Case Name:

United Mexican States v. Ortega

IN THE MATTER OF the Extradition Act
Between
The Attorney General of Canada, on behalf of the
United Mexican States, respondent/requesting state,
and
(Jose) Raul Monter Ortega, applicant

[2004] B.C.J. No. 402

2004 BCSC 210

237 D.L.R. (4th) 281

183 C.C.C. (3d) 75

117 C.R.R. (2d) 191

60 W.C.B. (2d) 450

Vancouver Registry No. CC001665

British Columbia Supreme Court
Vancouver, British Columbia

Koenigsberg J.

March 2, 2004.

(69 paras.)

[Editor's note: The first part of the constitutional anaylsis was released January 16, 2004 and has been incorporated into this judgment. See [2004] B.C.J. No. 432.]

Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings - - Extradition proceedings -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, reading in.

Application by Ortega for a Charter remedy. Mexico sought Ortega's extradition to stand trial for fraud-related offences. Pursuant to section 33 of the Extradition Act, the record of a case against an individual could be admitted at an extradition hearing where such evidence was certified as available for trial. Section 32(1)(b) of the Act did not contain the certification requirement. The section provided for admissibility of evidence submitted in conformity with an extradition agreement. The extradition treaty between Mexico and Canada did not require that Mexico certify that any evidence submitted for the extradition proceeding would be available for trial.

HELD: Application allowed. Canada's application for committal of Ortega for extradition to Mexico was dismissed, and the order was stayed for 30 days. Section 32(1)(b) violated section 7 of the Charter. The Extradition Act, as judicially interpreted, required certification of evidence as available for trial. The failure to provide this safeguard violated Ortega's Charter rights. The violation was not saved by section 1, as section 32(1)(b) did not minimally impair section 7 rights. The admissibility of evidence under the section was subject to extradition agreements, which might provide inadequate or no safeguards. The appropriate remedy was to read the certification requirement under section 33 into section 32(1)(b) of the Act.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 24(1).

Constitution Act, 1982, s. 52.

Extradition Act, S.C. 1999, c. 18, ss. 10(2), 29, 32(1)(a), 32(1)(b), 33, 33(3).

Treaty of Extradition between the Government of Canada and the Government of the United Mexican States, Can. T.S. 1990 No. 35.

Counsel:

Deborah J. Strachan, for the Attorney General of Canada, on behalf of the United Mexican States.

David J. Martin and Richard C.C. Peck, Q.C., for (Jose) Raul Monter Ortega.

[Editor's note: A Corrigendum was released by the Court May 13, 2004. The correction has been made and the Corrigendum is appended to this document.]

1 **KOENIGSBERG J.**:-- The applicant, (Jose) Raul Monter Ortega ("Monter"), challenges the constitutionality of s. 32(1)(b) of the Extradition Act, S.C. 1999, c. 18 (the "Act").

2 The applicant seeks a declaration that s. 32(1)(b) of the Act and Article VIII(1)(b)(iii) of the

Treaty of Extradition between the Government of Canada and the Government of the United Mexican States, Can. T.S. 1990 No. 35 (the "Treaty"), are inconsistent with ss. 7 and 1 of the Canadian Charter of Rights and Freedoms (the "Charter") and are therefore of no force and effect, pursuant to s. 52 of the Constitution Act, 1982. In the alternative, the applicant seeks a declaration that these provisions infringe s. 7 and 1 of the Charter and asks for an appropriate remedy pursuant to s. 24(1) of the Charter.

3 The basis for this challenge is that s. 32(1)(b) of the Act permits the extradition court to receive evidence pursuant to a treaty that is otherwise inadmissible and that the requesting state has not certified as available for trial. Essentially, the applicant argues that unless the evidence is certified as available for trial, the extradition court is left to decide a case on the basis of potentially no evidence, a situation that is not in accordance with the principles of fundamental justice.

4 The respondent, the United Mexican States, argues that s. 32(1)(b) of the Act merely re-enacts ss. 3, 16 and 17 of the former Extradition Act, R.S.C. 1985, c. E-23 (the "1985 Act"). It provided for the admissibility of evidence in accordance with the terms of a treaty; a practice Canada has followed for over 100 years.

5 Further, the respondent argues that the Supreme Court of Canada in numerous decisions has approved the use of evidence made admissible by means of a treaty, regardless of its consistency with fundamental rules of evidence in Canada. In addition, the Courts of Appeal in two jurisdictions in Canada have affirmed the constitutionality of the evidentiary provisions of the Act and specifically s. 32. Finally, the respondent submits that the failure of the applicant to assert as a matter of fact that the evidence is not available for trial or otherwise improperly gathered is fatal to this application.

OVERVIEW OF THE FACTS

6 Mexico seeks the extradition of (Jose) Raul Monter Ortega ("Monter") to stand trial in Mexico for two fraud-related offences. On August 7, 2001, the Minister of Justice authorized the Attorney General of Canada to seek an order for the commmittal of Monter for extradition to Mexico.

7 From 1993 to the end of 1996, Monter was employed as a promoter at Abaco Casa de Bolsa (the "Brokerage House") in the Monterrey branch of the brokerage located in the province of Nuevo Leon, Mexico. In January 1997, Monter was promoted to Director of Promotions of this branch, a position he held for six months.

8 The Brokerage House was owned by Abaco Grupo Financiero (the "Financial Group"). Among the investment products offered by the Brokerage House were a number of offshore fixed term investments, including investments in corporations called "Deerbrook" and "Scottie Holdings".

9 From 1990 onwards, Jorge Lankenau Rocha, president of the Financial Group and the Brokerage House, and Eduardo Camarana Legaspi, International Senior Vice-President of the Financial Group, took out loans from the offshore investments pursuant to promissory notes that were rolled over from year to year.

10 In mid-1997, the offshore investments became insolvent and over 120 clients lost money.

11 Initially the "disclosure" in this extradition proceeding came in three "parts": Part I, Part II, and Supplemental Materials. Appearing at the beginning of each part was a document that included an index of the materials of that part and a passage certifying that: (a) the records contained therein were sufficient to "file process" against Monter under the Law of Credit Institutions and under the Criminal Code for the Federal District in Local Matters and for all the Republic in Federal Matters; and (b) these records were "obtained in compliance with Mexican criminal and procedural laws". In January 2003, four boxes of "Supplementary Materials" were disclosed, which contained some replacement materials and some new materials. Similar certifications appear in these Supplementary Materials. On October 27, 2003, Mexico conceded that these certifications do not comply with the requirements of s. 33 of the Act. In particular, there is no certification that any of the evidence to be relied on to satisfy the test set out in s. 29 of the Act is available for trial. Instead, the respondent relies on s. 32(1)(b) of the Act and the Treaty.

(a) The Statutory Framework at Issue

12 The policy that underlies the "law of extradition" is that an alleged criminal should not escape trial and punishment by leaving one country and going to another. The purpose of an extradition hearing is to provide a "summary and expeditious determination" as to whether there is sufficient evidence to commit a person sought for surrender: see United States v. Wacjman (2002), 171 C.C.C. (3d) 134 (Que. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 89; see United States v. Dynar, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481 re: the 1985 Act.

13 While the ultimate determination of the issue of "guilt or innocence" is not part of the extradition process, the extradition judge does make critical determinations regarding the case against the person sought. First, the extradition judge must determine whether the requesting state has produced a prima facie case, such that there is "sufficient evidence to put the accused on trial for the offence charged": see United States v. Shephard, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424. Finally, the extradition judge must ensure that the hearing itself is conducted in accordance with the principles of fundamental justice (s. 7 of the Charter): see United States v. Cobb, [2001] 1 S.C.R. 587, 152 C.C.C. (3d) 270 at para. 24. The issue to be determined is not whether the person sought will have a fair trial if extradited, but whether he or she is having a "fair extradition hearing in Canada": see United States v. Akrami (2001), 157 C.C.C. (3d) 75 at paras. 86-87 (B.C.S.C.).

14 The provisions of the Act governing the admissibility of evidence are set out below:

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

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);
(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
(c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

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

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

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

...

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

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

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

(i) is sufficient under the law of the extradition partner to justify prosecution, or
(ii) was gathered according to the law of the extradition partner; or

...

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.
(5) For the purposes of this section, a record of the case includes any supplement added to it.

15 Section 29 of the Act sets out the test to be applied by the extradition judge in carrying out the designated judicial function under 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; ...

16 Of specific importance in the case at bar is that s. 32(1)(b) of the Act provides that evidence submitted in "conformity with the terms of an extradition agreement" shall be admitted at the committal hearing. On its face, there appear to be no procedural safeguards in this section. This is in direct contrast to the "record of the case" provision in s. 32(1)(a), which is subject to the certification requirements in s. 33 of the Act.

17 Here, the respondent seeks to admit foreign evidence pursuant to an extradition agreement between Canada and Mexico. The relevant provisions of the Treaty are set out below:

Article VIII - Documents to be Submitted

1. The following documents shall be submitted in support of a request for extradition:

(a) in all cases:

(i) information about the description, identity, location and nationality of the person sought;
(ii) a statement prepared by a judicial or public official of the conduct constituting the offence for which the extradition is requested indicating the place and time of its commission, the

nature of the offence and the legal provisions describing the offence and the applicable punishment. This statement shall also indicate that these legal provisions, a copy of which shall be appended, were in force both at the time of the commission of the offence and at the time of the extradition request.

(b) in the case of a person charged with an offence:

(i) the original or a certified true copy of the arrest warrant issued by the Requesting Party;
(ii) in the event that the law of the Requested Party so requires, evidence that would justify committal for trial of the person sought, including evidence to establish identity;
(iii) for the purpose of paragraph 1(b)(ii) of this Article, originals of certified true copies of exhibits, statements, depositions, minutes, reports, appendices or any other document received, gathered or obtained by the Requesting Party shall be admitted in evidence in the courts of the Requested Party as proof of the facts contained therein, provided that a competent judicial authority of the Requesting Party has determined that they were obtained in accordance with the law of the Requesting Party.

...

2. All documents submitted in support of a request for extradition and appearing to have been certified, issued or reviewed by a judicial authority of the Requesting Party or made under its authority, shall be admitted in evidence in the courts of the Requested Party without having to be taken under oath or solemn affirmation and without proof of the signature or of the official character of the person appearing to have signed them.
3. No authentication or further certification of documents submitted in support of the request for extradition shall be required.
4. Any translation of documents submitted in support of a request for extradition by the Requesting Party shall be admissible for all purposes in extradition proceedings. [emphasis added]

(b) Admissibility of Evidence under the Act

18 Three types of evidence are admissible at an extradition hearing, regardless of whether the evidence is admissible in a Canadian proceeding: 1) the record of the case (s. 32(1)(a)); 2) any documents submitted in accordance with an extradition agreement (s. 32(1)(b)); and 3) any "reliable" evidence offered by the citizen that is relevant to the test for committal (s. 32(1)(c)).

(i) Section 32(1)(a) - The Record of the Case

19 The record of the case must include a document summarizing the evidence available to the extradition partner for use at trial (s. 33(1)(a)). The record of the case may include other relevant documents (s. 33(2)). The record of the case is inadmissible unless a judicial or prosecuting authority from the extradition partner certifies that the evidence in the record of the case is available for trial, "the availability requirement", and: 1) is sufficient in the country seeking extradition to justify prosecution; or 2) was gathered according to the laws of the country seeking extradition, "the reliability requirement" (s. 33(3)(a)). The section is conjunctive as between the availability and reliability requirement. The section is then disjunctive as to the reliability requirement. The legislation requires that the requesting state satisfy both the availability and reliability requirements as a prerequisite to the admissibility of the evidence placed before the court.

(ii) Section 32(1)(b) - Documents Submitted under the Treaty

20 Pursuant to Article VIII(1)(b)(iii) of the Treaty, any original or certified true copy of evidence gathered by Mexico is admissible in Canadian courts as proof of the facts contained therein (including evidence to establish identity) provided that a competent Mexican judicial authority has determined that the evidence was obtained in accordance with the law of Mexico and arguably is sufficient to justify committal for trial.

SECTION 7 ANALYSIS

21 The challenge to the constitutionality of s. 32(1)(b) of the Act is based upon section 7 of the Charter which provides as follows:

> Every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

22 A number of decisions have dealt with fundamental justice in an extradition context and United States of America v. Yang (2001), 157 C.C.C. (3d) 225 has fully explored and discussed the topic at paras. 42-48:

> The court must also take a contextual approach. Procedure that in one context would not comport with the principles of fundamental justice may accord with

the principles of fundamental justice in an entirely different context. In Kindler v. Canada (Minister of Justice) (1991), 67 C.C.C. (3d) 1 at 51, 84 D.L.R. (4th) 438 (S.C.C.), McLachlin J. identified three elements that must be taken into account in identifying the principles of fundamental justice in the extradition context. They are reciprocity, comity and respect for differences in other jurisdictions. The implications of these contextual factors are profound. First and foremost, the courts are instructed not to impose Canadian standards upon our extradition partners. A foreign justice system is not fundamentally unjust because it does not recognize certain safeguards that we would consider principles of fundamental justice. La Forest J. put the case for accommodating differences in blunt terms when he said in R. v. Schmidt (1987), 33 C.C.C. (3d) 193 at 214, 39 D.L.R. (4th) 18 (S.C.C.), that the judicial process in the foreign country "must not be subjected to finicky evaluations against the rules governing the legal process in this country". He recognized that Canada has no monopoly on fairness or truth-seeking:

> A judicial system is not, for example, fundamentally unjust -- indeed it may in its practical workings be as just as ours -- because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.

In my view, given the pronouncements of the Supreme Court of Canada in post-Charter extradition cases and particularly the need to respect differences in other jurisdictions, the evidentiary provisions of the Extradition Act comply with the principles of fundamental justice. Put simply, if we are prepared to countenance a trial of persons, including our own citizens, in jurisdictions with very different legal systems from our own, it is open to Parliament to design an extradition procedure that, with appropriate safeguards, accommodates those differences. Our extradition process need only meet "the basic demands of justice". The system must be one that is "reasonably effective . . . for the surrender of fugitives from one country to another untrammeled by excessive technicality or fastidious demands that foreign systems comply with our constitutional standards" [Schmidt at p. 215]. The United States Supreme Court adopted a similar approach in Glucksman v. Henkel, United States Marshal, 221 U.S. 508 (1911) at 512, where Mr. Justice Holmes said:

> For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical

> form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.

A basic tenet of our legal system that informs the nature of fundamental justice for extradition is, as stated in United States v. Burns (2001), 151 C.C.C. (3d) 97 at 130, 195 D.L.R. (4th) 1 (S.C.C.), "that individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents". The new Extradition Act to a significant degree allows the foreign state to make its extradition request in accordance with its own procedures, especially its own rules of evidence. I have not been persuaded that the Act, on its face, infringes the s. 7 rights of fugitives. Whether the Act may operate unfairly in a particular case is a matter I will discuss at the end of these reasons. I will now set out my reasons for holding that the impugned provisions are constitutional.

In Kindler at p. 54, McLachlin J. held that in defining the principles of fundamental justice relevant to extradition the court "draws upon the principles and policies underlying extradition law and procedure". The court asks whether the impugned provision is "consistent with extradition practices, viewed historically and in the light of current conditions" and whether the provision serves the "purposes and concerns which lie at the heart of extradition policy". I have briefly reviewed the extradition procedure in the countries with which Canada does most of its extradition business as well as the U.N. Model Treaty on Extradition and the European Convention on Extradition. Similar material had persuasive effect in Burns. While there may not be any accepted universal international norm governing extradition process, the trend is towards simplifying the extradition process to accommodate differences in the legal systems of extradition partners.

It is possible to identify certain principles of fundamental justice in the extradition context. The fugitive is entitled to a hearing before an unbiased decision-maker and to be present: Idziak v. Canada (Minister of Justice) (1992), 77 C.C.C. (3d) 65 at 83 and 85, 97 D.L.R. (4th) 577 (S.C.C.). The fugitive has the right to know the case against him or her including the materials relied upon to establish the prima facie case: United States of America v. Kwok (2001), 152 C.C.C. (3d) 225 at 267, 197 D.L.R. (4th) 1 (S.C.C.), United States of America v. Dynar (1997), 115 C.C.C. (3d) 481 at 524-25, 147 D.L.R. (4th) 399 (S.C.C.). The

fugitive also has the right to participate in the hearing free of coercion from the requesting state: Cobb at pp. 284-85. However, the fugitive is not, in my view, entitled to any particular form of evidence. As Sopinka J. said in Rodriguez, [1993] 3 S.C.R. 519 at p. 590, "a mere common law rule does not suffice to constitute a principle of fundamental justice". Rather, principles of fundamental justice are ones "upon which there is some consensus that they are vital or fundamental to our societal notion of justice". Bearing in mind the need to respect differences in other jurisdictions, developments in extradition in other jurisdictions and the traditionally modest role of the extradition judge I cannot find that the hearsay rules, opinion rules or the other common law rules of evidence are vital to our societal notion of justice in the extradition context.

If, as said by La Forest J. in Schmidt in the passage quoted above, it is not unjust to extradite to a country that does not recognize the presumption of innocence or other evidentiary and procedural safeguards that we would consider fundamental, the question naturally arises whether there are any Canadian evidentiary standards that can be imposed, as constitutional requirements, at the extradition hearing. The starting point must be an examination of the role of the judicial phase of the extradition process. That role, described repeatedly as a modest one, is primarily to ensure the identity of the person sought and to protect that person from being surrendered for conduct that we would not recognize as criminal. In Schmidt at p. 209, the hearing was described as protecting the individual from being surrendered "unless prima facie evidence is produced that he or she has done something there that would constitute a crime . . . if committed here". Similarly, in McVey (Re); McVey v. United States of America (1992), 77 C.C.C. (3d) 1 at 20, 97 D.L.R. (4th) 193 (S.C.C.), La Forest J. described the judge's function as to "determine whether the conduct of the accused would constitute a crime if it had been committed in this country". Thus, the judicial hearing acts as a modest screening device. It is structured around the fundamental concept that the actual trial takes place in the requesting state. Accordingly, the hearing is "intended to be an expedited process, designed to keep expenses to a minimum and ensure prompt compliance with Canada's international obligations": Dynar at p. 522. The evidence adduced in this case demonstrates that the procedure under the former Extradition Act has, on occasion, frustrated that fundamental obligation.

If fundamental justice does not mandate any particular evidentiary safeguards, does it nevertheless impose a reliability minimum as held in Bourgeon? [Bourgeon, [2000] O.J. No. 1656] In my view, it does not. To the contrary, imposing such a requirement is inconsistent with an important aspect of the

> extradition hearing, which is the need to accommodate differences in procedure in the extradition partners. In the foundation case of United States of America v. Sheppard (1976), 30 C.C.C. (2d) 424 at 433-34, 70 D.L.R. (3d) 136 (S.C.C.), Ritchie J. made it clear that the judge's role in determining sufficiency of evidence did not extend to passing judgment on its reliability. He held at p. 427 that the judge was required to commit the fugitive in any case "in which there is admissible evidence which could, if it were believed, result in a conviction". The committal could even be based upon evidence that was, in the opinion of the judge, "manifestly unreliable". Sheppard is a pre-Charter case and must be read in that light. It must also be read in light of the statutory framework that existed at the time and required that, absent a treaty provision to the contrary, evidence be presented by way of sworn affidavits based on first-hand knowledge. It does, nevertheless, provide strong support for the view that it has not traditionally been the function of the extradition judge to pass upon the reliability of the evidence presented. Post-Charter cases have held that the Sheppard test applies and that the extradition judge must refrain from weighing the evidence or assessing credibility. See, most recently, United States of America v. Kwok (2001), 152 C.C.C. (3d) 225 (S.C.C.) at p. 244. It is certainly open to Parliament to give the extradition judge, as it has in s.32(1)(c) in respect of evidence adduced by the person sought for extradition, the right to pass on the reliability of evidence, but that does not mean that such a power is fundamental to the fairness of the process. [emphasis added]

23 Upon reviewing the principles of fundamental justice as they apply in relation to extradition law and procedure, I conclude that s. 32(1)(b) offends section 7 of the Charter. The issue is one of balance between the purposes of extradition and fundamental justice safeguards for the individual. In the extradition context, the Charter permits reliance on otherwise inadmissible evidence in the interests of comity, reciprocity and respect for other legal systems. However, some safeguards must be in place to protect the individual's liberty interest.

(a) Lack of Safeguards

24 The requesting State submits that there are sufficient safeguards preserving fundamental rights protected by section 7 of the Charter via the requirements of section 29 of the Act. Section 29 encapsulates the only "judicial" function of the extradition judge: having admitted otherwise inadmissible evidence pursuant to the requirements of section 32 - in this case, pursuant to the Treaty - the question will be the "sufficiency" of the evidence.

25 In the determination of the sufficiency of the evidence at the extradition hearing, however, the court does not consider the form of the evidence: See Yang at paras. 11 and 12. Thus, there is no safeguard for relying on otherwise inadmissible evidence.

26 The case law regarding the new Act makes clear that no particular form of evidence is required. However, equally clear, but not explicitly expressed, is that some evidence is required, at least sufficient to justify committal for trial in Canada.

27 In Yang, the s. 33(3) certification was said to be the reliability safeguard for the s. 32(1)(a) evidence.

28 When one considers the analysis in Yang and those cases relied upon to uphold s. 32(1)(a) in relation to a Charter challenge, it is manifest that no matter how the issue is framed, one principle remains intact: fundamental justice as required by the Charter compels safeguards in relation to the evidence itself or to the process involving evidence to be presented to an extradition judge. Safeguards in relation to the surrender of the liberty of a Canadian to a foreign jurisdiction certainly implies that there be evidence presented to an extradition judge that bears considering for fair determination of sufficiency. If evidence is presented that at the time of the extradition hearing is not available for trial, then that is not evidence the extradition judge can utilize to determine sufficiency.

29 Section 32(1)(b) can thus operate to deprive an individual of his Charter rights.

30 In this case, the Treaty contains no requirement for certification by a relevant Mexican judicial or prosecuting authority that any of the evidence, however it is gathered, is available for trial. Of course, it is possible for any one of the Canadian extradition treaties to have even fewer safeguards than does the one at issue. Thus, s. 32(1)(b) permits an individual to be extradited when the evidence proffered not only meets no reliability test but may not be available for use at trial.

31 Stromberg-Stein, J. aptly described the importance of the certification process in providing necessary but minimal safeguards in United Kingdom v. Tarantino [2003] B.C.J. No. 1696 at paras. 30-32 and 37-40:

> This is not a question of alleging doubt as to the weight to be given to pieces of evidence. It is a question of doubt about what evidence actually exists, despite assertions in the latest record of the case, given the lack of diligence and the careless, cavalier approach by the certifying prosecutor to the process of certification.
>
> Counsel inform me there are no reported cases like this one where there has been a history of certifications that have been proven to be inaccurate about important, allegedly available evidence.
>
> The case of U.S.A. v. Wacjman, [2002] Q.J. No. 5094 (C.A.) bears some similarity, except for the fact an error in the record of the case in the form of an

affidavit was brought to the attention of the requesting state and supplementary affidavits remedied the error.

...

The record of the case is now the primary method for introducing evidence. It is afforded a broad and powerful presumption of accuracy founded upon the act of certification by a responsible official in the requesting state.

The Supreme Court of Canada has commented that, for the validity of the certification, Canada relies on "the fairness and good faith" of the requesting state: U.S.A. v. McVey, [1992] 3 S.C.R. 475 at para. 58. Certification is of critical importance. It has been held to be the fibre with which the safety net of assurances as to available evidence is woven. With that safety net and the trust statutorily placed in it, foreign states are afforded extraordinary credence in their locally untested assertions based on the certification. This places a high level of responsibility on, and power in, the certifying authority who, by the Act, is granted the jurisdiction to legitimize the record of the case as worthy of acceptance by the Canadian court. What is certified is accepted by statute to be true and the liberty of a Canadian citizen is fundamentally compromised when a court relies upon the certification to send a Canadian citizen to a foreign country. If the certification authority is not exercised with utmost diligence and care, the Canadian court is without a proper foundation upon which to deprive a Canadian citizen of liberty. The person sought is without any realistic opportunity for judicial intervention since there is no ability to cross-examine or conduct independent investigation of the accuracy of the certified assertions.

Section 33(3) imposes an obligation on the certifying authority to ensure that, prior to submitting to a Canadian court a certified record of the case, the evidence certified is, in fact, available for trial. The certification process presumes and requires a reasonable degree of diligence and accuracy to ensure people are not extradited upon evidence which does not exist, and that court proceedings are not conducted and judgments reached on the basis of important assertions which have not been diligently examined and which are simply not accurate. This is not an unattainable goal for a certifying authority to achieve and reasonable diligence commensurate with the power is not too much to ask. It will be, one expects and hopes, a rare case where it is shown that a particular prosecuting official or authority has demonstrated, in their certification process, a lack of diligence and

> care resulting in proven important inaccurate assertions in successive records of the case. The case at bar is such a case, given the history of successive important inaccurate assertions.
>
> The presumption of accuracy provided by certification is considered in a number of cases under the new Act, where issues of fundamental justice were raised in arguments that the absence of sworn evidence supplanted by the certification process in s. 33 offended s. 7 of the Charter. Courts have consistently given deference to the certification process and have been willing to afford the presumption that what is certified to be available is available, in the absence of cogent reasons that cast doubt.

(b) No International Standards Concerning Availability Evidence

32 The requesting State submits that, given the flexibility in forms of evidence allowed and that the availability of evidence is not internationally required, the availability of evidence is not necessary for the determination of sufficiency. This is relevant because international standards can be an indicator of fundamental justice requirements. The respondent submits that in none of the reciprocal treaties now in force is there a requirement that Canada as the requesting State certify the availability of evidence at trial, suggesting that there is no international standard in relation to such certification.

33 However, the most recent treaty with South Africa arguably does have such a requirement, and clearly the amended treaty with the United States does require such certification: (See Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the Unites States of America, ..., s. 10(2)(b)). More importantly, though, is the lack of any international standard for specific requirements for extradition. Rosenberg J.A. in Yang at paras. 24-33, briefly reviews the recent history of States engaged in attempts to modernize and streamline extradition processes among reciprocating States; there is very little that is standard.

34 The lack of standardization is inevitable given the diversity of legal systems among States, even those considered western or westernized democracies. The extent of diversity is especially revealing when one considers that some European States refuse to extradite their own citizens at all.

35 In relation to this reasoning, the pivotal point is that Canada's Extradition Act as judicially considered requires certification of evidence as available for trial. Certification is also important as a safeguard of fairness where "streamlined" evidence is stripped of any reliability requirements. This is buttressed by the fact that inconsistencies between the Act and a treaty are resolved in favour of the Act: see s. 10(2).

(c) Case law has not determined the constitutionality of s. 32(1)(b)

36 The respondent submits that the constitutionality of section 32(1)(b) has already been determined in the Ontario and the Northwest Territories Courts of Appeal. Cases have been pled to include section 32(1)(b), but none have grappled with, or ultimately decided, whether there is a constitutional requirement that the evidence proffered under s. 32(1)(b) be available for trial (see Yang and Germany v. Ebke, [2001] N.W.T.J. No. 13, 2001 NWTSC 17; aff'd [2003] N.W.T.J. No. 49, 2003 NWTCA 1). Each of those cases was concerned with evidence proffered under section 32(1)(a) the record of the case. And in both Yang and Ebke, the whole of the analysis centered on that subsection and the certification process required by s. 33. The argument in those cases focused on the absence of a reliability standard.

37 Rosenberg J.A. begins his analysis in Yang by stating that the issue to be decided was whether the principles of fundamental justice require that the evidence tendered by the requesting State meet a minimum reliability standard. He goes on to specify that the constitutional challenge is to section 32(1)(a) so that section 33, the requirements for the contents of the record of the case, is at the "heart" of the challenge. The subsequent analysis focuses entirely on the issue of reliability being met by the requirements of section 33 as described at para. 58:

> It follows that I do not agree with Ewaschuk J. that fairness requires that the reliability condition imposed by statute upon evidence sought to be adduced by the fugitive must also be applied to the evidence sought to be adduced by the extradition partner. As Vertes J. noted in Ebke at para. 79, this fails to give effect to the reliability requirement inherent in the certification requirements of the Act. Under s. 33(3), the judicial or prosecuting authority must certify that the evidence summarized in the record of the case is available and either would be sufficient under the law of the extradition partner to justify prosecution or was gathered according to the law of the extradition partner.

38 The reasons assume the requirement that the evidence is certified available for trial, as per s. 33. The court never addresses the admissibility of evidence not certified to be available for trial.

39 In Ebke, the requesting State also tendered its evidence by way of the record of the case. While the case was pled as a challenge to both sections 32(1)(a) and 32(1)(b), counsel for Ebke conceded that there was no need to consider section 32(1)(b) if the extradition judge found, as he did, that section 32(1)(a) was constitutional: Ebke, at paras. 69 and 84. To that end, Vertes J. specifically declined to rule on the constitutionality of section 32(1)(b) for all cases: Ebke, at para. 84.

40 Thus, the case before this court can reasonably be said to be an argument of first instance. While the cases of Yang and Ebke do provide principles to guide the analysis, they did not decide the issue of the constitutional validity of s. 32(1)(b).

(d) Requesting State should demonstrate availability of evidence

41 There is scant disagreement over whether evidence being available for trial is an essential element for the determination of sufficiency of evidence under section 29. The issue seems to be whether the burden should be on the requesting State to certify that evidence is available or on the person sought to demonstrate that the evidence proffered is not available.

42 The practicalities of the matter overwhelmingly favour the requesting State to bear this burden. There are two obvious reasons. First, the evidence (whether witnesses or sources of documents) is located in a requesting State or at a place known to the requesting State. This is not necessarily the case for the person sought, who is obviously being sought because he is not present in the requesting State. Second, it is not onerous for the requesting State to certify that evidence it has gathered is available for trial. If the prosecuting officers do not know if it is available, they should not be seeking extradition.

(e) Summary

43 In the result and in summary, I consider the following as the essential reasons why s. 32(1)(b), in general, infringes the Charter and, in particular, why it infringes Mr. Monter's section 7 Charter rights.

1. The new Extradition Act provides for streamlining of the extradition process by removing any specific reliability requirement to be imposed on any evidence made admissible pursuant to section 32.
2. The substitute for previous evidentiary safeguards of reliability is the certification process provided for by s. 33, that is, the prosecuting attorney or judicial authority in the requesting State must certify that evidence being relied on to meet the test in section 29 is available for trial and is either sufficient under the law of the extradition partner to justify prosecution, or was gathered according to the law of the extradition partner.
3. In the case law to date dealing with the constitutionality of s. 32, certification has been found to be a sufficient index of reliability that section 32(1)(a) meets the test of fundamental justice required by s. 7 of the Charter and thus passes section 7 Charter scrutiny.
4. Section 32(1)(b) by its wording allows admissibility of evidence that meets no s. 33 requirements and thus, there is no fundamental justice safeguard provided for pursuant to section 32(1)(b).
5. In this case, the Treaty provides no such fundamental safeguard, and thus Mr. Monter's section 7 rights are infringed.

SECTION 1 ANALYSIS

44 Having found that subsection 32(1)(b) of the Act offends s. 7 of the Charter, the next step is to determine if it can be saved by s. 1 of the Charter.

45 Section 1 of the Charter reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

46 The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation: R. v. Oakes, [1986] 1 S.C.R. 103. The standard of proof is the civil standard, but in relation to this test, that standard must be applied rigorously. In this case, the onus is on the respondent.

47 The Crown provided no arguments specifically aimed at saving s. 32(1)(b) by the application of s. 1. Also, the Crown provided no evidence specific to this issue even though it was invited to do so. Thus, the Crown has failed to show that the Charter breach is justifiable.

48 In any event, s. 32(1)(b) is not saved by s. 1. The analysis is guided by the framework laid out in Oakes. There are two central criteria:

1. the measure must serve a pressing and substantial objective; and
2. the Crown must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components.

    i. the measure must be rationally connected to the objective;
    ii. the means chosen should minimally impair the right in question; and
    iii. there must be a proportionality between the effects of the limiting measure and the objective.

Pressing and Substantial Objective

49 The legislation, and s. 32(1)(b) in particular, does serve a pressing and substantial objective. The section does not make the extradition process more efficient as that depends on the treaty in question. However, the section does address the need for comity, reciprocity and respecting the differences in other legal systems. The section also helps Canada meet its obligations to implement treaties in force. These objectives are sufficiently important that justifiable limits may be imposed: See Yang.

Rational Connection

50 Section 32(1)(b) permits the contents of documents to be admitted as evidence as long as they are submitted in conformity with the terms of an extradition agreement. Thus, s. 32(1)(b) is rationally connected to the objectives considered above.

Minimal Impairment

51 Section 32(1)(b) is not saved by s. 1 however, because it does not impair s. 7 rights as little as possible. This section authorizes the use of otherwise inadmissible evidence. However, there are no evidentiary safeguards in the Act. The admissibility is left subject to extradition agreements which may provide no or inadequate safeguards.

52 Parliament's objective can still be served by employing, for example, the minimal safeguards set out in s. 33(3) of the Act. Those certification requirements are neither onerous nor disrespectful to the legal systems of other States. Conversely, at least a person sought is not denied liberty unless evidence is certified available for trial; an essential requirement of any fair trial.

53 For these reasons, and the relevant reasons that follow in the remedy section, I conclude that s. 32(1)(b) of the Act cannot be saved by s. 1 of the Charter.

REMEDY

54 For the reasons set out below, reading in the certification requirements set out in s. 33(3) of the Act is the appropriate remedy to resolve the inconsistency between s. 32(1)(b) and the Charter.

55 Sections 24(1) and 52(1) of the Constitution Act, 1982 provide:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> ...
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> ...

56 Sections 24 and 52 of the Constitution Act, 1982 give courts discretion and flexibility in determining the appropriate remedy for legislation that violates the Charter. In Schacter v. Canada , [1992] 2 S.C.R. 679, the Court examines the range of remedies in detail, explaining the options at 695:

> A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny.

> Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

(a) Appropriate Remedy

57 Lamer C.J. in Schachter at 702, explains that remedial choice is determined by examining the extent of the constitutional inconsistency, which is itself apparent from the manner in which it fails to be justified under s. 1.

58 Where a provision fails on the minimal impairment or effects portion of the Oakes test because it is not carefully tailored, reading in or severing can be an appropriate remedy: Schacter at 704-705. Severing or reading in several words may be all that is necessary to carefully tailor the provision and make it consistent with the Charter while not overly interfering with its intended application or meaning.

59 However, severance or reading in is only justifiable in the clearest of cases, where the following criteria are met (Schachter at 718):

> A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
> B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
> C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

60 In this case, reading in the certification requirements is justified. First, the objective of the impugned section is obvious and reading in would constitute a lesser interference with the objective

than would striking down. Striking down the section might frustrate execution of extradition agreements. Second, reading in would not constitute an unacceptable intrusion into the legislative domain. I discuss this point in more detail below. Finally, reading in will not involve any intrusion into legislative budgetary decisions.

(b) Legislative Intent

61 Courts must show respect for the role of Parliament and be as faithful as possible to the legislative scheme while still recognizing and protecting the Constitution: Schachter at 700.

62 The concern with the remedy of reading in is that the original scheme may be altered to a point where it no longer reflects the legislative intent. Even where the intent is respected, the concern is that the remedy of reading in may lead to a change in significance of the remaining portion: see Sharpe, [2001] 1 S.C.R. 45 at 115.

63 Although it is possible to identify with some certainty the exact portion of a statute that offends the Charter, it is not always as simple to determine which words need to be read into a statute in order to comply with the Charter. When it is difficult to determine the extent of the expansion, the legislature, not the courts, should fill in the details of the law. However, in this case, the excluded constitutional protection can be easily identified and carefully crafted. The Legislature has turned its mind to the appropriate standard that evidence must meet and still respect different legal systems. The evidence supplied to an extradition hearing by a requesting state under subsection 32(1)(b) of the Act should be subject to the certifications required by s. 33(3).

64 The Crown has argued that to read in onerous requirements would, in effect, undermine the legislative purpose of the streamlining of the requirements for extradition. In addition, to undermine a requesting state's reliance on an extradition agreement, would strike a blow at Canada's exclusive treaty-making authority and would be inconsistent with Canada's international obligations.

65 The requirements of s. 33(3) are minimal and entirely within the discretion and expertise of the requesting state. These requirements are not onerous. The requesting state surely knows whether the evidence being proffered is available and as already pointed out, if it does not, then it ought not seek extradition.

66 The certification by the requesting state that the evidence is available for trial would not change the application of 32(1)(b). As was intended by Parliament, the minimum procedural requirements under sections 32 and 33 would remain, and any requesting state not operating under a treaty would be unaffected by the change. A requesting state operating under its extradition treaty with Canada would also be largely unaffected. In the vast majority of cases the evidence produced at the hearing is available for trial, and the certification of this fact would be sufficient for an extradition court to proceed. Only in cases where the evidence is suspect or unavailable would the change hamper the requesting state; exactly what should happen when an individual's liberty is at stake. Therefore, reading in, as set out above, provides the appropriate remedy to the Charter

violation while not significantly changing the legislative intent or unduly hampering the scheme as provided by Parliament.

(c) Remedy for Applicant

67 The applicant has requested a dismissal of the application for committal, and the parties have jointly requested a stay of that order for 30 days.

RESULT

68 Section 32(1)(b) of the Act violates s. 7 of the Charter and is not saved by s. 1. It should be read subject to s. 33(3) of the Act.

69 The application for committal is dismissed. There will be a stay of the order for 30 days.

KOENIGSBERG J.

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CORRIGENDUM

Released: May 13, 2004.

In my Memorandum of Reasons for Decision, 2004 BCSC 210, issued March 2, 2004, the Docket number should read: CC001665.

KOENIGSBERG J.

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