The Response of One Democracy to the Arrival of the Uninvited Sheriff.

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A. Introduction

1. Speaking on behalf of a six justice majority of the Supreme Court of the United States in *Alvarez-Machain,* (1992) 112 S.Ct. 2188, released June 15, 1992, Chief Justice Rehnquist held that the invasion of Mexico to retrieve a citizen and resident of Mexico indicted in Texas for kidnapping and murder of a DEA agent did not violate the United States – United Mexican States Extradition Treaty, with the result that stays of proceedings entered by the Texas Courts based upon abuse of process were set aside.

2. In dissent, Stephens J., on behalf of Blackmum and O'Connor JJ. held, at para. 686 that:

> As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts. Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold. That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation. Indeed, the desire for revenge exerts "a kind of hydraulic pressure...before which even well settled principles of law will bend," ... but it is precisely at such moments that we should remember and be guided by our duty "to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it."... The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.
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> I suspect most courts throughout the civilized world—will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, but a decision of this character. [citations omitted] [Emphasis added]

3. One year later, on June 24, 1993, the English House of Lords responded to the "monstrous" example set by the *Alvarez-Machain* majority by holding, in *Reg v. Horseferry Rd Ct, ex parte Bennett,* [1994] 1 AC 42, that criminal proceedings in England against Bennett would be stayed in consequence of English Police involvement in the manipulation and evasion of extradition processes. The Dicta of Lord Bridge of Harwich in *Bennett's* case summarizes the tensions at play.

> There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands the court to take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind an insular and unacceptable view.

4. This paper analyzes the response of the Canadian judiciary to requesting state misconduct in extradition proceedings.

B. The Canadian Abuse of Process Doctrine as Applied in the Extradition Context

5. The two basic grounds pursuant to which a Canadian court will entertain an abuse of process application in extradition proceedings in Canada are set out in the Judgement of the Ontario Court of Appeal in *R. v. Larosa* (2002), 166 C.C.C.(3d) 449 at para. 52 (Ont. C.A.), Doherty J.A., for the Court, said as follows:

> [A]n extradition judge has the authority to stay proceedings under s. 25 of the *Extradition Act* or under the common law abuse of process doctrine in two related but somewhat different situations. He or she may stay the proceedings if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of [the Canadian Charter of Rights and Freedoms] s. 7 or an abuse of process. Unfairness is considered in the context of the purpose of the committal hearing, which is to determine whether a questioned state has established a *prima facie* case. The extradition judge may also stay committal proceedings if, in the circumstances, proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice. *Cobb* and *Shulman* are examples of situations in which proceeding with a committal hearing amounted to an abuse of process and a breach of s. 7 no matter how fairly that proceeding might be conducted. [Emphasis added.]

6. The latter of the above two bases for a stay of proceedings involves circumstances in which one of the parties to the extradition hearing, or persons associated with one of the parties, engages in conduct outside the hearing itself which is contrary to fundamental precepts of Canadian justice. In *United States of America v. Cobb,* (2001), 152 C.C.C.(3d) 270 (S.C.C.), Arbour J., described this form of abuse of process on behalf of a unanimous Supreme Court of Canada as follows, at para. 42:

> The s. 7 issue before the extradition judge is whether the extrajudicial conduct and pronouncements of a party to the proceedings, or those associated with that party, disentitle that party from the judicial assistance that it is seeking and whether it would violate the principles of fundamental justice to commit the fugitives for surrender to the Requesting State. [Emphasis added.]

7. An example of such extrajudicial conduct arose in *United States of America* v. *Licht*, (2002), 168 C.C.C. (3d) 287 (B.C.S.C.). In *Licht*, the misconduct in issue concerned the actions of American Drug Enforcement Agents who offered to sell narcotics in British Columbia during an under-cover operation. In holding that the illegal acts of these authorities resulted in an abuse of process, Dillon J. of the British Columbia Supreme Court held as follows, at para. 59:

> The conduct of a United States civilian police agent entering Canada without the knowledge or consent of Canadian authorities, in defiance of known Canadian requirements for legal conduct, with the express purpose to entice Canadians to the United States to commit criminal acts in that jurisdiction and acting illegally to offer to sell cocaine in Canada is shocking to the Canadian conscience. It is a serious violation of the sense of fair play and decency that has been established in cooperation agreements for mutual assistance in criminal matters. It is also a serious violation of Canadian legality in the circumstances of clear defiance of Canadian law without explanation except perhaps to pursue drug dealers through the reverse sting technique that requires specific planning and approval in Canada before it can be legal by authorized police officers. [Emphasis added]

8. In *United States v. Cobb*, *supra*, and *United States v. Shulman*, (2001), 152 C.C.C. (3d) 294 (S.C.C.), the extrajudicial conduct related to threats from an American prosecutor designed to induce a fugitive to waive his or her lawful right to resist extradition from Canada. In holding that this conduct resulted in an abuse of process, Arbour J. reasoned as follows:

> The respondent argues that any concern that the appellants may face unfair proceedings in the United States is a matter for the Minister, not for the extradition judge, whose sole function is to assess the sufficiency of the evidence. True as this may be, it misses the real issue here. The issue at this stage is not whether the appellants will have a fair trial if extradited, but whether they are having a fair extradition hearing in light of the threats and inducements imposed upon them, by those involved in requesting their extradition, to force them to abandon their right to such a hearing. The focus of the fairness issue is thus the hearing in Canada, to which the Charter applies, and not the eventual trial in the U.S., which it

> may be premature to consider pending the Minister's decision on surrender. Conduct by the Requesting State, or by its representatives, agents or officials, which interferes or attempts to interfere with the conduct of judicial proceedings in Canada is a matter that directly concerns the extradition judge. [Emphasis added.]

9. From the above authorities, it is clear that abusive extrajudicial conduct need not relate to evidence that the Requesting State is intending to rely upon in the extradition proceedings. Relevant misconduct need only be related in some way to the extradition proceedings. The necessary degree of relationship was described by Dillon J. in the disclosure judgment in *United States v. Licht*, as follows, at para. 31:

> It is not an answer in the circumstances of this disclosure application to say that the United States is not relying on evidence gathered in Canada to establish a *prima facie* case for committal. The Canadian operation was part of the overall reverse sting operation started in the United States. There is a link between events in Canada and those later in the United States because evidence gathered in Canada by foreign agents was intended to produce evidence directly leading to clear evidence for indictment on the conspiracy charge in the U.S. This is a sufficiently close link to found an argument for abuse of process. Furthermore, this is conduct attributable to a litigant before the court analogous to the statements by the American judge and U.S. prosecutor in *Cobb* in the sense of potentially affecting the fairness of the extradition process.

10. The first form of abuse of process, outlined by Doherty J.A. in *Larosa* in the passage set out above at para. 5, is misconduct during the judicial phase of the extradition process. For example, it is clear that demonstrated mischaracterization of the evidence relied upon by the Requesting State in support of the extradition request also strikes at the heart of the extradition process and may also be sanctioned by a stay of proceedings. This rule is illustrated, in *United Kingdom of Great Britain and Northern Ireland v. Tarantino* (2003), 177 C.C.C. (3d) 284 at para. 30 (B.C.S.C.), where Stromberg-Stein J. of the British Columbia Supreme Court distinguished between a case where there has been a careless or reckless certification of the available evidence and a case where the person sought is merely arguing about the weight to be assigned to certain evidence:

> 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.

11. In entering a stay of proceedings, Stromberg-Stein J. emphasized that unless the courts enforce a standard of diligence with Requesting States, the liberty of citizens in Canada will be subject to "potential injustice and abuse"; at paras. 43-45, 55:

> In this case, I am not being asked to analyze the quality of the evidence in the record of the case. What counsel for Mr. Tarantino asks is that, given the history of certifications in this case, this court should decline to grant the requesting state the presumption that their certification is meaningful or of such reliability that the liberty of a Canadian citizen should be potentially compromised.
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> I agree with counsel that, while the reliability requirement inherent in s. 33 is presumed, that presumption is not absolute in the face of cogent evidence, as exists in this case, that it ought not to be presumed.
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> Certification of the record of the case, impacting as it does on the liberty of a Canadian citizen, is not intended to be the perfunctory, pro forma, expedient exercise as it appears to have been here. Given the history of certifications in this case, it would be unsafe to rely on the certification of the current record of the case. The history of certifications in this case does not justify the presumption of accuracy afforded the record of the case by ss. 32(1)(a) and 33(3)(a) of the Act. [Emphasis added.]

12. In *U.S.A. v. Thomlison*, [2005] O.J. No. 1714 at paras. 7-8 (Sup. Ct. J.), Justice Gans of the Ontario Superior Court of Justice adopted the comments of Stromberg-Stein J. in *Tarantino*, *supra*. In accepting that the Requesting State is obliged to exercise due diligence and care in the certification process, Gans J. recognized that there is an obligation on the Requesting State to be full, fair and frank in its characterization of the evidence presented to a Canadian court in the course of extradition proceedings. This obligation arises as a matter of necessity, from the broad presumption of accuracy afforded to the certified evidence submitted by the Requesting State as part of its record of the case, at paras. 7-8:

> The record of the case is afforded a broad and powerful presumption of accuracy. The assurance of reliability of the record of the case comes, not by passing the information through a Canadian evidentiary screen, but by the certification of the judicial or prosecuting authority in the requesting state - a state in which Canada has signified confidence as to the fair operation of its judicial system.
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> Basically, the root of this notion is found in the certification process undertaken by the judicial or prosecuting authority of the extradition partner, who is called upon to certify that the evidence summarized in the

> record of the case is available for trial; is sufficient to justify the prosecution in accordance with the laws of the extradition partner; and the evidence summarized was gathered in accordance with the laws of that state.

13. It is important to note, on the particular facts of *Thomlison*, *supra*, that Justice Gans placed some significance on the fact that the Requesting State took steps to remedy a misdescription of evidence in the ROC. In particular, the witness in question was produced for cross-examination. In deciding to excise the impugned evidence, rather than enter a stay of proceedings, Gans J. held; at paras. 4, 10:

> However, the U.S. Attorney ultimately agreed to submit Ms. Friedman to cross-examination and waived any privilege that might otherwise be associated with the choice of methodology, thereby, smartly and rightly, avoiding any long term or irreparable prejudice with which the Person Sought was then beset. [Emphasis added.]

14. Justice Gans made a finding of fact in *Thomlison, supra*, that the AUSA's mischaracterization of the evidence was merely "ill conceived" and that the remedy of excision was therefore sufficient in those circumstances. The Court then emphasized the following; at para. 14:

> While, as I indicated, the court should be ever vigilant to insure that the reliability of the certification process is maintained at all times, such can be accomplished in this case if the evidence of Ms. Friedman is excised, in all respects. The use of the remedy now fashioned, which has been adopted in the extradition context, will in my view provide the requesting state and its Canadian counsel with a message that full, frank and fair disclosure must form the corner stone of the record of the case and, minimally, that there is no room for lack of diligence and care, even if it were inadvertent or misguided. [Emphasis added.]

15. In consequence, rather than entering a stay of proceedings, Gans J. granted a lesser remedy, namely excising evidence contained in the ROC which the Court found "to be misleading both in terms of context and substance" (para. 5). Gans J. granted this lesser remedy because the Requesting State produced correspondence between the United States O.I.A. and the Canadian I.A.G. which satisfied the Court that "...the U.S. Attorney did not set out to avoid the strictures of the Extradition Act..."

16. Finally, in the very recent case of *USA v. Gavin Tollman*, Ontario Superior Court of Justice, Court File No. E-1/05, on June 1, 2006 Molloy J. summarized the allegations of abuse of process made by the person sought during a disclosure application, as follows at para. 23:

> (i) "Engineered Fugitive Status"---The USA issued an arrest warrant for Mr. Tollman on November 8, 2004, but sealed it and did not disclose it to him. The USA then deliberately took no steps to proceed on the warrant while Mr. Tollman was in his home jurisdiction, but rather waited until he was away from home and passing through Canada to take steps to have him returned to the USA.
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> (ii) "Disguised Extradition"---The USA attempted to have Mr. Tollman returned to the USA to face the outstanding charges by using immigration procedures rather than extradition.
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> (iii) "Failure to Comply with the IRB Release Order"---After Mr. Tollman was detained in custody by Canadian immigration officials, the Immigration Review Board ordered his release, on terms. Although those terms were met, CBSA officials refused to release Mr. Tollman, stating there were irregularities in the IRB order, but not taking any steps to appeal or vary the order. While Mr. Tollman was still being detained in breach of the IRB order, the extradition process was commenced and an extradition arrest warrant obtained.
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> (iv) "Improperly Obtained Extradition Arrest Warrant"---The USA failed to make full, fair and frank disclosure on its application for an extradition arrest warrant.

17. In consequence, Justice Molloy ordered the Canadian Border Services to disclose documents relevant to the above abuse allegations which included email correspondence between the Assistant United States Attorney, the Office of International Assistance, Homeland Security, and the Canadian Border Service Agency so that Mr. Tollman could explore these allegations of extrajudicial abuse, at para. 26, for the following reasons:

> Mr. Tollman's allegation that what lies behind these events was a deliberate attempt to thwart the Canadian extradition process and deny him the protections afforded under our legislation, is one plausible explanation for these events. It is not the only possible plausible explanation, as I have indicated above, but neither is it so far-fetched that it does not deserve to be fully examined. The strength of Mr. Tollman's case in respect of the "disguised extradition" allegation is particularly compelling. It easily meets the threshold of demonstrating a reasonable possibility that his allegations can be substantiated. Indeed, in my view, Mr. Tollman has, at this point, demonstrated a *prima facie* case on this aspect, which I believe goes beyond what is required to show an "air of reality". The evidence thus far on the other three bases is not quite as

> strong. However, neither are these allegations far-fetched. All four bases relate to an overall scheme to thwart the extradition process. In this context, the motivation behind the other abusive acts alleged is legitimately called into question. There is a reasonable basis for the inference that concerted efforts were made to keep Mr. Tollman in custody and to bring maximum pressure to bear in the hopes of causing him to simply acquiesce to deportation, thereby avoiding the delays and procedural protections involved in the extradition process. The pattern of conduct throughout calls for an explanation. Accordingly, I find there is an air of reality in respect of all four bases upon which Mr. Tollman alleges extra-judicial phase abuse.

18. After disclosure was made, an evidentiary hearing was conducted over seven days ending June 12, 2006, with the result that the Court ordered that the extradition proceedings would be stayed in consequence of found abuse of process, with detailed Reasons for Judgment to follow, which were issued on September 14, 2006.

19. In summarizing her conclusions Justice Molloy stated, at para. 13:

> In my view, the evidence supports Mr. Tollman's contention that the United States deliberately set out to thwart the Canadian extradition process and to deny him the protections afforded to him under our legislation. US authorities initially sought to use the Canadian immigration system to effect Mr. Tollman's removal to the United States, completely and improperly ignoring the extradition process. When that attempt was unsuccessful, they continued to press for his detention, only bringing these extradition proceedings when all else had failed. Further even in the extradition proceedings, they were less than forthright in the application for the arrest warrant that resulted in Mr. Tollman's further detention. It would appear that the intention behind all of this was to bring maximum pressure to bear upon Mr. Tollman in the hopes that he would simply agree to deportation and give up his rights under the *Extradition Act*. The fact that none of these efforts was successful is irrelevant. The conduct of the United States constitutes an affront to the processes of this court that cannot be condoned. This case falls squarely within the principles enunciated by the Supreme Court of Canada in *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 152 C.C.C. (3d) 270, 2001 SCC 19. By attempting to thwart the appropriate legal process in Canada in the hopes of having Mr. Tollman abandon his rights under Canadian law, the foreign state has disentitled itself to any relief from this court. This is conduct that offends this community's sense of fair play and decency and constitutes an abuse of process. The only suitable remedy in these circumstances is a stay of proceedings, which I have ordered. [Emphasis added]

20. Having reviewed the detail of the disclosed emails Molloy J. commented upon the fact that no evidence had been advanced by the requesting state in response to the apparent inferences to be drawn, as follows, at para. 120:

> It is often said that actions speak louder than words. The actions taken by the United States against Gavin Tollman in this country speak loudly of a deliberate plan to engineer the return of Mr. Tollman to the United States to face tax fraud charges without having to go through the nuisance of an extradition proceeding. The fall-back plan was that if extradition had to be resorted to at all, it would be pursued in this country where Mr. Tollman had no ties to the community, away from his wife, his children, his friends and his work; a place where he was more likely to be held in custody or to have his freedom severely curtailed, and therefore more likely to waive his rights and simply surrender to the United States. When the actions taken are coupled with the words found in the exchange of e-mails between US and Canadian authorities, the nefarious nature of the plan is all too clear. There have been no words of explanation in the face of the serious allegations now made; the actions taken and words said at the time of the events speak all the more clearly.[Emphasis added]

21. Having found facts Her Ladyship turned to the relevance of the applicable bilateral treaty and the Rule of Law, as if in answer to the *Alvarez-Machain* challenge at para. 122, as follows:

> The evidence is clear that the United States first approached Canadian immigration officials seeking to have Gavin Tollman turned over to them for prosecution without having to go through the extradition process. United States authorities sought not only to bypass the logical route of extraditing Mr. Tollman from the country where they knew him to be ordinarily resident; they sought to bypass the extradition route in Canada as well. There is clear and binding authority that it is an abuse of process to use the immigration system for the purpose of effecting extradition. We have extradition treaties and extradition legislation for a purpose, just as we have immigration legislation for a purpose.[Emphasis added]

22. Turning to the impact of abuse upon the person sought Her Ladyship noted, at para. 146:

> Efforts were made to keep Mr. Tollman in a harsh prison setting, away from his family, friends and community, in order to pressure him into abandoning his rights. Those attempts failed, but that is no answer to the allegations of abuse. Indeed, but for the egregious conduct against him, Mr. Tollman might well have simply surrendered into US custody, as his

> counsel in New York was negotiating at the outset. It was his sense of outrage at what was being done that stiffened his resolve to resist. A man with less moral fibre, and certainly a man with less personal wealth, would likely have succumbed to the pressure exerted.[Emphasis added]

23. Finally, in summarizing, Molloy J. described the values at stake, at para. 149:

> In addition to the personal impact on Mr. Tollman, the conduct here must be condemned as contrary to the fundamental principles upon which our justice system is based. The justice system must be fair for all who become enmeshed in it, regardless of intellect, wealth or station in life. Mr. Tollman was able to insist on his rights, albeit at considerable personal and financial cost. However, he was armed with intelligence, stamina, a social position of power and prestige, and enormous personal wealth. Very few people would have been able to do what he has done. If the system went awry for him, what hope is there for the weak, the poor and those less powerful? The answer must be in the vigilance of the justice system itself. Misconduct of this sort cannot ever be tolerated, for to do so is to condone, perhaps even to invite, similar conduct in the future. This is the kind of conduct that offends this community's sense of fair play and decency. Having conducted itself in this manner, the requesting state is disentitled to any relief from this court. Accordingly, this extradition proceeding is permanently stayed.[Emphasis added]

24. The decisions in *Cobb, Licht, Tarantino, Thomlison* and *Tollman* speak with one voice. The Sheriff must abide by its word embodied in its treaties; it must respect the sovereignty and laws of its treaty partners, it must act as a responsible global citizen; and if it does not, its conduct will not be tolerated, it will be sent home.

C. An Institutional Effort to Minimize Abuse

25. Evidence of systemic abuse often leads to institutional reform. Such reform also occurred in Canada this summer with the July 21, 2006 release of two decisions of the Supreme Court of Canada. On June 17, 1999, the new Canadian *Extradition Act* came into force. The new evidentiary scheme was revolutionary in that it allowed for the admission of evidence that would otherwise be inadmissible in accordance with the general law of Canada. Until the new *Extradition Act* in 1999, this evidentiary regime was safeguarded by the requirement that all evidence tendered at an extradition hearing be admissible under Canadian law. The removal of the admissibility requirement in the

Extradition Act left the extradition process devoid of significant procedural and evidentiary safeguards.

26. In *U.S.A. v. Ferras*, 2006 SCC 33; and *United Mexican States v Ortega*, 2006 SCC 34, the Supreme Court of Canada considered whether the new evidentiary regime embodied in the 1999 Act violated s. 7 of the Canadian Charter of Rights and Freedoms which guarantees the rights to liberty and security of the person. The appellants in the *Ferras* appeals argued that the record of the case method was constitutionally infirm because it allows for the possibility that a person might be extradited on inherently unreliable evidence. The appellants in the *Ortega* appeals argued that the treaty method was infirm because it does not contain even the safeguards of the "record of the case" method, in particular a requirement that the requesting state certify that the evidence is available for trial.

27. While, in the result, the Supreme Court of Canada upheld the constitutionality of ss. 32(1)(a), (b), (c) and 33 of the Act, the Court first emphasized the requirement for a vital, fulsome judicial role in extradition proceedings.

> A person cannot be sent from the country on mere demand or surmise. The case for extradition need not be presented in a particular technical form. But it must be shown that there are reasonable grounds to send the person to trial. A *prima facie* case for conviction must be established through a meaningful judicial process. It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process. The idea is as old as the *Magna Carta* (1215).
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> It follows that before a person can be extradited, there must be a judicial determination that the requesting state has established a *prima facie* case that the person sought committed the crime alleged and should stand trial for it.
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> These propositions capture not only the history of extradition, but its dual purposes. The first purpose is to foster efficient extradition where such a case is made out, in accordance with Canada's international obligations. This requires a flexible, non-technical approach. The second purpose is to protect an individual in Canada from deportation in the absence of at least a *prima facie* case that he or she committed the offence alleged, which must also be an offence in Canada: *Schmidt*. The two purposes

> are complementary. International comity does not require the extradition of a person on demand or surmise.

28. Having placed the issue in question in its appropriate context the Court held that Charter s. 7 does not require any particular form of process as long as the process is a fair one. Rather than declare the admissibility provisions unconstitutional, the Court held that the admissibility and sufficiency provisions of Act could be construed in such a way so as to render the regime constitutional. For a unanimous Court, McLachlin C.J.C. stated, at para. 34:

> What fundamental justice does require is that the person sought for extradition be accorded an independent and impartial judicial determination on the facts and evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition. This basic requirement must always be respected; a person cannot be extradited upon demand, suspicion or surmise: *Glucksman.* If the combined provisions of the Act reduce the judicial function to "rubber stamping" the submission of the foreign state and forwarding it to the Minister for committal, then s. 7 is violated.[Emphasis added]

29. The pre-*Charter* jurisprudence, *U.S.A. v. Shephard*, held that an extradition judge may not refuse to order extradition where there is some evidence of every element of the parallel Canadian crime, even if the judge believes that the evidence from the foreign state is unreliable or otherwise inadequate.

30. Given that the extradition judge, under the *Shephard* model of extradition, had no discretion to weigh the evidence proffered by the foreign state, the only procedural guarantees of reliability were those provided for in the admissibility provisions of the new Act. The Court held that the combined effect of the *Shephard* model and the 1999 Act evidentiary provisions entailed the potential to deprive a person sought of a fair extradition hearing:

> On this view of the law [the *Shephard view*], the combined effect of the relevant provisions (ss. 29, 32 and 33 of the Act) may be to deprive the person sought of the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition. If the extradition judge possesses neither the ability to declare unreliable evidence inadmissible nor to weigh and consider the sufficiency of the evidence, committal for extradition could occur in circumstances where committal for trial in Canada would not be justified. I take as axiomatic that a person could not be committed for trial for an offence in Canada if

> the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1). Yet, under the current state of the law in *Shephard*, it appears that the judge is denied this possibility. [emphasis added]
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> If s. 29(1) can be interpreted in a way that allows the extradition judge to weigh the evidence and refuse to extradite if the case as a whole is insufficient, then that interpretation should be adopted. If it cannot, then the Act is inconsistent with the *Charter* and is void to the extent of that inconsistency under s. 52 of the *Constitution Act, 1982*.

31. In upholding the constitutionality of the admissibility provisions of the Act based on the notion that they provide some guarantee of threshold reliability, the Court recognized that s. 7 required more of the extradition Judge under s. 29(1). The Court, at paras. 46, 47, 49, held that a fair extradition hearing, one that accords with the *Charter*, requires that the extradition judge be able to decline to commit on evidence that is unavailable for trial or manifestly unreliable:

> In my view, the provisions of the 1999 Act can be read to accommodate these requirements - requirements inherent in the right to a hearing by a neutral magistrate. Section 29(1) of the Act requires the extradition judge to determine whether evidence would "justify committal" for trial. This may be read as permitting the extradition judge to provide the factual assessment and judicial process necessary to conform to the *Charter*.
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> Section 29(1)'s direction to an extradition judge to determine whether there is admissible evidence that would "justify committal" requires a judge to assess whether admissible evidence *shows the justice or rightness* in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot "justify committal". The evidence need not convince an extradition judge that a person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that *could go to trial* in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.
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> I conclude that to deny an extradition judge's discretion to refuse committal for reasons of insufficient evidence would violate a person's right to a judicial hearing by an independent and impartial magistrate - a right implicit in s. 7 of the *Charter* where liberty is at stake. It would deprive the judge of the power to conduct an independent and impartial

> judicial review of the facts in relation to the law, destroy the judicial nature of the hearing, and turn the extradition judge into an administrative arm of the executive. The process of assessing whether all the boxes are ticked and then ordering committal is not an adjudication, but merely a formal validation. Insofar as the majority view in the pre-*Charter* case of *Shephard* suggests a contrary view, it should be modified to conform to the requirements of the *Charter*. [emphasis added]

32. Accordingly, where the reliability of evidence is successfully impeached or where it is not shown by the requesting state that the evidence tendered in support of the request for extradition is available for trial, the extradition judge has a discretion to refuse to extradite under s. 29(1) of the Act.

33. The Court also commented on procedural issues that may arise at an extradition hearing in relation to the new sufficiency analysis. The Court noted, at paras. 53, 54, that while certification under s. 33 of the Act raises a presumption of threshold reliability, the person sought can adduce evidence to impeach the reliability of the foreign state's evidence:

> The person sought for extradition may challenge the sufficiency of the case including the reliability of certified evidence. Section 32(1)(*c*) of the Act permits the person sought to submit evidence "if the judge considers it reliable". This does not require an actual determination that the evidence presented by the person sought is in fact reliable. The issue is threshold reliability. In other words, the question is whether the evidence tendered possesses sufficient indicia of reliability to make it worth consideration by the judge at the hearing. Once it is admitted, its reliability for the purposes of extradition is determined in light of all the evidence presented at the hearing. When viewed in this way, s. 32(1)(*c*) in effect presents no greater evidentiary hurdle to the person sought than s. 32(1)(*a*) or (*b*) presents to the requesting state.
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> Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

34. Accordingly, the person sought may now present arguments to an extradition judge that the evidence tendered by a requesting state in support of extradition is so unreliable that it would be "dangerous or unsafe" for a jury to convict. In undertaking the sufficiency analysis, the extradition judge must assess the strength of the case as a whole, including any evidence tendered by the person sought. In the course of that analysis the extradition judge can engage in a limited weighing of the evidence. As such, this modified approach represents a significant broadening of the extradition judge's role at the committal hearing.

35. The Court also held, at para. 56, 57, that concerns about the availability of foreign evidence are addressed by s. 29(1) of the *Extradition Act*:

> ...If availability of evidence for trial is a crucial factor in determining whether the test for committal is established (and indeed, on my interpretation of s. 29(1), it is), neither the executive's appraisal of a country's trial practices nor a presumption of the requesting state's good-faith are sufficient to meet the sought person's right to an assessment by a neutral magistrate prior to extradition.
>
> ...Even where a treaty does not expressly require the availability of evidence to be certified, it remains a fundamental element to be established to meet the test for committal. Where the requesting state does not certify or otherwise make out a *prima facie* case that the evidence exists and is available for trial, the case for committal is incomplete and should be dismissed.

36. Where there has been a certification of availability by the foreign state there again is a presumption that the evidence is available for trial in the foreign state. The person sought can, however, challenge that presumption, at para. 58:

> For example, where a person sought can show that a requesting state relies on evidence of a witness who, prior to the extradition hearing, retracted his or her statement, the availability of that evidence for trial may be brought into doubt. Another example is where a state makes only a bare assertion that evidence exists without providing any description whatsoever of its content or form. In such a case, the availability of the evidence may be in doubt... [Emphasis added]

37. In the result, the Court reviewed the evidence tendered against Messrs. Latty Ferras and Wright and concluded that there was sufficient evidence to "justify

committal". Their appeals were dismissed. The Court allowed the appeals of Messrs. Ortega and Shull and remitted them back to the extradition judges for determination under the new rules.

38. These decisions represent a sea change in the Canadian extradition regime. The person sought may now challenge the reliability of foreign evidence. The extradition judge can now engage in a limited weighing of the evidence to determine if the evidence is available and sufficiently reliable to justify committal. It does not overstate to suggest that the Supreme Court of Canada's approach to these issues may well have been informed by the instances of abuse described in Part B of this paper.

D. Conclusion

39. As has been demonstrated, the English House of Lords, the superior trial Courts of Canada, and the Supreme Court of Canada have all responded to the "monstrous" *Alvarez-Machain* majority decision by turning away from it and by emphasizing the requirement for the maintenance of the international rule of law. Yet the United States Department of Justice Policy Manual para. 9-15.600 provides:

> A fugitive may be non-extraditable for any number of reasons, including but not limited to instances where he or she is a national of the country of refuge, the crime is not an extraditable offense, the statute of limitations has run in the foreign country, or extradition was requested and denied. If, after discussing the case with the Office of International Affairs (OIA), the prosecutor concludes that the fugitive is not extraditable, that conclusion and the reasons should be documented. See USAM9-15.225.
>
> There may be available alternatives that will result either in the return of the fugitive or limitations on his or her ability to live or travel overseas. OIA will advise the prosecutor concerning the availability of these methods. These alternative methods are discussed in USAM 9-15.610-650.

40. Then the Department of Justice Policy Manual, para. 9-15.610 continues:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like

> bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation.

41. An objective observer might be forgiven for asking: What will it take before the Sheriff comes to realize, absorb and adopt the words of Thomas Paine one of America's greatest Founding Fathers:

> He that makes his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.