leading the arrest team. But, and especially since the command responsibilities had been allocated prior to the application for the search warrant, it would have been an easy step to name Sgt. Hardy, who was designated as the leader of the search team, as the specified officer in the warrant. This is not a mere technicality. It is a serious disregard of the responsibilities cast upon the named officer by this type of statutory provision. And, in this case, I agree with the submissions of Ebke's counsel as to why the naming requirement was particularly critical: this was the search of a residence; it was also a bed-and-breakfast so there was a reason to suspect that innocent guests and their possessions may be on the scene; and, there was the presence of an officer from the requesting state as an "observer". Someone had to be responsible for ensuring that these concerns, concerns that were identified by the inclusion of special conditions in the warrant, were satisfied. And I agree with the submission of Pfeiffer's counsel when he said that the failure to have Cpl. Munn exercise this function was more than mere inadvertence. These were senior police officers making deliberate operational decisions and acting on the advice of counsel.

[77] Counsel for the Attorney General argued that this was not a substantive defect in the execution of the warrant. He suggested that some flexibility should be permitted since at least Cpl. Munn was exercising a senior role in the overall operation. He also referred me to the decision in *R. v. Dawson* (1999), 248 A.R. 82 (Q.B.), as supporting the proposition that deficiencies in Mutual Assistance search warrant procedures are less offensive than similar deficiencies under domestic law. In *Dawson*, the trial judge seems to have accepted the argument that lapses ought to be tolerated since holding the foreign authority and the competent Canadian authorities to too high a standard may defeat the purpose of the Act.

[78] If *Dawson* does stand for the proposition advanced by counsel then I respectfully do not agree with it. There must be some point to Parliament's inclusion

of a naming requirement for these search warrants. That point has been identified by the relevant jurisprudence. There must be some point to the legislative requirement to establish that the warrant was executed according to its terms and conditions. I think Parliament clearly intended that the statutory provisions respecting these types of search warrants be strictly observed. One may have flexibility with respect to the description of the offences and the description of the things to be seized — since the materiality of any potential evidence to those offences depends primarily on foreign law — but I see no reason to evade what is an explicit direction by Parliament to Canadian authorities for the conduct of a search on premises within Canada.

[79] Counsel for the Attorney General also referred me to the *Gladwin* case (*supra)* as an example where a defect in complying with the naming requirement was held to be insufficient to either invalidate the warrant or to require an order returning the things seized. In that case, the warrant (also obtained under the Act) had, on its face, the name of the designated officer typed in not on the authorizing line but just below it. It was argued that the warrant was invalid because it did not name the authorized officer. The judge at first instance and the Court of Appeal held that this deficiency did not impair the validity of the warrant or its execution.

[80] The *Gladwin* case, however, has to be considered in the context of its own particular facts. In my opinion it does not stand for a blanket argument that the naming provision need not be complied with nor that the officer named need not fulfill the responsibility of supervising the search. This is made clear from a summary of the facts taken from the judgment of O'Driscoll J. at first instance in *Gladwin*, [1996] O.J. No. 371 (Ont. Ct. of J.), at paras. 30-38:

> In this case,
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> (1) Corporal Thomas was the affiant of the affidavit on the Information To Obtain a Search Warrant that was sworn by McRae, J.
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> (2) Corporal Thomas' name appears on the warrant just below the authorizing lines: "To peace officers in the City of Toronto and in the Province of Ontario".
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> (3) Corporal Thomas attended at the site and, in fact, executed the warrant and supervised the other officers in the execution of the warrant.

(4) Corporal Thomas made the report as required by the Act, and he also made a supplementary report.

(5) There is no suggestion that the warrant was not executed in accordance with the terms and conditions thereof.

(6) There is no suggestion of a Charter violation.

(7) There is no suggestion that the administration of justice was besmirched in anyway.

(8) The solicitors for the respondents were on site at the time of the execution and their client, Dale Gladwin, was on site; he was given a copy of the warrant. There is no evidence that Corporal Thomas was challenged in anyway. There is no suggestion of any prejudice suffered by any of the respondents by the Absence of Corporal Thomas' name in the "authorizing" part of the warrant.

[81] If *Gladwin* is relevant at all to this issue, it is simply this: the name of the authorized officer can be put in the wrong place on the face of the warrant without invalidating the warrant. In the present case, there was an officer named, Cpl. Munn. She swore the Information to Obtain and she filed the report as required by the Act. The defect is that she did not in fact execute the warrant. She did not supervise the search. This is significantly different from the circumstances of *Gladwin*.

[82] Based on the evidence presented to me, and to employ the wording of s.15(1)(a) of the Act, I am not satisfied that the warrant was executed according to its terms and conditions.

(d) Role of Officer Trede:

[83] This issue also raises the question of whether the warrant was executed according to its terms and conditions but I prefer to view it in a different manner, one that I hope will become clear.

[84] The search warrant specifically provided that officer Trede, of the German federal police, could attend at the search site as an "observer". Cpl. Munn's Information to Obtain the warrant outlines the information provided by Trede as to the investigations conducted in Germany, general background information, and advice on the conduct of the investigation in Canada. I think Trede's role can be accurately

described as a "resource" person. This was the way Cpl. Munn phrased the request for Trede's attendance at the search site:

> -I would ask that KOK TREDE be authorized to attend the search as an observer as he may be able to provide crucial information from his previous experiences dealing with German Terrorists as to where and what we should be looking for with respect to methods of concealment and items used in Terrorist actions.

[85] As the evidence revealed, however, Trede took a more active role during the search than merely that of an observer or resource person. He examined things brought to him by the search officers and he gave advice on whether or not they should be seized. This is not the type of involvement I would associate with someone who is supposed to be a mere "observer".

[86] I do not think there is anything untoward about having officer Trede on the scene as an observer: see *R. v. Rutherford Ltd.* (1995), 101 C.C.C. (3d) 260 (B.C.S.C.), at para. 25. It is no doubt necessary and helpful to have an officer from the investigating jurisdiction provide background information and to act as an advisor and resource person. But that advice surely cannot extend to allowing the officer of the requesting state to examine items and then instruct the Canadian police to seize them. After all, the whole purpose of a s.15 hearing is to determine if the things seized should be sent to the requesting state. Nothing is to be sent to the requesting state unless an order is issued to that effect. It necessarily follows that no representative of the requesting state should be able to examine the material before such an order is made. Letting Trede see the materials and decide what to seize defeats the entire purpose of these statutory provisions.

[87] Counsel for the Attorney General submitted that officer Trede was doing what was contemplated. He was being a resource person. The role to be played by Trede, as outlined by Cpl. Munn in the Information to Obtain, was that Trede would give advice as to the type of things to look for and the methods of concealment that may be employed. That does not include examining specific items or advising what specific item should or should not be seized. If the problem was that many items were in the German language then I think the solution to that would have been to bring in more German-speaking R.C.M.P. officers to assist in the search. One was on site and he helped. Another one testified at the hearing before me. So it is not as if there were

no alternatives but to have the executing officers go to Trede for assistance in understanding what they were seizing.

[88] A somewhat similar situation arose in the *Dawson* case (*supra*). There an attack was made on a Mutual Assistance warrant because of the involvement of a foreign officer in the search. The warrant authorized an officer of the requesting state's investigative authority to accompany the Canadian officer executing the search. The things to be seized were described as being of a highly "sophisticated and technical nature". This is the way the situation was described by Smith J. in *Dawson* (at para. 61):

> ... the warrant authorized Sgt. Edwards to have a member of the United States investigative authority accompany him to help determine relevance of any item to be seized. In *viva voce* evidence Sgt. Edwards testified he was not familiar with the type of equipment that needed to be seized, and he needed help in this regard. He swore in the Information that he needed help with the documents. While I view the involvement of the foreign investigator as generally unadvisable, the evidence of Sgt. Edwards satisfies me on balance that he wanted and needed Detective Crum present for help because of the sophisticated and technical nature of the things needed to be seized.

[89] The judgment does not set out exactly what was seized but I think it must have been computer and data-storage equipment because there is a reference later on in the judgment to obtaining information from the respondent's computer. Indeed the complaint in *Dawson* is that information gained in the search was shared with the foreign officer prior to a decision by the court as to releasing the things seized. The court held that there was no evidence of such sharing of information. It therefore seems to me that the court drew a distinction between the things seized and the information those things may have contained.

[90] So, in my opinion, *Dawson* is distinguishable. The foreign officer, as I said before, may advise on the type of things to be seized but there is no justification for allowing the officer to actually examine the substantive information or contents of the things seized prior to a judicial order sending the seized items to the requesting state. In this case the number of items on which Trede was consulted and which he looked at may be small in proportion to the volume of material seized; but, his active involvement undermined the integrity of this process and tainted the entire search and seizure effected by the R.C.M.P.

[91] As I noted previously, this problem may also be regarded as non-compliance with the terms and conditions of the warrant. Officer Trede exceeded the role of "observer" which was the condition placed on his attendance during the search. He exceeded it not just on his own initiative but with the active involvement of Canadian officers. I prefer however to view this problem from a somewhat broader perspective. In my opinion, this is the type of circumstance that warrants not making an order. It is a pervasive defect that taints the entire process. It defeats the very purpose of a judicial hearing to decide whether or not to send the materials to the requesting state.

4. Conclusion:

[92] For the reasons stated above, and again using the phrasing found in s.15(1)(a) of the Act, I am not satisfied that the warrant was executed according to its terms and conditions and I am satisfied that an order should not be made sending the things seized to the requesting state. I base these decisions on the totality of the circumstances presented by the evidence and, in particular, the conduct of the authorities in the execution of the warrant.

[93] This issue was not argued before me on the basis of an unreasonable search and seizure that violates Ebke's rights under s.8 of the Charter. Nor was there any discussion as to whether an order should be made as a s.24 remedy that the evidence not be sent to the requesting state. There was also no reference to the concepts of conscriptive and non-conscriptive evidence (as those terms are used in *R. v. Stillman*, [1997] 1 S.C.R. 607). The issue was argued as alleged defects in the warrant and the execution process such as to justify my exercising my discretion to refuse to make a sending order. If the matter had been argued on a constitutional basis, however, I would still exercise my discretion in the same manner. The things seized were "real" evidence and no doubt they could have been seized properly if the police had followed correct procedures. But there is no issue of "trial fairness" at play here since there will be no trial of Ebke in Canada. The trial, if there is one, will be in Germany and it would be pure speculation as to what effect admitting or not admitting these things into evidence would have on the fairness of a German trial. I am satisfied though that the failure of the police to follow proper procedures in the execution of the search is serious. I am also satisfied that the disregard for the terms and conditions of the warrant and the involvement of the foreign officer would be viewed by the Canadian public as a serious breach of Canadian law. If a Canadian court were to countenance

such a breach by simply allowing the material seized to be sent overseas, I am satisfied that the administration of justice would be brought into disrepute.

[94] Having said all that, I prefer to view these issues in the way they were presented within the parameters of the statute. The Act requires that I be satisfied or not satisfied as to certain things in deciding whether or not to send the things seized to the requesting state. I have given my reasons as to why I have concluded that they should not be sent. In doing so I have taken into consideration the aims of the Act, being the promotion of international co-operation in the suppression of crime, and the need for a certain degree of flexibility so as to accomplish those aims.

[95] Therefore, pursuant to s.15(1)(a) of the Act, I order that the things seized pursuant to this search warrant be returned to the person from whom they were seized or their lawful owner. I recognize that some or many things were seized not just under the authority of my warrant but also under the Territorial Court warrant issued for the investigation of offences under the Immigration Act. My order here, of course, does not affect any process under that warrant and any disposition pursuant to that warrant would have to be under the authority of the Territorial Court. I will, however, stay my order pending expiry of any appeal period or the disposition of any appeal proceedings if there is an appeal.

COMMITTAL:

[96] As noted previously, the role of an extradition judge in the committal phase is a "modest" one limited to the determination of whether or not the evidence is sufficient to justify committing the person sought for surrender. 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;

[97] The test is the same as that applied on a preliminary inquiry under Canadian domestic criminal law: Is there any admissible evidence which, if believed by a properly charged jury acting reasonably, could justify a conviction (as per *United States v. Sheppard*, [1977] 2 S.C.R. 1067)? The extradition judge is not to determine guilt or innocence. He or she is not expected to weigh the evidence for reliability or to rule on the credibility of witnesses.

[98] The provisions of s.29(1)(a) require that I answer the following two questions: (1) Is the person before the court the Walter Lothar Ebke sought by Germany? (2) Is there evidence admissible under the Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offences set out in the Authority to Proceed? The Authority to Proceed sets out Canadian criminal offences so question number 2 requires an examination of the "double criminality" rule. I must decide whether, if the conduct alleged had occurred in Canada, it would constitute crimes under Canadian law. I need not, indeed I cannot, concern myself with German law or procedure. The "double criminality" rule requires that an act be criminal in both the requesting and requested states. But this does not involve an examination of the law of the requesting state since the focus of the inquiry is on the conduct alleged against the person sought. It is that conduct that must be criminal under Canadian law: see *McVey* (*supra*) at 535-537. The alleged conduct could, however, be relevant to more than one Canadian offence: see *Dynar* (*supra*) at 499.

1. <u>The Authority to Proceed</u>:

[99] The Authority to Proceed sets out ten Canadian offences which the Attorney General says correspond to different facets of the conduct alleged against Ebke:

> (1) Aggravated assault upon Harald Hollenberg contrary to section 268 of the *Criminal Code;* and
>
> (2) Conspiracy to commit aggravated assault upon Harald Hollenberg contrary to section 465(1)(c) of the *Criminal Code*; and
>
> (3) Aggravated assault upon Dr. Karl Gunter Korbmacher contrary to section 268 of the *Criminal Code*; and
>
> (4) Conspiracy to commit aggravated assault upon Dr. Karl Gunter Korbmacher contrary to section 465(1)(c) of the *Criminal Code*; and

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

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

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

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

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

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

[100] These are the offences that are relevant to this inquiry. Any order of committal must reference the offence or offences in the Authority to Proceed for which the committal is ordered: see s.29(2). These offences are also relevant in terms of Canada's obligations under the treaty with Germany.

[101] The treaty provides, in Article II, that extradition shall be granted only in respect of an act or omission that constitutes an offence as set out in the Schedule to the treaty and is a criminal offence in both countries. The Schedule lists such acts as wounding, maiming or assault causing bodily harm (item number 3 of the Schedule), wilful damage to property (item number 11), and offences relating to firearms and other weapons and explosives (item number 29). The treaty also includes conspiracy to commit and participation in any of these offences. So the offences identified in the first nine of the enumerated offences in the Authority to Proceed would also come within the scheduled items to the treaty. It is not the description of the offence that is important but the fact that the alleged conduct can be subsumed within the substance of any of the scheduled offences (see Article II (5) of treaty). The one notable

exception is the tenth offence, the one of participation in the activities of a criminal organization. That does not appear in the Schedule. That offence will be addressed in due course.

[102] The offences listed in the Authority to Proceed are not the same as those listed in the German arrest warrant. That document states the German offences as follows:

> The accused person Walter Lothar Ebke is strongly suspected of having from the beginning of 1985 to 1993 in Berlin and at other locations in the Federal Republic of Germany by the same act
>
> (a) been a member of an association whose aim and activities are directed toward committing criminal acts causing public danger pursuant to sections 306 to 308 and section 311 of the German Penal Code,
>
> (b) jointly caused an explosion using explosives on the night of February 5/6, 1987 in Berlin, thus endangering third party's property of considerable value,
>
> (c) jointly attempted to cause an explosion using explosives, and thus to endanger third party's property of considerable value on January 15, 1991 in Berlin.
>
> Crimes punishable under section 129a subsection 1 number 3 of the German Penal Code, section 311 subsection 1 of the German Penal Code (as formerly amended), sections 23, 25 subsection 2, 52 subsection 1 and 2 of the German Penal Code.

The offences listed as items one through four and nine and ten in the Authority to Proceed are said to arise from the conduct alleged in relation to the charge noted as (a) above, being a member of a criminal association. Those noted as items (b) and (c) above correspond to those items numbered five through eight of the Authority to Proceed.

[103] Counsel for Ebke, in his submissions on the "double criminality" issue, argued that since the assessment of the evidence must be conduct based, one must examine the conduct that underlies the foreign charge and then determine if that conduct in its substance corresponds to a crime under Canadian law. This was pertinent to the German criminal association charge, if I understood the argument correctly, because the corresponding Canadian offences may be components of the German charge but not any or all can be said to be the essence of that charge. In other words, the conduct

to be considered must have some connection to the foreign charge or must constitute some evidence of that charge. One must distinguish between the essential facts underlying the charge and mere circumstances surrounding the charge: see *United States v. Manno* (1996), 112 C.C.C. (3d) 544 (Que. C.A.), leave to appeal to S.C.C. denied; *United States v. Tavormina* (1996), 112 C.C.C. (3d) 563 (Que. C.A.); and *United States v. Commisso* (2000), 47 O.R. (3d) 257 (C.A.). I take counsel's meaning to be that the substantive Canadian offences arising out of the conduct alleged as underlying the German criminal association offence are merely surrounding circumstances while the essence of the German offence is membership in the criminal association. And, as he argued, we do not criminalize mere membership in anything in Canada.

[104] As interesting as counsel's argument may be, and as compelling as it may have been prior to the enactment of the 1999 *Extradition Act*, it is in my opinion no longer pertinent. The Act requires an analysis of conduct in relation only to the offences listed in the Authority to Proceed. This is a completely new methodology found in the 1999 Act for the first time. Therefore, cases preceding the current Act are of minimal relevance on this point. I respectfully agree with the comments of Dambrot J. in *Drysdale (supra* at para. 76) on this issue:

> The new Act is clear and unequivocal. The judge is to decide whether there is evidence admissible under the Act of conduct that, if it had occurred here, would justify committal in Canada on an offence set out in the authority to proceed. The problem under the old regime, if there was one, was that there was no place to look for guidance as to the offences upon which committal was sought other than the foreign arrest warrant or indictment. The new Act does not even require the foreign warrant or indictment to be placed before the extradition judge. The evaluation of evidence now clearly relates solely to the authority to proceed.

[105] Therefore, I need not examine the nature of the German offences. This does not mean that the "double criminality" requirement is diminished; it merely means that it is respected in different ways. One way is for the Minister to be satisfied that the person is sought for prosecution for acts that are crimes in the requesting state; another way is for the extradition judge to be satisfied, on the basis of the evidence placed before him or her, evidence that is available for use in the foreign prosecution, that there is a *prima facie* case disclosed with respect to acts that would constitute crimes according to Canadian law.

[106] It is not, in my opinion, how the alleged criminal acts are described under German law. It could be one charge in Germany or it could be several. But that makes no difference. Whether it is one or several foreign charges, the inquiry in Canada is whether the conduct alleged reveals crimes under Canadian law (if that conduct had taken place in Canada). There may be several Canadian offences revealed by that conduct. The only reference points that the extradition judge need be concerned with, however, are the Canadian offences listed in the Authority to Proceed.

2. Evidence:

[107] The *Extradition Act*, in sections 31 through 37, contains its own rules of evidence. It includes, as admissible evidence, evidence that would not otherwise be admissible under Canadian law so long as it is certified in accordance with certain requirements under s.33(3) of the Act. This evidence, contained in a record of the case, must include at least a summary of the evidence available for use in the prosecution of the person sought for extradition. In my earlier judgment, released on February 23, 2001, I dismissed a challenge to the constitutional validity of these evidentiary rules.

[108] The evidence presented on the committal hearing was contained in a record of the case. That record included a certification by an official with the Federal Ministry of Justice in Germany, in accordance with the certification requirements of the treaty, and a certification by a senior prosecutor in Germany, in accordance with the requirements of the Act. There is an extensive summary of previous investigations into the activities of an alleged terrorist organization called "Revolutionary Cells/Rote Zora". These activities ranged from 1973 through 1995 and include numerous instances of arson and explosives attacks. A large segment of the record of the case is the transcript of a statement given by an alleged accomplice of Ebke. This alleged accomplice, one Tarek Mousli, was interviewed by an "examining judge" of the Federal Court of Justice in Germany in April, 2000. Mousli was in custody and the subject of separate proceedings. The prosecutor's summary also contains evidence as to the identification of Ebke by Mousli by means of a photo line-up.

[109] The record of the case contains summaries of four specific incidents in which Ebke is alleged to have participated. Two of these are the shootings of one Harald Hollenberg and of one Karl Korbmacher. These shootings are listed in the Canadian offences in the Authority to Proceed but are not the subject of separate German

charges. I was told that the limitations period has expired for prosecuting these specific crimes under German law. They are, however, part of the overall conduct alleged against Ebke in support of the German charge of membership in a criminal association. The two other incidents summarized are explosives attacks on a government building and a monument. These two alleged offences are the subject of separate charges in Germany and itemized as separate offences in the Authority to Proceed.

[110] The record of the case also contains several documents which were obtained in Canada by Officer Trede. These are Ebke's German passport and his application to the German consulate in Vancouver for a renewal. These documents also attach photographs of Ebke.

[111] Ebke's counsel submitted that since these passport documents were obtained in Canada then they have to satisfy Canadian standards of admissibility (as per s.32(2) of the Act). It was evidence obtained by Trede, while he was working in conjunction with the R.C.M.P. in Yellowknife, and therefore it amounts to a warrantless search and seizure by a state agent. Furthermore, these documents, it was argued, cast doubt on the German prosecutor's certification that the evidence was gathered according to the laws of Germany. Thus the certification for the entire record is flawed. Counsel for the Attorney General submitted that the certification overcomes any admissibility defect for evidence gathered in Canada. In other words, if it is part of the record of the case and the record is properly certified then there is no need to have regard to s.32(2) of the Act: see *United States v. Debarros* (Ont. S.C.J.; February 9, 2000) at para. 33.

[112] The difficulty with respect to this point lies in the *Extradition Act*. There must be evidence admissible under the Act. Section 32(1)(a) makes the contents of the record of the case admissible if they are certified under s.33(3). It does not matter if the evidence would be otherwise inadmissible under Canadian law. Section 32(2), however, says that evidence gathered in Canada must satisfy Canadian laws of admissibility. So, what I understand the Attorney General's counsel to be saying is that even if evidence is gathered in Canada it need not meet Canadian admissibility rules if it is contained in a record of the case duly certified under s.33(3). One is not exclusive of the other. If that is correct, then it seems to me that there would be no safeguards on how foreign officials operate on Canadian soil to gather evidence. Surely the purpose of s.32(2) is to recognize that, while we cannot nor should not

inquire into the niceties of foreign law and procedures, we should still maintain the integrity of Canadian laws for activities undertaken in Canada (such as the gathering of evidence).

[113] I am therefore somewhat dubious of the analysis proffered on behalf of the Attorney General on this point. I find, however, I need not make a definitive ruling. The question of whether the passport documents would be admissible under Canadian law was not argued extensively, both counsel preferring to base their arguments on the wording of the relevant sections of the *Extradition Act*. For purpose of this case, I am prepared to rule this evidence inadmissible but severable from the record of the case. These documents are not the type that are necessary for the record nor are they essential for any finding I have to make (in light of the totality of the evidence in this case). Further, it seems to me that there is nothing in the Act to suggest that a part of the record of the case may not be severed. I note that s.33(5) contemplates a "supplement" being added to a record of the case; by extension there could be a part deleted from it without affecting the admissibility of the remainder.

3. Identification:

[114] The Act requires that I be satisfied that the person before the court is the person sought by the requesting state. At the beginning of this hearing, counsel for Ebke admitted that the name of the person before the court is Walter Lothar Ebke. This admission, however, did not go so far as to concede that he is the Walter Lothar Ebke wanted in Germany.

[115] The Act also contains provisions relating to evidence of identity:

> 37. The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:
>
> > (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
> >
> > (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

[116] In this case, there is more than sufficient evidence to satisfy me that the person before the court is the same person referred to in the German arrest warrant and the other documents provided in support of the extradition request: the name is the same; the identification of Ebke from the photo lineup by Mousli contained in the record of the case; and, the similarity of the physical characteristics between the person in court and the photographs identified as those of the person referred to by Mousli. There are also certain Canadian identification documents seized upon Ebke's arrest, a Northwest Territories driver's license and a federal Firearms Acquisition Certificate, which identify Ebke by name and photograph, both of which are similar to the German materials.

4. Evidence of Offences:

[117] Much of the evidence linking Ebke to the alleged offences comes from the witness Mousli. In his interview (contained in the record of the case), Mousli recounts how in the early 1980's he and Ebke became friends and in 1985 they were recruited to join the "Revolutionary Cells". This was a group that, according to Mousli, regarded itself as a social revolutionary movement. The two of them made a joint decision to join. They were given code names.

[118] With respect to each offence, Mousli recounts his knowledge of it and Ebke's participation in it. In the record of the case, however, there is much more evidence relating to the actual commission of the offences, such as police on-site investigations and forensic reports, but none directly implicating Ebke.

(a) Aggravated Assault on Hollenberg:

[119] On October 28, 1986, one Harald Hollenberg, the director of the German government's Aliens Office in Berlin, was shot twice in his legs. The shooting was carried out by two perpetrators, a man and a woman, who ran from the scene and subsequently fled by getting into a VW-Passat automobile driven by another male. The vehicle was subsequently located. The next day letters were received by various press agencies in which the "Revolutionary Cells" claimed responsibility for the shooting of Hollenberg.

[120] Mousli's statement was that he and Ebke, while not participating in the decision to carry out the attack, were subsequently involved in its preparation and execution.

They were assigned roles by another member of the group (who is also now in custody). Together Mousli and Ebke conducted surveillance and identified a suitable escape route. He and Ebke stole the automobile used in the escape. During the actual attack, Mousli and Ebke monitored police radio communications from two different locations. The group, including Mousli and Ebke, held a "post-attack" meeting one week later.

[121] In my opinion, there is evidence to establish a *prima facie* case as to Ebke's involvement as a party to this offence. His actions, as alleged by Mousli, could be found to have facilitated the commission of the offence.

(b) Aggravated Assault on Korbmacher:

[122] On September 1, 1987, Dr. Karl Korbmacher, a judge of the Federal Administrative Court with responsibility for asylum issues, was shot twice in the thigh by two persons passing by on a motorcycle. The motorcycle was located and determined to have been stolen. Forensic tests revealed that the bullets were fired from the same weapon as used in the attack on Hollenberg. Letters were received by various press agencies the next day. Once again the group calling itself the "Revolutionary Cells" claimed responsibility for the attack.

[123] Mousli stated that this attack was the subject of several group discussions in which he and Ebke participated. The two of them conducted surveillance on Korbmacher's residence and identified an escape route. The two of them, along with another person, stole a motor vehicle to be used for escape purposes. (The police subsequently in 1988 located what is believed to be that stolen vehicle.) It was eventually decided, however, that a motorcycle would be used for the escape. Mousli stated that he and Ebke had obtained a motorcycle that had been earlier stolen. They tested it and changed the identification. During the attack the two of them were together at a "safe house" monitoring police radio communications. The group then had some "post-attack" discussions.

[124] Again, based on this evidence, I am satisfied that a *prima facie* case has been made out sufficient to commit Ebke as a party to this offence.

[125] It should be noted that at some points in the English translation of the German material contained in the record of the case the date for the attack on Korbmacher is

shown as “1989". This is a misprint also found in parts of the German text. An examination of other date references in that material, as well as the summary of the grounds attached to the German arrest warrant, reveals that the correct date is 1987.

(c) Placing an Explosive Substance at the Central Social Relief Office for Asylum Seekers:

[126] On February 6, 1987, police discovered that an explosive charge had blown a hole in the exterior wall of the Central Social Relief Office for Asylum Seekers in Berlin. The hole was approximately 40 x 50 centimetres in size, through a 24 centimetre thick wall, and damage was caused to a furnace room located on the interior. Subsequently various press agencies received letters in which the “Revolutionary Cells” claimed responsibility for this attack.

[127] Mousli stated in his interview that, prior to the attack, he and Ebke had conducted surveillance of the scene for several weeks. This was done so as to determine the schedule for security patrols. He and Ebke experimented with various types of detonators (although the explosive device used was put together by another person). Mousli claimed that Ebke and this other person placed the explosive device. Mousli was at another location keeping watch but in contact with Ebke by radio. Mousli and Ebke also participated in the drafting of the letter claiming responsibility for the attack. This was done prior to the attack itself.

[128] Ebke’s counsel argued that all the evidence reveals is Ebke’s assigned role, not what he actually did. This is because Mousli’s statement as to Ebke’s activities in the commission of the crime is prefaced by the following statement: “For the commission of the crime the tasks were assigned as follows...” I do not agree. The statement of Mousli can be taken not only as relating to what the assigned roles were but also as to what the participants did in whole or in part. In any event, there is sufficient evidence to commit Ebke as a party to this offence.

(d) Placing an Explosive Substance at the “Siegessaule” Column:

[129] On January 15, 1991, an explosive device caused damage to the “Victory Column”, the “Siegessaule”, located in Berlin-Tiergarten. The device was recovered and investigation determined that the explosive used had been stolen in 1987. A press

agency received a letter in which the "Revolutionary Cells" claimed responsibility for this attack.

[130] Mousli stated that he was not involved in this attack but that, right after he read about it in the newspaper, he contacted Ebke who told him that he and several others were involved in the commission of this attack. Ebke, according to Mousli, said that the "Revolutionary Cells" had done it.

[131] Ebke's counsel submitted that there is no evidence as to what Ebke actually did, if anything. There has to be some evidence that Ebke did something to aid in the commission of this offence. Counsel is correct that there has to be some evidence to show that Ebke did something. That evidence is found in Ebke's alleged admission to Mousli that he and three others committed the attack (along with various details as to its execution). This evidence is admissible (any question as to its reliability not being the issue) so there is sufficient evidence to commit on this offence.

(e) Conspiracy to Commit:

[132] The Authority to Proceed also lists as separate offences those of conspiracy to commit each of the four substantive offences outlined above.

[133] In its simplest terms, conspiracy is an agreement by two or more persons to commit a criminal offence. The agreement must have a common purpose. Merely being party to an offence is not the same thing as being a party to a conspiracy to commit an offence. Conspiracy is a separate and distinct offence from the substantive offence that is the object of the conspiracy. But any acts undertaken in furtherance of the commission of the offence and the commission of the offence itself would be evidence of the conspiracy. It is not necessary for each member of the conspiracy to know all the details of the plan so long as the agreement includes substantially all the elements of the offence which is the object of the conspiracy. And conspiracy, like many crimes, can be established by circumstantial evidence.

[134] A jury, in a conspiracy case, is required to decide initially if the conspiracy existed. Then they must decide whether the accused person was a member of that conspiracy. To do that a jury must first examine the evidence directly admissible against the accused from his own acts and declarations. If the jury concludes that, on

the basis of that evidence, the accused was probably a member of the conspiracy, then they may go on to consider evidence of acts and declarations of co-conspirators, in furtherance of the conspiracy, to determine whether the accused was, beyond a reasonable doubt, a member of the conspiracy. This is the well-known formula as to the co-conspirators exception to the hearsay rule outlined in *R. v. Carter*, [1982] 1 S.C.R. 938.

[135] This case, however, does not require application of the hearsay rule or any other special formula. I say that for two reasons. First, as noted in *Drysdale (supra)*, at para. 108, the function of an extradition judge, just as for a preliminary inquiry justice, is to determine (a) if there is any evidence on which a reasonable jury, properly instructed, could find that the conspiracy existed, and (b) if there is any evidence directly admissible against the person sought on which a reasonable jury could find that the person was a member of that conspiracy. There is no need to consider hearsay evidence since that is solely a matter for the ultimate trier of fact. Secondly, where the evidence consists of an unindicted co-conspirator's evidence of his dealing with the accused and the accused's own statements and acts, as opposed to non-witness hearsay evidence, then there is no need to concern oneself with the *Carter* formula: see *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal to S.C.C. denied.

[136] In this case, Mousli is in the position of an unindicted co-conspirator. His evidence, if given at trial, is evidence receivable directly against Ebke. That evidence reveals planning and implementation of each of the substantive offences. In each case there was evidence that an organization calling itself the "Revolutionary Cells" had committed the offence. There was evidence that Ebke and others were members of this organization acting for a common purpose. Any issue as to the reliability of that evidence, given as it may be by a co-conspirator or an accomplice, goes to weight, not admissibility, and is not part of my jurisdiction as the extradition judge. In my opinion, there is sufficient evidence to commit Ebke on each of the four conspiracy offences.

(f) Possession of an Explosive Substance:

[137] The substance of this offence is that, from 1988 to 1991, Ebke maintained a cache of explosives and weapons on a property where Ebke worked as a caretaker. The explosives had earlier been stolen in 1987 and maintained by Mousli and others on behalf of the "Revolutionary Cells". There is sufficient evidence to support a

committal as far as the substance of the offence is concerned. There is one issue, however, that needs to be addressed.

[138] The specific offence listed in the Authority to Proceed is the possession of an explosive substance for the benefit of, at the direction of or in association with a criminal organization, contrary to s.82(2) of the Criminal Code. That subsection, however, only came into force in 1997, well after the time-frame of Ebke's alleged commission of this offence. So the question is whether one can be committed under the Extradition Act for conduct that at the time it was committed was not criminal in Canada. Ebke's conduct may have been an offence under s.81(1) of the Code — the possession, without lawful excuse, of explosives — since that was in force at the time but I see nothing in the *Extradition Act* that authorizes me to substitute one offence for another in the Authority to Proceed in the absence of an application to amend by the Attorney General.

[139] This question as to whether one can be committed for conduct that was not a crime in Canada at the time the conduct was committed also arises under the final offence and so I will address it under that heading.

(g) Participation in the Activities of a Criminal Organization:

[140] This specific offence is identified in the Authority to Proceed as s.467.1 of the Criminal Code. The elements of this offence are (a) a group of five or more persons, (b) having as one of its primary activities the commission of an indictable offence, and (c) where the accused participated in or substantially contributed to the group's activities knowing that the members engage in or have engaged in the commission of a series of indictable offences, and (d) where the accused was actually a party to the commission of an indictable offence for the benefit of, at the direction of or in association with the group. Based on all of the evidence before me, and without other considerations, there is a *prima facie* case established for this offence.

[141] The significant issue is that this offence was unknown to Canadian criminal law prior to 1997. Ebke's alleged criminal conduct ends in 1993. Ebke's counsel submitted that to commit Ebke on this offence would amount to the retroactive application of substantive criminal law, something that must not be done in the absence of an unambiguous legislative intent to do so. Furthermore, counsel argued, Article II(1) of the treaty between Canada and Germany states that extradition shall be granted

only in respect of an act that is a criminal offence in both countries. Therefore, if the offence did not exist at the time of the act, it is not an extraditable crime under the treaty.

[142] Counsel also referred to the judgment in *United States v. Allard* (1991), 64 C.C.C. (3d) 159 (S.C.C.). In that case the fugitive was wanted for hijacking an airplane in 1969. Hijacking was not a crime under Canadian law until 1972 nor was it included in the relevant treaty until 1976. The Supreme Court held that the fugitive may only be extradited if the act of which he is charged was a crime recognized in Canada at the time it was committed. But this conclusion was very much based on the provisions of the old Act, a factor which counsel for the Attorney General says should lead to a different result.

[143] The Attorney General submitted that s.29(4) of the current *Extradition Act* has changed the law from the result in *Allard*. That subsection states simply that the date of the Authority to Proceed is the "relevant date" for the purpose of subsection 29(1). Counsel argued that this must mean that it is not the date of the alleged criminal act that is relevant for a committal. Since the offence under s.467.1 was a crime in Canada as of the date of the Authority to Proceed, it does not matter that the conduct predated the coming into force of that section. Support for this argument can be found in *United States v. Quintin*, [2000] O.J. No. 791 (S.C.J.), at para. 107:

> While on the face of s.29(1) there would appear to be no reason why Allard would not continue to prevail, regard must be had to s.29(4). It provides that the date of the authority to proceed is the relevant date for the purposes of subsection (1). While this provision is perhaps not as clear as one might wish, the only meaning that I can ascribe to it is that when the extradition judge considers whether committal would be justified in Canada, he or she should look to the Canadian law as it existed at the date of the authority to proceed, and not at the date of the alleged offence.

[144] Counsel for Ebke made two points about s.29(4) of the Act. First, he submitted that its purpose is to freeze the date for evidence gathering for use at the hearing. The evidence that is put forward must be in existence as of the date of the Authority to Proceed. Otherwise, any new evidence that arises after the Minister's decision to issue the Authority to Proceed may change the corresponding Canadian charges. Counsel referred to the phrase "there is evidence admissible" in s.29(1)(a) as support for this point.

[145] The difficulty with this argument is that it does not take into account the provisions whereby, first, the Minister may substitute another Authority to Proceed at any time before the hearing begins and, second, the court may, on application of the Attorney General, amend the Authority to Proceed after the hearing has begun so as to accord with the evidence that is produced during the hearing: see s.23 of the Act. There would be no meaning to those provisions, particularly of the power to amend the Authority to Proceed after the hearing has begun, if the evidence gathering was frozen as of the date of the Authority to Proceed. I think it is precisely in case of new evidence arising that this provision was put into the Act.

[146] Counsel's second point was that since there is an obvious ambiguity about the meaning of s.29(4), then one must choose the interpretation most in favour of protecting the individual. After all, even in *Quintin*, the judge stated that the provision is "not as clear as one might wish".

[147] There is a strong presumption that legislation is not to be construed as having retroactive application unless such a construction is expressly or by necessary implication required by the language of the legislation: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271. "Retroactive" in this sense is used to describe the application of legislation to facts that occurred before the legislation came into force (although sometimes the term "retrospective" is also used). The Criminal Code does not in any way signal a retroactive application of s.467.1 so that is not the question. It is whether s.29(4) of the *Extradition Act* results in a retroactive application of s.467.1 and, if it does, does it do so in clear language.

[148] There is no doubt that the *Extradition Act* is penal legislation. Its application can result in an individual's loss of freedom. The general rule in construing penal legislation is that, where there is uncertainty or ambiguity of meaning, it should be construed in favour of the individual: *R. v. McLaughlin*, [1980] 2 S.C.R. 331; *R. v. Paré*, [1987] 2 S.C.R. 618. This rule of strict construction has been qualified in recent years in an attempt to reconcile it with s.12 of the *Interpretation Act*, R.S.C. 1985, c.I-21, which requires that all legislation be deemed remedial, and the principle of applying a liberal and purposive interpretation. Thus the strict construction rule is to be applied only if, after attempting to find the appropriate meaning, there is still real ambiguity as to the meaning of the legislation. This was recently explained in *R. v. Mac* (2001), 152 C.C.C. (3d) 1 (Ont. C.A.), at para. 27:

> The principle that ambiguous penal provisions must be interpreted in favour of an accused does not mean that the most restrictive possible meaning of any word used in the penal statute must always be the preferred meaning. The principle applies only where there is true ambiguity as to the meaning of a word in a penal statute: *R. v. Hasselwander* (1993), 81 C.C.C. (3d) 471 (S.C.C.) at 476-77. The meaning of words cannot be determined by examining those words in isolation. Meaning is discerned by examining words in their context. True ambiguities in a statute exist only where the meaning remains unclear after a full contextual analysis of the statute.

[149] In my opinion, the results of that contextual analysis and purposive approach favour the position advanced by the Attorney General. First, it is important to bear in mind that, in construing extradition statutes and treaties, there is a well-established rule that courts should give them a broad and liberal interpretation with a view to fulfilling Canada's international legal obligations: see *LaForest's Extradition to and from Canada* (3rd ed.), at 21. This is consistent with the pressing and substantial concern respecting the investigation, prosecution and repression of crime through international co-operation that is the aim of extradition legislation. Second, the focus on a conduct-based analysis of the evidence alleviates any concern over designation of specific offences. The Canada-German treaty lists offences in a Schedule but the crimes need not be described the same way in both countries and the Schedule provides that other offences may be included. The point is that the crimes need not be conceptually similar so long as the conduct charged falls within a crime listed in the treaty. Here, the crime under s.467.1 of the Criminal Code contains within it elements of offences listed in the treaty, all of which were crimes in Canada at the time, such as wounding, possessing stolen property, wilful damage, offences relating to firearms and explosives, and conspiracy to commit or participation in any of these offences. It is true, as Ebke's counsel said, that mere association in a criminal enterprise was not a crime in Canada prior to 1997, indeed it is not now. But participation in the commission of an actual offence was a crime and it is still an essential element of the offence under s.467.1. But the point is that the conduct is the same. It is simply the designation of offences, and the number of offences, that has changed. The fugitive, however, faces no more severe consequences in Canada due to any retroactive application of s.467.1 since he will not be tried or punished in Canada (and there is no issue that all of the German offences were not in force at the time of the alleged conduct).

[150] Finally, one can also look at the words used in s.29(1)(a) to assist in the interpretation of s.29(4) of the Act. Subsection (a) says: "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... ". It does not say "*had* it occurred in Canada *would have* justified committal". That would have suggested the necessity for a temporal connection between the occurrence of the conduct and Canadian criminal law as it existed at that time. But here the reference is simply to conduct that, if it had occurred, would justify committal on a Canadian crime set out in the Authority to Proceed, not a Canadian crime that was in the Criminal Code at any past point in time. And so the reference to "relevant date" in s.29(4) is to connect the conduct to Canadian criminal offences as of that date, that being the date of the Authority to Proceed.

[151] While I may also think that s.29(4) is not as clear as it could be, or perhaps should be, I do not think that its meaning is so ambiguous as to be beyond rational definition. Difficulty in comprehension is not necessarily the same thing as ambiguity. In my opinion, when I consider the scope to be given to the statute and the application of a conduct-based perspective, s.29(4) requires an extradition judge to look to Canadian law as it exists at the date of the Authority to Proceed as opposed to the date of the conduct.

[152] For these reasons, Ebke will be committed on both offences of possession of an explosive substance and of participation in the activities of a criminal organization.

5. Conclusions:

[153] I am satisfied on the evidence presented to me that the test set out in s.29(1)(a) of the *Extradition Act* has been met on the ten offences listed in the Authority to Proceed (and set out previously). There is admissible evidence which, if believed, could result in a conviction on each of those offences.

[154] An order of committal will issue committing Walter Lothar Ebke into custody to await the decision of the Minister of Justice as to his surrender to the requesting state. I ask that counsel for the Attorney General prepare the formal order of committal contemplated by s.29(2) of the Act. The material described in s.38(1) of the Act will be transmitted to the Minister. In accordance with s.38(2) of the Act I hereby inform Ebke that he will not be surrendered until the expiry of 30 days and that he has a right to appeal this order and to apply for judicial interim release.

[155] In closing, I thank all counsel for their able and helpful submissions.

J. Z. Vertes
J.S.C.

DATED this 6th day of September, 2001.

Counsel for the Attorney General of Canada (on behalf of the Applicant):	Wesley Smart and Debra Robinson
Counsel for the Respondent:	Wes Wilson
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CR 03881

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN
THE FEDERAL REPUBLIC OF GERMANY

Applicant

- and -

WALTER LOTHAR EBKE

Respondent

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