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Extradition – conspiracy to support terrorism – Application for bail – need to balance flight risk against international obligations in extradition – (Canada)

A was wanted for prosecution in the United States on charges of “conspiracy to provide foreign material support or resources to a designated foreign terrorist organization,” the terrorist organization being Hizballah.

The facts alleged were that between February 1999 and July 2000, A conspired with three other named conspirators and others “to provide currency, financial services, training, false documentation and identification communications equipment, explosives and other physical assets to Hizballah in order to facilitate its violent attacks.”

A was arrested in pursuance of an extradition request from the United States. He applied to the Supreme Court of British Columbia for bail, pending the extradition hearings. The application was opposed on behalf of the United States and his continued detention was sought under s. 515(10) of the Canadian Criminal Code. It was argued that

- (1) A posed a flight risk if he was released on bail;
- (2) The Court should consider the criteria set out in the case of *R. v. McDougal* (1999) 138 C.C.C. (3d) 38 at 46 which included considerations such as the apparent strength of the prosecution's case, the gravity and nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

A had dual Canadian and Lebanese citizenship. Although his Canadian passport had expired, there was no evidence that he had or attempted or was attempting to obtain a false passport or any other travel documents. Most of his relatives still lived in Lebanon, except for his wife and children.

➤ Held:

1. Several Canadian cases have held that adherence to Canada's international obligations as triggered by extradition proceedings may require that a different and lesser standard may be applied in considering whether detention should be ordered; that is, in considering whether there was a risk of flight, the court should weigh the international obligations of Canada in matters of extradition as it is not only the Canadian system of justice which must absorb any such risk, which is the case with domestic matters, but the risk to its international obligations as well.

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The Court must balance the risk of flight against Canada's international obligations in matters of extradition. The cases in which the risk of flight was found to be greater than that which was commensurate with Canada's international obligations included, for instance, *The United States of America v. Ross* (July 5, 1993), Van. Registry No. CA01711). In that case there were facts of flight from the requesting state on two occasions prior to trial in the requesting state and in circumstances in which committal for extradition had already been ordered and the release was sought pending appeal. *The Government of India v. Singh* (Jan. 5, 2001, Van. Registry No. CC001215), was also another example. In that case, the detainee had entered Canada illegally and had a history of assuming different identities and changing residence seeking to evade detection. Further, Mr. Singh had alleged that he had reason to fear for his life should he be returned to India. In other words, there were real tangible factors indicating a risk of flight aside from the trial or sentence faced for conviction in the requesting state. There were no such factors in the present case. The Court found no evidence that but for the extradition proceedings against him, A posed a flight risk.

2. In relation to the apparent strength of the prosecution's case, the Court noted that there was no actual evidence before it. There was no affidavit evidence of any sort. The court was told that the requesting state was still putting together a case for extradition. The Court noted that on an extradition hearing, much less on a bail hearing, the judge was not to weigh any evidence or assess the credibility of any evidence to determine if extradition was likely, but the court was to determine whether there was admissible evidence on an extradition hearing.

A pointed out two issues that weakened the apparent strength of the prosecution's case. First, the offence alleged in the foreign indictment was not a crime in Canada. Counsel on behalf of the United States argued that they needed only to show that the conduct alleged, if committed in Canada, would be a crime, the label attached to the crime was not the issue. Besides there was pending legislation which would create the specific offence for which A was wanted for extradition. It was argued that s. 29(3) of the Extradition Act provided a change in the law as stated in *USA v. Allard and Charette* [1991] 1 S.C.R. 861. *Allard* had stated that a person could only be extradited if the offence with

which he was charged was a crime recognized in Canada at the time it was committed. Under the new Extradition Act a person could be extradited for an act which was an offence at the time of extradition.

Regard must be had to s. 29(3). It provides that the date of the authority to proceed is the relevant date for the purposes of s-s. (1). While this provision was perhaps not as clear as one might have wished, the only meaning that could be ascribed to it was that when the extradition judge considers whether committal would be justified in Canada he or she should look to the Canadian law as it existed at the date of the authority to proceed and not at the date of the alleged offence.

However, even if that decision was correct, there was no Canadian law comparable to that relied on in the United States indictment and no evidence before the court that the bill referred to would be law at the date of the authority to proceed.

3. The second issue raised was questions as to the strength of the prosecution's case, since some of the evidence referred to at the bail hearing may not be admissible at the extradition hearing. Although the court was not in any way weighing or assessing evidence, the burden rested with the Crown to show that there was apparent strength in the prosecution case. It relied on no evidence, but rather representations of American representatives of what evidence they have or may have to present to the extradition judge.

4. The court must also consider the presumption of innocence and the general care any court in Canada must exercise when deciding whether to deprive a Canadian citizen of his liberty before he has been convicted of a crime, or even had a hearing, or, in this case, before he has been found liable to be committed for extradition, especially when there had been no time set for such a hearing. The court was cognisant that Canada was considering strengthening the powers of government and the courts to limit further the freedoms and rights of Canadians in the face of a real and tangible threat from terrorist acts. The allegations in this case encompass acts of terrorism of the type that constitute that real and tangible threat, but the court was also aware that fundamental principles of the Canadian justice system were at play in determining whether A should be detained before his hearing. Detention was not necessary

to maintain public confidence in the administration of justice having regard to all the circumstances outlined. In fact, in the face of no real evidence of a risk of flight, an alternative means available to deal with any slight or inferential risk from the gravity of the crime faced, together with the problems which may be faced by the prosecution in obtaining an order for extradition, it was the Court's view that it could undermine confidence in the administration of justice if detention were ordered in such circumstances.

R. v. Amhaz [2001] bcsc 1562 Internet Site:
www.canlii.org/bc/cas/bcsc/2001/2001bcsc1562.html

Extradition – publication ban – circumstances when right to a publication ban becomes meaningless – (Canada)

When A applied for bail following his provisional arrest, he also applied for a publication ban under the Extradition Act, S.C. 1999, s.26, and under s. 517 of the Criminal Code which is incorporated into the Extradition Act pursuant to s. 19 of the Act.

Section 26 of the Extradition Act provides that:

“Before beginning a hearing in respect of a judicial interim release or an extradition hearing, a judge may, on application by the person or the Attorney General and on being satisfied that the publication or broadcasting of the evidence would constitute a risk to the holding of a fair trial by the extradition partner, make an order directing that the evidence taken not be published or broadcast before the time that the person is discharged or, if surrendered, the trial by the extradition partner has concluded.”

and section 19,

“Part XVI of the Criminal Code applies, with any modifications that the circumstances require, in respect of a person arrested under section 13 or 16 or to whom a summons has been issued under section 16.”

Section 517 of the Criminal Code:

“ Where the prosecutor or the accused intends to show cause under section 515, he shall so state to the justice and the justice may, and shall on application by the

accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any newspaper or broadcast before such time as

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

The Court had previously ordered a provisional ban at the outset of the bail hearing. The Vancouver Sun (a Newspaper company) applied to be heard with regard to lifting the provisional ban and further requested that there be no publication ban at all.

➤ **Held:** dismissing the application;

1. The case raised one particularly vexing issue in relation to the two sections of the Extradition Act: ss. 26 and 19 which appear to be in conflict. In the court's view, the two sections were not necessarily in conflict.

The court had evidence that many of the allegations and assertions of specific evidence available to support the extradition proceeding had already been published. It appeared from the uncontradicted evidence that in the State of North Carolina, where A was to be tried if extradited, there were no provisions for publication bans on evidence presented on bail hearings or preliminary inquiries.

There was also evidence of extensive coverage in newspapers and over the Internet of the specific information that A sought to protect from publication. In this context, a s. 26 ban was untenable. Any publication ban issued in British Columbia or Canada would have no effect whatsoever in protecting A's rights to a fair trial.

2. It was however, argued that A still had his right conferred by s. 517 which would provide protection of his privacy while he remained in Canada and if the U.S.A. was unsuccessful in extraditing him. Unfortunately, in the circumstances of the case, that protection was rendered of little or no effect because there had already been newspaper coverage available in British Columbia of many of the allegations against A and the court was aware that there

were numerous available sources of information published that were not dependent on the information adduced in the hearing and which had been the subject of the provisional ban. In other words, were the court to order a publication ban in these circumstances it would not have the desired effect.

3. These particular circumstances, were relevant to providing content to the modifying clause incorporating s.517 into the Extradition Act. The non-discretionary right of an accused to a publication ban in proceedings governed by the Extradition Act could have no application. The circumstances render such a right without meaning.

It is trite law of statutory construction that a court must give meaning to each provision in an Act. Further, where any two provisions or clauses appear to be in conflict, the court must seek to reconcile the two provisions if such reconciliation can reasonably be done. (*R. Sullivan, Driedger on the Construction of Statutes* (Toronto/Vancouver: Butterworths, 1994) at pp. 245-250, and pp. 176-192.) In this case, the section bringing in s. 517 contains a clause which must be given meaning. That meaning must have regard to circumstances relating to the extradition proceeding and the effect of any publication ban. In *Federal Republic of Germany v. Ebke*, the Court decided that it was bound by the non-discretionary provisions of s. 517. No argument was apparently addressed to the modifying words of s. 19 of the *Extradition Act*. It may have been that, in the circumstances of that case, there would be no requirement to modify s. 517 and provide for qualifications on the right to a publication ban. However that point was not addressed.

4. There was no doubt that the *Charter of Rights and Freedoms* had at least limited application to extradition proceedings. (*USA v. Kwok*, 2001 SCC 18). The issue of whether *Charter* principles would apply in interpreting the publication ban provisions of the *Extradition Act* was not specifically addressed by the Supreme Court of Canada in *Kwok*. However, the court could not think of any principle which would stand in the way of such an application. Indeed, s. 26 itself codifies a test to be met before a publication ban would be imposed which is consistent with the test set in *CBC v. Dagenais et al.*, [1994] 3 S.C.R 835, that a publication ban should only be ordered when:

“(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.”

If the ban fails to meet this standard (which clearly reflects the substance of the *Oakes* test application when assessing legislation under section 1 of the *Charter*) then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.

5. A did not face any serious chance of a trial in Canada, the fairness of which could be jeopardized by publicity. A was likely to face threats to his sense of safety and well-being while on bail awaiting his extradition hearing. However, the efficacy of a publication ban to avert this threat to his s. 7 rights was rendered nugatory in this case by the fact that much of the information sought to be protected had already been made available to the public.

6. In the result, the provisional publication ban was lifted because, in the specific circumstances of this case, no publication ban, whether granted pursuant to s. 517 or s. 26, would be of any effect and thus s. 517 was required by these circumstances to be modified by suspending its non-discretionary provision.

USA v. Amhaz [2001] 1bcsc 1541

Source: www.canlii.org/bc/cas/bcsc/2001/2001bcsc1541.html

Extradition - application for warrant in terms of section 5 of Act 67 of 1962 - whether proceedings should be stayed on ground of unreasonable delay – (South Africa)

M, an educational psychologist, was born in South Africa and is a citizen of that country and of Germany. She lived in the United States of America and Germany for some years after which she returned to South Africa in about 1988. During 1985, at a time when she resided in the United States, M was alleged to have been involved in a conspiracy to murder the United States Attorney for the Federal District of Oregon. Before the indictment could be served upon her she left the United States and

went to Germany. While she was in Germany an application for her extradition from Germany was unsuccessfully brought by the United States Government, after which she returned to South Africa.

In 1990 the United States Government requested the South African Government to extradite her to the United States to face trial on the conspiracy to murder charge. She was arrested in Johannesburg on 11 September 1990 on a warrant issued in terms of section 5 of the Act. Subsequently that warrant was withdrawn and another one issued. Then the State applied for a series of adjournments following which M's counsel was able to obtain a court order discharging her on the ground that the required evidence was not forthcoming within a reasonable time.

Nearly a year later, the State applied to an additional magistrate in Johannesburg, for a third warrant for M's arrest. The application was brought on the same papers as the previous one, supplemented by further affidavits to remedy the deficiencies in the papers which had caused the previous application to fail. The fact that there had been a previous unsuccessful application for M's extradition was not disclosed to the Magistrate before he authorised the warrant. The appellant was arrested, for the third time, and brought before another additional magistrate for the district of Johannesburg. Her counsel's plea of *res judicata* was dismissed. A review of that decision was refused.

M then applied to the Witwatersrand Local Divisional court seeking (1) an order to set aside the warrant of arrest; (2) an indefinite stay of the proceedings against her; (3) a referral to the Constitutional court of the issue of the constitutionality of the re-institution of extradition proceedings against her after discharge.

The application was dismissed. M appealed, contending that the trial court had erred in failing to set aside the warrant for her arrest and in failing to grant the indefinite stay of the proceedings in the magistrates' court which the appellant had sought.

➔ **Held:** dismissing the appeal;

1. *The alleged invalidity of the warrant*

Counsel for M argued that the third warrant for the appellant's arrest was incorrectly issued because the magistrate did not exercise the

discretion bestowed upon him. The State was obliged, when the third warrant of arrest was applied for, to disclose to the first respondent that there had been two previous warrants of arrest issued in terms of section 5 of the Act, that the first had been withdrawn and the second had culminated in the appellant's discharge in terms of section 10(2) of the Act almost a year before.

The Court accepted the fact that the state did not disclose that there had been an unsuccessful application for the extradition of the appellant almost a year before the application for the third warrant was made. The question for the court's consideration was whether there was a material non-disclosure by the State such as vitiated the magistrate's decision to grant the warrant. In the opinion of the Court, had these facts been disclosed to the magistrate, they would not have affected his decision to grant a warrant. The position would have been different if the deficiencies had not been rectified. If that had been so the magistrate would and should have refused to grant the warrant until satisfied that the problems previously encountered had been rectified. But this had already happened. There was nothing in what had preceded the application for the third warrant to justify the magistrate in coming to the conclusion that enough was enough and that the time had come to put his foot down firmly and refuse the application. Indeed, if he had done so the State could successfully have reviewed a refusal by him to grant the warrant. The trial court was right to have rejected the application to set aside the warrant.

2. *The application for an indefinite stay*

M's counsel submitted that she was entitled to the protection afforded to accused persons embodied in section 25(3)(a) of the Interim Constitution, which provided:

- "(3) Every accused person shall have the right to a fair trial which shall include –
- (a) the right to a public trial before an ordinary court of law within a reasonable time after having been charged".

In order to decide whether the period that had elapsed since M was first charged (at her arrest on the first warrant in 1990) was such that one could say that there has been unreasonable delay, it was necessary to divide up the period to see what occasioned the delay.

The first period was the period covered by the first extradition enquiry in the magistrates' court. It was postponed thrice at the State's request for it to obtain the necessary evidence. That was between 11 September 1990 to 22 November 1990. The court did not regard this period as excessive or unreasonable.

The second period (22 November 1990, when the appellant was discharged, to 8 November 1991, when she was arrested on the third warrant), was attributable to the State. The Court did not agree with M's counsel that it was unreasonable delay for which the state did not give any valid explanation. The court accepted the Attorney General's explanation that the request for further documentation from the United States was done through diplomatic channels which in themselves were time-consuming and lengthy. The period of just under one year was not inordinately long nor was there any unexplained delay.

Since the third warrant was authorised and executed on 8 November 1991 approximately nine years had elapsed. Some of the time had been lost through M's failure to raise points of objection and file papers earlier than she did. However, the time which was lost in this way was not inordinate.

The time from 10 December 1991 to 23 May 1995 was spent on an unsuccessful plea of *res judicata*, which, though it ultimately failed, was held by two Judges to have been correctly raised. So again it would not be fair to blame M for the time so used. Further time was spent on the application for the referral of constitutional issues and then the attack on the warrant. In the court's view these delays may be described as "systemic" delays in the courts. The systemic delays encountered in this case had been nothing other than reasonable in the context of the South African legal system. Nor can it be found that the systemic delays under

consideration had rendered nugatory M's right to have her trial begin and conclude without unreasonable delay.

The nature of the relief sought by M, i.e., an indefinite stay, was something which is far-reaching and would seldom be warranted in the absence of significant prejudice to the accused: *Sanderson v. Attorney General, Eastern Cape* [1998] 2 SA 38 (CC). Moreover, in the absence of trial prejudice, claims for a stay of prosecution (which is in effect what M was seeking) "must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate": *Wild and Another v. Hoffert NO and others* [1998] 3 SA 695 (CC). No such extraordinary circumstances were present in M's case.

As regards the question whether there was trial prejudice, M's counsel argued that the trial would be materially affected in terms of recollection of events and locating witnesses. In the opinion of the court, these were not sufficient reason to justify the far-reaching remedy of an indefinite stay. At least some of the handicaps from which M would suffer may well also render the prosecution's task more difficult, in particular those relating to the availability fifteen years on, of witnesses and their recollection of events. Furthermore these points which will all have a bearing on the question of proof beyond reasonable doubt would be brought to the attention of the jury with all the emphasis at the command of her legal representatives.

Ann Phillis McCarthy v. the State and Others, Supreme Court of Appeal, South Africa, September 2000.

Source: www.server.law.wits.ac.za/scrtappeal/scaalph_2000.htm

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Mutual Assistance in criminal matters – Application to forward seized items to requesting country – whether MACM Act authorizing such return unconstitutional – Circumstances in which court will allow cross-examination of witnesses of the requesting country – Section 15 Mutual Assistance in Criminal Matters Act – Canadian Charter of Rights and Freedoms, s. 8 – (Canada)

W and eleven companies were being investigated in the United States regarding a telemarketing scheme through which they purportedly defrauded a number of senior citizens. The offences being investigated included mail fraud, credit card fraud, and banking fraud. At the time of the request, the investigation was still ongoing, and no criminal charges had yet been laid.

Although all of these alleged offences took place in the United States, W, was a resident of British Columbia, Canada and the offices of the companies were also in Canada.

As part of their investigation into these alleged offences, the Government of the United States made a request pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters between Canada and the United States. They sought a search warrant of places of business of the Respondents. A representative of the Attorney General in Canada sought a search warrant order under s.11 of the Mutual Legal Assistance in Criminal Matters Act (the Act). The application was granted and search warrants were executed on various premises from which the Respondents conducted business.

The AG representative then applied to the Court for an order that the items seized in that search be forwarded to the United States. The Respondents opposed this application and made a number of cross-applications. In particular, they sought an Order that the s.15 application be dismissed, and that the seized items be returned to them on the grounds that the Act was unconstitutional. Alternatively, if the Act was constitutional, the Respondents sought an Order that they be permitted to cross-examine a number of individuals and that the s.15 application be adjourned in the meantime. Alternatively, the Respondents asked that the

application be dismissed and that the seized items be returned to them on the basis of abuse of process and/or on the basis that the Crown had failed to prove that the seized items were necessary for purposes of the investigation as required by s.490 of the *Criminal Code* of Canada.

➤ *Held: dismissing the respondents applications, and granting the order that the items be forwarded to the United States;*

1. On the constitutional challenge, the Court held that because legislation is presumed to be constitutional, the burden was on the Respondents, as the party challenging the legislation, to prove that it was not valid. See *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 620.

With respect to the submission that the Act does not fall within the exclusive jurisdiction of the Federal Government to legislate criminal offences because there are no criminal offences created, the exclusive jurisdiction of the Federal Government in criminal matters was not limited to the creation of criminal offences. Rather, as set out under s.91(27) of the *British North America Act*, the jurisdiction of the Federal Government extends to procedure in criminal matters.

The provisions of the Act set out the procedure to be followed in Canada when assistance is sought from Canada by a foreign state regarding the investigation, prosecution, and suppression of crime in that country, including the procedure to be followed in obtaining a search warrant or enforcing an Order pertaining to the seizure of proceeds of crime. As the offences for which the assistance is sought are criminal offences, the procedures set out in the Act pertain to "procedure in criminal matters", an area which is within the exclusive jurisdiction of the Federal Government.

Therefore, the Act is not *ultra vires* the powers of the Federal Government.

2. With respect to the contention that the search warrant provisions of the Act were inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms*, the Charter protects the rights of all persons on Canadian soil, including those targeted by international mutual legal assistance requests. See *United States of America v. Ross* (1995), 100 C.C.C. (3d) 320 (Que.C.A.). Persons are protected under the

Act by the *Charter* against unreasonable searches. Although the grounds on which a judge may issue a search warrant can include hearsay, that evidence must be accompanied by sufficient evidence to reassure the issuing judge of its reliability, thereby protecting a person from unreasonable searches. See *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.).

Given that the *Charter* protects everyone on Canadian soil, including those who are the subject of a search under the *Act*, the search warrant provisions of the *Act* are not inconsistent with the *Charter*.

Regarding the application to cross-examine some witnesses, the Respondents' intention was to make representations that the manner and circumstances in which the search warrant was issued, and executed, and the conduct of the Crown after the items were seized, constituted an abuse of process as a consequence of which the Crown's application should be dismissed. To do so, the Respondents needed to gather further evidence, and, in particular, they needed to cross-examine a number of specific individuals "on their knowledge and participation in the investigation, application, acquisition, and execution of the search warrant ... and on the care and control of the records, items, documents, materials and things seized thereunder".

The Court has jurisdiction to grant leave to cross-examine individuals regarding applications made under the *Act*: *Davis v. Canada (Attorney General)* (1997), 49 C.R.(2d) 114 (B.C.S.C.). This jurisdiction may arise as a result of a party's right to be heard in accordance with the principles of procedural fairness and natural justice as protected by s.7 of the *Charter* and/or as a result of a party's right to make full answer and defence if they are an accused party.

The appropriate circumstances did not exist in this case to warrant the Court to exercise its discretion and grant leave to cross-examine. The Court will exercise its jurisdiction and grant leave to cross-examine if there is a basis on which to conclude that cross-examination will elicit pertinent facts that will demonstrate that the Court has been or is being misled and has made an Order, or is to make an Order it should not. Applying these legal principles to this case,

the Respondents must demonstrate with respect to each of the named individuals respectively that there was a basis on which to conclude that the cross-examination of them would elicit pertinent facts showing that an abuse of process had occurred and these orders were or would be, based on fraudulent, incomplete, and/or misleading evidence.

The fact that hearsay is included in an affidavit filed in support of the issuance of a search warrant was not, by itself, a sufficient basis on which to grant leave to cross-examine. That fact alone is not sufficient to demonstrate that a search warrant was issued on the basis of fraudulent, incomplete, or misleading evidence. Rather to meet the necessary standard, there would have to be some basis on which to conclude that the hearsay information might well be fraudulent, incomplete or misleading. There was no such basis in the present case.

3. Regarding the application by the USA that the items seized be forwarded to the United States, the court found that once items had been seized pursuant to a search warrant issued under s.12 of the *Act*, the U.S.A., as the requesting state, must apply to the Court pursuant to s.15 of the *Act* for an Order that those items be forwarded to the United States. Before making such an Order, it must be satisfied that the search warrant was executed in accordance with its terms and conditions and there was no reason why the order should not be made: *R. v. Gladwin*. The fact that there had been no criminal charges laid and that the investigation was still continuing was not a bar to the making of an Order to forward the seized items: *Zingre v. The Queen*, [1981] 2 S.C.R. 392.

4. The Crown had the onus of proving on the balance of probabilities that the requirements of s.15 of the *Act* had been met: *United States of America v. Sigurdson*, [1998] M.J. No. 374 (Q.B.), affirmed, [1999] M.J. No. 105 (C.A.).

The search had been properly executed and there was no abuse of process.

USA v. Wilson [2002] BCSC 124

Source: www.canlii.org/bc/2002/2002bcsc124.html

